<u>आयकर अपीलीय अधिकरण "एल" न्यायपीठ मुंबई में।</u>

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L", MUMBAI

श्री बी. रामकोटय्य, लेखा सदस्य एवं श्री विवेक वर्मा, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND SHRI VIVEK VARMA, JUDICIAL MEMBER

आयकर अपील सं. 4229/मुम/2011
निर्धारण वर्ष A.Y. 2004-05
ITA No. 4229/Mum/2011
(Assessment year : 2004-05)

मे.सं. सि य्ल य्स ऐ ईडिया लिमिटेड, 8/यफ़ द्लमल हाउस, नरिमन पौइंट, मुंबई-400 021 M/s CLSA India Ltd., 8/F Dalamal House, Nariman Point, Mumbai - 400 021 स्थयी लेखा सं.:PAN: **AAACP 0484 C**	Vs	Dy Director of Income-tax, International Taxation) 1(2), Mumbai
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
अपीलार्थी की ओर से Respondent by	:	श्री नितेष जोशि, श्री के. के. वेद Shri Nitesh Joshi, Shri K.K. Ved
प्रत्यर्थी की ओर से Applicant by	:	मिस. निरज प्रधान Ms Neeraj Pradhan

सुनवाई की तारीख /Date of Hearing : 29-04-2013
घोषणा की तारीख /Date of Pronouncement: 29-04-2013

<u>आ दे श</u>
<u>O R D E R</u>

<u>श्रि विवेक वर्मा, न्या स:</u>
<u>PER VIVEK VARMA, JM:</u>

The appeal is filed by the assessee against the order of CIT(A) 10, Mumbai, dated 17.12.2011, wherein the following grounds have been taken:

> *Based on the facts and circumstances of the case, the Appellant respectfully submits that the Learned Commissioner of Income Tax (Appeals) erred in passing an order under section 250 of the Income Tax Act,1 961("ITA") for Assessment Year 2004-2005, on the following grounds:*
>
> *1. That the Commissioner of Income Tax (Appeals) erred in passing an order holding the Appellant as an 'Assessee in default' for*

non-deduction of tax at source on the basis that payment made to the Appellant as referral fees of Rs. 7,73,58,162 were chargeable to tax in India as fees for technical services and hence liable to tax deduction at source under section 195.

2. *That the learned Commissioner of Income Tax (Appeals) has also consequently erred in upholding the order of the AO under section 201(IA) to levy interest on the amount ought to be withheld by the Appellant under the notice of demand.*
3. *That the Commissioner of Income Tax(Appeals) erred in failing to appreciate that the referral services rendered by CLSA Ltd. (Hong Kong) are not in the nature of 'managerial', 'technical' or 'consultancy' services as set out in explanation 2 to section 9(1) (vii) of the ITA.*
4. *That the Commissioner of Income Tax(Appeals) erred in not appreciating the fact that the referrals made by CLSA Ltd. to the Assessee are purely in the nature of client introductions and support services and does not involve rendering any kind of managerial, technical or consultancy services as neither did it provide any services in relation to any organizational policies of the Assessee, nor did it provide services to the Assessee which involved the use of a technical skill or specialized knowledge and lastly it did not provide any expert advice in relation to undertaking broking services etc.*
5. *That the Learned Commissioner of Income Tax(Appeals) erred in treating the income derived by CLSA Ltd. (Hong Kong) in respect of services rendered abroad to the Appellant accruing / arising in India as per section 5(2) and section 9(1)(i) of the ITA.*
6. *That the Commissioner of Income Tax (Appeals) has consequently erred in holding the Appellant liable for non-deduction of tax under section 195 of the ITA read with section 201 of the ITA.*
7. *That without prejudice, the learned Commissioner of Income Tax (Appeals) failed to consider the fact that there were contrary opinions within different departments of the Income Tax department and the Transfer pricing officer had in his order upheld that no services were rendered by the Non-Resident in the nature of referring clients to the Assessee.*

The Appellant submits that each ground of appeal is without prejudice to the other. Further the Appellant craves leave to add, alter, vary, omit, substitute or amend any of the above grounds of appeal, at any time before, or at the time of the appeal, so as to enable the Hon'ble Tribunal to decide this appeal in accordance with law, justice and equity".

2. The facts in brief are, that the assessee is a part of CLSA Ltd. group, based in Hongkong, who are the leading equity brokering company in the Asia Pacific Market. In the year under consideration, the assesee paid to its parent affiliate a sum of Rs. 7,73,58,162/- as referral fee as per the Referral Agreement dated 07.02.2013. In the assessment proceedings the AO noticed that the assessee has not deducted tax at source on this amount of Rs. 7,73,58,162/- as per the

provisions of section 195 of the Income Tax Act, 1961. It was also show caused as to why the assessee be not treated as *assessee in default* under the provisions of section 201(1A) of the Act.

3. The assessee in its replies dated 26.03.2010 and 29.03.2010 contended that income to CLSA Limited, on account of referral fee was not chargeable to tax in India. It was also pointed out that CLSA Limited has paid its taxes and it also produced challans and therefore, the assessee was outside the mischief of section 201(1A) of the Act.

4. The AO, considered the above replies but held the same to be untenable and passed the order under section 201(1A), relying on the order of the CIT(A) dated 14.01.2008, wherein, the CIT(A), in quantum, and held,

> *"... Thus in view of the above discussion I hold that the referral fees received by the appellant qualified as 'fees for Technical Services', and is income of the appellant arising In India. Hence the addition of Rs 77,358,162/- made by the AO is confirmed and the appeal in respect of this Ground No.5 is dismissed".*

5. Aggrieved, the assessee approached the CIT(A) before whom the assessee reiterated its submissions.

6. The CIT(A) held,

> *"...the submission of the assessee are also not acceptable in view of the decision of the Bombay High Court in the case of CIT vs NGC Network Asia LLC (313 ITR 187), all Income of a non resident is tax deductible and hence the interest under section.2348 is not chargeable in the case of nonresident assessee. In the present case, it is very clear that the non resident has earned income from Indian company and hence such income would be subject matter of tax deduction. Thus In this case the assessee was bound to deduct tax at source on the payments made to non-resident company. However, the assessee has failed to deduct tax on the referral fees paid of Rs.7,73,58,162/-. On such amount income tax ought to have been deducted @ 20.50% (Including surcharge @ 2.5%). Accordingly, the AO treated the assessee in default under section 201(1A) of the Act and held that the assessee was bound to deduct tax under section 195 of the Act which it has failed to do so. Therefore, It was held that the assessee is in default in respect of the taxes of Rs. 1,58,58,423/- (20.50% including surcharge @ 2.5%) of Rs. 7,73,58,162/- ..."*

7. The issue before us is whether at all, the assessee could be held as assessee in default in the particular circumstances as in the instant case. The AR, pointed out that the issue has since been decided by the coordinate Bench in the case of CLSA Limited, in ITA no. 2010/Mum/2008 dated 18.01.2013, wherein ground no. 2, as raised was, *"The issue in ground no. 2 relates to the addition of Rs. 7,73,58,162/- made by the AO & confirmed by the learned CIT(A) on account of referral fees received by the assessee from CLSAI treating the same be in the nature of fee for technical service"*. The AR referred to the concluding para of the order, wherein, it has been held, *"… we hold that the referral fees received by the assessee is not taxable in India. Accordingly, the addition made by the AO and confirmed by the learned CIT(A) on this issue is deleted and ground no. 2 of the assessee's appeal is allowed"*.

8. The AR, therefore, submitted that since the issue is directly covered the decision in ITA no. 2010/Mum/2008, the appeal merits to be allowed.

9. The DR placed reliance on the order of the revenue authorities.

10. We have heard the arguments and have perused the orders of the revenue authorities and the order of the coordinate Bench of ITAT in ITA no. 2010/Mum/2008 in the case of CLSA Limited *(supra)* wherein, it was held in the recipient's case, that no tax was exigible on the impugned receipts. Since no tax was exigible in the hands of the recipient, the question of assessee, being the payer, cannot be held to be assessee in default under section 201(1A).

11. In these circumstances, we hold that the revenue authorities are in error and that the assessee was not liable to deduct the tax at

source, we, therefore, set aside the orders of the revenue authorities, and direct the AO to delete the interest levied at Rs. 1,05,54,152/- under section 201(1A).

12. परिणामतः निर्धारिती की अपील स्वीकृत की जाती है ।

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

Order pronounced in the open Court on 29th April 2013.

Sd/-	**Sd/-**
(बी. रामकोटय्य)	**(विवेक वर्मा)**
लेखा सदस्य	**न्यायिक सदस्य**
(B. RAMAKOTAIAH)	**(VIVEK VARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई: दिनांक 29 अप्रेल 2013 **/ Mumbai, Date:** 29th April 2013

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.
2) प्रत्यर्थी /The Respondent.
3) आयकर आयुक्त(अपील) -22 , मुंबई / The CIT (A)-22 , Mumbai.
4) आयकर आयुक्त -10, मुंबई /The CIT–10, Mumbai,
5) विभागीय प्रतिनिधि "एल" , आयकर अपीलीय अधिकरण, मुंबई/
The D.R. "L" Bench, Mumbai.
6) गार्ड फाईल
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आदेशानुसार/By Order

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स
*Chavan, Sr. PS