IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "C" BENCH

Before: Ms. Annapurna Gupta, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member

ITA No. 304/Ahd/2019
Assessment Year 2016-17

Prolific Research Pvt. Ltd. A/101, Safal Profitare, Prahladnagar, Ahmedabad PAN No:AAGCP2795N (Appellant)	Vs	The DCIT, Circle-4(1)(2), Ahmedabad (Respondent)

Appellant by : None
Respondent by : Shri V.K. Singh, Sr.D.R.

Date of hearing : 13-07-2022
Date of pronouncement : 31-08-2022

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

The present appeal has been filed by the Assessee against the order dated 21.12.2018 passed by the Commissioner of Income Tax (Appeals)-13, Ahmedabad, as against the order passed under section 201 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year (A.Y) 2016-17.

2. The brief facts of the case is that the assessee is a company is engaged in the business of collecting market research data and conducting surveys/interviews in the different countries based on project specifications provided by its clients. In consideration, it receives payments on Cost Per Interview (CPI) basis. For the purpose of preparation of questionnaire and survey design, the assessee log into the Web Portal of the NEBU, A Netherlands-based Company and utilizes its survey link for the purpose. The assessee company charges its customer for the survey data and the assessee made payments of Rs. 7,24,268/- i.e. Euro 8790 in 6 installments to NEBU of Netherland.

2.1. The Assessing Officer held that the combined reading of the meaning of hoisting charges as claimed by the assesse and the nature of services rendered by the NEBU of Netherlands makes it clear that the services which NEBU of Netherland renders to its clients are Royalty and Fees for Technical Services as defined u/s. 9(1)(vii) of the Act. Thus the assessee failed to withhold the tax before making payment to NEBU of Netherland.

3. The assessing officer held that as per the Article 12(5) of the India-Netherlands Double Taxation Avoidance Agreement (DTAA), the consideration paid for the services rendered by the NEBU fall within the meaning of Fees for Included services. Thus the assessee was required to deduct tax. Thus in this case, the A.O. charged for Short deduction of taxes u/s. 201(1) of Rs. 78,264/- and interest

payable u/s. 201(1A) of Rs. 20,279/- in all aggregating to Rs. 98,543/- for which the assessee is treated as in default.

3.1 Aggrieved against this order, the assessee filed an appeal before Ld. CIT(A). The assessee submitted that the NEBU is not having any Permanent Establishment in India and furnishing the copy of the agreement between the assesse and NEBU. The agreement says that the customer is given right to use the software and related documentation. The assessee was asked to explain why the ratio of judgment rendered by the Hon'ble Madras High Court in the case of Verizon Communications Singapore Pte. Ltd. vs. ITO (2013) 39 Taxmann.com 70 (MDS), wherein the payment made by the Indian customers to the Taxpayer for providing bandwidth/telecom services by way of International Private Lease Circuit (IPLC) is taxable as "royalty". Wherein the High Court held that such payments amount to "Royalty" both under the Indian Tax Laws and Double Taxation Avoidance Agreement between India and Singapore.

3.2. The Hon'ble High Court also observed that post introduction of Explanation 5 in section 9(1)(vi) of the Act, scope of definition of Royalty under the Act has increased. Further, the assessee has not brought any decision on record of any other High Court post decision of Verizon Communications Singapore Pte. Ltd. (supra) judgment of Madras High Court after considering post amendment by Finance Act 2012 and introduction of Explanation 5 in section

9(1)(vi) of the Act. Thus, the Ld. CIT(A) dismissed the appeal as follows:

> *In the instant case, it is observed that NEBU is market research software based in Netherlands and provides a component based software for data collection and also provides technical support, hosting and training and allows its clients to unlock the full potential of data. When a company pays to host their files on NEBU web server, they were buying hosting. NEBU is hosting website of another company on its servers. It is nothing but one type of included services with regard to web hosting and its future use. Since the services rendered by NEBU Netherland to the Remitter-company are in nature of Royalty and fee for included services, the consideration of Rs.7,24,268/- paid for rendering of such services are in the nature of royalty and fee for technical services as defined u/s 9(l)(vi) and (vii) of the Income-tax Act, 1961.*
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> *In view of the above detailed discussion, I find that the payments made to NEBU are in the nature of royalty and fees for technical services as per section 9(l)(vi) and (vii) of the Act as well as per Article 12 of the DTAA and therefore the' same is liable to be taxed in India. In view of the same the appellant was liable to withhold tax" in India and therefore it was rightly held as assessee in default. In the result this ground of appeal is dismissed.*

4. Aggrieved against the appellate order, the assessee is before us raising the following Grounds of Appeal:

> *That on the facts and in the circumstances of the case and as per law the learned CIT (A) erred in upholding the action of the assessing officer treating the assessee in default under section 201 of the Income Tax Act 1961 and thereby confirming the demand of Rs. 78,264 on the ground of short deduction of taxes and Rs. 20,279 towards interest under section 201 (1A) of the Act,*
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> *1.2 That the learned CIT (A) erred in upholding the contentions of the assessing officer that appellant was liable to deduct tax at source, in respect of payment made to NEBU (a Netherland-based company), under section 195 of the Income Tax Act, 1961 on the ground that the payment to the said company was in the nature of "Royalty" in terms of the provisions of section 9 (1) (vi) of the Act.*
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> *1.3 That the learned CIT (A) was ought to have considered the fact that appellant had made a payment, to the NEBU, for accessing its online tools located on its server and no proprietary rights were created in favour of the appellant for web hosting services provided by the said company. Hence, payment to the said company was not in the nature of "Royalty" as provided by section 9(1)(vi) of the Act.*
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> *1.4. That the learned CIT (A) failed to consider the fact that the non-resident company, i.e. NEBU of Netherland, had no establishment in India nor it had carried on any business operation or provided any service in India. Hence, no portion of payment has an element of income chargeable to tax in India. Accordingly, following the ratio laid down by the Honourable High Court of Gujarat in the case of "Principal Commissioner of Income Tax*

Vs. Nova Techno Cast (P) Ltd (304 CPR 670)" Appellant was not liable to deduct tax at source under section 195 of the Act.

1.5 That the learner CIT (A) further erred by relying on the ratio laid down by Honourable High Court of Karnataka in the case of "Commissioner of Income Tax & Anr. Vs. Samsung Electronics Co Ltd" as the facts of that case are clearly distinguishable from the facts of the present case of the appellant.

4.1. Today is the 11th time of hearing of this appeal before us. In the previous hearing on 13th June, 2022, this case was listed for hearing, Shri Dipen Sankhesara Advocate appeared and undertook to file Vakalatnama as well as written submission on behalf of the assessee. Therefore the case is adjourned to 16.06.2022. However on 16.06.2022, the Bench did not function and the case is adjourned to 13.07.2022. Today none appeared on behalf of the assessee. Except on 16.06.2022 none appeared on behalf of the assessee in all the previous hearings. Therefore with the material available on record and with the assistance of the Ld. D.R., we are required to proceed with the appeal.

5. The Ld. D.R. appearing for the Revenue submitted that the services rendered by the assessee is in the nature of Royalty and liable to deduct tax at source in respect of payment made to NEBU of Netherland, u/s. 195 of the Act. Therefore the assessing officer is correct in charging short deduction of taxes u/s. 201(1) and charging interest u/s. 201(1A) of the Act from the assessee. This addition is being sustained by the Ld. CIT(A) following the judgment of the Hon'ble Madras High Court in the case of Verizon Communications Singapore Pte. Ltd. wherein Explanation 5 in section 9(1)(vi) of the Act has been considered elaborately and the

assessee could not be able to distinguish the above judgment before the Ld. CIT(A).

5.1. Further the Hon'ble Karnataka High Court in the case of CIT & ANR. Vs. Samsung Electronics Co. Ltd. & Ors. 185 Taxmann.com 313 (Kar) held that the transfer of copyright including the right to make copy of software for international business, any payment made in that regard would constitute 'Royalty' for imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill as per clause (iv) of Explanation 2 to Section 9(1)(vi) of the Act. Thus the payment made by the assessee to the non-resident supplier would amount to Royalty and there is obligation on the part of the assessee to deduct tax at source u/s. 195 of the Act. Thus the ld. D.R. submitted it is settled principle of law by the various High Courts and the payments made by the assessee to NEBU of Netherland is in the nature of Royalty and therefore liable to deduct tax at source u/s. 195 of the Act. Failure on which attracted Section 201(1) and 201(1A) of the Act which were rightly done by the Assessing Officer, which has also been upheld by the Ld. CIT(A) thus does not require any interference and therefore the addition made by the A.O. is to be sustained and dismiss the present appeal filed by the assessee.

6. As stated in the preceding paragraph none appeared on behalf of the assessee and no written submissions is placed on record before us. Perusal of the records makes it very clear that the Ld. CIT(A) has considered the Hon'ble Madras High Court in the case of

Verizon Communications Singapore Pte. Ltd.(cited supra) which is considered the amended provisions of Section 9(1)(vi) with Explanation 5, gives a very expansive meaning to the term 'Royalty' and this has a bearing on the issue's so too the various clauses in the agreements which are to be looked at in a holistic manner.

6.1. The better understanding Explanations 5 & 6 to Section 9(1)(vi) of the Act is reproduced as follows:

Explanations 5 & 6 to section 9(1)(vi) of the Act reads as under:

"9. (1) The following incomes shall be deemed to accrue or arise in India:—
……

(vi) income by way of royalty payable by—
(a) the Government; or
(b) a person who is a resident, except -where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:
……

Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—
(a) the possession or control of such right, property or information is with the payer;
(b) such right, property or information is used directly by the payer;
(c) the location of such right, property or information is in India.

Explanation 6 —For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;"

It is to be noted that both the definition of royalty under the Act and Tax Treaty includes the. term "use" or "right to use" industrial, commercial or scientific equipment and process. However, meaning to these terms is not provided in the Treaty. In view of the

same, as per Article 3(2) of the India - USA Tax Treaty provides that "As regards the application of the Convention by a Contracting State any term not defined in the Tax Treaty therein shall, unless the context otherwise requires or the competent authorities agree to a common meaning pursuant to the provisions of Article 27 (Mutual Agreement Procedure), have the meaning which it has under the laws of that State concerning the taxes to which the Convention applies". In view of the same, since the terms i.e. use or right to use with respect to right, property or information or process is not defined under the Treaty, meaning of such terms is to be taken from the Act. Hence, interpretation provided under the Explanation 5 and 6 has to be accepted and as held by the decision of Verizon (supra) it has to be supplied.

7. In our considered view, the findings of the lower authorities does not require any interference. In fact the assessee's reliance in its Grounds of Appeal of Jurisdictional High Court judgment in the case of Nova Technocast Pvt. Ltd. (304 CTR 670) is a judgment considering Explanation 2 of Section 9(1)(iv) and is not applicable to the facts of the present case. There is no contra judgments placed before us, on the post introduction of Explanation 5 in section 9(1)(iv) of the Act, enlarging the scope of the definition of 'Royalty'. In the absence of the same, therefore the grounds raised by the assessee are hereby rejected and the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 31 -08-2022

Sd/-	**Sd/-**
(ANNAPURNA GUPTA)	**(T.R. SENTHIL KUMAR)**
ACCOUNTANT MEMBER True Copy	**JUDICIAL MEMBER**
Ahmedabad : Dated 31/08/2022	

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)

5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद