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

+ ITA 9/2020

PRINCIPAL COMMISSIONER OF INCOME
TAX, DELHI-5

..... Appellant

Through: Mr. Abhishek Maratha, SSC
with Ms. Nupur Sharma & Mr.
Parth Semwal, Advs.

Versus

M/S JAS FORWARDING PVT. LTD. Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with
Ms. Kavita Jha, Mr. Vaibhav
Kulkarni, Mr. Udit Naresh &
Mr. Himanshu Aggarwal, Advs.

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+ ITA 24/2020

PRINCIPAL COMMISSIONER OF
INCOME TAX, DELHI-5,

..... Appellant

Through: Mr. Abhishek Maratha, SSC
with Ms. Nupur Sharma & Mr.
Parth Semwal, Advs.

Versus

M/S JAS FORWARDING
WORLDWIDE (I) PVT. LTD.

..... Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with
Ms. Kavita Jha, Mr. Vaibhav
Kulkarni, Mr. Udit Naresh &
Mr. Himanshu Aggarwal, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE PURUSHAINDR KUMAR
KAURAV**

ORDER

04.04.2024

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1. The instant appeals assail the judgment rendered by the Income



Tax Appellate Tribunal [“**ITAT**”] dated 08 May 2019, and raise the following common questions of law:-

“(i) Whether in the facts and circumstances of the case and the prevailing law, the Hon’ble Tribunal has erred in deleting the disallowance of Rs. 21,58,139/- made under Section 40(a)(i) of the Act by the AO on account of reimbursement of expenses made under section 195 of the Act, to the non-resident association enterprises?

(ii) Whether in the facts and circumstances of the case and the prevailing law, the Tribunal has erred in upholding the direction of Ld. CIT(A) deleting the disallowance of Rs. 21,05,07,858/- made under Section 40(a)(i) of the Act by the Ld. AO on account of payment made to non-resident association enterprises for freight and forwarding services?

2. We note that the first issue which stands posited is with respect to reimbursement of expenses which the respondent/assessee made to Non-Resident Associated Enterprises [“**NRAE**”]. The relationship between the Indian assessee and its NRAE stood comprised in an agreement dated 12 December 2005, relevant parts whereof are extracted hereinbelow:

“2.0 GENERAL CONDITIONS”

2.1 This Agency Agreement covers the Agency work for and on behalf of the Principal and includes the duties of marketing the services of the Principal and other activities as desired by the Principal.

2.2 Whereas both parties are fully organized and equipped to perform all the services customarily associated with international sea and air transportation of goods and property as legally obligated in accordance to the Bill of Lading/Airway Bill so issued.

2.3 Whereas both parties are mutually desirous of entering into an agreement hereinafter set forth.

3.0 DUTIES OF THE AGENT

3.1 To represent the Principal in the territory and to supervise all activities in connection with the Principal's services in the territory, while complying at all times with any specific instructions, which the Principal may reasonably give, from time to time.



3.2 Agent shall perform his best in promoting the services of the Principal in an effective and proactive manner as deemed necessary to enhance the image of the services.

3.3 Agent shall employ professional staff with adequate knowledge of international shipping practices and laws, who shall act in the interest of the Principal at all times, thereby protecting the Principal from exposure to claims or liabilities, by their prudent initiatives.

3.4 The Agent will promptly report to the Principal of any accidents, claims or liabilities brought against the Principal, in respect of containers, cargo, Principal's equipment or other property or any other matter giving rise to a claim on the Principal and will, at request, deal with all such claims in accordance with the Principal instructions.

3.5 Agent will confirm to all statutory regulations and Laws, which is required to be fulfilled by them, on behalf of the Principal as the local Law may call for.

3.6 The Agent shall arrange and effect documentation of cargo in accordance with the standing instructions of the Principal's Line Management Office, or as the Principal may otherwise require, in writing.

3.7 Agent will account for all sums paid and received by them, on behalf of the Principal and for all balances held by them. Agents shall collect all revenues due to the Principal, such as freight, Terminal Handling charges, Transportation charges, etc.

3.8 Save as expressly authorized by the principal in writing the Agent shall not without the Principal's prior express approval incur any liabilities on behalf of the Principal nor pledge the credit of the Principal nor make any representations nor give any warranty on behalf of the Principal.

3.9 The Agent has no authority to and shall not take part in any dispute or institute or defend any proceedings or settle or attempt to settle or make any admission concerning any dispute proceedings or other claim relating to the affairs of the Principal generally. The Agent will immediately inform the Principal of any of the foregoing and will act in relation thereto only upon and in accordance with the instructions of the Principal but so that the Principal will indemnify the Agent against any cost expenses or liabilities incurred by reason of the Agent's own negligence or default.

3.10 The Agent shall inform the Principal, prior to quoting various charges such as CAF/BAF/FSC etc, applicable from time to time. They shall also notify of any changes in the trade practices to the Principal periodically.



4.0 Duties of the Principal

4.1 The Principal shall support the Agent in his efforts to promote services at all times with timely and appropriate information with reasonable limits of his infrastructure.

4.2 The Principal shall pay the remuneration to the agents at the rates so agreed, in accordance to this Agreement (Clause 5.2).

5.0 PAYMENT & ACCOUNTING PROCEDURE

5.1. Payments of collect freight less Profit share will be settled as agreed mutually by both the parties.

5.2. Profit share between the Principal and the Agent shall be on a 50/50 basis and it shall be calculated only on the sea freight or airfreight, irrespective of whether freight is prepaid or collect.

6.0 INDEMNITY

In the event of any claim/liability to be referred to the local JAS STATION/Entity involved in the claim/liability

6.0 DURATION & TERMINATION.

6.1 This Agreement shall become effective from September 2005, and shall continue to be in effect for a period of 60 months.

6.2 If either of the party would like to terminate the agreement, then the same to be discussed by both party and agreed mutually and thereafter a notice of 60 days should be given in writing before the termination of the agreement.

7.0 ARBITRATION AND LAW

In case of unsuccessful attempt of the amicably settlement negotiations, any dispute or claim connected with the formation, performance, interpretation, nullification, termination or invalidation of this Agreement or arising there from, or related thereto in any manner whatsoever shall be referred to arbitration in accordance with the law in Switzerland.”

3. The issue of reimbursement of expenses came to be flagged for the first time before the Assessing Officer [“AO”] who while framing the order of assessment took note of the following details:

“04. Vide order sheet entry dated 29.11.2010 was asked to furnish details of payments made to non-residents and if tax was deducted at source or not and reason thereof. In response, the assessee company filed submission dated 08.12.2010. The submissions



contain inter alta details of reimbursement made to non-residents associate enterprises. The same is reproduced as under: -

Name of the Company	Country	Amount	Nature of Services
JAS Forwarding Worldwide (PTY. Ltd.)	USA	13780	Reimbursement of Server Maintenance cost
JAS Worldwide Management LLC	USA	199089	Reimbursement of netting charges
JAS Worldwide Management LLC	USA	1012859	Reimbursement of management expenses
JAS Jet Air Service SPA, Milan, Italy	Italy	38797	Reimbursement of Travelling Cost
JAS (UK) Ltd. London UK	UK	8800	Reimbursement of Travelling Cost
JAS Forwarding (USA) INC.	USA	50507	Reimbursement of Travelling Cost
JAS Forwarding GMBH Frankurt, Germany	Germany	20224	Reimbursement of Travelling Cost
JAS Forwarding (USA) INC.	USA	755655	Reimbursement of NVOCC Insurance Expenses
JAS Forwarding (USA) INC.	USA	58428	Reimbursement of NVOCC Tarrif filing Expenses
TOTAL		2158139	

4.1. Vide order sheet entry dated 08.12.2010, the assessee was asked to justify non deduction of tax at source on these payments. The assessee vide reply dated 13.12.2010 has stated):-

"The assessee is a Multinational Enterprise (MNE) and in MNE it is common to have one member of the group to give services to other members of the group in the interest of the whole group. These arrangements are commonly referred as "intra- group services".



Therefore, the services are provided by one member to other member and later on a bill for reimbursement of expenses is cross changed".

The submission of the assessee company were duly examined, considered and however, not found acceptable.

4.2. At the outset, it is to be noted that the sums were paid by way of expenses to non-resident third parties who had rendered services to the assessee. These payments therefore fall within the purview of section 9(1)(vii) and are therefore taxable in India as fee for technical services.

4.3 The contention of the assessee that the payment made is reimbursement against actual expenses, and therefore not chargeable to tax is not acceptable.

4.4 At the outset it may be noted that the Income Tax Act as well as tax treaties entered into by India, provide for taxation of fees for technical services on a gross basis. As far as taxation by the source state is concerned, this gross basis of taxation is also provided for in respect of dividends, royalty and interest payments. While deducting tax at source, the source state is not required to look into the profitability of the payment in the state of residence of the taxpayer. Hence, this is the reason for deducting on gross basis. The typical case arises in the case of banks, for whom interest is chargeable to tax in the source state on gross basis; but in the residence state, the income element on such interest is very less, because banks have to in turn pay interest to their depositors. In the existing structure of withholding tax internationally, neither the person making the payment, nor the source state is not required to look into the actual profitability of the payment, as this is neither the requirement of the Income Tax Act nor the tax treaty.

4.5. To reiterate, the taxation of fee for included services/ royalties/technical services is not on net basis, had it been so, out of the receipts, such expenses would be required to be deducted for computing the net income and such income would be taxable at the normal higher rate of tax (as opposed to the rates for TDS).

4.6. The assessee has taken the plea that there is no income embedded in the payment made. However, in that case; taxability of the receipt in the hands of the foreign company to whom the payment has been made by the associate enterprises at the instance of the assessee is material and not that of the associate enterprises. Therefore, it is the statutory provision which would determine the liability of the assessee in this regard and not an internal arrangement made by the assessee.

4.7. Considering this, all the payments, whether the same are shown as reimbursement of expenses or otherwise, are



consideration for rendering of services. This issue has been the matter of debate by judicial authorities in a number of cases. The following are worth noting:

4.8. In the case of Cochin Refineries. Ltd. vs. Commissioner of Income Tax [1996] 222 ITR 0354 [Kerala High Court] the Hon'ble Kerala High Court held that reimbursement of payments made to the personnel of the consultant would be part and parcel in the process of advice of a technical character and would fall for coverage only within the meaning of the Explanation to Section 9(1)(vii) of the Income Tax Act, 1961 and the amounts were assessable to tax in India.

4.9 In the case of Steffen, Robertson and Kirsten Consulting Engineers and Scientists vs. Commissioner of Income Tax. [1998] 230 ITR 0206 [Authority for Advance Ruling], the Hon'ble Authority for Advance Ruling in its order dated 29.10.1997 held that "the living allowance paid to the foreign. technicians will form an integral part of the fees payable to SRK under the agreement and will also be taxable in India."

4.10. In Danfoss Industries P. Ltd. vs. Commissioner of Income Tax [2004] 268 ITR 0001 [Authority for Advance Ruling], the Hon'ble Authority in its order dated 14.05,2004 held that "the payments to be made by the applicant pursuant to the agreement proposed to be entered into between the said Danfoss Singapore for the services to be provided by it to the applicant cannot be said to be reimbursement of the actual expenditure incurred by Danfoss Singapore and it cannot be said that no income is embedded into such payment, therefore, the payments have to be made after withholding tax under Section 195 of the Act."

4.11. The Authority for Advance Ruling again in the in the case of Timken India Ltd. [2005] 273 ITR 0067 held:

a) That the sum of US\$, 756,728.26 received by Timken-USA from the applicant as consideration for services rendered in the USA in pursuance of the agreement dated August 2, 2000, would be subjected to tax irrespective of there being a profit or income in the hands of Timken-USA and that sum would be subjected to tax in India and accordingly the applicant would have to withhold income-tax at the appropriate rate (under the Act or the Treaty), whichever is less, under Section 195(1) of the Act.

b) That the question of determination of the quantum of net income embedded in the said sum (US\$ 756,728.26) under section 195(2) for withholding tax does not arise.

4.12. In view of the above, the contention of the assessee that the payments are mere reimbursement of expenses and not liable to tax is rejected.



4.13. The import of the above discussion is that the tax should have been deducted on the amount of reimbursement made under section 195. This non compliance with the TDS provisions as mentioned in chapter XVII of the income tax act attracts the provisions of section 40(a)(i) of the I.T. Act. The section 40(a)(i) states that where tax was deductible at source on fees for technical services-(among other payments) and the same has not been deducted, then as per the provisions provided, such expenditure shall not be allowed as a deduction. Therefore Rs.21,58,139/- is disallowed and added back to the total income of the assessee.

I am satisfied that the assessee filed inaccurate particulars of its income and thereby concealed its income to the tune of Rs.21,58,139/-. Penalty proceedings under section 271 (1)(c) are initiated separately for furnishing inaccurate particulars of income.

(Addition of Rs.21,58,1391-).

4. As would be evident from the above, the AO took the position that the reimbursement of expenses would fall under Section 9(1)(vii) of the Income Tax Act, 1961 [**“Act”**] and thus liable to be classified as *“fee for technical services”*. When the matter reached the level of the Commissioner of Income Tax (Appeals) [**“CIT(A)”**], it disagreed with the view as expressed by the AO and held that while the expenses so incurred would not fall within the ambit of *“fee for technical services”*, in the absence of the respondent/assessee having established the same would be liable to be disallowed in terms of Section 37 of the Act. Those conclusions of the CIT(A) had been duly noted by the ITAT in Para 25 of the order impugned. The said findings are reproduced hereinbelow:

“25. The CIT (A) thereafter admitted the additional evidence and Noted that the AO has also not made any adverse comment with regard to admission of additional evidence. Before the CIT (A), the, Assessee preferred written submissions explaining the nature of reimbursements. Relevant extracts of the submission which *also* find mention in the order of the CIT (A) are reproduced herein below-



“The Assessee carried out certain transactions during the year under appeal with overseas JAS Group of Companies and other domestic entities. In this regard JAS Group of Companies incurred certain expenses totaling Rs.21,58,139/- on behalf of the Assessee which were later on recharged by its associates on cost to cost basis. The nature of such expenses are discussed below:

(i) Reimbursement of Server Maintenance Cost amounting to Rs. 13,780/-. Here, the expenses only represented proportionate expenses incurred by the AE for the maintenance of server from time to time. An overseas server had been set up to run the business efficiently, which is shared and maintained by Jas Forwarding Worldwide Pty Ltd, Australia (Hereinafter referred to as 'Jas Australia'). Expenses are required to be incurred for the maintenance of server from time to time; therefore, Jas Australia incurred the expenditure by giving the contract of such maintenance to a third party, which were agreed to be shared between the parties. Accordingly, Jas Australia raised the bill of reimbursement of expenses on the Assessee towards its share.

(ii) Reimbursement of Netting Charges amounting to Rs.1,99,089/- The expenses only represented proportionate expenses incurred by the AE to avail financial settlement services from network services from server situated outside India. In order to carry out its business activities smoothly within India and outside India, the Assessee avails the network of more than/around 150 offices set by the JAS Group globally. The settlement of all the financial transactions incurred between all the members of the JAS Group is handled by a single clearing account, i.e. all the receivable and payables within the Group Companies are handled on the single desk by Jas Worldwide management LLC located at Atlanta, USA, wherein full fledged procedures and software in relation to carry out operation, communications and other matters is set up, so that all the transactions are set out smoothly. It is submitted that in respect of both the netting charges and management expenses, referred to above, the Assessee has not “made available” any technical knowledge, experience, skill, know-how, or processes, or the alleged services does not consist of the development and transfer of a technical plan or technical design and mere rendering of services is not roped in unless the person utilizing the service is able to make use of the technical knowledge etc by



himself in his business or for his own benefit and without recourse to the performer of the; services in future. In our case, the services rendered are not left with the Assessee but it is a mere reimbursement of expenses incurred by non-residents on the activities performed by it. For all the said activities, netting centre at USA incurred some cost which they distributed amongst the netting participants, i.e. members of the Group Companies and accordingly the Assessee was required to reimburse its portion of the expenses.

(iii) Reimbursement of Management Expenses amounting to Rs. 10,12,859: Jas Worldwide Management LLC, situated in Atlanta, USA perform administrative, business development activity for common interest of the JAS Group which in-turn help the entities to grow their businesses. In this procedure, they incur some cost which they allocate within the group members which are benefited by the said activity, directly or indirectly. The Assessee was also charged its share of expenses, for which the assessee made the payment. Further, the expenses only represented proportionate expenses incurred by the non-resident to avail administrative, business development activity.

(iv) Reimbursement of Traveling Cost amounting to Rs.1,18,328: The said expenses were incurred by the Assessee on behalf of the non-resident on account of local air tickets of foreign delegates coming to India. The same was cross charged by the Assessee to the respective non-resident during the year. However, during the assessment proceedings, when the Assessee provided the details of the payments made to the non-residents, the above travelling cost, which was in fact receivable from the nonresident was inadvertently included as payable in the list. Since the same was received/ receivable by the Assessee, therefore, in any case, it does not come within the ambit of section 195 of the Act as no sum was payable to a nonresident, therefore, no disallowance can in any case be made.

(v) Reimbursement of NVOCC Insurance Expenses amounting to Rs. 7,55,655:- The Appellant is engaged in the business of International freight forwarding, wherein, the goods of customers is required to be transferred from origin to destination, by moving shipments from one point to other internationally, therefore, there is always a risk of something untoward happening during the transit. To cover up this risk, the Appellant need an insurance cover for the goods



transmission, for which Jas Group take a joint cover from an International Insurance company and allocate the cost on basis of risk/ business involved to the member companies. The appellant made the payment of its share of insurance expenses to Jas Forwarding (USA) Inc, USA. Further the expenses only represented cross charge of group insurance.

(vi) Reimbursement of NVOCC Tariff Filing Expenses amounting to Rs.58,428 – It pertained to the payment made by the Assessee to JAS Forwarding (USA) Inc. for the amount charged towards payment made on behalf of the Assessee for filing freight tariff to USA.”

5. Ultimately, and upon due consideration of the material as was placed before the CIT(A), it came to record the following conclusions:

“26. The Ld. CIT (A) though, accepted the stand of the Assessee that it does not fall within the domain of fees for technical services. Which is evident from his following observations: -

"It is the case of the A. O. that all the payments in question are fees for technical services paid to the non-resident associate enterprises. However, no finding has been made by him as to what was the nature of service-managerial, technical or consultancy, rendered by the non-resident associate enterprises to the assessee. On perusal of the material placed on record, I am of the considered opinion that the payments in question do not fall within the ambit of section 9(1)(vii) of the Act".

6. The ITAT while dealing with the aforesaid aspect has observed as follows:

“30. We have heard the rival submission and have perused the material placed before us which includes the submissions filed by both the parties and the paper book placed on record. We find that the nature of reimbursement is of such expenses which are purely in the nature of day-to-day expenses of the business activities of the Assessee. The copy of the invoices, ledger accounts etc. have been filed before us. We find that the nature of expenses includes server maintenance Cost, netting charges, management expenses, travelling cost, insurance expense etc., which are an integral part of running of a business and for undertaking day-to-day activities. The Ld. AO/CIT(A) have not doubted the genuineness of the expenses. In fact, even the nature of the expenses stands accepted. Thus, the domain of commercial expediency cannot be entered into. We find that this issue in principle is covered in the case of



S.A. Builders (SC) (288 ITR 1) and is directly applicable on the facts of the present case as the evidences have already been filed by the Assessee and as stated above, the expenses being reimbursed are regular business expenses. Thus, the appeal filed by the Assessee succeeds.”

7. Before us it was principally sought to be contended that the nature of functions which have been performed by the foreign principals in favour of the respondent/ assessee would clearly amount to and fall within the ambit of Section 9(1)(vii) of the Act and thus constitute “*fee for technical services*”.

8. Undisputedly, the additions came to be made pursuant to the provisions made in Section 40(a)(i) of the Act. The appellants in that respect had tried to source the obligation of the respondent/ assessee to deduct tax at source by virtue of Section 195 of the Act. The obligation to deduct tax in terms of that provision would arise provided it were established that the reimbursement of remittances made would fall within the scope of Section 9 of the Act and to the extent that it introduces legal fictions in respect of income which could be said to have accrued in India.

9. While dealing with the subject of fee for technical services, Section 9(1)(vii) of the Act makes the following provisions:-

“9. Income deemed to accrue or arise in India.—(1) The following incomes shall be deemed to accrue or arise in India—

XXXX

XXXX

XXXX

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”.

10. It was, therefore, incumbent upon the appellants to establish that the fee or amounts which were remitted would fall within the ambit of any technical, managerial or consultative service that had been rendered. Having perused the relevant clauses of the Agreement, we find ourselves unable to sustain that submission.

11. In view of the above, no substantial question of law arises. The appeals consequently fail and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDR KUMAR KAURAV, J.

APRIL 4, 2024/kk