

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE

BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

ITA Nos.15 & 16/PUN/2022

निर्धारण वर्ष / Assessment Years : 2011-12 & 2013-14

ACIT, Circle 12, Pune	Vs.	M/s Vishay Components India Pvt. Ltd. Loni Kalbhor, Near Pune (C.Rly), Pune – 412201 PAN: AAACB9652L
Appellant		Respondent

Assessee by Shri Darpan Kirpalani
and Ms Shaily Agarwal
Revenue by S/Shri B. Koteswara Rao
and M.G. Jasnani

Date of hearing 13-01-2023
Date of pronouncement 20-01-2023

आदेश / ORDER

PER S.S. GODARA, JM :

These Revenue’s twin appeals for AY 2011-12 and 2013-14 arise against the CIT(A), Pune-5’s separate orders, both dated 28-02-2020, passed in case Nos.ITBA/APL/S/250/2019-20/10258886961(1) and ITBA/APL/S/250/2019-20/1025888439(1) in proceedings under Section 143(3) of the Income Tax Act, 1961, in short ‘the Act’, respectively.

Heard both the parties. Case files perused.

2. It transpires during the course of hearing that both these appeals instituted on 03.01.2022 suffer from identical 597 days delay. The same stands condoned since falling in Covid-19 pandemic outbreak period in light of hon'ble apex court's decision in Re Cognizance for Extension of Limitation dated 10.01.2022. Ordered accordingly.

3. The Revenue's identical sole substantive grievance pleaded in both these appeals seeks to revive the Assessing Officer's identical action invoking section 40(a)(i) disallowance of Rs.1,52,35,409/- and Rs.4,76,17,077/-; assessment year-wise, respectively, which has been reversed in the CIT(A)'s detailed discussion in the "lead" A.Y. 2011-12 as follows:

"[4]. In Ground No.1 the Appellant agitates that the learned A.O. has erred in disallowing a sum of Rs.1,52,35,409/- u/s 40(a)(i) of the Act and while making the above disallowance, the learned A.O. has erred in recharacterising the sum paid by the Appellant as "Royalty" in view of explanation 6 to section 9(1)(vi) disregarding the real character of the sum paid as reimbursement of expenses paid to Vishay Intertechnology Asia Pte Ltd.("Vishay Singapore").

[5] The issue finds mention at para 6 onwards in the Assessment order. The Assessing Officer observed that the Assessee had paid an amount of Rs.3,49,10,791/- to its associated Enterprise Vishay Intertechnology Asia Pte Ltd, Singapore and no tax was deducted at

source on the payment. In this regard, the Assessee was asked to explain why the expenditure should not be disallowed u/s. 40(a)(i) since tax was not deducted at source. In reply to above, the Assessee submitted his reply which is reproduced by the Assessing Officer at Para 6.1 of the Assessment order and is not being reproduced here for the sake of brevity.

5.1 The above submission was considered by the Assessing Officer. In his submission, the Assessee had claimed that the payment of Rs.3,49,10,791/- represented only reimbursement of cost to its non-resident Associated Enterprise namely Vishay Intertechnology Asia Pte Ltd, Singapore. It is on this ground alone that the Assessee claimed that tax was not deductible u/s. 195. In support of its contention, the Assessee had relied upon the decisions of Honorable Supreme Court in the case of GE India Technology Centre Pvt Ltd vs CIT (2010)(327 ITR 456), M/s Invensys Systems Inc (2009-TIOL-21-ARA-ITXAAR), Honorable Bombay High Court in the case of DIT vs Krupp GMBH (354 ITR 173) CIT vs Siemens Aktiengesellschaft (2009)177 Taxman 81(Mumbai High Court), CIT vs TELCO Ltd (245ITR 823)(Mumbai High Court), CIT vs Dunlop Rubber Co Ltd (142 ITR 493) (Calcutta High Court), Raymond Ltd v DCIT 80 TTJ 120 (Mumbai Tribunal) and Indian Rayons & Inds Ltd vs CIT (ITO N0/6/4/88 of 2001) (Mumbai Tribunal).

5.2 The Assessing Officer contended that the judgment of the Hon'ble Supreme Court in the case of GE India Technology Centre Pvt Ltd vs CIT (2010)(327 ITR 456) is squarely on the issue. Hence, being law laid down by the Apex Court, it would suffice to analyze the Supreme Court's judgment and draw the ratio therefrom. The Assessing Officer further stated that in the case of GE India Technology Centre Pvt Ltd, the Supreme Court has nowhere suggested that the test for deducting tax at source (TAS) is the "quantum of income embedded in the sum paid to the non-resident which is chargeable to tax". On the contrary, the test which the Supreme Court had said should be applied is whether "the sum paid is chargeable under the provisions of the Income Tax Act, 1961 " which, in fact, is the wording of section 195(1) "Quantum of income embedded in the sum paid" is a subset of the "sum paid to the non-resident"; The Assessee is erroneously trying to find similarity of meaning in these two phrases. In order to properly appreciate the Supreme Court's findings, the Assessing Officer has reproduced the

relevant portions of the Court's order at Para 6,3 of the Assessment order.

5.3 On perusal of the relevant portion of the Court's findings, Assessing Officer found it clear that what the Hon'ble Supreme Court has discussed is the character of the sum paid to the non-resident. If the character of the sum paid is such that it is chargeable under the provisions of the Act, then liability to deduct TAS u/s 195 arises. This is the threshold. In such an event, there is no mandate to further go into the issue of the quantum of income embedded in such chargeable sum'. The Assessee's argument was that it had been cross charged at cost by Vishay Singapore; as a result, Vishay Singapore had earned no income and therefore, TAS was not deductible u/s 195. Here, the Assessee had crossed the threshold point that the sum paid was chargeable under the Act but is, thereafter, claiming that no income is embedded, in such sum.

5.4 The Assessing Officer further has pointed out that the sentence "The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident" is likely to be mis-interpreted to-mean that the Supreme Court indicated that TAS is to be deducted only on the net income or profit embedded in the sum paid to the non-resident. However, for a harmonious interpretation of the Hon'ble Supreme Court's judgment, it is necessary to take into account the entire tenor of the judgment, and if one does so, there is only one valid interpretation possible, namely that "deduction of TAS is required to be done on the composite sum paid to the non-resident which is chargeable to tax under the Act". This is what the SC had held in the case of Transmission Corporation of A.P. Ltd Vs. CIT [239 ITR 587 (SC)] also.

5.5 The Assessing Officer further stated that it is established that it is the character of the sum paid to the non-resident which needs to be examined to determine whether the sum paid is chargeable under the provisions of the Act or not, let us examine the character of the sum paid by the Assessee to its non-resident Associated Enterprise. The Assessee has paid an amount of Rs. 3,49,10,791/- to its Associated Enterprise Vishay Intertechnology Asia Pte Ltd, Singapore. As submitted by the Assessee, the payment was towards leased line charges (communication cost or Equant charges), IT charges, IT

support cost, and allocation towards development, maintenance, upgradation, backup, security maintenance of global IT infrastructure/security/web charges. The Assessing Officer found it clear from the above that Vishay Singapore had made available various facilities to the Assessee for which the Assessee had made above payment of Rs.3,49,10,791/". The nature of the facilities indicates that the payments-were towards royalty. In this regard, at Para 6.9 the Assessing Officer has reproduced royalty payments as defined in section 9 of the Income Tax Act, 1961 as well as in Article 12 of the DTAA between India and Singapore.

5.6 On perusal of the DTAA Article 12, Para 3 the Assessing Officer stated that for the use of, or right to use any "process" is Royalty. Likewise, as per sub-clause (iii) of Explanation 2 to Section 9(i)(vi) of the Income Tax Act, 1961, "Royalty" includes consideration for the use of any process. Further, in Explanation 6 to Section 9(i)(vi), it is clarified that "Process" includes transmission by satellite (including up-linking, amplification, conversion for downlinking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret. Further, in Section 9(i)(vi), Explanation 2, sub-clause (vi), Royalty is defined as consideration for the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v). From the above definitions of Royalty, it is-clear that the services provided by Vishay Singapore are "Processes" and also, Vishay Singapore is "rendering services" in connection with such "Processes". Hence, it is held that payment of Rs.3,49,10,791/- made by the Assessee to its Associated Enterprise Vishay Intertechnology Asia Pte Ltd, Singapore falls in the category of "Royalty". Therefore, the Assessee was liable to deduct tax at source. The Assessee had failed to do so. In these circumstances, in view of the provisions of section 40(a)(ia), the Assessing Officer disallowed the expenditure of Rs.3,49,10,791/-claimed by the Assessee. The Assessee was requested to furnish the break-up of this expenditure amongst its DTA, EOU and STPI units so that it could be worked out how much of the disallowance would become eligible for deduction u/s 10A & 10B and how much would need to be added to the returned income. In this regard, the Assessee submitted unitwise expenditure which is reproduced at Para 6.13 in the Assessment order. Thus, in view of the provisions of section.40(a)(1), the Assessing Officer disallowed total amount

of expenditure; amounting to Rs.1,52,35,409/- and was added to the returned income of the Assessee.

[6]. The written submission dated 25.09.2017, 27.09.2019 and 23.10.2019 and filed during the course of Appellate proceedings are considered and placed on records.

[7] I have perused the material on record and the contention of the Appellant carefully. Ground No. 1 related to the disallowance made u/s, 40(a)(ia) of the Act with respect to the payment made of Rs.1,52,35,409/- to the Appellant's associated enterprises Vishay Enterprise Intertechnology Asia Pvt.Ltd. Singapore on account of cross charge of certain expenses. It is the Appellant's claim that these charges being in the nature of leased line charges are incurred globally by Vishay Enterprise Intertechnology Asia" Pvt. Ltd' Singapore and later on reimbursed on cost-to cost basis. There, is therefore no element of additional mark-up or income in it. The Appellant has also vide detailed submissions quoted above explained how the AO's reliance on treating the same as royalty and therefore applying provisions of Explanation 6 to section 9(16) of the Act r. w. the India Singapore DTAA is incorrect since there are no processes of royalty involved for these charges. Further the appellant has stated that the Hon. Pune ITAT in the appellant's own case for A.Y. 2012-13 ITA No. 500/PUN/2017 has held as under:

"Ground 2:- Disallowance under section 40(a)(ia) of the Act

Erred in disallowing an amount of Rs. 4,34,70,794 under section 40(a)(ia) of the Act by re-characterizing reimbursement of expenses paid by the appellant to Vishay Intertechnology Asia Pvt. Ltd. Singapore as 'Royalty' in view of explanation 2 and explanation 6 to section 9(1)(vi) of the Act by disregarding the actual nature of payment i. e. reimbursement of expenses which was also accepted by the learned TPO:

.....

.....

"The associated enterprise had cross charged certain expenses to Vishay India which were in the nature of leased line charges (Communication cost Equant charges), IT charges, IT support cost and allocation towards development, maintenance, upgradation, backup, security maintenance of global IT infrastructure/ security/ web charges. The assessee explained

that the said expenses were incurred globally by associated enterprises and later on reimbursed from Vishay group entities, including the assessee on cost to cost basis. Since it was reimbursement of expenses, it did not involve any element of additional markup or income and hence, there was no requirement to deduct tax at source."

7.1 *The Hon'ble Pune ITAT in the said case relied on the decisions of Hon'ble Supreme Court, jurisdictional Bombay High Court and Jurisdictional Pune ITAT and held as follows:*

"Further, the Hon'ble Supreme Court also in DIT (IT) vs. A. P. Moller Maersk AS (supra) and the Hon'ble Bombay High Court in CIT vs BNP Paribas SA (supra) have held that when it is case of reimbursement of expenses, then there is no requirement of deduction of tax from such payments. Accordingly, we hold that there is no merit in the orders authorities below in holding the assessee liable for such non deduction of tax at source. Reversing the same, we allow the claim of assessee and disallowance made under section 40(a)(ia) of the Act is thus, deleted. The ground of appeal No. 2 raised by the assessee is thus, allowed."

7.2 *Since the facts and issue in the ground of appeal are exactly same, respectfully following the above decision of the Jurisdictional Hon. Pune ITAT it is held that the AO's treatment of such payments as royalty and therefore liable for TDS u/s. 195 is incorrect. Thus the disallowance so made u/s 40(a)(ia) is directed to be deleted. Accordingly, Ground No.1 is allowed."*

4. Learned DR could hardly dispute the clinching fact that this tribunal co-ordinate bench's recent orders in assessee's appeal in ITA No.500/PUN/2017, dated 12.09.2019 (A.Y. 2012-13) and in ITA No128/PUN/2020, dated 25.05.2021 (A.Y. 2015-16) have already decided the very issue against the department on the identical reasoning that the latter's payments involve an instance of

mere reimbursement of expenses on cost to cost basis rather than having any income element requiring TDS deduction attracting section 40(a)(i) disallowance. We further note that the department has not pleaded any distinction on facts or law, as the case may be, *qua* instant sole issue in all these assessment years. Faced with the situation, we hereby adopt judicial consistency to affirm the CIT(A)'s foregoing identical findings deleting section 40(a)(i) disallowance in both these years. Ordered accordingly.

No other ground or argument has been raised before us.

5. These Revenue's twin appeals ITA Nos.15 & 16/PUN/2022 are dismissed in the above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the Open Court on 20th January, 2023.

Sd/-
(DIPAK P. RIPOTE)
ACCOUNTANT MEMBER
पुणे Pune; दिनांक Dated : 20th January, 2023
GCVSR

Sd/-
(S.S. GODARA)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A), Pune-5, Pune
4. The Pr.CIT, Pune-4, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे “B” /
DR ‘B’, ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	16-01-2023	Sr.PS
2.	Draft placed before author	17-01-2023	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
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9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		