

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'F' BENCH,
NEW DELHI [THROUGH VIDEO CONFERENCING]**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**ITA No. 5972/DEL/2017
[Assessment Year: 2014-15]**

M/s Poddar Pigments Ltd
A-283, Ground Floor,
Okhla Industrial Area
Phase - I, New Delhi

Vs.

The A.C.I.T
Circle 20(1)
New Delhi

PAN: AACCB 4590 M

[Appellant]

[Respondent]

**Date of Hearing : 01.07.2020
Date of Pronouncement : 02.07.2020**

Assessee by : Shri P.C. Parwal, Adv
Revenue by : Shri Saras Kumar, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order of the
ld. CIT(A)-7, New Delhi dated 24.07.2017 pertaining to assessment year
2014-15.

2. The sum and substance of the grievance of the assessee is as under:

“The Id. CIT(A) erred in confirming the action of the Assessing Officer in making disallowance of Rs. 17,92,851/- and Rs. 19,02,050/- u/s 40(a)((i) of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] by holding that payment to Dr. Werner Stibal and Hans Peter Meyer respectively is a payment in the nature of technical and consultancy services falling u/s 9(1)(vii) r.w. Explanation 2 by not accepting the contention of the assessee that payment is for 'independent scientific activity' covered by [Article 14](#) of the said DTAA with Switzerland and thus not liable for deduction of tax at source u/s 195 of the Act”.

3. Briefly stated the facts of the case are that that the assessee company is engaged in the business of manufacturing of master batches and engineering plastics compounds. The Assessing Officer noticed that the assessee has made payment of Rs. 66,53,411/- on account of technical fees of Rs. 29,57,610/- to Shri Sergiomanciali, Rs. 17,92,851/- to Dr. Sibal and Rs. 19,02,950/- to Hans Peter Meyer of Switzerland.

4. The assessee was asked to explained whether tax was deducted on this amount or not and why disallowance u/s 40(a)(i) of the Act may not be made in this regard.

5. In response, the assessee filed detailed reply.

6. However, the Assessing Officer observing that similar disallowance was also made in A.Ys 2008-09 to 2013-14 and the ld. CIT(A) has also dismissed the appeal of the assessee holding that the payments fall under the category “fee for technical services”, added back Rs. 36,94,801/- to the total income of the assessee.

7. Aggrieved, the assessee carried the matter before the ld. CIT(A) who confirmed the action of the Assessing Officer.

8. At the very outset, the ld. counsel for the assessee submitted that the issue involved in this case is squarely covered in favour of the assessee by order of the Tribunal in assessee’s own case for A.Y 2013-14. The assessee furnished a copy of the order of the Tribunal.

9. Per contra, the ld. DR fairly conceded to the same.

10. We have given thoughtful consideration to the orders of the authorities below. We find force in the contentions of the ld. counsel for the assessee. We find that a similar issue was considered by the co-ordinate bench in assessee's own case in ITA No. 5259/DEL/2016 for Assessment Years 2013-14. The relevant findings of the co-ordinate bench read as under:

"8. Coordinate Bench of the Tribunal in assessee's own case for AYs 2008-09, 2009-10, 2010-11 and 2011-12 vide order dated 23.08.2018, available at pages 26 to 55 of the paper book, accepted the contention raised by the ld. AR for the assessee that the services rendered by Dr. Werner Stibal and Hans Peter Meyer are not covered by [Article 12](#) of DTAA rather these are covered under [Article 14](#) of the DTAA by returning following findings :-

"21. We have considered the rival contentions and perused the orders of the lower authorities. The identical issue has been decided by us in the appeal of the assessee for Assessment Year 2008-09 wherein, we have held that such services are covered by the provision of section 9(1)(vii) of the Act and also by virtue of [Article 14](#) of the DTAA such sum are chargeable to tax in Germany and hence, no tax is required to be withheld under section 195 of the Act. For the similar reasons, we direct the ld Assessing

Officer to delete the disallowance of Rs. 268980/- u/s 40(a)(i) with respect to payment made to Dr. U Thiele.

22. The second issue involved in the same ground is with respect to disallowance u/s 40(a)(i) of Rs. 1082175/- made to Dr. Werner Stibal who is resident of Swiss Confederation who provided professional services to the assessee. The Id Assessing Officer noted that similar services were provided by the Swiss National and where there is specific [Article 12](#) for fees for technical services it has to be considered in that Article only. Therefore, he rejected the claim of the assessee that the income of the foreign national falls under the [Article 14](#) of DTAA and no tax is required to be deducted. The Id CIT(A) originally missed the issue and failed to decide on merit and subsequently he rectified his order on 08.08.2014 confirming the view of the Id Assessing Officer.

23. The Id AR repeated the same argument which were advanced before the Id lower authorities and the Id DR supported the order of the Id lower authorities.

24. We have carefully considered the rival contentions and perused the orders of the lower authorities. It is undisputed facts that services have been provided by an individual which are in the nature of Independent scientific services". According to the assessee it falls under [article 14](#) of the DTAA whereas Revenue is of the view that it falls under [article 12](#) of the DTAA.

25. [Article 14](#) of the India Swiss DTAA is as under :-

[ARTICLE 14](#) INDEPENDENT PERSONAL SERVICES

1. - Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State :

(a) if he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or

(b) if his stay in the other State is for a period or periods aggregating 183 days or more in any 12 month period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, surgeons, dentists and accountants.]

26. [Article 12](#) of the Indo Swiss DTAA is as under :-

[\[ARTICLE 12\]](#) ROYALTIES AND FEES FOR TECHNICAL SERVICES

1. - Royalties and fees for technical 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 technical 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 technical services is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or the fees for technical services.

3. The term "royalties" as used in this Article means 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 trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, any industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.

4. For purposes of this Article the term "fees for technical services" means payments of any kind to any person in consideration for the rendering of any managerial, technical or consultancy services, including the provision of services by technical or other personnel.

5. Notwithstanding paragraph 4, "fees for technical services" does not include amounts paid:

(a) for teaching in or by educational institutions;

(b) for services covered by Article 14 or Article 15, as the case may be.

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical 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 contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of [Article 7](#) or [Article 14](#), as the case may be, shall apply.

7. Royalties and fees for technical 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 technical 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 technical services was incurred, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.]

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 1[technical] services paid exceeds the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply on the last mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of such Contracting State, due regard being had to the other provisions of this Agreement.

27. According to [Article 12 \(5\) \(b\)](#) meaning of the Term fees For Technical Services specifically excludes income covered under [Article 14](#) and [15](#) of the DTAA . Therefore, issue in this year is specifically covered in favour of the assessee by the decision of the coordinate bench in case of Graphite India [2003] 127 Taxman 90 (Kolkata)(MAG)/[2003] 86 ITD 384 (Kolkata)/[2003] 78 TTJ 418 (Kolkata) wherein identical issue with respect to Indo US DTAA was in question. The Coordinate bench held as under :-

"7. The primary thrust of rival contentions before us has been in support of the assessee's contention that the impugned payment for consultancy fees is covered by the scope of expression independent personal services' within meanings of [Article 15](#) of the Indo US DTAA, and, of course, in support of revenue's contention, that the impugned payment is covered by the scope of fees for technical services termed as 'fees for included services' within meanings of [Article 12\(4\)](#) of the same. On a careful analysis of the provisions of the [Article 12](#), however, even this proposition seems to be somewhat fallacious inasmuch as in case the impugned

payment falls within the scope of expression independent personal services' within meanings of [Article 15](#), the same shall automatically be out of ambit of [Article 12\(4\)](#) since, in view of the specific provisions of [Article 12\(5\)](#), notwithstanding the provisions of [Article 12\(4\)](#), "fees for included services" does not, inter alia, include amounts paid to any individual for independent personal services as defined in [Article 15](#). In other words, when an amount paid to an individual, or for that purpose a firm of individuals, resident in the United States of America, is found to be covered by the scope of expression =independent personal services' within meanings assigned in [Article 15](#) of the Indo US DTAA, it is immaterial whether or not the same is covered by the scope of =fees for included services', which in common parlance is known as =fees for technical services', under [Article 12\(4\)](#) of the Indo US DTAA. In that eventuality, in view of the provisions of [Article 12\(5\)](#), if at all that amount is exigible to tax in India, it can only be taxable under [Article 15](#) of the Indo US DTAA. To that extent, provisions of [Article 12\(4\)](#) and [Article 15](#) are noncompeting and mutually exclusive."

28. There are also similar condition in Indo Swiss DTAA in [article 12 \(5\) \(b\)](#) excluding professional services under [article 14](#) and [15](#) of that DTAA. Therefore, it is apparent that the services are covered under [Article 14](#) of the DTAA and not under [Article 12](#) of DTAA. Further it is not the case of the revenue that the services provided by the Swiss resident is not professional services as defined under [Article 14\(2\)](#) of DTAA. Further, it is not the case of the revenue that such services are provided by him from its fixed

base in India or he has stayed for more than 183 days in India. Therefore, we hold that no tax is required to be deducted on payment made to Dr. Werner Stibal who is a resident of Swiss Confederation and rendered the professional services with respect to the similar services as provided by Dr. U Thiele, therefore, those services are independent, personal services in the nature of independent scientific services which shall be taxable only in Swiss confederation. Hence, no tax is required to be deducted on sum paid by the assessee to Dr. Werner Stibal u/s 195 of the Act. In view of this ground No. 1 of the appeal of the assessee is allowed."

9. The decisions cited as [GVK Industries Ltd. vs. ITO, Director of Income-tax vs. Rio Tinto Technical Services and Centrica India Offshore \(P.\) Ltd.](#) (supra) relied upon by the Id.

DR for the Revenue are not applicable to the facts and circumstances of the case as the services rendered in this case was independent scientific activity specifically covered under Articles 14 & 15 of the DTAA.

10. So, following the decision rendered by the coordinate Bench of the Tribunal in assessee's own case (supra), discussed in preceding paras, we are of the considered view that services rendered by Dr. Werner Stibal and Hans Peter Meyer are covered under [Article 14](#) of the DTAA which are independent scientific activities. Moreover, finding on facts have been returned by the coordinate Bench of the Tribunal that the assessee has no fixed PE in India and it is undisputed case of the assessee that both Dr. Werner Stibal and Hans Peter Meyer have not stayed in India for 183 days

or more and as such, no tax is required to be deducted at source, hence disallowance of Rs.11,77,391 and Rs.10,16,330/- to Dr. Werner Stibal and Hans Peter Meyer respectively made by the AO/confirmed by the Id. CIT (A) is ordered to be deleted."

11. Respectfully following the same, we hold accordingly. Ground raised by the assessee is allowed.

12. In the result, the appeal of the assessee in ITA No. 5972/DEL/2017 is allowed.

The order is pronounced in the open court on 02.07.2020.

Sd/-

[AMIT SHUKLA]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 02nd July, 2020.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)

Asst. Registrar
ITAT, New Delhi

5. DR

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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