
(2010) 07 IPAB CK 0015

In the Intellectual Property Appellate Board

Case No : ITA No. 1893/Mad/2007 (A.Y 2002-03)

Vatech Wabag Ltd.

APPELLANT

Vs

Asstt. Cit

RESPONDENT

Date of Decision : 07-07-2010

Acts Referred:

Income Tax Act, 1961 — Section 80IA, 90, 40(1)(i), 40(a)(i), 148, 143(1), 143(3), 147, 195, 195(2)

Citation : (2010) 07 IPAB CK 0015

Hon'ble Judges : Pradeep Parikh, J; George Mathan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

George Mathan, J.M.

1. This is an appeal filed by the Assessee against the order of the learned Commissioner (Appeals)-III, Chennai, dated 23-5-2007 for the assessment

year 2002-03. Shri Sriram Seshadri represented on behalf of the Assessee, and Shri K. Subramaniam, senior standing counsel represented on behalf

of the revenue. The Assessee has raised the following grounds :

1. The order of Commissioner (Appeals) is against the provisions of law and contrary to the facts of the case.

2. The Commissioner (Appeals) erred in upholding the disallowance of fees for technical services of Rs. 1,15,36,306. .

3. The learned Commissioner (Appeals) failed to note that the fees for technical services rendered from Austria is not liable to tax under the

provisions of DTAA entered between Government of Austria and India dated April, 1963.

4. The Commissioner (Appeals) failed to note that the Notification No. 682(E),

dated 20-9-2001 (2001) 251 ITR (St) 97) under which tax is to be levied for services rendered from Austria comes to effect from 1-4-2002. Also this notification is dated 20-9-2001 and accordingly Article 28 of the convention will come into force from 1-4-2002 only.

5. The learned Commissioner (Appeals) failed to observe that the amended treaty between Government of India and Austria will come into effect from 1-4-2002 onwards and any technical fee accrued prior to 1-4-2002 will be governed by the old treaty and as per the old treaty the fees for technical services rendered from Austria is not liable to tax in India.

6. For these and other grounds that may be agitated at the time of hearing or earlier it is prayed that the Hon'ble Tribunal may be pleased to allow the appeal and render justice.

2. It was submitted by the learned Authorised Representative that the Assessee is engaged in the business of executing turnkey project of

water/waste water"" treatment and sewerage treatment plants. For the year under consideration, the Assessee filed its return of income on 31-10-2002

declaring nil taxable income. The return was processed by the assessing officer under Section 143(1) on 28-2-2003. Assessment was subsequently

reopened by the assessing officer by the issue of notice under Section 148 dated 17-2-2006 for the reasons that the Assessee has wrongly claimed

deduction under Section 80-IA. The assessing officer was of the view that the Assessee is merely a work contractor executing civil contract works

and therefore it was not entitled to deduction under Section 80-IA of the Act. As a result, the assessing officer has disallowed the entire deduction

claimed by the Assessee under Section 80-IA to the extent of Rs. 2,76,46,265. In addition to the above, the assessing officer has disallowed fees for

technical services amounting to Rs. 1,15,36,306 by invoking provisions of Section 40(a)(i) of the Act since the Assessee had not deducted tax at

source while making the said payment. As a result, the reassessment has been completed under Section 143(3) read with Section 147 on 26-12-2006

determining total income of the Assessee at Rs. 3,83,26,870. It was the submission that in appeal before the learned Commissioner (Appeals), the

learned Commissioner (Appeals) has upheld the action in respect of the fees for technical services on account of non-compliance of provisions of

Section 40(a)(i) of the Act. It was the submission that both the assessing officer

and the learned Commissioner (Appeals) had not appreciated that there were two treaties between India and Austria. First treaty had been entered into between India and Austria in April, 1963 and the second treaty in September, 2001. It was the submission that the assessing officer and learned Commissioner (Appeals) failed to appreciate that it was the first treaty being the treaty entered into by the Republic of India and Government of the Republic of Austria in 1963, which was applicable in so far as per Article 28 of the new treaty entered into on 5-9-2001, the new treaty came into effect and was to take effect in respect of the income arising in any fiscal year beginning on or after 1st April, next following the calendar year in which the exchange of instrument of ratification takes place. The instrument of ratification having taken place after September, 2001, the said treaty between India and Austria would have effected only from 1-4-2002 relevant to the assessment year 2003-04. It was the submission that the assessment year in appeal is 2002-03. It was the submission that as per the old treaty between India and Austria, Article 7 provided for the taxation of the fee for technical services. It was the submission that as per Article 7 the fee for technical services paid by the Indian company to the Austrian company was not liable to tax in India. Consequently no TDS was liable to be made. It was the submission that in view of the fact that no income of the Austrian company was liable to be taxed in India in view of the applicability of the DTAA between India and Austria as was applicable for 2002-03, the provision of Section 40(a)(i) of the Act could not be invoked to make the disallowance. The learned Authorised Representative drew our attention to the copy of the agreement entered into by the Assessee with M/s VA Tech Wabag Ltd., Austria, wherein it has been specifically provided that the Austrian company would provide the Assessee technical support from their premises in Austria. He further drew our attention to clauses 1 to 5 of the said agreement, which are as follows :

1. The services provided to Wabind by Wabag Vienna shall be from Wabag Viennas registered office at Siemensstrasse 89, A-1210, Vienna in connection with the project. Wabag Vienna shall obtain all relevant information and data necessary to perform its obligations under the agreement from Wabind.
2. Wabag Vienna shall maintain the closest co-operation and co-ordination with

Wabinds project managers consultants in India for the interpretation of the requirement of Wabind.

3. Wabind shall assign/depute highly technically competent and experienced personnel to Vienna to assist and help Wabag Vienna perform the services as contemplated under this agreement. If required Wabag Vienna shall propose detailed manning schedule for the works.

4. The technical support mentioned above shall include the following support provided from Vienna.

- Review of technical specifications as per Wabinds client and provide necessary technical advice on the same.

- Discuss specific technical issues and provide solutions.

- Review of the preliminary drawings and provide comments thereon.

- Assist in sourcing of components in the form of technical evaluation of vendors in Austria and neighbouring countries.

5. Wabag Vienna shall in its office at Vienna, use facilities viz., telephone, teleconferencing, tele-fax, photocopies, printing and stationary etc., for the purposes of communicating with the personnel of Wabind and providing technical expertise to Wabind. The designs if any transferred should be e-mailed to the project manager in-charge of the project, whose name will be communicated for each specific work and would be agreed upon as each project beings. Acknowledgement be obtained for successful transmission to Wabind. The deliverables may be sent by courier to the project manager in India as well to the address of the designated project manager in Wabind.

2.1 It was the submission that basic advisory and trouble shooting facilities were provided by the Austrian company at Vienna and consequently no

income of the Austrian company was liable to be taxed in India. The learned Authorised Representative drew our attention to the decision in the case

of In re AT & S India (P) Ltd., (2006) 287 ITR 421 (AAR), which has been relied upon by the learned Commissioner (Appeals) in para 4.6 of his

order. It was the submission that in the said decision, the issue was in respect of the fee for technical services as per the new DTAA entered into

between India and Austria in September, 2001. It was the submission that the said decision had no applicability. He specifically drew our attention to

para 3 of the said decision wherein it was clearly stated that the new DTAA was being considered. In respect of the decision relied upon by the

learned Commissioner (Appeals) in the case of In re IMT Labs (India) (P) Ltd., (2006) 287 ITR 450(AAR), it was the submission that the said

decision was in respect of the DTAA entered into between India and USA, wherein the words were totally different. It was the further submission

that both the decisions relied upon by the learned Commissioner (Appeals) were completely distinguishable from the facts of the Assessee's case. He

further placed reliance on the Co-ordinate Bench of this Tribunal in the case of TVS Suzuki Ltd. v. ITO (2000) 73 ITD 91 (Mad), which had

considered the issue of the fee for technical services paid to a resident in Austria and which was also in relation to the old DTAA between India and

Austria, which was applicable till the assessment year 2002-03. In the said decision, the Co-ordinate Bench of this Tribunal has held as follows :

Let us also consider the decision of the Patna High Court of this Tribunal by Dy. CIT v. Tata Yodogawa Ltd. (1999) 68 ITD 47 (Pat). The facts of

this case are that the Assessee entered into technical collaboration agreement duly approved by the Government of India and RBI with an Austrian

company. In terms of the agreement the Assessee was required to remit by way of lump sum technical know-how fees to the foreign company in

three instalments. The assessing officer asked the Assessee to deduct tax on the payments being made to the said company as they were fees for

technical services. On appeal the Commissioner (Appeals) held that deduction of tax at source was not called for in view of the provisions of DTAA

between India and Austria. On the revenue's appeal the Tribunal held that in view of Article 7 of the DTAA between India and Austria the amounts

paid to the Austrian company for technical services rendered in Austria are taxable in Austria and not in India. In view of this there was no question

of deduction of tax at source from the payments in question. In the instant case the technical services for which the payments were made were

rendered in Austria and not in India. Hence the Commissioner (Appeals) was right in holding that the deduction of tax at source was not called for in

this case and the assessing officer should have issued no objection certificate for the remittances of technical know-how fees without deduction of tax

at source. Thus the departmental appeal was dismissed. The facts of the case in hand are identical with those in the case considered by the Patna

Bench of this Tribunal. In the instant case also the Austrian company (AVL) had no PE in India and technical services were all rendered in Austria,

i.e., outside India. Also the payment was not in the nature of royalty as had been already held by us.

2.2. It was the further submission that the learned Commissioner (Appeals) has also relied upon the provisions of the Sections 195 and 195(2) of the

Act. It was the submission that the said provisions had no applicability in so far, as per the DTAA entered into between India and Austria which

operated during 2002-03, the income of the Austrian company itself was not taxable in India. It was the further submission that in the event that it is

held that the DTAA between India and Austria, which was entered into in 1965 was held to be not applicable and treaty as entered into in September,

2001 was applicable then as per Article 24 of the new treaty being the nondiscriminatory clause, the income of the Austrian company was still not

taxable in India. It was this the submission that the orders of the learned Commissioner (Appeals) and the assessing officer are able to be reversed

and the disallowance made and confirmed is liable to be deleted.

3. In reply, the learned departmental Representative submitted that the applicability of Section 195(2) was mandatory and if the Assessee did not want

to deduct TDS on the payments to the non-resident, it was incumbent upon the Assessee to make an application under Section 195(2) of the Act. It

was fairly agreed by the learned departmental Representative, on a specific query by the Bench that the old treaty between India and Austria, which

was entered into in 1963 would be applicable for the relevant assessment year. It was the further submission that as per the provisions of Section

40(1)(i), the expenditure claimed was liable to be disallowed. It was the further submission that the decision of the Special Bench of this Tribunal in

the case of ITO v. Prasad Production Ltd. (2010) 37 DTR (Chennai)(SB) 418: (2010) 3 ITR 58 (Chennai)(SB)(AT) was not applicable in so far as it

had not considered the decision of the Hon'ble Karnataka High Court in the case of CIT v. Samsung Electronics Co. Ltd. and Ors. (2009) 31 DTR

(Kar) 257 : (2010) 320 ITR 209(Kar), it was the further submission that the non-discriminatory clause of the DTAA entered into between India and

Austria in September, 2001 did not apply the Assessee's case. It was the further submission that circular issued by the RBI in respect of the non-

obtaining of the no objection certificate did not mean that the provisions of Section 195(2) had no applicability. He vehemently supported the order of

the learned Commissioner (Appeals).

4. We have considered the rival submissions. A perusal of DTAA entered into between India and Austria clearly shows that the DTAA entered into between India and Austria on 5-9-2001 would be applicable in respect of the assessment year 2003-04. The DTAA entered into between India and Austria in April, 1965 would be the DTAA, which is applicable till the assessment year 2003-04 (sic--2002-03). The assessment year in appeal before us is the assessment year 2003-04 (sic--2002-03). A perusal of the Article 7 of the said DTAA reads as follows :

Article 7--Fees for technical services

Amounts paid by an enterprise of one of the territories for technical services furnished by an enterprise of the other territory shall not be subject to tax by the first-mentioned territory except in so far as such amounts are attributable to activities actually performed in the first-mentioned territory. In computing the income so subject to tax, there shall be allowed as deductions the expenses incurred in the first-mentioned territory in connection with the activities performed in that territory.

As per the said Article 7 of the DTAA, the amount paid by the Indian enterprise for technical services rendered by an Austrian enterprise is not subjected to tax by India except in so far such amounts are attributable to the activities actually performed in the Indian territory. A perusal of the agreement entered into between the Assessee and the Austrian enterprise clearly shows, that the technical services are provided by the Austrian enterprise at its establishment in Vienna and no portion of the services are provided in India. Thus, as per the DTAA entered into between India and Austria as is applicable for the relevant assessment year, no income of the Austrian enterprise is liable to tax in India. A perusal of the provisions of Section 195 of the Act clearly shows that if any sum chargeable under the provisions of the Act is paid to a non-resident foreign company, then TDS is liable to be deducted. Here what is important is the sum chargeable under provisions of the Act, it is undisputed that the provisions of Sections 90 and 91 would override the other provisions of the Act. Thus, when the transaction is covered under the provisions of the DTAA, it is to be first shown that the DTAA does not apply or that the particular income is taxable in India under the provisions of the Act if the provisions of Section 195 are to be

invoked. The Article 7 of the DTAA entered into between India and Austria relevant to the assessment year 2002-03 clearly held that the income of the Austrian enterprise is not taxable in India in view of the fact that no portion of the activities were performed by Austrian enterprise in India. In the circumstances as it is found that the income of the Austrian enterprise is not taxable in India on account of Article 7 of the DTAA entered into between India and Austria relevant to the assessment year 2002-03, there can be no sum chargeable under the provisions of the Income Tax Act, 1961 which has been paid by the Assessee to the foreign company on account of the fee for the technical services. In the circumstances, the provisions of Section 195 of the Act would not be applicable to the payment made by the Assessee to the Austrian enterprise on account of the fee for technical services for the assessment year 2002-03. In the circumstances, as the provision of Section 195 does not apply, the requirement of the Assessee to obtain certificate under Section 195(2) also does not survive. As the provision of Section 195 does not apply the payment made by the Assessee to the Austrian enterprise on account of the fee for technical services would not be hit by the provisions of Section 40(a)(i) of the Act and consequently, no disallowance of the expenditure on account of the fee for technical services paid to Austrian enterprise can be made. In the circumstances, the disallowance of the expenditure as made by the assessing officer and confirmed by the learned Commissioner (Appeals) stands deleted.

5. In the result the appeal of the Assessee is allowed.