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THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 04.07.2019

Order Reserved on:
01.07.2019

Order delivered on:
04.07.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal No.401 of 2019

M/s.RegenPowertech Pvt. Ltd.,
7th Floor, KRM Plaza, North Tower,
No.2, Harrington Road, Chetpet,
Chennai - 600 031.

(PAN: AADCR5531M-TAN: CHER08858D)

...Appellant

-vs-

The Deputy Commissioner of Income Tax,
International Taxation - 2(1),
Chennai.

...Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal Chennai 'B' Bench, dated 28.02.2019 in ITA No.2721/CHNY/2017 for the Assessment year 2014-15, against the order of the Commissioner of Income Tax(Appeals)-16, Chennai in ITA.NO.60/CIT(A)-16/2016-17 dated 01/08/2017 for assessment year 2014-15 filed against the order passed under section 201(1)/201(1A) of the Income Tax, International Taxation 2(1), Chennai dated 30/06/2016 for the Assessment year 2013-2014 against the order passed by the Deputy Commissoioner of Income-Tax, International Taxation 2(1), Chennai in PAN AADC R5531M/CHER 08858D.

For Appellant : Mr.Raghav Rajeev Menon
for Mr.R.Sivaraman

For Respondent : Mr.Karthick Ranganathan
Senior Standing Counsel



JUDGMENT

(Judgment was delivered by T.S.Sivagnanam, J.)

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This appeal filed by the assessee under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity) is directed against the order dated 28.02.2019 passed by the Income Tax Appellant Tribunal, 'B' Bench, Chennai (hereinafter referred to as 'the Tribunal') in I.T.A.No.2721/CHNY/2017 for the assessment year 2014-15.

2.The present appeal has been filed raising the following substantial questions of law:

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the findings of the lower authorities without taking into consideration that the services for which payments are made by the Appellant without deduction of Tax at source are provided outside India and such entities have no permanent establishments in India thereby qualifying as exigible transactions in accordance with Section 9(1)(vi) and Section 9(1)(vii)(b) of the Act?
2. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the findings of the lower authorities that the Appellant is an assessee in default with respect to the payment of Rs.1,19,47,013/8- paid towards the rent for leasing a crane in Srilanka, especially when the entire transaction has occurred outside India and thereby exigible to tax as per Article 7 of DTAA between India and Srilanka and Section 9(1)(vii) of the Act?
3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the findings of the lower authorities as the Appellant is an assessee in default with respect to the payment of Rs.3,34,414/- paid towards the service rendered by M/s.Wingtec Rotor Services-Germany, especially when the entire transaction has occurred outside India and thereby exigible to tax as per Article 7 of DTAA and Section 9(1)(vii) of the Act between India and Germany?



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4. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the findings of the lower authorities as the Appellant is an assessee in default with respect to the payment of Rs.3,34,414/- paid towards the consultancy service rendered by M/s.Earnst & Young especially when the entire transaction has occurred outside India and thereby exigible to tax as per Articles 5, 7 and 14 of DTAA between India and UAE?

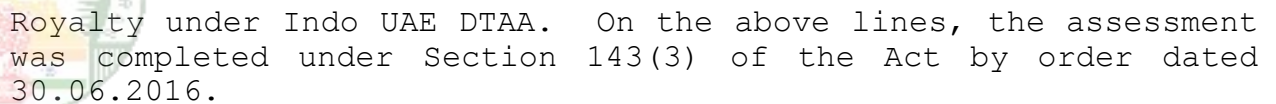
3.The assessee has its principal business of manufacturing and supplying wind turbines. During the year 2013-14, the assessee exported/supplied Wind Turbine Generators (WTG) to their customers in Srilanka. The scope of work not only involve supply but also erection and commissioning of the WTG in the premises of the customers. The assessee engaged the services of M/s.Windforce Private Limited, Srilanka (WFPL) for the purpose of erection and commissioning of WTGs at customers premises. The assessee effected payments for hiring of crawler crane for one month from 21.04.2013 to 20.05.2013 at the site at Srilanka for erection and commissioning of WTG in the premises of the customers and while effecting payment did not deduct Tax Deducted at Source (TDS). The Assessing Officer issued a show cause notice calling upon the assessee to explain as to why no TDS was made on the payment made to M/s.WFPL as the payment amounts to Fee for Technical Services. The assessee in its reply dated 08.02.2016 stated that they took the help of M/s.WFPL for construction scope and the entire services were rendered outside India by M/s.WFPL and it has no Permanent Establishment (PE) in Indian and the activity is in the nature of erection/assembly or shipment has entirely happened outside the Indian tax jurisdiction and has not accrued or arisen in India to M/s.WFPL in any way bringing it under the scope of Section 9(1)(vii) r/w. explanation thereunder. It was further stated that the activity was undertaken outside India and in Srilanka and the income if any is taxable only in that Country.

4.The Assessing Officer did not agree with the stand taken by the assessee and in so doing referred to the work order issued by the assessee to M/s.WFPL, the scope of work mentioned therein and the various clauses contained in the work order and held that the work being carried out in Srilanka is not mere construction, assembly or mining like project, installation of wind turbine requires lot of technicality. M/s.WFPL are required to provide skilled technical assistants and site engineers for executing the installation work. Thus the Assessing Officer held that the services of technical personnel



are used in the Installation of Wind turbines and hence, the services rendered by M/s.WFPL to the assessee for his projects in Srilanka are in the nature of Fee for Technical Services. The Assessing Officer referred to Article 12 of India-Srilanka DTAA and stated that the royalty of Fee for Technical Services may also be taxed in the contracting State in which they arise, according to the law of that State, but if the beneficial owner of the royalties or Fees for Technical Services is a resident of the other Contracting State, the tax so charged shall not exceed 10% of the gross amount of the royalties or Fees for Technical Services. It was stated that the services are rendered by M/s.WFPL to the assessee who is based in India and as per Clause (2) of Article 12 of DTAA the payments made towards services rendered by M/s.WFPL are liable to withholding tax at 10%. Without prejudice to the above finding, the Assessing Officer stated that the payments made by the assessee are also in the nature of royalty as it involves the payments for right to use industrial, commercial or scientific equipment, as the payment was towards hiring of cranes and hence in the nature of right to use Industrial, commercial equipment and hence applicable rate of TDS is at 10%.

5.The other issue was with regard to the repair service extended by M/s.Wingtec Rotor Service, Germany (WRS). The assessee engaged M/s.WRS for carrying out repair on the rotor blades by deploying its service technicians and had incurred an amount of Rs.3,34,414/- towards the same and the assessee has not deducted TDS on the said payment for the reason that the nature of remittance is towards repair charges. The Assessing Officer held that the repairs are not mundane repairs, but require highly sophisticated techniques and hence in the nature of Technical Services as per Section 9(1)(vii) r/w. Explanation 2 of the Act. Reference was also made to the India-Germany DTAA. The other issue was with regard to Fee for Professional Services. The assessee made a remittance of Rs.12,01,000/- to M/s.Ernst & Young, UAE (E&Y) in connection with a market study for Wind Energy rendered by M/s.E&Y and the assessee had not deducted TDS on the ground that it is only a market study. The assessee referred to Articles 5, 7 and 14 of the Indo UAE DTAA and stated that it is to be treated as business profits and taxable in the receiving end and hence no TDS is required to be deducted on this. Services rendered outside India are not taxable and M/s.E&Y do not have PE in India. The Assessing Officer held that the market study being in the nature of Technical Services the remittances is treated as Fee for Technical Services, income in the hands of M/s.E&Y and is liable to TDS. Without prejudice to the said conclusion the Assessing Officer observed that the said market study is in the nature of information concerning commercial experience and hence is



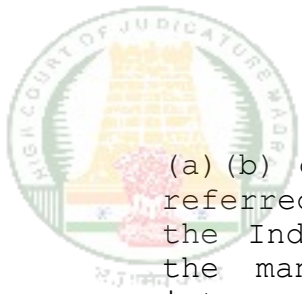
6. The assessee preferred an appeal before the Commissioner of Income Tax (Appeals)-16, Chennai (CIT(A)). The CIT(A) examined the nature of work and in this regard referred to various clauses in the work order and held that it is evident that the work being carried out in Srilanka is not mere construction, assembly or mining like project, installation of wind turbine requires lot of technicality and hence, M/s.WFPL provided skilled technical assistants and site engineers for executing the installation work, services of technical personnel are used in the installation of wind turbine and hence the service rendered by M/s.WFPL to the assessee for its project in Srilanka are in the nature of Fee for Technical Services. Further, by referring to Article 12 of India-Srilanka DTAA, it held that services are rendered by M/s.WFPL to the assessee who is based in India and hence as per Clause (2) of Article 12 of India-Srilanka DTAA, the payments made towards services rendered by M/s.WFPL are liable to withholding tax at 10%. Accordingly the finding of the Assessing Officer was upheld. With regard to repair services rendered by M/s.WRS, Germany, the CIT(A) referred to Article 12 of India-Germany DTAA and held that the services being in the nature of Fee for Technical Services is rightly treated as income chargeable to tax in India and hence liable to TDS. With regard to payments effected to M/s.E&Y for market study for Wind Energy in UAE, the CIT(A) held that the market study being in the nature of Technical Services, the remittance is treated as Fee for Technical Services, the income in the hands of M/s.E&Y and is liable to TDS. Accordingly, the appeal was dismissed. Aggrieved by the same, the assessee preferred an appeal before the Tribunal. The Tribunal affirmed the order passed by the CIT(A) on all the three issues and this is how the assessee is before us by way of this appeal.

7. The learned counsel appearing for the assessee contended that the Tribunal erred in confirming the order passed by the CIT(A) and the Assessing Officer referring to the provisions of Sections 9(1)(vi) and 9(i)(vii)(B) of the Act which prima facie discusses the accrual of income through royalty and Fees for Technical Services respectively when such amount is payable by a resident. It is submitted that when fees are paid in respect of services employed in a business or profession carried on by such person outside India then the said provision would not apply. The assessee effected all payments for services provided outside India and hence these payment do not come under the ambit of the aforesaid provision. So far as the addition made in respect of



payments to M/s.WFPL, Srilanka and M/s.WRS, Germany, the said Companies do not have a PE in India and as such these incomes are not taxable in India keeping in line with Article 7 of the DTAA with Srilanka and Germany respectively read with Section 90 of the Act. It is further submitted that the Tribunal committed error in observing TDS is deductible in respect of the payment made to M/s.WFPL, Srilanka merely because the business of the assessee is in India especially when the rent for the crane is paid in Srilanka and the work has also been done in Srilanka and as such there is no incidence to tax as per the provision of Section 9(1)(vii)(b) of the Act. Further, it is submitted that the Tribunal erroneously invoked the provision of Article 12(2) of the India-Srilanka DTAA by holding that the payment made by the assessee towards mere rental of crane in Srilanka would qualify as payment made towards royalties or Fees for Technical Services. Further, the Tribunal has not rendered any reasoned finding while holding that the payments made by the assessee to M/s.WRS, Germany are in the nature of Fees for Technical Services without appreciating the very nature of the payments being repair works effected in Germany which clearly qualify under Explanation 2 of Section 9(1)(vii) of the Act. It is further contended that the Tribunal ought to have deleted the addition made on account of all payments effected to M/s.E&Y when the assessee was able to substantiate that the amount paid is towards consultancy services for market study done in UAE in relation to business connection in UAE and hence cannot be construed to be payment made for royalties. Further it is submitted that the payments made to M/s.E&Y are in the nature of business profits would fall under the purview of Article 5, 7 and 14 of Indo UAE DTAA and such payments cannot be taxed in India. In support of his contentions, reliance was placed in the decision of *Evolv Clothing Company Pvt. Ltd. vs. Assistant Commissioner of Income Tax* ([2018] 407 ITR 72(Mad)) and *Principal Commissioner of Income Tax vs. Motif India Infotech (P) Ltd.* ([2018] 409 ITR (Guj)).

8.The learned Senior Standing Counsel appearing for the revenue submitted that the Assessing Officer, CIT(A) and the Tribunal have carefully analysed the terms and conditions of the contract as contained in the work order and have rendered a factual finding and this Court exercising jurisdiction under Section 260A of the Act will decide the substantial question of law and will not embark upon a fact finding exercise. It is submitted that the India-DTAA is very widely couched and worded more or less on the lines of the Income Tax Act, 1961. The DTAA does not have a "make available clause" and therefore the finding rendered by the authorities and the Tribunal are legally valid. In this regard, the learned counsel has drawn the attention of this Court to Article 12(3)



(a) (b) of the India-Srilanka DTAA. Further, the learned counsel referred to Section 991(vii)(b) of the Act and submitted that the Indian Company shall have their persons outside India and the manner in which the authorities and the Tribunal have interpreted Section 9(1)(vii)(b) of the Act considering the facts of this case does not warrant any interference. In support of his contention, the learned Senior Standing Counsel referred to the decision in the case of Commissioner of Income Tax vs. Havells India Ltd. [(2013) 352 ITR 376(Delhi)].

9. We have heard the learned counsels for the parties and perused the materials placed on record.

10. There are three issues raised before us in this appeal. First relates to payments made by the assessee to M/s.WFPL, Srilanka, the second relates to payment made to M/s.WRS, Germany and the third relates to payment made to M/s.E&Y, UAE. The result to be arrived in this appeal wholly revolves upon the terms and conditions of the contract entered into between the assessee and the three foreign entities. The Assessing Officer has examined the terms and conditions minutely and has assigned reasons in support of his conclusion as to why the assessee should have deducted TDS while effecting such payments. The learned Senior Standing Counsel for the revenue is right in his submission that we cannot embark upon a fact finding exercise but we are required to answer the substantial question of law, if any arisen in this appeal. We would be well justified in interfering with the order of the Tribunal if the assessee contends that it suffers from perversity. The assessee has not raised such a ground in this appeal but seeks to assail the findings of the Tribunal, vis-a-vis the interpretation given to the type of contract/arrangement between the assessee and the three foreign entities. Therefore, we are not expected to re-appreciate the factual position to arrive at a conclusion in the matter. Nevertheless, we noted the findings of the Assessing Officer as affirmed by the CIT(A) and the Tribunal as well as the work order issued by the assessee to M/s.WFPL, Srilanka dated 25.03.2013. The assessee in their reply to the show cause notice dated 08.02.2016 contended that they took the assistance of M/s.WFPL, Srilanka for construction scope to be performed in Srilanka. If we examine the terms and conditions mentioned in the work order, more particularly the scope of work and the various clauses contained therein, we have no hesitation to hold that the nature of activity done in Srilanka is not mere construction or assembly or mining like project. Admittedly, the installation of wind turbine is a highly skilled and technical work. The various clauses in the work order clearly demonstrates the scope of work and therefore, we cannot but hold that the Assessing officer was right in concluding that the



services rendered by M/s.WFPL is in the nature of Fee for Technical Services. Similarly, with regard to the services rendered by M/s.WRS, Germany was stated by the assessee to be a repair work. The Assessing Officer after taking note of what is the type of repair work which would accrue in wind turbine, concluded that the repairs are not mundane repairs but require highly sophisticated techniques and accordingly held that it is in the nature of technical services. After analysing the type of services rendered by M/s.E&Y at UAE, the Assessing Officer held that the market study is in the nature of technical services and the remittance is to be treated as Fee for Technical Services. We find that there is no error in the said conclusion especially when it has been rendered on appreciation of the scope of work based on the documents placed by the assessee before the Assessing Officer. Therefore, we find that the conclusion arrived at by the two authorities and the Tribunal on all the three issues does not call for interference.

11.The decision in the case of Evolv Clothing Company Pvt. Ltd. is clearly distinguishable on facts. In the said case, the assessee carried on business of export of garments entered into agency agreements with a non-resident Italian agent for procuring export orders for the assessee at a commission. The Assessing Officer found that though the assessee had no business outside India, the assessee had made payments from sources which are taxable in India. The non-residents did not file any return in India or pay Indian taxes in respect of the services rendered by them nor obtained exemption under Section 195(2) of the Act and the amounts paid to the non-residents were therefore to be deemed to be income that had arisen in India under Section 9(1) (vii) of the Act for which the assessee ought to have deducted TDS under Section 195 of the Act. The appeal preferred by the assessee to the CIT(A) was allowed and the revenue filed an appeal to the Tribunal. The Tribunal reversed the order of the CIT(A) and restored the order of the Assessing Officer. The Court after taking note of the findings rendered by the Tribunal held that there is no factual finding of any activity on the part of the payee in India as it is nobody's case that the service rendered by the overseas agent was either managerial or technical but the payment was for research with regard to the need for products was incidental to the job of procuring orders on commission basis. For such reasons and others assigned, the appeal filed by the assessee was allowed. As mentioned earlier, the decision can render no assistance to the assessee as the factual position was entirely different.

12.The facts in the case of Motif India Infotech (P) Ltd. was that the assessee provided software related services to its overseas clients. The Assessing Officer came to the conclusion that the assessee had failed to deduct TDS and the expenditure



was required to be disallowed. The CIT(A) allowed the assessee's appeal on the ground that the services were utilized outside India in a business or profession carried outside India for the purpose of earning any income outside India. The revenue's appeal before the Tribunal was rejected, against which an appeal was filed to the High Court. The appeal was dismissed by the High Court and in so doing pointed out that the CIT(A) and the Tribunal have accepted the assessee's factual assertion that the payments were for technical services provided by a non-resident for providing services to be utilized for serving the assessee's foreign clients and thus, the Fees for Technical Services was paid by the assessee for the purpose of making or earning any income from any source outside India and clearly the source of income, namely, the assessee's customers were the foreign based Companies. This decision also is clearly distinguishable on facts as noted by us above and does not render assistance to the case of the assessee.

13. In the case of Havells India Ltd, one of the substantial question of law framed for consideration was whether the Tribunal is right in holding that Section 40(a)(ia) of the Act is not applicable to testing fee paid to a Company in Chicago as there is no failure on the part of the assessee to deduct TDS? The question was answered in favour of the revenue and while doing so, the Court analysed Section 9(1)(vii)(b) of the Act in the following manner:

"13. Section 9(i)(vii)(b) contemplates a source located outside India. It is difficult to conceptualise the place/ situs of the person who make payment for the export sales as the source located outside India from which assessee earned profits. The export contracts obviously are concluded in India and the assessee's products are sent outside India under such contracts. The manufacturing activity is located in India. The source of income is created at the moment when the export contracts are concluded in India. Thereafter the goods are exported in pursuance of the contract and the export proceeds are sent by the importer and are received in India. The ITA 55/2012 & 57/2012 Page 13 of 22 importer of the assessee's products is no doubt situated outside India, but he cannot be regarded as a source of income. The receipt of the sale proceeds emanate from him from outside India. He is, therefore, only the source of the monies received. The income component of the monies or the export receipts is located or situated only in India. We are making a distinction between the source of the income and the source of



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the receipt of the monies. In order to fall within the second exception provided in Section 9(1)(vii) (b) of the Act, the source of the income, and not the receipt, should be situated outside India. That condition is not satisfied in the present case. The Tribunal, with respect, does not appear to have examined the case from this aspect. Its conclusion that the technical services were not utilised for the assessee's business activity of production in India does not bring the assessee's case within the second exception in Section 9(1)(vii)(b) of the Act. It does not bring the case under the first exception either, because in order to get the benefit of the first exception it is not sufficient for the assessee to prove that the technical services were not utilised for its business activities of production in India, but it is further necessary for the assessee to show that the technical services were utilised in a business carried on outside India. Therefore, we cannot also approve of the Tribunal's conclusion in para 29 of its order to the extent it seems to suggest that the assessee satisfies the condition necessary for bringing its case under the first exception. Be that as it may, as we have already pointed out, since the source of income from the export sales cannot be said to be located or situated outside India, the case of the assessee cannot be brought under the second exception provided in the Section."

14. In our considered view, the decision in the case of Havells India Ltd. would apply with full force to the case on hand. In any event, as observed by us earlier the finding rendered by the Assessing Officer, affirmed by the CIT(A) and the Tribunal revolves entirely on the interpretation of the terms and conditions of the work order/contract and in the absence of any perversity, we decline to interfere in the matter as no substantial question of law arises for consideration.

15. In the result, the appeal fails and is dismissed. No costs.

Sd/-

Assistant Registrar(CS III)

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Sub Assistant Registrar



To

1.The Deputy Commissioner of Income Tax,
International Taxation - 2(1),
Chennai.

2.The Income-tax Appellate Tribunal,
"B" Bench, Chennai.

3.The Commissioner of Income Tax(Appeals)-16,
121, Mahathma Gandhi Road, Chennai-34.

4.The Deputy Commissioner of Income Tax,
International Taxation 2(1), Chennai.

+lcc to Mr.Karthick Ranganathan, Advocate sr.56175

+lcc to Mr.R.Sivaraman, Advocate sr.56418

T.C.A.No.401 of 2019

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