IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 1917/MUM/2013
(Assessment Year : 2009-10)

The Asstt. Commissioner of Income Tax 11(2),
Room No.479, 4th Floor,
Aaykar Bhavan, MK Road,
Mumbai 400 002 ... Appellant

Vs.

M/s. BSR & Co.
Loadha Excelus, 1st Floor,
Apollo Mills Compound,
N.M.Joshi Marg, Mahalakshmi,
Mumbai 400 011
PAN: AAAFK 9852F .... Respondent

Appellant by : Shri Vaibhav Jain
Respondent by : S/Shri Harsh Kapadia/
Paras Savla/Viraj Mehta

Date of hearing : 27/04/2016
Date of pronouncement : ...../05/2016

**ORDER**

**PER G.S. PANNU,AM:**

The captioned appeal filed by the Revenue pertaining to the A.Y. 2009-10 is directed against an order passed by Ld. CIT(A)-3, Mumbai dated 24/12/2012, which in turn arises out of an order passed

by Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') dated 28/12/2011.

2. In this appeal, Revenue has raised a solitary issue arising from the action of the CIT(Appeals) in holding that the Assessing Officer was not justified in disallowing a sum of Rs.1,45,89,345/- by invoking the provisions of section 40(a)(i) of the Act .

2.1 Briefly put, the relevant facts are that the respondent assessee is a firm of Chartered Accountants and during the year under consideration, it was found to have paid a sum of Rs.1,45,89,345/- to various entities detailed in Para-3 of the assessment order on account of professional fee. On being show-caused as to why the requisite tax was not deducted at source, the assessee firm explained that the payments were made to various non-residents and it is not in the nature of income chargeable to tax in India and thus, tax was not required to be deducted in terms of section 195 of the Act. The Assessing Officer however, did not accept the submissions of the assessee and instead held that tax was required to be deducted tax at soruce and on the failure to do so, the expenditure of Rs.1,45,89,345/- was disallowable in terms of section 40(a)(i) of the Act.

2.2 Before the CIT(Appeals), assessee made varied submissions contending that invoking of provisions of section 40(a)(i) was not justified. Assessee contended that the payments made to various non-resident entities was governed by the provisions of Double Taxation Avoidance Agreement (DTAA) with the respective countries, in terms of which such payments were not income chargeable to tax in India. The

CIT(Appeals) has since upheld the stand of the assessee and did not find any merit in the stand of the Assessing Officer and accordingly, he deleted the disallowance made under section 40(a)(i) of the Act.

3. Before us, the Ld. Departmental Representative has primarily contended that the plea of the assessee that the payments could not be considered as 'fee for technical services' was not justified as assessee had obtained professional services from the recipients.

4. At the time of hearing, Ld. Representative for the assessee has furnished a fact sheet, which brings out the nature of services rendered by each of the recipients of income. Primarily, it is revealed that professional services have been rendered by such entities for assistance in audit, taxation, IT services, professional services in relation to transfer pricing, VAT, etc. Ld. Representative for the assessee has also tabulated the recipient entities country-wise and made reference to the respective clauses in the Double Taxation Avoidance Agreements. In sum and substance, the discussion made by the CIT(Appeals) on each of the payments, in Para 1.3 to 1.3.4 by the CIT(Appeals) has been relied upon.

5. In the above background, we have carefully considered the rival submissions. Pertinently, the issue revolves around the payments made by the assessee to certain non-resident entities for professional services rendered by them outside India. It has been consistently explained by the assessee that the services of such entities were availed during the

course of the execution of engagements of assessee firm. The assessee firm did not deduct the tax at source and, therefore, the Assessing Officer invoked the provisions of section 40(a)(i) of the Act and disallowed such expenditure. The details of the entities alongwith the amounts paid have been culled out by the Assessing Officer in Para-3 of the assessment order and the same is not being repeated for the sake of brevity. The payments have been made to 12 different professional entities based in 10 different countries. In so far as the payments that are made to KPMG LLP, USA and KPMG LLP, Canada are concerned, the same has been made on account of professional services rendered in relation to taxation and transfer pricing. Undisputedly, the professional services have been rendered by the aforesaid entities outside India. The stand of the Revenue is that such services are in the nature of 'fee for technical services' and, therefore, tax was liable to be deducted at source in India. Factually speaking, the aforesaid stand of the Revenue is devoid of any support because there is no material to establish that any technical knowledge, skill, etc. has been made available to the assessee so as to consider it as falling within the purview of Article-12 of Indo-US Double Taxation Avoidance Agreement. It is also an established fact that such non-resident recipients do not have permanent establishment in India and, therefore, in the said background the same can, at best, be treated as independent personal services covered by Article-15 of the Indo-US Double Taxation Avoidance Agreement. As a consequence and in the absence of any fixed base in India, such income cannot be held chargeable to tax in India so as to require deduction of tax at source.

Therefore, invoking of section 40(a)(i) of the Act to disallow such expenditure is not tenable.

5.1 In so far as payments to KPMG LLP, UK and KPMG USMCG Ltd. UK are concerned, herein also the said entities do not have permanent establishment in India. The CIT(Appeals) has found that such entities are eligible for the benefit of Article -15 of Indo-US Double Taxation Avoidance Agreement dealing with independent personal services and hence, payments are not chargeable to tax in India so as to require deduction of tax at source. The aforesaid findings have not been disputed before us on the basis of any cogent material and, therefore, we hereby affirm the same. Consequently, invoking of section 40(a)(i) in the context of aforesaid payments is also not justified.

5.2 In the context of payments made to KPMG Tax Services Pvt. Ltd., Singapore, KPMG LLP, Singapore and KPMG Tax Advisor, Belgium, the CIT(Appeals) noted that they are companies registered in the respective countries, who have rendered services outside India. Such services related to assistance in audit, taxation, information technology services, conducing background checks, etc. Considering the nature of the services rendered, which is not disputed by the Revenue, in our view, the CIT(Appeals) made no mistake in holding that the payments are not 'fee for technical services'. The aforesaid services have been rightly held to be outside the purview of Article-12 and/or Article-13 of the respective tax treaties, and instead such income falls within the scope of Article-7 thereof i.e. in the nature of 'business profits'. It has also

not been disputed that such entities do not have a permanent establishment in India, therefore, such incomes are not chargeable to tax in India so as to require deduction of tax at source. On this aspect also, we affirm the stand of the CIT(Appeals) that such payments are not liable for disallowance under section 40(a)(i) of the Act.

5.3 With regard to the payments to KPMG, Mauritius, KPMG Hazen Hassan, Egypt, KPMG Dubai, UAE and KPMG, Sri Lanka are concerned, the CIT(Appeals) has noticed that the tax treaties with the respective countries do not have any Article defining 'fee for technical services'; and that the services were being rendered in relation to taxation matters. In this back ground, the CIT(Appeals) held that the payments for such services fall within the scope of article 14/15 of the respective treaties dealing with independent personal services and in the absence of any fixed place of business of the recipient in India, income from such services was not chargeable to tax in India. Therefore, there was no requirement to deduct tax at source and accordingly the invoking of section 40(a)(i) of the Act has been set-aside by the CIT(Appeals). The aforesaid factual matrix brought out by the CIT(Appeals) has not been assailed by the Revenue before us on the basis of any cogent material and, thus, the same is hereby affirmed.

5.4 The last item remaining is payment made by assessee to KPMG, Malaysia for audit services. It is not in dispute that the said services have been rendered outside India and the same cannot be construed as managerial or technical services so as to be governed by Article-13 of

India-Malaysia tax treaty, as contended by the Revenue. Clearly, they are in the nature of independent personal services falling for consideration under Article-14 of Indo-Malaysia tax treaty and, therefore, in the absence of any fixed place of business of the recipient in India, the impugned income is not chargeable to tax in India. Therefore, in such a situation, assessee is not liable for deduction of tax at source in India so as to invoke the provisions of section 40(a)(i) of the Act. The stand of the CIT(Appeals) on this aspect is also affirmed by us on the basis of his findings, which have remained uncontroverted before us by the Revenue.

5.5 Apart therefrom, even if we were to accept, for the sake of argument, that the services by the aforesaid entities are in the nature of technical services and are rendered and utilized in India so as to be taxable in terms of section 9(1)(vii) of the Act, even then the disallowance is not warranted as the following discussion would show. Ostensibly, the requirement of rendering services in India in order to attract section 9(1)(vii) of the Act was removed by insertion of Explanation by the Finance Act, 2010 with retrospective effect from 1/4/1976. This has been understood by the Revenue to say that inspite of the services having been rendered by the recipients outside India, the same is taxable in India by applying the aforesaid amendment. In our view, such retrospective amendment would be determinative of the tax liability in the hands of the recipients of income. So however, in the present case, what is held against the assessee is the failure to deduct tax at source at the time of payment of such income.

Ostensibly, dehors the aforesaid amendment, the impugned income was not subject to tax deduction at source in India as per the prevailing legal position. Taxability of a sum in the hands of recipient, on account of a subsequent retrospective amendment would not expose the assessee-payer to an impossible situation of requiring deduction of tax at source on the date of payment. Therefore, on this count also the assessee cannot be held to be in default in not deducting tax at source so as to trigger the disallowance under section 40(a)(i) of the Act. Ld. Representative for the assessee has relied upon the decision of the Mumbai Bench of the Tribunal in the case of Channel Guide India Ltd. vs. ACIT, 25 taxmann.com 25 (Mum.) in support of the above said proposition. In the absence of any contrary decision, the said plea of the assessee is also liable to be upheld and the disallowance made by the Assessing Officer under section40(a)(i) of the Act is untenable. The disallowance has been rightly deleted by the CIT(Appeals), which we hereby affirm.

6. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 06/05/ 2016.

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| Sd/- | Sd/- |
| (PAWAN SINGH) | (G.S. PANNU) |
| JUDICIAL MEMBER | ACCOUNTANT MEMBER |

Mumbai, Dated 06/05/2016

*Vm*, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
**ITAT, Mumbai**