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

\+ ITA 71/2022

PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI-2

..... Appellant

Through: Mr.Sanjay Kumar, Sr.Standing Counsel for the Revenue.

versus

M/S BOEING INDIA PVT. LTD. ..... Respondent

Through: Ms.Sachit Jolly with Mr.Rohit Garg, Ms.Disha Jham and Mr.Sphum Dua, Advocates.

% Date of Decision: 11th October, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J (Oral):

C.M.No.15980/2022

Exemption allowed, subject to all just exceptions.

Accordingly, the application stands disposed of.

ITA No.71/2022

1. Present appeal has been filed challenging the order dated 17th August, 2020 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.9765/Del/2019 for the Assessment Year 2015-16.

2. The appellant-revenue has suggested the following substantial questions of law:-

> *"1. Whether on facts and in the circumstances of the case and also on the prevailing law, Hon'ble ITAT is justified in allowing the appeal of the assessee on the grounds that draft order framed u/s 144(c(1) of the Act is in the name of a non-existent company and accordingly, void ab initio, making all subsequent proceedings non-est, ignoring the fact that final assessment order has been passed in the name of the new entity as per the directions of Hon'ble DRP.*
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> *2. Whether on facts and in circumstances of the case and also on the prevailing law, Hon'ble ITAT is justified in deleting addition of Rs.22,16,059/- on account of receivables, which in contravention of the judgment of Hon'ble Delhi High court in the case of Kusum Healthcare.*
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> *3. Whether on facts and in the circumstances of the case and also on the prevailing law, Hon'ble ITAT is justified in allowing the appeal of the assessee on disallowance u/s 40A(i) of the Income Tax Act, 1961 ignoring the facts that the matter has been decided in favour of Revenue in the case of Centrica India Offshore India Ltd. 364 ITR 336 before the Hon'ble High Court."*

3. Learned counsel for the appellant states that ITAT has erred in allowing the appeal of the assessee on the ground that the draft order framed under Section 144C(1) of the Income Tax Act, 1961 ('the Act') was issued in the name of a non-existing company and was accordingly *void ab-initio* making all subsequent proceedings *non-est* ignoring the fact that initial jurisdictional notice dated 16th March, 2016 under Section 143(2) of the Act had been issued to the correct entity and the final assessment order dated 29th October, 2019 had been passed in the name of the new entity as per the Directions of the Dispute Resolution Panel (DRP).

4. He further states that the ITAT has erred in deleting the addition of Rs.22,16,059/- on account of receivables in contravention of the judgment of this Court in ***Principal Commissioner of Income Tax vs. Kusum Health Care Pvt. Ltd., (2017) SCC OnLine Del 12956***, wherein it has been held as under:-

> *"11. The court is unable to agree with the above submissions. The inclusion in the Explanation to section 92B of the Act of the expression "receivables" does not mean that dehors the context every time of "receivables" appearing in the accounts of an entity, which may have dealings with foreign associated enterprises would automatically be characterized as in international transaction. There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which will have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the assessee will have to be studied. In other words, there has to be a proper inquiry by the Transfer Pricing Officer by analyzing the statistics over a period of time to discern a pattern which would indicate that vis-à-vis the receivables for the supplies made to an associated enterprise, the arrangement reflects an international transaction intended to benefit the associated enterprise in some way."*

5. Leraned counsel for the appellant also states that the ITAT has erred in deleting the additions of Rs.56,58,19,799/- made by the Assessing Officer under Section 40(a)(ia) read with Section 195 of the Act without appreciating that the assessee was clearly liable to deduct tax on this expenditure. In support of his submission, he relies upon the judgment of this Court in ***Centrica India Offshore Pvt. Ltd. vs. Commissioner of Income Tax and Ors., (2014) 364 ITR 336 (Delhi)***.

6. Having heard learned counsel for the parties this Court finds that the ITAT in the impugned order has deleted the adjustment of Rs.22.16 lakhs on account of receivables holding as under:-

> *"20. We have carefully considered the orders of the authorities below. The undisputed fact is that the assessee is a debt free company. It is also not in dispute that no interest was paid to the creditor/supplier nor any interest has been earned from unrelated party. Moreover, being a 100% captive service provider, the revenue of the assessee is 100% from its AEs. In our considered opinion, the question of receiving any intererest on receivables does not arise. Considering the facts of the assessee in hand, in totality, we do not find any merit in the TP adjustment of Rs.22.16 lakhs and the same is, accordingly, directed to be deleted."*

7. On similar facts, the ITAT, Delhi Bench I-2 in ITA No.1478/Del/2015 titled '***Bechtel India Pvt. Ltd. vs. DCIT***' dated 21st December, 2015 has held that "*It is brought to our notice that the assessee is a debt free company. In such circumstances it is not justifiable to presume that, borrowed funds have been utilized to pass on the facility to its AE's. The revenue has also not brought on record that the assessee has been found paying interest to its creditors or suppliers on delayed payments."*

8. Upon the said matter being carried forward in an appeal, the Division Bench of this Court in ***Principal Commissioner of Income Tax-2 vs. M/s Bechtel India Pvt. Ltd.*** in ***ITA No.379/2016*** dated 21st July, 2016 held as under:-

> "*4. As far as question (B) concerning the adjustment for interest on receivables, the Court finds that the ITAT has returned a detailed finding of fact that the Assessee is a debt free company and the question of receiving any interest on receivables did not arise. Consequently, no substantial questin of law arises for consideration as far as this issue is concerned*."

9. A Special Leave Petition against the aforesaid judgment being CC No. 4956/2017 was dismissed by the Supreme Court on 21st July, 2017. The order of the Supreme Court is reproduced hereinbelow:-

> *"We are in agreement with the High Court that as far as Question-B concerning adjustment for interest on receivabales is concerned, the Tribunal has returned a finding of fact. Consequently, no substantial question of law therefore, arises, on the facts of this case.*
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> *The special leave petition is dismissed."*

10. Even the judgment of this Court in ***Principal Commissioner of Income Tax vs. Kusum Healthcare Pvt. Ltd.*** (supra) is not in favour of the appellant. The Division Bench while dismissing the appeal of the revenue observed as under:-

> *"12. The court finds that the entire focus of the Assessing Officer was on just one assessment year and the figure of receivables in relation to that assessment year can hardly reflect a pattern that would justify a Transfer Pricing Officer concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by this court in CIT v. EKL Appliances Ltd., (2012) 345 ITR 241 (Delhi). Consequently, the court is unable to find any error in the impugned order of the Income-tax Appellate Tribunal giving rise to any substantial question of law for determination. The appeal is, accordingly, dismissed."*

11. As far as disallowance under Section 40(a)(ia) of the Act is concerned, this Court finds that there is no dispute that the assessee has

deducted tax at source under Section 192 of the Act. This Court is in agreement with the opinion of the ITAT that Section 195 of the Act has no application once the nature of payment is determined as salary and deduction has been made under Section 192 of the Act.

12. This Court is further of the view that the judgment in ***Centrica India Offshore Pvt. Ltd*** (supra) has no application to the present case as the ITAT has returned a finding that the real employer of the seconded employees continues to be the Indian entity and not the overseas entity.

13. In ***Director of Income Tax (IT)-I vs. A.P.Moller Maersk A S***, the Supreme Court in Civil Appeal No.8040/2015 decided on 17th February, 2017 has held as under:-

> *"11. Aforesaid are the findings of facts. It is clearly held that no technical services are provided by the assessee to the agents. Once these are accepted, by no stretch of imagination, payments made by the agents can be treated as free for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is reemphasized that neither the AO nor the CIT(A) has stated that there was any profit element embedded in the payments received by the assessee from its agents in India. Record shows that the assessee had given the calculations of the total costs and pro-rata division thereof among the agents for reimbursement. Not only that, the assessee have been submitted before the Transfer Pricing Officer that these payments were reimbursement in the hands of the assessee and the reimbursement was accepted as such at arm's length. Once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax."*

14. A Division Bench of this Court in ***Commissioner of Income Tax, Delhi II vs. Karl Storz Endoscopy India (P) Ltd., ITA No.13/2008*** decided

on 13th September, 2010 has held as under:-

> *1. This appeal pertains to the Assessment Year 2001-02. The issue relates to the treatment which is to be given to the amount of Rs.6,59,416 paid by the assessee to its parent foreign company, i.e., Karl Storz Vertriebs GMBH & Company. The assessee had claimed that he parent company had deputed one of the employees, viz., Mr. Peter Laser to the Indian Company/assessee and the aforesaid amount represented reimbursement of the salary, which was payable to Mr.Peter Laser. The Assessing Officer (AO), however, was of the opinion that since no agreement between the assessee and the parent company was produced and even the agreement between the parent company and its employees. Mr. Peter Lazer on the basis of which he was purportedly deputed to the Indian Company was produced, this amount should be treated as payment towards technical fee.*
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> *3. Learned counsel for the respondent-assessee has pointed out that this was not the first year in which such a claim was made. He stated that the Indian Company was incorporated during the Assessment year 1998-99 and for the establishment of this company which is subsidiary to the aforesaid foreign company. Mr. Peter Laser was deputed, the amount paid from the Assessment year 1998-99 onwards were always treated as salary and accepted as such. Learned counsel for the respondent has produced the copy of the orders dated 15.06.2005 passed by the ITAT, which relates to the Assessment year 1998-99, i.e. the first year of the incorporation of the respondent-company. Perusal of this orders shows that this very issue is decided and the following findings were arrived at by the Tribunal holding that the aforesaid payment would be treated as salary to Mr.Peter Laser.*
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> > *"10. The foreign company had deputed one of its employees to look after the affairs of the Indian Company. The salary payable to this employee was to be borne by the foreign company. The Indian company was to reimburse this salary at cost, i.e. without any mark-up. Thus, it was merely the question of payment of salary to Mr. Peter Laser. There is no question of any technical fees being paid to the foreign company. Assuming for the sake of argument that it was in the nature of technical fees paid to the foreign company; then, as rightly pointed out by the learned*

counsel, Article 12.4 was applicable and not Article 13.4 as contended by the learned DR. Even if Article 12.4 was applicable, the said Article specifically excludes payments mentioned in Article 15. Article 15 states that salaries, wages and other similar remuneration derived by a resident of a Contracting State (Germany) in respect of an employment shall be taxable in the other Contracting State (Indian) only if the employment is exercised there. In other words, salaries paid to such personnel like Mr. Laser are taxable in India and they cannot be considered to be fees for technical services. Further, even as per Section 9 of the Act, the payment cannot be treated as fees for technical service. Explanation 2 to Section 9(1)(vii) gives the meaning of the expression "fees for technical services" as per which, inter alia, any consideration which would be income of the recipient chargeable under the head "salaries", then such payment will not be considered as fees for technical services. Thus, even as per the provisions of the Act, the payment in question cannot be treated as fees for technical services. Moreover, since it is paid as salary to Mr. Laser, tax has been deducted under Section 192 of the Act."

4. Learned counsel also submitted that thereafter in the Assessment Year 1990-00 as well as 2000-01, the amounts reimbursed in identical manner were treated as "salary" to Mr.Laser. He further states that no appeal was filed against the aforesaid order of the Tribunal by the Revenue."

15. Consequently, this Court is of the view that the issues of 'receivables' as well as 'disallowance' under Section 40(a)(ia) of the Act are essentially questions of fact, which give rise to no substantial questions of law especially when the findings of the ITAT are not perverse.

16. This Court may mention that though it was inclined to admit Question No.1 proposed by the appellant, yet keeping in view of the fact that this Court has concurred with the findings of fact rendered by the ITAT on Question No.2 & 3 and as a consequence no substantive addition can be made in the present appeal, the Question No.1 is left open to be agitated in

an appropriate matter.

17. With the aforesaid liberty, the present appeal is dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

OCTOBER 11, 2022
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