आयकर अपीलीय अधिकरण, **'बी'** न्यायपीठ**,** चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री वी. दुर्गा राव**, माननीय न्यायिक सदस्य** एवं
श्री **जी. मंजूनाथा, माननीय** लेखा सदस्य **के समक्ष**
BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.2791/Chny/2019**
निर्धारण वर्ष **/Assessment Year: 2016-17**

M/s.Sunsmart Technologies Pvt. Ltd., No.672, 4th Floor, Temple Tower, Anna Salai, Nandanam, Chennai. [**PAN:** AAJCS 7454 C]	**v.**	The Asst. Commissioner- of Income Tax, Corporate Circle-6(2), Chennai.
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Mr.D. Anand, Adv.
प्रत्यर्थी की ओर से /Respondent by	:	Mr.Varuvooru Sreedhar, Addl.CIT
सुनवाई की तारीख/Date of Hearing	:	18.10.2022
घोषणा की तारीख /Date of Pronouncement	:	02.11.2022

आदेश **/ O R D E R**

PER G. MANJUNATHA, AM:

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-15, Chennai, dated 13.08.2019 and pertains to assessment year 2016-17.

2. The assessee has raised the following grounds of appeal:

1. The order of the learned CIT(A) is contrary to law, facts and evidence on record.

2. The learned CIT(A) fundamentally assumed jurisdiction fact wrongly and failed to appreciate the provisions of section 9(1)(vii) of the I.T. Act.

3. The learned CIT(A) erred in holding that deduction of 25% of project value retained by the SSG Technologies is liable to suffer TDS u/s.195 is misconceived since the appellant products are copy right items of owned by the appellant and the SSG technologies only marketed its products· to its clients and hence no technical services were rendered to SSG technologies nor has capacity to do it independently.

4. The learned CIT(A) fundamentally failed to notice that the services rendered by marketing the products of the appellant at foreign country is plainly not liable since the services of marketing would not qualify under any of the provisions of the Income Tax Act, 1961, particularly u/s.40(a)(ia) of the Act and hence the appellant is under no obligation to deduct any tax.

5. The CIT (A) further failed to take cognizance of the provisions of sec.40(a)(i) wherein sub-clause (B) clearly excludes the foreign company from the purview of sec.40(a)(i) of the Act and hence it can be safely concluded that sum retained by the foreign party is not the income chargeable to tax in India. Once an income ii hot chargeable to tax in India then the question of deducting TDS under the provision u/s 195 of the Act does not arise.

6. The appellant craves leave to file additional grounds.

3. The brief facts of the case are that the assessee company is in the business of providing software solutions and services to diversified industries. The assessee company had entered into marketing agreement with M/s.SSG Technologies, LLC, Dubai, w.e.f.01.01.2015 for marketing its product in middle east Asian countries. As per the terms of the agreement between the parties, the assessee authorized its partner to market, promote and distribute the products to the customers and also provide sales support services only in accordance with the assessee's policies and procedures. The agreement further specifies that the marketing partner shall not alter the products or product information without prior written approval from the assessee. The agreement further specifies that the assessee will train the partner resources for carrying out pre-sale activity and also implementation and support services. As per the agreement

between the parties, the marketing partner will retain 25% of project value as charges for rendering services. During the course of assessment proceedings, the AO noticed that the assessee has remitted charges for rendering services to non-resident marketing partners without deduction of TDS and thus, opined that services rendered by marketing partner, are in the nature of Fees for technical Services (in short "FTS") as per Explanation-2 to Sec.9(1)(vii) of the Act, and thus, rejected the arguments of the assessee and disallowed payment made to marketing partner amounting to Rs.61,66,565/- u/s.40(a)(i) of the Act.

4. Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee submitted that payment made by the assessee to M/s.SSG Technologies, LLC, is nothing but a commission paid for rendering marketing services outside India and further, said services is a simpliciter marketing services, does not come under FTS as per Explanation-2 to Sec.9(1)(vii) of the Act. The assessee further contended that out of sum of Rs.61,66,565/- paid by the assessee also includes reimbursement of expenditure like rent, salary, commission, travel expenditure, accommodation, etc. The Ld.CIT(A) after considering relevant submissions of the assessee and also on analysis of agreement between the parties opined that services rendered by the marketing partner to sell assessee's products in terms of the agreement between the parties is in the nature of FTS as per Explanation-2 to Sec.9(1)(vii) of the Act, and thus, upheld the findings of the AO in

disallowance of sum paid by the assessee without deduction of TDS u/s.40(a)(i) of the Act. However, the Ld.CIT(A) has accepted alternate plea of the assessee and directed the AO to delete additions towards reimbursement of expenses such as rent and other expenses, because, said reimbursement does not come under the provisions of Sec.40(a)(i) of the Act. Aggrieved by the order of the Ld.CIT(A), the assessee is in appeal before us.

5. The Ld.AR for the assessee referring to marketing, agreement between the assessee and M/s.SSG Technologies, LLC, submitted that if you consider the scope of services rendered by the partner, it is in the nature of simple marketing services without any technical knowledge and thus, same cannot be classified as FTS as per Explanation-2 to Sec.9(1)(vii) of the Act. The Ld.Counsel for the assessee referring to certain judicial precedents including the decision of ITAT Bangalore Benches in the case of Infosys BPO Ltd. v. DCIT (International Taxation) reported in [2022] 66 CCH 0001 (Bang-Trib.) submitted that services rendered by a partner without any knowledge of technical expertise, does not come under FTS. In this case, if you go through scope of the agreement between the parties which is just like a marketing agreement to provide pre-sale and after sale services to customers and thus, the same cannot be considered as FTS. The AO as well as the Ld.CIT(A) without appreciating the fact simply made additions.

6. The Ld.DR, on the other hand, supporting the very same marketing agreement between the assessee and channel partner submitted that if you go through terms & conditions, and scope of agreement between the parties definitely services rendered by marketing partner comes under FTS, because, in order to give pre-sale and post-sale services to product, the partner requires expertise in products manufactured by the assessee and thus, said services definitely comes under FTS. Therefore, the AO has rightly disallowed said expenditure and their orders should be upheld.

7. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. As per Explanation-2 to Sec.9(1)(vii) of the Act, FTS means any consideration (including in lump sum consideration) for the rendering of any managerial, technical or consultancy services, but does not include consideration for any construction, assembling, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'salaries'. Further, as per Explanation-2 to Sec.9(2) of the Act, income of a non-resident shall be deemed to accrue or arise in India under Clause (v) or Clause (vi) or Clause (vii) of sub-section (1) and shall be included in the total income of the non-resident whether or not –

> *(i) the non-resident has a residence or a place of business or business connection in India; or*
>
> *(ii) the non-resident has rendered services in India.*

If we examine the nature of services rendered by a marketing partner in terms of the agreement between the parties in light of above legal position, we are of the considered view that services rendered by M/s.SSG Technologies, LLC, definitely comes under 'FTS' as defined under Explanation-2 to Sec.9(1)(vii) of the Act, because, the scope of agreement clearly specifies the nature of services to be rendered by marketing partner and as per said agreement, the assessee will train the resources of marketing partner to provide pre-sale and after sale product services to the customers. Since, the assessee is in the business of providing software solutions and services to various industries, in our considered view, said services definitely requires technical expertise and knowledge. Therefore, when the marketing partner provides pre-sale services and post-sale services to customers, the employees of marketing partner should be expertise in technical knowledge of the products. Therefore, we are of the considered view that the AO has rightly held that services rendered by marketing partner in terms of agreement between the assessee and M/s.SSG Technologies, LLC, comes under FTS as per Explanation-2 to Sec.9(1)(vii) of the Act. Since, the services rendered by marketing partner is in the nature of FTS, the assessee ought to have deducted TDS in terms of Sec.195 of the Act. Since, the assessee has failed to deduct TDS when payment made to non-resident, the AO has rightly disallowed said payment u/s.40(a)(i) of the Act. The Ld.CIT(A) after considering relevant facts

rightly upheld addition made by the AO. Hence, we are inclined to uphold the findings of Ld.CIT(A) and reject the ground taken by the assessee.

8. In the result, appeal filed by the assessee is dismissed.

Order pronounced on the 02nd day of November, 2022, in Chennai.

Sd/-	***Sd/-***
(वी. दुर्गा राव**)**	**(**जी. मंजूनाथा**)**
(V. DURGA RAO)	**(G. MANJUNATHA)**
न्यायिक सदस्य**/JUDICIAL MEMBER**	लेखा सदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 02nd November, 2022.
TLN

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF