IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10TH DAY OF SEPTEMBER 2020

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE H.T.NARENDRA PRASAD

I.T.A. NO.383 OF 2012

BETWEEN:

1. THE DIRECTOR OF INCOME-TAX
INTERNATIONAL TAXATION
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BANGALORE.

2. THE DY. COMMISSIONER OF INCOME TAX
INTERNATIONAL TAXATION
CIRCLE-1(1), RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD, BANGALORE.

... APPELLANTS

(BY SRI. K.V. ARAVIND, ADV.,)

AND:

M/S. JEANS KNIT PVT. LTD.,
NO.21, E-1, II PHASE
PEENYA INDUSTRIAL AREA
BANGALORE-560058.

... RESPONDENT

(BY SRI. T. SURYANARAYANA, ADV.)

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THIS ITA IS FILED UNDER SECTION 260-A OF I.T. ACT, 1961 ARISING OUT OF ORDER DATED 29.06.2012 PASSED IN ITA NOs.19 & 23/BANG/2010 FOR THE ASSESSMENT YEAR 2007-08, PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO:

(I) FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN.

(I) ALLOW THE APPEAL AND SET ASIDE THE ORDER OF THE ITAT, BANGALORE IN ITA NOS.19 & 23/BANG/2010 DATED 29-06-2012 AND CONFIRM THE ORDER OF APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE DEPUTY COMMISSIONER OF INCOME, TAX, INTERNATIONAL TAXATION, CIRCLE-1(1), BANGALORE.

THIS ITA COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.,** DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the revenue. The subject matter of the appeal pertains to the Assessment year 2007-08. The appeal was admitted by a bench of this Court vide order dated 01.03.2013 on the following substantial question of law:

> *(i) Whether the tribunal was correct in holding that the services rendered by the on-resident company is not akin to technical skill and expertise as per the provisions of Section 9(1)(vii) of the Act and TDS provisions are not applicable?*

(ii) Whether the tribunal was correct in holding that the inspection and ensure of quality of fabric, scheduled shipment of raw material and other related services rendered by the non-resident company would not fall within the services contemplated under Section 9(i)(vii) of the Act?

(iii) Whether the tribunal was correct in setting aside the order passed under Section 201(1A) of the Act?

2. The factual background, in which the aforesaid substantial question of law which arise for consideration needs mention. The assessee is engaged in the business of manufacturing and export of garments and 100% export oriented undertaking. The assessee company requires to import accessories from other countries and mostly from Europe. For the aforesaid purpose, the assessee had engaged M/s Sharp Eagle International, Honkong (hereinafter referred to as 'non resident company' for short) to render various

services at the time of import such as inspection of fabrics, timely dispatch of material etc. The assessee company paid 12.5% of the import value as charges to the aforesaid non resident company. The assessee made payments to non resident company in assessment year 2007-08 without deduction of TDS. The Assessing Officer by an order dated 11.08.2008, inter alia held that non resident company is a service provider and is not an agent of the assessee and the services rendered by non resident company have to be treated as technical services and are squarely covered under the scope and ambit of Section 9(1)(vii) of the Act. The assessee failed to deduct the Tax at source at the rate of 10% and therefore, the assessee is treated as an assessee in default. Accordingly, the liability of the assessee along with interest was determined at Rs.1,73,23,048/-.

3. The assessee thereupon approached the Commissioner of Income Tax (Appeals) by filing an appeal. The Commissioner of Income Tax (Appeals) by

an order dated 15.10.2009 inter alia held that the assessee has not been able to furnish proper and satisfactory evidence in order to establish that the consideration payable for services rendered by non resident company under the terms of the agreement is not in the nature of Fee towards technical services within the meaning of Explanation 2 to Section 9(1)(vii) of the Act. Accordingly, the appeal was dismissed. The assessee thereupon filed an appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal' for short). The tribunal by an order dated 29.06.2012 inter alia held that non resident company is not involved either in identification of the exporter or selecting the material and negotiating the price. It was further held that the quality of material is already determined by the assessee and non resident company is only required to make physical inspection of the material to examine if it resembles the quality specified by the assessee. In other words, it only has to compare

the material with samples provided by the assessee and for this activity no technical knowledge is required. Accordingly, it was held that the non resident company is not providing any technical services and the payments made by the assessee to non resident company do not fall within the ambit of fee for technical services and therefore, provision of Section 195(1) is not attracted. In the result, the appeal filed by the assessee was allowed. In the aforesaid factual background, the revenue is in appeal before us.

4. Learned counsel for the revenue submitted that for the assessment year 2007-08, the assessee had received managerial, technical or consultancy services from the non resident company and therefore, was under an obligation to deduct tax at source under Section 195(1) of the Act. It is also urged that non resident company has an expertise in textile and under the agreement it was required to check quality, quantity and to ensure timely dispatch of materials and

therefore, the non resident company had rendered managerial services. Alternatively it is submitted that the services rendered by the non resident company, in any case, amount to consultancy services. In support of aforesaid submissions, reliance has been placed on decisions of the Supreme Court in '***CENTRAL BOARD OF DIRECT TAXES VS. OBEROI HOTELS (INIDA) (P) LTD., (1998) 97 TAXMAN 453 (SC)*** and ***'GVK INDUSTRIES LTD. & ANR. VS. THE INCOME TAX OFFICER & ANR., CIVIL APPEAL NO.7796/1997 DATED 18.02.2015***

5. On the other hand, learned counsel for the assessee submitted that the assessee gets raw material from abroad and under the agreement non resident company is required to inspect and ensure quality of sample approved by the assessee and to ensure timely delivery. It is pointed out that under the agreement the non resident company had no role in selecting samples, design or colour, but it acts only as commission agent.

It is also pointed out that all the documents were supplied before the Assessing Officer and all the correspondences were produced before the Commissioner of Income Tax (Appeals). However, neither the Assessing Officer nor the Commissioner of Income Tax (Appeals) has taken note of the material produced by the assessee. It is contended that non resident company neither provided any technical or managerial services and services provided by it cannot be termed as consultancy services. It is pointed out that the tribunal after meticulous appreciation of evidence on record has recorded a finding of fact that the services rendered by the non resident company does not amount to consultancy services. The aforesaid finding of fact has neither been assailed by the revenue as perverse and even in the memo of appeal no perversity has been even alleged. Therefore, no substantial question of law arises for consideration in this appeal as the finding recorded by the tribunal is a pure finding of fact.

Alternatively, it is submitted that even if the tax has to be deducted at source with retrospective effect, the liability cannot be put on the assessee with retrospective effect. In support of aforesaid submissions, reliance has been placed on decisions in ***'THE DIRECTOR OF INCOME-TAX & ANR. VS. M/S SASKEN COMMUNICATION', ITA NO.241/2011 DATED 10.06.2020, 'DIRECTOR OF INCOME TAX (INTL. TAX.)- II VS. PANALFA AUTOELECTRIK LTD., ITA NO.292/2014 DATED 22.07.2014, 'COMMISSIONEROF INOCME TAX-IV VS. M/G GRUP ISM P. LTD., ITA NO.325/2014 DATED 29.05.2015, 'COMMISSIONER OF INCOME-TAX, CHENNAI VS. FARIDA LEATHER COMPANY', (2016) 66 TAXMANN.COM 321 (MADRAS)*** and ***'THE COMMISSIONER OF INCOME TAX-11 VS. M/S NGC NETWORKS (INDIA) PVT. LTD.', IA NO.397/2015 DATED 29.01.2018.***

6. We have considered the submissions made by learned counsel for the parties and have perused the record. The singular question, which arises for consideration in this appeal is whether the fee made by the assessee to non resident company is in the nature of technical services and would be covered under the scope and ambit of Explanation 2 to Section 9(1)(vii) of the Act. Before proceeding further, it is apposite to take note of Section 9(1)(vii) of the Act, which reads as under:

> ***Section 9(1)(vii) in The Income- Tax Act, 1995***
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> *(vii) income by way of fees for technical services payable by-*
>
> *(a) the Government; or*
>
> *(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or*

(c) a person who is a non- resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

***Provided** that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976 , and approved by the Central Government.*

***Explanation 1**-For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976 , shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.*

***Explanation 2**- For the purposes of this clause," fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of*

technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head" Salaries".

7. It is well settled rule of interpretation of taxing statute that words not defined in the Act must be interpreted in their popular sense meaning, 'that since, which people conversant with the subject matter with which statute is dealing would attribute to it. The words therefore, have to be interpreted according to ordinary parlance and must be given a meaning, which people conversant with the commodity would ascribe to it. [***SEE: 'ORIENT TRADERS VS. COMMERICAL TAX OFFICER, TIRUPATI', (2008) 14 SCC 440, 'STATE OF MADHYA PRADESH VS. MARICO INDUSTRIES LTD.,', AIR 2016 SC 3462*** and ***'VIJAYA GOPALA LOHAR VS. PANDURANG RAMCHANDRA GHORPADE AND ORS.', AIR 2019 SC 3272***]. It is pertinent to

mention here that expression 'managerial', 'technical' and 'consultancy services' employed in Explanation 2 to Section 9(1)(vii) of the Act have neither been defined under the Act nor under the general clauses Act, 1987. Therefore, the aforesaid words have to be understood in the sense in which they are understood by the persons engaged in the business and by the common man who is aware and understands the same. The Delhi High Court in ***'CIT VS. BHARTI CELLULAR LTD.,', (2009) 319 ITR 139 (DELHI)*** as well as in the case of PANALFA supra dealt with word 'consultancy' and held that the word 'consultancy' has been defined in the Black's Law Dictionary, 8th Edition as an act and advise of someone (such as a lawyer). It has further been held that it may mean a meeting in which parties consult or confer. For consultation service under Explanation 2, there should be a provision of service by the non-resident, who undertakes to perform it, which the acquirer may use. The service must be rendered in the form of an advice

or consultation given by the non-resident to the resident Indian payer. The aforesaid decisions were referred to approval in GROUP ISM (P) LTD. supra and it has been held that consultancy services ordinarily would not involve instances where the non-resident is acting as a link between the resident and another party, facilitating the transaction between them, or where the non-resident is directly soliciting business for the resident and generating income out of such solicitation. It is equally well settled legal proposition that tribunal is a fact finding authority and decision on facts rendered by the tribunal can be gone into by High Court only if a question is referred to it, which says the finding is perverse [See: SANTHOSH HAZARI VS. PURUSHOTTAM TIWARI', (2001) 3 SCC 179 and a decision of this court in CIT VS. SOFT BRANDS (P) LTD.', (2018) 406 ITR 513].

8. In the backdrop of aforesaid well settled legal principles, we may examine the facts of the case in

hand. It is pertinent to mention here that the assessee had filed copies of agreement, brief note on nature and purpose of remittance, invoice copies, list of suppliers and chartered accountant's certificate for remittance before the Assessing Officer. However, the Assessing Officer has failed to take note of the same. Similarly, the assessee had filed e-mail correspondences pointing out various activities carried out by a non resident company in terms of the agreement executed between the parties dated 01.03.2006. The assessee has also provided the information as sought for by the Commissioner of Income Tax (Appeals) vide communication dated 27.08.2009. The aforesaid fact is recorded in paragraph 4.3.2 of the order passed by the Commissioner of Income Tax (Appeals). From the agreement executed by the assessee with the non-resident company, it is evident that the non-resident company is required to inspect the quality of fabric and other accessories in accordance with the sample approved by the assessee

and coordinate with the suppliers to ship the goods within stipulated date. The services have been described in the agreement dated 01.03.2006 as information and tracking services. Under the agreement, the non-resident company is required to ensure coordination with the suppliers, so that goods are shipped on time and to undertake necessary coordination and ensure that correct quantity and quality of goods are shipped to assessee. It is pertinent to mention here that the assessee in consultation with the exporters identifies the manufacturers as well as the quality and price of the material to be imported. The non-resident company is no where involved either in identification of the exporter or in selecting the material and negotiating the price. The quality of material is also determined by the assessee and the non-resident Indian company is only required to make physical inspection to see if it resembles the quality specified by the assessee. For rendering aforesaid service, no technical knowledge is

required. The tribunal on the basis of meticulous appreciation of evidence on record, has recorded a finding that non-resident company is not rendering any consultancy service to the assessee. Therefore, the same would not fall within the services contemplated under Section 9(1)(vii) of the Act. The aforesaid finding of fact is based on meticulous appreciation of evidence on record and cannot be termed as perverse. It is pertinent to mention here that even in memo of appeal, no ground has been urged with regard to perversity of the aforesaid finding. For the aforesaid reason also, the substantial questions of law framed by a bench of this court deserve to be answered against the revenue.

In view of preceding analysis, the substantial questions of law framed by a bench of this court are answered against the revenue and in favour of the assessee.

In the result, we do not find any merit in this appeal. The same fails and is hereby dismissed.

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JUDGE

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