

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

Before Sh. Kul Bharat, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 3694/Del/2016 : Asstt. Year : 2011-12

M/s Hitachi Metglas (India) Pvt. Ltd., (Now merged with Hitachi Metals India Pvt. Ltd.), 1C, Vandana Building, 11, Tolstoy Marg, Connaught Place, New Delhi-110001	Vs	DCIT, Circle-11(2), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AABCH9302G		

Assessee by : Sh. Himanshu Sinha, Adv.

Revenue by : Sh. Farhat Khan, Sr. DR

Date of Hearing: 29.07.2021	Date of Pronouncement: 13.10.2021
------------------------------------	--

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of the Id. CIT(A)-16, New Delhi dated 15.03.2016.

2. Following grounds have been raised by the assessee:

"1. Ld. CIT(A) / AO have erred in confirming disallowance of INR 35,60,212 under section 40(a)(i) of the Act.

2. Ld. CIT(A) / AO have erred in law and on facts of the case in holding that the network and administrative support services rendered to the Appellant by its non-resident group companies & others are technical in nature and partakes the

character of Fee for Technical Services ("FTS") under section 9(1)(vii) of the Act.

3. Ld. CIT(A) / AO have erred in law and on facts of the case in presuming that there is an element of managerial, technical or consultancy in the services rendered to Appellant by its non-resident group companies, by completely disregarding facts including that the provisioning of such services did not involve any human intervention.

4. Ld. CIT(A) / AO have erred in law and on facts of the present case by holding that payments made for network and administrative support charges are characterized as FTS under section 9(1)(vii) of the Act and therefore the appellant is liable to deduct tax at source under section 195 of the Act.

5. Ld. CIT(A) / AO have erred in law and on facts of the case by not considering all materials / submissions filed during the course of assessment / appellate proceedings.

6. Ld. AO has erred by alleging that the Assessee has furnished inaccurate particulars of income, thereby proposing to initiate penalty proceedings under Section 271(1)(c) of the Act."

3. The assessee company is engaged in the business of designing and manufacturing of cores and other amorphous metal or nanocrystalline soft magnetic metal used in transmission and distribution equipment and in electronic and computer products and other related products.

4. The assessee filed return of income on 29.11.2011 declaring income of Rs.17,48,94,464/-. During the year under consideration, the assessee has undertaken international transaction with its Associated Enterprises (AE) and the matter was referred to the TPO in accordance with the Section 92CA of

the Income Tax Act, 1961. The TPO passed an order u/s 92CA(3) of the Act dated 25.08.2014 in which no adjustments have been made with regard to the international transaction.

5. During the year, the assessee company paid for support & analysis system provided by three A.E.s namely M/s Metglass INC USA, Hitachi Asia Ltd. Singapore and Hitachi Ltd. Japan. With this support system & analysis, the assessee company is producing certain articles or things in India & therefore the Assessing Officer held that the income is clearly arising or accruing & also deemed to be accruing in India u/s 9(1) of the I.T. Act.

6. The AO held with regard to the fee for technical services used in India, it can be said that the services rendered are such which require expertise and knowledge in the specific area of work and such expertise cannot be developed overnight but is the result of long period of work in this line of activities coupled with accumulated experience of operations. Hence, the payments made by the taxpayer to the AEs namely, Metglass INC USA, Hitachi Asia Ltd. Singapore and Hitachi Ltd. Japan partakes the character of FTS under the domestic law.

7. In view of the above, the Assessing officer held that assessee was liable to deduct TDS on Admin and Network Support service charges of Rs.35,60,212/- paid by Hitachi Metglass India Pvt. Ltd. to Metglass INC USA, Hitachi Asia Ltd. Singapore and Hitachi Ltd. Japan. Since the assessee did not deduct TDS as per provisions of the section 195 of the Act; therefore total deduction of expenditure of Rs.53,76,510/- on Admin and Network Support service charges as claimed by the

assessee was disallowed and added back to the total income the assessee.

8. The Id. CIT(A) confirmed the action of the AO referring to the Section 4, Section 5 and Section 8 of the agreement between the assessee and the Hitachi Asia Ltd. and Hitachi Ltd. and holding that "human intervention" is in fact an integral part of the service agreement.

9. Before us, the Id. AR argued that the services cannot be treated as "Fee for Technical Services" as the amounts have been paid for link charges for mail and internet services which do not need in "human intervention". He argued that the services are seamless and the transmission is automatic in nature.

10. On the other hand, the Id. DR argued that "human intervention" is a part of service agreement and the AE also provides for certain service personnel. Hence, the services availed should be treated as "Fee for Technical Services" u/s 9(1)(vii).

11. Heard the arguments of both the parties and perused the material available on record.

12. The Sections referred by the Id. CIT(A) pertaining to the Master Service agreement between the assessee and Hitachi Ltd. are as under:

"SECTION 4 INFORMATION AND ACCESS

Each of HAS and Service Recipient may have in its possession or under its control (or the control of persons or firms which have rendered services to or otherwise done business with it) books, records, Contracts, instruments, data and other information (collectively, "Information") which may be necessary or desirable to the other in connection with the performance of this Agreement. Worn- lotion shall include, without limitation, information required for purposes of audit, accounting, claims litigation and tax as well as for purposes of fulfilling disclosure and reporting obligations under any applicable laws. Accordingly:

"(i) HAS agrees an provide to Service Recipient and Service Recipient agrees to provide to HAS upon the others written request at all reasonable times full and complete access to (including, access to persons or firms possessing information) and duplication rights with respect to any and all such information as the other may reasonably request and require in connection with the performance of this Agreement: and

(ii) Each of HAS and Service Recipient agrees to use its reasonable efforts to make available to each other upon the other party's written request their respective officers, directors, employees and agents as witnesses to the extents that such persons may reasonably be required connection with any legal, administrative or other proceedings in which HAS or Service Recipient as the case may be from time to time be involved."

SECTION 5 MAIL, ETC.

Each of HAS and Service Recipient may receive mail, packages and other communications properly belonging to the other pursuant to HAS providing the Services. Accordingly, end; of HAS and Service Recipient authorizes the other to receive and open all mail, packages and other communications received by it and not expressly restricted as in confidential handling, and to retain the same to the extent that they relate to the business of the receiving party or to the extent that they do not relate to the business of the receiving party and do relate to the business of the other party, or in the extent that they relate to both businesses, the receiving party shall promptly contact the other party by telephone for delivery instructions and such mail, packages or other communications (or in case the same relate to both businesses, copies thereof) shall promptly be forwarded to the other party in accordance with its delivery instructions. The foregoing provisions of this section 5 shall constitute Full authorization to the postal authorities all telegraph and express companies and all other persons to make deliveries to HAS or Service Recipient, as the case may be addressed to either of them or to any of their officers and/or directors in their capacities as such. Notwithstanding anything to the contrary in this Agreement the provisions of this Section 5 are not intended to and shall not be deemed to constitute an authorization by either HAS or Service Recipient to permit the other to accept service of process on its behalf and neither party is or shall be deemed to be the agent of the other for service of process purposes.

SECTION 8 CONFIDENTIALITY

Except as otherwise required under applicable law or legal process, HAS and Service Recipient agree to maintain as confidential and not to disclose to any third party any and all Confidential information provided by one party to the other or otherwise obtained by one party from the other party in the performance of this Agreement. "Confidential information" shall mean the non-public information of each party, but shall not include information that: (a) at the time of disclosure is published or is otherwise in the public domain; (b) after disclosure becomes part of the public domain other than through a breach of this clause by the receiving party; (c) was known to the receiving party prior to receipt from the disclosing party provided such prior knowledge can be adequately sustained by documentary evidence dated prior to the disclosed (d) is disclosed by a third party who, in making such information available to the receiving party is not in violation of any obligation of confidentiality to the other party hereto; or (e) has been disclosed by the disclosing party to a non- party on an unrestricted basis."

13. Further, we have gone through the Section 1 pertaining to Scope of Work (SOW) as mentioned in para 1.1 of the said agreement. The SOW deals with providing Global Wan which is a broadband network that spans the entire Hitachi Group and a corporate platform that encompasses WAN networks varying in their modes of implementation. The global WAN is able to provide Hitachi Group Companies with the services like two-way connectivity between locations/grouped firms- builds secure

two-way connectivity among Hitachi Group Companies networks varying in security level. The services provided by Hitachi Limited (Japan) included managed Data Network for the Appellant's office situated in Gurgaon. A brief overview of the GWAN services and the process involved in provision of such services was provided at pages 11 to 16 of the paper book. The invoices raised by the service providing entities (Hitachi Ltd, Japan and Hitachi Asia Ltd, Singapore) mentions that the services provided were for "link charges and internet". Payment made to a group company for intra-group intranet and server maintenance.

14. We find that the services provided by the non-resident AEs to the Assessee are standard automated services. These services, as specified above, are provided to enable the assessee to send and receive data through the broadband network over the intranet and internet. All companies of the Hitachi group are provided with network services to exchange information through intranet and regulate use of internet through its proxy servers or provide remote access to log on to the company's network. It is a settled law that standard/common services cannot partake the character of FTS under the IT Act.

15. The Hon'ble Madras High Court in the case of Skycell Communications Ltd. v. Dy. CIT 251 ITR 53 held that call charges received from telecom operators from firms and companies subscribing to cellular mobile services provided by them do not come within the definition of technical services under section 194J read with section 9(1)(vii) Explanation 2 as

it a mere collection of fee for use of standard facility provided to all those willing to pay for it.

16. Reliance in this regard is placed on the ruling of the Hon'ble Supreme Court in the case of CIT vs. Kotak Securities Ltd. [2016] 383 ITR 1 (SC) wherein it was held that common or standard services provided to every member who wants to trade on the stock exchange cannot be termed as fee for technical service under Explanation 2 to section 9(1)(vii) of the IT Act(para 9).

17. In the ruling of CIT vs. Media World Wide (P.) Ltd. 120 taxmann.com 423, the Hon'ble Calcutta High Court observed that mere collection of a 'fee' for use of a standard facility which is available to everybody against payment of a fee, does not amount to the provider of the facility receiving fee for technical services.

18. In the ruling of CIT vs. ESTEL Communication (P.) Ltd. 318 ITR 185, Hon'ble Delhi High Court held that the taxpayer in that case was merely paying for an internet bandwidth to the deductee and then selling it to its customers. It observed that the use of internet facility may require sophisticated equipment but that does not mean that technical services were being rendered by the deductee to the taxpayer in that case. It was a simple case of purchase of internet bandwidth by the taxpayer from the deductee. The High Court held that the provisions of Section 9(1)(vii) of the IT Act did not apply.

19. The invoices raised by Hitachi Limited, Japan and Hitachi Asia Limited, Singapore to the Assessee in lieu of the services

received by the latter make it clear that services provided by foreign AEs were not technical in nature but were standard intranet, broadband and link services. Payment of network charges does not take the character of FTS due to absence of human intervention:

20. Hence, the services received by the assessee can be said to be not in the nature of FTS as defined under Explanation 2 to Section 9(1)(vii) of the IT Act. To treat any consideration as FTS, such consideration must be paid for rendering of managerial, technical or consultancy services.

21. The revenue failed to consider the fact that the IT support services availed by the Assessee did not involve any human intervention. The Ld. CIT (A) reproduced extracts of the Master Service Agreement between the Assessee and Hitachi Asia Limited, Singapore and observed that human intervention is an integral part of the Master Service Agreement which is completely misconceived. In fact, no reasons were provided by the Ld. CIT (A) as to how human intervention was an integral part of the Master Service Agreement.

22. The extracts of the agreement relied upon by the Ld. CIT(A) do not indicate that the IT support services were provided through human intervention. By their very nature and inherent characteristics, networking services over internet and intranet including mail services cannot be provided by human activities and intervention. Sections 4 – 8 of the services agreement extracted by the Ld. CIT(A) in his order does not demonstrate or show in any manner that human intervention was required for rendering the IT support services. The

obligation to share information, confidentiality and other obligations are standard obligations that are provided in any services agreement and do not deal with the manner of provisioning of services but with ancillary obligations of the parties. There is no human intervention in the supply of services.

23. The Hon'ble Delhi High Court in CIT vs. Bharti Cellular Ltd. 319 ITR 139 has held that the word "technical" as appearing in Explanation 2 to section 9(1)(vii) of the Act is preceded by the word "managerial" and succeeded by the word "consultancy" and the same takes colour from the word "managerial and consultancy". The Court held that in such a case principle of noscitur a sociis gets attracted, which means that the meaning of the word or expression is to be gathered from the surrounding word i.e. from the context. Coupling of the words together shows that they are to be understood in the same sense. The word "managerial and consultancy" is a definite indicative of the involvement of a human element. Managerial services and consultancy services must be given by human only and not by any means or equipment. Therefore, the word "technical" must be construed in the same sense involving direct human involvement, and without that, the services provided cannot be held to be technical services under Explanation 2 to Section 9 (1) (vii) of the IT Act. Following the ratio laid down in Bharti Cellular (supra), various co-ordinate Benches of the Tribunal have held that to treat any payment as FTS, element of human involvement is mandatory:

- CIT v. Vodafone South Ltd. [2016] 290 CTR 436 (Karnataka)
- DCIT v. Vodafone Essar Digilink Ltd. [2018] 64 ITR(T) 392 (Delhi - Trib.)
- ITO v. Primenet Global Ltd. [2016] 48 ITR(T) 451 (Delhi - Trib.)
- DCIT v. Velti India (P.) Ltd. [2015] 153 ITD 244 (Chennai - Trib.) (Para 8);
- Bharti Hexacom Ltd. v. ITO [2015] 42 ITR(T) 686 (Jaipur - Trib.)
- Elsevier Information Systems GmbH v. DCIT [2019] 106 taxmann.com 401 (Mumbai - Trib.)

24. We have also gone through the ratio laid down by the Hon'ble apex court in the issue in the following cases.

- Engineering Analysis Centre of Excellence (P.) Ltd. vs. CIT 125 taxmann.com 42 (SC)
- CIT-4, Mumbai vs. Kotak Securities Ltd. 67 taxmann.com 356 (SC)
- CIT vs. Bharti Cellular Ltd. 330 ITR 239 (SC)

25. Thus we conclude that the foreign AE (service provider) has neither employed any technical or skilled person to provide managerial or technical service nor there was direct interaction between the assessee and the foreign AE. Thus, where the entire process resulting in provisioning of service is fully automated process with no human intervention, charges paid for provision of such services cannot be classified as FTS for the purpose of the IT Act.

26. Disallowance of Rs.35,60,212/- includes amounts accrued towards link charges payable to Airtel and BSNL (Rs. 74,879/-) and misc. provision of Rs. 1,76,932/-.

27. In view of the foregoing submissions, it is held that the IT support services availed by the Assessee from Hitachi Ltd., Japan, and Hitachi Asia Ltd., Singapore are standard connectivity and networking services cannot be termed as technical services within the meaning of Section 9(1)(vii) of the Act. Hence, we hold that the assessee was not liable to deduct TDS on such expenditures. Accordingly, the disallowance made by the AO and confirmed by the Ld. CIT (A) in the present case is liable to be deleted.

28. In the result, the appeal of the assessee is allowed.
Order Pronounced in the Open Court on 13/10/2021.

Sd/-

(Kul Bharat)
Judicial Member

Dated: 13/10/2021

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR