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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 13.11.2024

+ **ITA 627/2019**

+ **ITA 628/2019**

+ **ITA 629/2019**

PR. COMMISSIONER OF INCOME TAX- 2Appellant

Through: Mr. Vipul Agarwal, Advocate.

versus

CIENA COMMUNICATIONS INDIA PVT. LTD.Respondent

Through: Mr. Vishal Kalra, Mr. S.S. Tomar,
Mr. Ankit Sahani, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (ORAL)

1. The Revenue has filed the present appeals impugning a common order passed by the learned Income Tax Appellate Tribunal (hereafter *the ITAT*) dated 27.09.2018 (hereafter *the impugned common order*) which is the subject matter of the present appeals. The impugned common order was passed in ITA 3561/Del/2018 in respect of Assessment Year (AY) 2012-13; ITA No. 3562/Del/2018 in respect of AY 2013-14; and ITA No. 3563/Del/2018 in respect of AY 2014-15.

2. The controversy in the said appeals relates to whether the payments made by the respondent (hereafter the Assessee), during the respective



Financial Year (FY), to an overseas associated enterprise (Ciena Communications Inc., a company incorporated in Delaware, having its principal place of business in Maryland – hereafter referred to as *Ciena, US*) was liable to be disallowed by virtue of Section 40(a)(i) of the Income Tax Act, 1961 (hereafter *the Act*), on the ground that the Assessee had not deducted tax at source on the payments made to Ciena, US. These payments (₹8,09,63,299/- in FY 2011-12, ₹3,92,82,982/- in FY 2012-13 and ₹3,99,09,962/- in FY 2014-15) were accordingly added to the declared income of the Assessee for the previous years relevant to the Assessment Years in question. The said addition was premised on the assumption that the payments made to Ciena, US were chargeable to tax, under Section 9(vii) of the Act, being fees for technical services. The Assessing Officer (hereafter *the AO*) also proceeded on the basis that the benefit of Article 12 of the India-USA Double-Taxation Avoidance Treaty Agreement (*the DTAA*) would not be available, as the services rendered, for which the aforesaid payments were made, included the element of “make available” of technology to the Assessee.

3. For the purpose of considering the present appeals, we consider it apposite to refer to the facts and the proceedings, in respect of AY 2012-13 (ITA 629/2019).

4. The reasoning of the learned AO for its conclusion as set out in its order dated 16.12.2016, is reproduced below:

“3.4 Thus, from the submissions of the assessee it is gathered that as per the assessee the services received will qualify as technical services only they make available technology, know-how, skill, processes, experience etc to the service recipient. The make available clause is there in the India USA Treaty but



the assessee is trying to take benefit of the India USA treaty. In this regard it has been found that the services received by the assessee do make available knowledge, experience, know - how to the recipient and this clearly visible when one examines the nature of the services rendered and the consequential enduring benefits obtained by the recipient. Any technical service can be provided only when the provider possesses the expertise, skill, knowledge or know how etc., in the relevant field and once it is so, the further act of providing such services to the recipient enables the recipient in many ways including enabling it to apply such technology on its own. Having established the facts of this case as above, it will be appropriate if further analysis of the scope of phrase "technical services" and "Make Available" is made keeping in view the explanations offered by the assessee on these phrases in its replies.

"Technical Services"

It was held in *Intertek Testing Services*, in (2008) (307 ITR 418) by Authority of Advance Ruling (AAR) that the expression "technical services" cannot be construed in narrow sense. It has been observed therein that the term "technical" ought not to be confined only to technology relating to engineering, manufacturing or other applied sciences. Professional service imbued with expertise could be regarded as technical service.

'Similarly In &. *V.K, Industries* (22\$ ITR 564), it was held that advice given by a financial consultancy firm on the modalities of procuring loans shall be regarded as technical and consultancy service

Hon'ble Supreme Court in the case of *Continental Construction Ltd. vs. CIT* 195 ITR 811 (SC) has held that the advice rendered by the lawyer would be a piece of 'technical service'. In the case of *CBDT Vs. Oberoi (India) (P.) Ltd.*, 97 Taxmann 453 (SC), it was held that services provided by hotel consultants and specialists to a Foreign Hotel was 'technical service'.



"Make Available"

3.5 The term 'make available' came under the examination by the AAR in its' ruling in the case of Shell India Markets Pvt. Ltd. (order dated 12.1.2012 in AAR No. 833 of 2009). In this case, the foreign company provided industry specific expertise to the assessee which was applied in running business. This way the assessee's employees would be equipped to carry on that business/ service on their own without reference to the service provider, when the service agreement comes to an end. It has been stated that it was not a per-requisite for applicability of "make available" clause that the right to continue the practice put into effect and adopted under the service agreement on its expiry should be conveyed specifically. It was found that while describing the services, the term 'advise/advice' has been used repeatedly and the services are themselves called 'support services'. This itself indicates that while providing General BSS, foreign company works closely with the employees of the assessee and supports/advises them. Thus, General BSS were made available to the assessee. It was held that the services were clearly made available to the assessee.

In the case of Areva TAD Ltd. (order dated 7.2.2012 in AAR No. 876 of 2010), the AAR has held that the IT sharing services 'made available' technical knowledge/experience to the assessee, resulting «*such services .being Characterized as PT5 and therefore, subject to Indian withholding tax.

In the case of Mersen India Pvt. Ltd. 120121 20 taxmann.com 475 (AAR), the facts of the case were that the Assessee, an Indian Company, entered into a service agreement with a French Company. In terms of service agreement, French Company has undertaken to provide assessee with services in nature of assistance, professional and administrative consultation and training. Various clauses of service agreement contain provisions for services which relate to overall management and direction, marketing



· and managing accounts and financial operations of assessee. It is also apparent that advice and assistance provided by French Company on business strategy, on general management, on marketing and commercial matters, on financial control and accounting matters, and on purchase and sales, environment and safety and giving of training to optimize sales techniques to employees of assessee, are all capable of being put to use by assessee in future on its own and, thus, consultancy services are also made available to assessee. In view of these facts, the AAR held that the payments by assessee to French company towards advisory services is fees for technical services' and, therefore, assessee is required to deduct tax at source under section 195(1) while making payments for aforesaid services. Thus, the term "make available" is not limited to services of technical nature but also includes the consultancy services."

A close look of the nature of services rendered by the assessee clearly shows that the consideration paid for the services rendered by the foreign companies are clearly FTS as per India and USA Treaty."

5. The AO also referred to the decision of the Authority for Advance Ruling (AAR) in *In Re: Intertek Testing Services: (2008) (307 ITR 418)* as well as in *Shell India Market Pvt. Ltd.: order dated 17.01.2012 in AAR No. 833 of 2009*, in concluding that Cien, US had made available technical knowledge/ experience to the Assessee, resulting in this said service being chargeable to tax in India, in terms of Section 9(1)(vii) of the Act and falling within the exclusionary clause of Article 12 of the DTAA.

6. It is relevant to refer to Section 9(1)(vii) of the Act and Article 12 of the DTAA, which are set out:

“Section 9(1)(vii)

Section 9(1): The following Incomes shall be deemed to accrue or arise in India :-



(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 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.

Article 12 of DTAA

ARTICLE 12 - Royalties and fees for included services –

1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) in the case of royalties referred to in sub-paragraph (a) of paragraph 3 and fees for included services as defined in this Article [other than services described in subparagraph (b) of this paragraph] :

(i) during the first five taxable years for which this Convention has effect,

(a) 15 per cent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that



Contracting State, a political sub-division or a public sector company ; and

(b) 20 per cent of the gross amount of the royalties or fees for included services in all other cases ; and

(ii) during the subsequent years, 15 per cent of the gross amount of royalties or fees for included services ; and

(b) in the case of royalties referred to in subparagraph (b) of paragraph 3 and fees for included services as defined in this Article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 3(b) of this Article, 10 per cent of the gross amount of the royalties or fees for included services.

3. The term “royalties” as used in this Article means :

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

4. For purposes of this Article, “fees for included services” means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(a) are ancillary and subsidiary to the application or enjoyment of



the right, property or information for which a payment described in paragraph 3 is received ; or

- (b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

5. Notwithstanding paragraph 4, “fees for included services” does not include amounts paid :

- (a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a) ;
- (b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic ;
- (c) for teaching in or by educational institutions ;
- (d) for services for the personal use of the individual or individuals making the payments ; or
- (e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for included services, being a resident of a Contracting State, carries on business in the other Contracting State, in which the royalties or fees for included services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for included services are attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be shall apply.

7. (a) Royalties and fees for included services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, or a resident of that State. Where, however, the person paying the royalties or fees for included services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in



connection with which the liability to pay the royalties or fees for included services was incurred, and such royalties or fees for included services are borne by such permanent establishment or fixed base, then such royalties or fees for included services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

(b) Where under sub-paragraph (a) royalties or fees for included services do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State.

8. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for included services paid exceeds the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of the Convention.”

7. The Assessee unsuccessfully appealed the said assessment order before the learned Commissioner of Income Tax (Appeals) [*hereafter CIT(A)*] and the appeal was dismissed by an order dated 08.12.2017 passed under Section 250 of the Act. In the aforesaid context the Assessee filed an appeal before the learned ITAT.

8. The learned ITAT had found that the fundamental premise that the Assessee had made payments for technical services, which included an element for making available technical knowledge and experience or skill to the Assessee, was not sustainable in the given facts.

9. The relevant extract of the said decision is set out below:

“9. Adverting to facts of case before us, service rendered by AE to assessee is as per agreement dated 01/04/10. According to the agreement, furnished by assessee placed at page 54-62 of paper book, services



provided by AE to assessee are in nature of assistance in troubleshooting, isolating the problem and diagnosing related trouble and alarms and equipment repair services wherein the equipments will be shipped to US by assessee as and when required. It has been agreed between the parties that AE would be providing such services remotely and no on-site support services would be provided to customers of assessee.

9.1. It appears from the above description of services rendered by AE that there is use of technical knowledge and/ or skill, utilised by AE qualifies as "fee for technical services", as defined under Explanation 2 to section 9(i)(vii) of the Act.

9.2. As India has double taxation avoidance agreement with US, and Article 12(4) of India-USA DTAA deals with "fee for technical services", to determine taxability of income received by AE for services rendered in India, the services rendered should satisfy the requirements under Article 12 (4), which requires technical knowledge, experience, skill etc., to be "made available" to the recipient of such services."

10. In the aforesaid context, the Revenue has projected the following question for consideration of this Court:

“A. Whether the Ld. ITAT erred in deleting the addition of Rs.8,09,63,299/- on account of non deduction of TDS u/s 40(a)(i) of the Act, even though the assessee company was under obligation to deduct tax at source or withhold the tax u/s 195 of the Act read with Article 12 of the India USA DTAA for the FTS paid by it to the foreign entity?”

11. It is apparent that the above question is premised on the basis that the Assessee had an obligation to withhold tax under Section 195 of the Act read with Article 12 of the DTAA. However, the facts as set out by the



learned ITAT in its order indicate that the services rendered by Ciena, US did not contain an element of making available technology, knowledge and experience to the Assessee. The Revenue does not challenge the findings of the learned ITAT on the ground of perversity.

12. On a pointed query of this Court to Mr Agarwal, the learned counsel appearing for the Revenue that, whether the present appeal was sustainable if the learned ITAT's finding that the services rendered by the Ciena, US did not contain an element of make available of the technology and experience was accepted; the learned counsel had responded in the negative.

13. However, Mr Agarwal submitted that a plain reading of the Agreement entered into between the Assessee and the Ciena, US would establish that the findings of the learned ITAT regarding the nature of services were erroneous. He also submitted that there was no other material before any of the authorities other than the Agreement (agreement dated 01.04.2010), and therefore, the authorities had drawn their conclusions on the basis of the said Agreement alone.

14. It is relevant to refer to Article 2 and Paragraphs 4.2 and 4.3 of the Agreement. The same are set out below:

“2. APPOINTMENT

Ciena India hereby appoints Ciena USA, and Ciena USA hereby agrees, to carry out and perform equipment repair and maintenance support services (remote on call support as well as physical repair of defective equipments/ parts thereof sent outside India) to the customers of Ciena India”

4. SERVICES

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4.2 Ciena USA shall provide remote on call support services of its Global Product and Emergency Technical Support teams situated outside India to Ciena India customers for assistance in trouble shooting, isolating the problem and diagnosing reported trouble and alarms. Ciena USA shall provide such equipment maintenance report services remotely only and no onsite services shall be provided.

4.3 Ciena USA will also provide physical repair activities in relation to the defective equipments or part thereof. Ciena India will arrange to ship and arrange for necessary clearances required for exporting the defective equipment or parts thereof for repairs to Ciena USA.”

15. The aforesaid clause is clearly supports the findings of the learned ITAT. As noted above, the learned ITAT had noted that Ciena, US provides technical on-call advisory services. Ciena, US remotely provides support services through call centres, to the customers of the Assessee, in case of problems of outage, or where emergency technical support is required in cases where a system is compromised. However, in cases where the equipment develops any defect and requires repair, the same has to be shipped overseas to Ciena, US for the repairs. It is also relevant to note that Ciena, US is the manufacturer of the equipment supplied to customers in India, and the agreement between the Assessee and Ciena, US, is essential to ensure that the support services are provided to the customers in India.

16. The Revenue’s contention that Ciena, US directly provides knowledge, technology, skill and experience to the Assessee for it to render services is not supported by the plain language of the Agreement dated 01.04.2010. Thus, the contention that consideration paid by the Assessee



was fees for included services as defined under paragraph 4(b) of Article 12 of the DTAA, is not merited.

17. As noted-above, the findings of the learned ITAT regarding the nature of services rendered by Ciena, US are the findings of the fact. It is also important to note that no question regarding whether the said findings are perverse has been projected by the Revenue in this case.

18. In view of the above, we do not find that any substantial question of law arises in the present appeals.

19. The appeals are accordingly dismissed, with the aforesaid directions.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

NOVEMBER 13, 2024/at

Click here to check corrigendum, if any