IN THE ITAT MUMBAI BENCH 'L'

Apollo Consulting Services Corporation

v.

Director of Income-tax (International Taxation), Mumbai*

P.M. Jagtap, Accountant Member

And Amit Shukla, Judicial Member

IT Appeal No. 2983 (Mum.) of 2010

[Assessment year 2005-06]

July 27, 2012

ORDER

Amit Shukla, Judicial Member - This appeal has been filed by the assessee against the order dated 30.3.2010 passed by the Director of Income Tax, Mumbai u/s 263 for the assessment year 2005-2006.

2. Brief facts relevant for the issue involved in the appeal are that assessee, M/s. Apollo Consulting Services Corporation (hereinafter referred to as ACSC) is a non-resident company incorporated in USA. It has filed its return of income for the assessment year 2005-2006 on 31.10.2005 declaring "NIL" income. ACSC and International Business Machines Corporation (hereinafter referred to as IBM) based in USA had entered into a Global Agreement which is also known as 'Base Agreement' on 11.01.2002. By virtue of this agreement, ACSC agreed to provide IBM, USA and its global subsidiaries certain services. In the background of the Base Agreement, IBM India made deal with ACSC through IIC Systems Private Limited, India (hereinafter referred to as ISPL) for the services to be performed in the USA. For these purposes, contract was entered into by ACSC and ISPL on 2.1.2004 for procuring software personnel in USA for the projects of IBM in USA and ISPL and IBM India had also entered into a contract w.e.f. 1.1.2004 in this regard. Thus, whenever, IBM require software personnel for the projects outside India, IBM enters into statements of work agreement with ISPL, detailing the scope of work, description of services required, skill required for software personnel etc. which is then passes over the statement of work to ACSC. During the previous year, as per the agreement between IBM India and ISPL, ACSC provided technical manpower to IBM in USA according to its requirements. Thus, the link between the three entities was that, purchase orders are issued by IBM to ISPL who in turn passed that to ACSC. The entire arrangement was for providing skilled manpower in USA. It is also relevant to mention herein that ISPL and ACSC are affiliates and are subsidiaries of Indotronix International Corporation, USA. Thus, the whole of the business activities are basically governed by the three agreements and Base Agreement covers over all the relationship.

3. The assessee's case during the course of the assessment proceedings was that the personnel provided by it performed their services wholly in the US and no part of the activity was carried out in India. As the activities were carried out outside India, no part of income accrues or arises in India. Further, the payments are also received outside India, no part of income his taxable in India as income neither received in India not can it be said to have deemed to have been received in India. The Assessing Officer in order to examine the nature of services and the terms of agreements required the assessee to furnish the copies of various agreements and ancillary documents related to the activities carried out during the year under consideration. It was pointed out before the AO that as per the agreements dated 2.1.2004 between ISPL and ACSC, it was to assist ISPL in procuring required personnel for projects outside India, mainly in the USA as specified in purchase orders / work orders issued under this agreement. Such order specifies the name of the client to whom the services are to be rendered by the personnel of the assessee, on-site location, number of hours, skill required, rate per hour, etc. Thus the assessee's activity was purely recruiting and supplying of skilled personnel to IBM India through ISPL. These technical personnel were neither the employee nor were they working under the supervision of the assessee i.e. ACSC. The recruited personnel were independent personnel contracted by the assessee by virtue of separate contracts in terms of clause 2.5 of the agreement between IBM India and ISPL and payment was made on hourly basis as per the methods agreed by the assessee with IBM. Thus, payment made was by the IBM to the assessee was for time value or the remuneration of the supplied personnel employed by the IBM's clients project outside India and it has no relationship or nexus with the work or services or software developed by the said personnel for the IBM's client. All these facts have been narrated in para no.3 of the assessment order.

4. During the course of assessment proceedings the assessee was required by the Assessing Officer to give reasons for claiming the income earned on providing technical manpower to IBM India in USA were not taxable in India. In response to this, the assessee vide letter dated 14.11.2007, gave detailed submission regarding the nature of services provided by the assessee company and that the payment received is neither Fees for Technical Services (FTS) within the meaning of section 9(i)(vii) nor under Fees for Included Services (FIS) as per Article 12(4)(b) of Indo Us DTAA. The submission of the assessee has been incorporated from pages 3 to 5 of the assessment order. After carefully considering the submissions and the agreement submitted by the assessee, the Assessing Officer accepted the contention of the assessee that the payment received were neither in the nature of Fees for Technical Services nor Fees for Included Services. He, thus, accepted the return of income of the assessee at "NIL" in the order passed u/s 143(3) vide order dated 28.12.2007.

5. Learned DIT called for the assessment records and on perusing the same she was of the view that as per the Base Agreement dated 11.1.2002 between IBM and ACSC (i.e. assessee), it was required to provide the Deliverable and Services described in 'Statement Of Work' issued

under the Base Agreement. Deliverable also included developed works preexisting materials and tools as per the definition in the Base Agreement and the Developed Work meant all the work product including software and its externals. Further it was observed by the DIT that the technical services agreement between IBM and ISPL, the scope of services also included the software development activities. From this it was deduced by the DIT that the nature of services to be provided under the various agreements was totally different and not simply supply of technical manpower and these aspects have not been examined by the AO. Therefore, to this extent, the assessment order is erroneous and has resulted in prejudice to the Revenue. Accordingly a show cause notice u/s 263(1) was issued to the assessee on 17.3.2010.

6. In response, the assessee submitted detailed submissions which have been incorporated in para 6 of the impugned order. The basic contention of the assessee was that the contract between ACSC and IBM was terminated during the assessment year 2005-2006 and until the termination of the contract, payment received by ACSC was from ISPL. It was further submitted that the contract was purely for the manpower supply contract with IBM and fresh contract of such supply of manpower was signed with ISPL and that the ACSC was not having any permanent establishment (PE) in India. The provisions of certain standard conditions of the Base Agreement for supply of such manpower services are relevant for the purpose of an agreement between ACSC and the ISPL. Moreover, from the nature of services performed by the personnel employed by ACSC would hardly be relevant as they were not responsible to anyone either ACSC or ISPL. It was also submitted that neither u/s 9(i)(vii) nor under Article 12 of Indo US DTAA was applicable on supply of such independent personnel.

7. The Ld DIT after considering the submissions of the assessee held that the Assessing Officer has failed to appreciate the nature of services to be provided under the contract between ISPL and ACSC for AY 2005-2006 which was different from the services provided as per Base Agreement dated 11.1.2002 between IBM and ACSC. The relevant finding of the Ld DIT while setting aside the assessment order with a direction to make necessary enquiries is as under:

"The submissions made by the assessee have been carefully considered. On perusal of records, it is seen that the Assessing Officer has failed to appreciate that the nature of services to be provided under the contract between ISPL and Apollo for AY 2005-06 was different from the services provided as per base agreement dated 11.1.2002 between IBM and Apollo. There was no reference to the base agreement in the other two agreements produced before the AO. Further, the AO has not called for the agreement between IBM India and ISPL nor has he verified the exact nature of services rendered to IBM and ISPL by Apollo. On verification of contract of Apollo with ISPL, it is seen that Apollo is required to screen the personnel for procuring them in the required discipline using its own appropriate independent skill and judgment. Therefore, the assessee has made available its technical knowledge and expert skill in rendering these services and accordingly payments for the same prima-facie constitute "Fees

for Included Services" within the meaning of Article 12 of the India-US DTAA. The AO has also not examined what is the agreement between ISPL and its other clients in India. The AO has failed to verify the exact nature of services rendered by the personnel who were appointed by M/s. Apollo and also to verity whether the same amount to "fees for included services" within the meaning of Article 12(4) of the DTAA between India and USA. As the AO has not examined these aspects the assessment order dated 28.12.2007 is erroneous and has resulted in prejudice to the revenue."

8. Ld. Counsel on behalf of the assessee submitted that the AO has examined not only the Base Agreement but also the other two agreements which is evident from the narration given in para no.2 of the assessment order. Not only the nature of services but also the specific issue of whether the payment received was in the nature of Fees for Technical Services under section 9(i)(vii) or under Fees for Included Services under Article 12 has been gone into by the Assessing Officer which is evident from the fact that the assessee's explanation, which is narrated in pages 3 to 5 of the assessment order, has been duly considered by the AO. Once the Assessing Officer has examined this issue and has come to a conclusion and has taken a possible view, revisionary jurisdiction u/s 263 cannot be invoked. Further, he submitted that, what are the actual services rendered are borne out from the agreement between ISPL and IBM and there maybe clause of various services in the agreement but one has to be look into what was the actual services rendered by the assessee. The assessee has purely provided recruitment services which do not fall within the meaning of FIS or FTS. The Ld DIT in her entire order has not proved that the assessee has rendered any other services besides this agreement. The most important fact which was brought to our knowledge by the learned AR was that in the case of ISPL, for the assessment year 2005-2006, similar issue had arisen with regard to deduction of TDS u/s 195, based on the same agreement and similar services have before the ITAT, Hyderabad Bench in Asstt. CIT v. IIC Systems (P.) Ltd. [2010] 127 TTJ 435 (Hyd.). The Hon'ble Tribunal vide its order dated 9.10.2009 has discussed this issue in detail and categorically held that primary services rendered by the ACSC (i.e. assessee here in this case) to ISPL is akin to recruitment and placement service rather than making available any technology, plan, design etc. Lastly, in support of his contention he submitted that once a possible view has been taken and there is no finding in the order u/s 263, that assessment order is erroneous in law and also prejudicial to the interest of revenue, revisionary jurisdiction u/s 263 cannot be invoked. In support of his contention, he relied upon the following case laws.

(i) CIT v. Gabriel India Ltd. [1993] 203 ITR 108/71 Taxman 585 (Bom.)

(ii) CIT v. Max India Ltd. [2007] 295 ITR 282/[2008] 166 Taxman 188 (SC)

(iii) Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83/109 Taxman 66 (SC)

(iv) Grasim Industries Ltd. v. CIT [2010] 321 ITR 92/188 Taxman 327 (Bom)

(v) Ranka Jewellers v. Addl. CIT [2010] 328 ITR 148/190 Taxman 265 (Bom.)

(vi) CIT v. Development Credit Bank Ltd. [2010] 323 ITR 206/[2011] 196 Taxman 329 (Bom.)

9. Per contra, learned CIT-DR submitted that the AO has not applied his mind at all which is evident from the fact that he has just incorporated assessee's reply and has drawn conclusion in just two lines. The Assessing Officer was required to give detail reasons as to why he has accepted the assessee's explanation. The Assessing Officer had failed to carry out any enquiry or examination and has passed very cryptic order and, therefore, the view taken by the DIT in the impugned order is justified. In support of his contention he has also relied upon the decision of Hon'ble High Court of Himachal Pradesh in the case of CIT v. Himachal Pradesh Financial Corpn. [2010] 186 Taxman 105 that lack of proper enquiry and non-application of mind leads to assumption of revisionary jurisdiction u/s 263 of the Act. Further, all the three agreements were not before the AO. He strongly relied upon the various findings and observations given by the DIT regarding various agreements. In the rejoinder, learned Counsel submitted that all the three agreements were before the AO and the agreement between ISPL and ACSC was more relevant to the issue involved. The DIT has not pointed out either from the record or from the agreement that the assessee has actually carried out any technical services. He strongly relied upon the ITAT decision of Hyderabad Bench in the case of ISPL.

10. We have carefully considered the rival submissions and also perused the material placed on record. So far as the facts, which have been narrated by us in the above paragraphs from 2 to 7 there is no dispute. For acquiring the jurisdiction u/s 263, the CIT or DIT (herein this case) has to satisfy two conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous and (ii) it is prejudicial to the interest of the Revenue. If any one of them is absent, section 263 cannot be invoked. From the perusal of the assessment order and the replies submitted during assessment proceedings, it is seen that the Assessing Officer has required the assessee to furnish all the relevant agreements and to give justification for the nature of services rendered. After examining this, he has accepted the contention and explanation of the assessee, though not in a very speaking and elaborate words. However, while accepting such a contention, it is not necessary that the Assessing Officer must passed a lengthy order for justifying the acceptance of the contention which are otherwise acceptable in view of documents and evidences furnished before him. In such a situation, when CIT / DIT is holding the order as erroneous and prejudicial to the interest of revenue must give reasons for his conclusion that assessment order which has been passed even though in a cryptic manner was erroneous in

law and on facts and is also prejudicial to the interest of revenue. Such a condition has to be spelled out categorically from the facts on record. Here in this case, the Ld DIT has observed in the impugned order that the Assessing Officer has not examined the 'Base Agreement' and has not examined the exact nature of the services. This observation seems to be prima facie incorrect as the AO has himself mentioned about the nature of services in para nos. 2 & 3 and also considered the detailed explanation given by the assessee which has also been elaborated by us in foregoing paragraphs. Based on these documents, the Assessing Officer has taken a possible view that it was not in the nature of FTS or FIS. The Ld DIT has set aside the entire matter to re-examine this issue from the angle where the assessee has made available any technical knowledge and expert skill in rendering these services. The DIT has even gone further by stating that assessee has, in fact, made available the technical knowledge and skill and therefore the payments for the same is FIS within the meaning of Article 12 of Indo-US DTAA. Such an observation or finding is not wholly borne out from the agreements or records. One or two terms in an agreement will not per se lead to any conclusion of providing any technical services, unless something is found in terms of actual work order, bills and payment received for services rendered. The entire substance of the agreement is to be seen. From the perusal of the ITAT order in the case of ISPL as has been referred to by the learned Counsel, it is seen that in the case of ISPL, this aspect of the matter and the transactions among the ACSC, ISPL and IBM has been taken duly note of and examined in the same very assessment year 2005-2006 by the Tribunal. The relevant finding of the Hon'ble Tribunal for the sake of ready reference is reproduced hereunder:

"Thus, the primary question that arises is whether the payments in question made by the assessee to the ACSC, were by way of fee for technical services or merely by way of payment for supply of personnel. The next question is whether the payments in question can be considered as fees for 'included service' or not. The ultimate question that arises is whether the payments in question are taxable as business profit in the hands of the recipient as per Article-7 of the DTAA between India and USA.

However, in terms of DTAA between India and USA, it needs to be examined whether the said remittances are payments made by the assessee company to the ACSC falling within the definition of 'fee for included services' as Article 12(4) of the DTAA, since the provisions of DTAA, as held by the Apex Court in the case of Azadi Bacho Andolan (263 ITR 706), shall prevail over the provisions of the Income-tax Act, to the extent the same are beneficial to the assessee. The CIT (A) after elaborate discussion with regard to the various aspects of the matter, in the light of the contentions of the assessee, came to the conclusion that so far as DTAA between India and USA is concerned, consultancy services which are not technical in nature, cannot be treated as 'fee for included services'. We also notice that the fact that in the instant case the agreement of the assessee with ACSC is only for manpower supply or supply of technical personnel and it is well accepted even by the assessing officer is para-2 of the impugned orders passed under sec. 201(1) r.w.s.195 of the Act. The DTAA between India and

USA also clarifies that the provision of services may require technical input by a person providing the person, which does not per se means that technical knowledge or skill are made available to the person purchasing the service. Similarly, use of the product which embodies technology shall not per se be considered to make the technology available and rendering of the service must enable the payer to apply such technology. Moreover, even if there is a transfer of developed work, software etc., it is not the ACSC but the assessee who transfers the right. It appears that neither the assessee company nor the ACSC are engaged in computer programming activity, which is evident from paragraph 1 and 2 of the orders of the assessing officer and even the developed work never belonged to the assessee company or the ACSC as referred by the assessing officer in his orders. In the circumstances, as correctly held by the CIT (A), the question of treating the payments as 'fees for included service' would not arise at all. The orders of the assessing officer fastening the liability to TDS on the assessee are based on the agreement between the assessee and the IBM in order to determine the nature of the services rendered by the ACSC to the assessee. We agree with the CIT (A) that what was required to be looked into is whether there is an element of technical services in the agreement between the assessee and the ACSC, which gives rise to income that can be brought to tax in India. It is because the payments remitted by the assessee to ACSC flows from the agreement between the assessee and ACSC and not from the agreement between the assessee and IBM. In our considered view, the primary services rendered by the ACSC to the assessee is akin to recruitment and placement service rather than making available any technology, plan, design, etc. One important aspect we noticed is that the final product or result on account of payment of technical personnel by the assessee through the ACSC is not predetermined by the ACSC or the assessee. The Department has not brought anything on record to show that any product was developed by the assessee company and transferred to IBM.

Thus, Neither the agreement nor the invoice refer to any technical services rendered or any product or software developed for IBM. All the agreements, invoices and related documents produced before us lead to the fact that the payments have been made only for supply of manpower for certain amount of hours and nothing more. Since there is no technology, skill, experience, technical plan, design, etc. had been made available either by the assessee or the ACSC as held by the Cit (A), invoking the provisions of Article 12(4)(b) of the DTAA for treating the payments as chargeable to tax in India, is not justified. In our view, the CIT (A) was justified in holding that the services rendered by the ACSC for which remittances in question have been made by the assessee are akin to those of a recruitment or placement agency, and would not come within the purview of 'fee for included services' with the meaning of Article 12(4)(b) of the DTAA between India and USA. Even if the payments would constitute fees for technical services u/s 9(1)(vii) of the Income Tax Act, in view of sec. 90(2) of the Act, the Indian company has option to be governed by the provisions of the Tax Treaty, if the same are more beneficial to it. Accordingly, the payments so made by the assessee company to ACSC will not be chargeable to tax in India, in view of the provisions of the DTAA between India and USA."

11. Thus, the view taken by the ITAT is in fact directly contrary to the view taken by the Ld DIT and, therefore, we can safely presume that finding and view taken by the AO in accepting the assessee's explanation is a better possible view. Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. (supra) and Max India Ltd. (supra) has held that, on one of the two courses permissible by law has been adopted by the Assessing Officer and it has resulted in loss of the revenue and where two views are possible and the Assessing Officer has taken one view with which CIT does not agree, it cannot be treated as erroneous or prejudicial to the Revenue, unless the view taken by the AO is unsustainable in law.

12. Thus, in view of above, we hold that the setting aside of the assessment order by the DIT u/s 263 is neither sustainable in law nor on facts and, therefore, the impugned order passed by the DIT is cancelled.

13. In the result, the appeal filed by the assessee is allowed.