Inter IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, 'D': NEW DELHI

BEFORE SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

AND

SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER

ITA No.2844/Del/2019
[Assessment Year: 2013-14]

Sujan Luxury Hospitality Pvt. Ltd. 1, Sri Aurobindo Marg, Hauz Khas, New Delhi-110016	Vs	Assistant Commissioner of Income Tax, Circle-24(2), C.R. Building, New Delhi-110002
PAN-AALCS5821M		
Appellant		Respondent

Appellant by	Shri Neeraj Jain, Adv. Ms. Mansha Sharma, CA
Respondent by	Shri Amaninder Singh Dhindsa, Sr. DR

Date of Hearing	**27.01.2025**
Date of Pronouncement	**25.04.2025**

ORDER

PER BRAJESH KUMAR SINGH, AM,

This appeal filed by the assessee is directed against the order dated 28.01.2019 of the ld. CIT(A)-16, New Delhi, arising out of order u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to 'the Act') dated 16.03.2016 relating to Assessment Year 2013-14.

2. Brief facts of the case:- The Assessing Officer noted that the assessee had claimed interest expenditure on inter corporate deposit amounting to Rs.24,53,696/-. The Assessing Officer further noted that the assessee during the year had advanced interest free loans to its three associate concerns and had not charged any interest on such advances. The Assessing Officer asked the assessee to explain why interest debited in the profit & loss account amounting to Rs.24,53,696/- being

expenditure not directly related for the enhancement of business income should not be disallowed. In reply assessee submitted as follows;

> *In this regard, it is respectfully submitted that such interest free ICDs to subsidiaries, also engaged in the business of hospitality and being in a financial losses were given in order to fund/support the business venture and strategic investments of the company: owning to our business interest held in such companies. Thus, it was fully based on commercial expediency and strategic nature of investment made earlier. In this regard, is placed on the decision of Supreme Court in the case of Hero Cycles Pvt. Ltd. vs. CIT, Ludhiana, 281 CTR 481, 236 Taxman 447 dated 05-11-2015 and S A Builders Ltd. vs. CIT, Chandigarh 288 ITR-1, 206 CTR 63 / dt. 14/12/2016. "*

2.1. The Assessing Officer did not agree with the same for the reasons as stated in para 3.3 of his order and disallowed a sum of Rs.24,36,140/- after allowing credit of Rs.17,556/- being interest received.

3. Aggrieved with the said order, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) after considering the facts accepted the plea of the assessee that the loans given to M/s Desert Friendly Camp Pvt. Ltd. and Rs.2 lakhs to M/s Sujan Art Ltd. were not hit by provisions of section 36(1)(iii) of the Act and directed the Assessing Officer to delete the proportionate disallowance of the interest on the said loans. However, in respect of interest free loan to M/s Forest Friendly Camp Pvt. Ltd.(hereinafter referred to 'FFC'), the ld. CIT(A) noted that the facts were somewhat different. The Ld. CIT(A) noted that perusal of the financial statement of M/s Forest Friendly Camp Pvt. Ltd. as on 31.03.2013 showed a profit of Rs.7,57,862/- and profit after tax of Rs.10,73,326/-. The Ld. CIT(A) noted that revenue from operations during the said period amounting to Rs.3,25,42,615/- was decent if not robust. The ld. CIT(A)

further noted that the perusal of the cash flow statement shows that the cash flow from operating activities was Rs.10,73,326/- up from a loss of Rs.72,62,839/- in the immediately preceding year. The Ld. CIT(A) observed that despite the improved financial health of M/s Forest Friendly Camps (P.) Ltd. the loan from the holding assessee company had increased fromRs.2.60 Crores to Rs.4.18 Crores. The Ld. CIT(A), in view of these facts observed that the claim of the assessee company that interest bearing loan taken from Asia Investment Ltd. and given to M/s Forest Friendly Camps (P.) Ltd. for the purpose of business does not ring true. In view of these facts, the Ld. CIT(A) held that the interest accrued on loans that were given to M/s Forest Friendly Camps (P.) Ltd. do not fall within the ambit of provisions of section 36(i)(iii) of the Act and therefore could not allowed to that extent. The Ld. CIT(A) directed the Assessing Officer to ascertain the interest incurred on the said interest free loan given to M/s Forest Friendly Camps (P.) Ltd. and disallow the same while giving the appeal effect.

4. Aggrieved with the said order, the assessee is in appeal before us.

5. The Ld. AR submitted that interest free loan given by the assessee company to M/s Forest Friendly Camps (P.) Ltd. was on account of commercial expediency. In this regard, the relevant extract of the written submission of the assessee is reproduced as under:-

> ***Re: Interest free loan given to subsidiary on account of commercial expediency***
>
> *As stated above, the appellant is in the business of providing hospitality services and is also holding strategic investments in*

subsidiary companies engaged in the same business of hospitality, i.e., running and operating hotels. FFC is niche concept-based luxury hospitality company specializing in the business of Forest Camps and is a wholly owned subsidiary of the appellant. The appellant's shareholding in the said company represented strategic / controlling interest therein. The appellant, being a veteran in the said field, had also entered into management agreements (Refer pages 45-55 of the paperbook) with subsidiary companies for rendering management consultancy services, in lieu of management fee. During the year under consideration, the appellant had earned management consultancy and service fee of Rs.77,88,894 (Refer, page 15 of the paperbook)

Thus, the appellant held deep business interest in the said companies: (i) by way of controlling interest and ii) interest by way of management agreement. The said companies were at a fledgling stage and required complete training as also managerial and financial support.

Accordingly, since the appellant had deep financial interest in the said subsidiaries, it was incumbent on the part of the appellant to lend funds and support such companies and interest expenditure, if any, would be considered as being incurred out of commercial expediency which would be an allowable business deduction under section 36(1)(iii) of the Act.

5.1. Further, the ld. AR relied upon various case laws in support of its claim.

6. The Ld. DR relied upon the orders of the authorities below.

7. We have heard both the parties and perused the materials available on record. The Ld. CIT(A) deviated from its predecessor dated 13.10.2016 order for AY 2012-13 on the ground that FFC had reported profits in the current year. However, the Hon'ble Apex court in the case of S.A. Builders Ltd. vs CIT 288 ITR 1 has defined commercial expediency as under:-

"an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal

obligation, but yet it is allowable as a business expenditure, if it was incurred on grounds of commercial expediency"

7.1. Thus, the Hon'ble Apex Court has given a very wide import to the expression 'commercial expediency'. In this case, as noted by the Assessing Officer as well as the Ld. CIT(A) that the assessee company had signed a specific agreement with the FFC and had submitted that the profitability of its associate FFC would impact the financial status and the business of the assessee concern. The Ld. CIT(A) took a very narrow view of the expression "commercial expediency" by observing from the financials of the FFC that it had earned profit during the year and therefore, it was out of scope of commercial expediency. We have carefully considered the same but do not agree with it. The transition of FFC from loss making to marginal profit was only during the year and that it would not per-se end the requirement of 'commercial expediency'. This is best left to the assessee to judge its requirement of commercial expediency unless the Assessing Officer makes it out a case that commercial expediency is no longer required. The commercial expediency does not mean the support by a holding company to its associate concern only when the associate concern is in a loss. Moreover, the Ld. CIT(A) observed that the loan from the holding company to its subsidiary FFC during the year had increased from Rs.2.60 Crores to 4.18 Crores which prima facie shows that the subsidiary was in need of more funds during the year. Moreover, that in pursuance of the management agreement entered by the assessee with the associate concern, the assessee had earned consultancy and service fee of Rs.77,88,894/-. Therefore, we do not agree with the order of the Ld. CIT(A) and direct the Assessing Officer

to delete the disallowance of interest made by the Assessing Officer in respect of the loan given by the assessee company to M/s FFC. Accordingly, ground no.1 and 1.1 of the assessee are allowed.

8. Ground no.2 and 2.1 of the appeal is against the disallowance of retainership fees of Rs.4,20,000/- u/s 40(a)(i) of the Act paid to Mr. Yusuf Ansari towards 'payment of retainership fees' for the alleged non-deduction of tax at source on the said payment. The assessee explained before the Assessing Officer that due tax was deducted in the said account but inadvertently the same was deposited with tax for AY 2013-14 instead of AY 2012-13. The written submission of the assessee as mentioned in para 4.2 of the assessment order is reproduced as under:-

> *4.2. In response to the same, the assessee has filed a reply vide letter dated 31.12.2015 stated that*
>
> *"TDS Deduction*
>
> *a) Mr. Yusuf Ahmad Anis Ansari :*
>
> *Fee of Rs. 4,20,000/- provided on 31/03/2015 & TDS of Rs. 42,000/- with cue interest was deposited on 06-08-2013. The tax was wrongly deposited with the tax of assessment year 2013-14 instated of A. Y 2012-13, we request you to kindly consider this mistake and allow the expenditure as the tax interest on delayed payment tax has been paid by us, as per TIS certificate attached."*

8.1. However, the Assessing Officer did not accept the explanation of the assessee and disallowed the said sum.

9. In appeal, the ld. CIT(A) also did not accept the plea of the assessee and dismissed the appeal of the assessee by observing as under:-

"Payment made to Yusuf Ahmed Anis Ansari, resident of Rs 4,20,000/-on account of retainership fee for rendering professional services

The payment of retainership fee to a resident very clearly falls within the ambit of the provisions of section 194J which holds as under:

194J. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of—

(a) fees for professional services, or

(b) fees for technical services26, " [or]

[(ba) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company, or]

(c) royalty, or

(d) any sum referred to in clause (va) of section 28,]

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to 29[ten] per cent of such sum as income-tax on income comprised therein:

The appellant company has not disputed the requirement of such payment. They have, in fact claimed that a TDS of Rs. 42,000/- on the said amount has been paid on 06.08.2013. However, no evidence of payment was produced before either the AO or before me during the course of appellate proceedings. A bald assertion without documentary evidence cannot be accepted during appellate proceedings or any quasi-judicial proceedings. Reference is made the provisions of Section 114(g) of the Indian evidence Act which mandates as under:

Section 114(g) in The Indian Evidence Act, 1872

(9) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

The appellant, has further taken refuge in the 2nd proviso of Section 40(a)(ia) and claimed that as the payee has paid taxes on the said amount, the appellant company is deemed to have deducted tax on retainership fee paid to the payee.

This argument of the appellant company has no legal locus standi has in such a case to substantiate such a claim, the deductor, in this case the appellant company was required to

file a certificate from an Accountant under the first proviso to sub-section (1) of section 201 in Form 26A to DGIT(Systems) or the person so authorized by him as clearly laid down in Rule 31ACB of the Income Tax Rules. This has not been done by the appellant company. Accordingly, I hold that the AO has rightly made the disallowance on this account. The order of the AO on this account is upheld given the clear and unequivocal provisions of the Income Tax Act."

10. We have heard the rival contentions and perused the materials available on record. In this regard, the assessee filed a written submission submitting that the TDS of Rs.42,000/- in respect of payment to Shri Yusuf Ansari, was already made and deposited on 06.08.2013 and submitted as under:-

"In view of the above, in the present case since the amount of TDS of Rs.42,000 was deposited on 06.08.2013 i.e., before the due date of filing the return of income for the relevant assessment year (i.e. 30.09.2013), in support thereof, the appellant had also furnished the ledger account and Form 16A of the said party before the AO/CIT(A), the impugned expenditure cannot be disallowed under section 40(a)(ia) of the Act and therefore, the disallowance made in the assessment order deserves to be deleted at the threshold on the aforesaid ground itself. (Refer, ledger @ page 79 and Form 16A @ pg. 80 - TDS of Rs.70,000 deducted on retainership fee aggregating to Rs.7,00,000 (impugned payment of Rs.4,20,000 plus Rs.2,80,000)

It appears that the CIT(A) has glossed over the supporting documents in form of ledger account and Form 16A of the said party, which were duly furnished by the appellant and very much available on record and erroneously held that no documentary evidence was furnished by the appellant.

10.1. In this regard, the assessee has filed copy of ledger account and relevant TDS certificate substantiating that TDS was deposited before the due date of filing of return for relevant assessment year (Page no.78 to 81 of the paper book).

10.2. In view of the above facts, this issue is restored back to the file of the Assessing Officer to verify the above contention of the assessee and to take into cognizance the TDS deducted as referred to page no.79 and 80 of the paper book and decide the issue afresh as per law. Ground Nos.2 and 2.1 is partly allowed as per the above observation.

11. Ground no.3 of the appeal is against the following two disallowances:-

I. Rs.9,65,000/- paid to Rosamond Freeman-Attwood, a resident of Srilanka,

II. Rs.5,61,700/- paid to Elephant Pepper Camp Ltd. Kenya.

11.1. The assessee on query by the Assessing Officer vide letter dated 31.12.2015 submitted the reasons for non-deduction of TDS in respect of above payments to the two parties as under:-

> *b) Elephant Pepper Camp Lid., Kenya*
>
> *We have paid to Elephant Pepper Camp Lid. Kenya for Marketing survey done by them on our behalf for hospitality Sector in Kenya. Please note that they do not have any permanent establishment in India and as per DTAA the tax liability is not applicable on them in India as per 15CA & 15CB attached alongwith voucher, bill & remittance related documents.*
>
> *c) Rosamond Freeman Attanvood. SPA Consultants*
>
> *Ms. Resamond Awood a Srilankan Resident is our SPA Consultant, Please note that her stay in India was less than 120 days during A. Y 2013-14 and as per DTAA the tax liability is not applicable on her in India as per 15CA & 15CB attached alongwith voucher, bill & remittances related documents (which is placed on record.)"*

11.2. The above reply of the assessee was not accepted by the Assessing Officer on the ground that there is no specific provision under the Act for

making a payment to a non-resident without deduction of TDS unless a no objection certificate is obtained from income tax authority under section 195(2) of the Act. The Assessing Officer further considered the above payment as "Fee for Technical Services" (in short 'FTS') and held that the same was liable for TDS u/s 40(a)(i) of the Act and in view of the failure of the assessee to do so, the Assessing Officer disallowed the above payments.

11.3. Aggrieved with the said order, the assessee preferred an appeal before the ld. CIT(A). The Ld. CIT(A) confirmed the order of the Assessing Officer and held that the payments were in the nature of FTS and were not in the nature of independent personal services. The relevant finding of the order of the ld. CIT(A) is reproduced as under:-

> ***Payment to Rosamond Freeman Attwood, Sri Lanka of Rs 9,65,000/ -***
>
> *The appellant company made a payment to Rosamond Attwood, a resident of Sri Lanka who was appointed as a Spa consultant for rendering services in the nature of spa training, spa audit, spa management. However, no tax was withheld on this payment. The AO made an addition on this account, holding that these services were in the nature of 'Fee for Technical Services' and the appellant company was required to deduct tax at source on this payment. The appellant has not disputed that the services are 'Fee for technical services' but has simply submitted that this payment falls within the ambit of the Article 14 of Indo-Sri Lanka TAA dealing with 'Taxation of 'Independent Personal services (IPS) and hence no tax needs to be deducted as it would be taxable in in the*
>
> *First, we need to look at the nature of the services rendered by Rosamond Attwood. As per the agreements), the non-resident individual, was to render the following services:*
>
> - *30 days of spa training, spa audit, spa management to be undertaken in two visits.*

- *Twice a month to receive and assess on email the spa reports from each property.*
- *Site visits to the properties managed by the appellant,*
- *Coaching the General Managers with focus one following areas:*
- *Identify areas requiring improvement - personal, for enhancing guest experience & for achieving Company goals*
- *Identify methods to inspire and motivate their team*
- *On ways to communicate expectations to the team*
- *To realize the need to focuses on solutions, not problems Identify barriers and roadblocks in achieving team goals*
- *Identify what steps to take if team is not meeting expectations*
- *Emphasize need for GM to spend time with the team, identify peoples strengths and weaknesses and issues that face each individual*
- *Any other aspect requiring coaching.*

From the above, it is clear that the services rendered fall within the ambit of technical services as they clearly fall within the ambit of 'managerial', 'technical or consultancy services' as envisaged in Section 9(1)(vii).

The Legislature has not set out with precision as to what would constitute "technical" service to render it "technical service". The Hon'ble Madras High Court in the case of Skyceli Communications Ltd. 251 ITR 53 (Mad) had an occasion to examine the definition of 'fee for technical services' in the context of payment of fees by a cellular/Mobile phone subscriber to the operator of the cellular/mobile phone facility." The High Court said:

The meaning of the word "technical" as given in the New Oxford Dictionary is adjective

> *1. of or relating to a particular subject, art or craft or its techniques: technical terms (especially of a book or article)*
>
> *2. requiring special knowledge to be understood: a technical report.*

3. of involving, or concerned with applied and industrial sciences: an important technical achievement.

4. resulting from mechanical failure: a technical fault.

5. according to a strict application or interpretation of the law or the rules

The scope of the term 'technical services' has been discussed in foregoing paras with reference to Article 13(4) of Indo-UK DTAA and Article 12(4) of Indo-US DTAA wherein it has been clearly held that any service which makes available technical knowledge, experience, skill know-how or processes, or consists of the development and transfer of a technical plan or technical design is a service that falls within the ambit of 'technical services'. The services enumerated above are in the nature of transfer of, training in of specialized skills pertaining to 'spa management, 'spa audit etc. So as per the above detailed discussion, the payment made by the appellant company to Rosamond Attwood is in the nature of 'Fee for Technical services' which requires tax to be deducted at source by the deductor-appellant company.

A perusal of the Indo-Sri Lanka DTAA also shows that, although there is a clause about Independent professional Services, it is limited to independent activities of physicians, lawyers, engineers, architects, dentists and accountants. Thus, the Indo-Sr Lanka DTAA does not cover the services rendered by Rosamond Attwood as is clear from the reading of Article 14 of the DTAA. Article 14 of DTAA reads asunder:

ARTICLE 14

Independent Personal Services

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State unless his stay in the other Contracting State is for a period or periods exceeding in the aggregate 120 days within any 12 months period, when such income may also be taxed in the other Contracting State.

2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

In the light of the above, I hold that the appellant company was liable to deduct tax at source on the payment made to Rosamond Attwood. As this has not been the AO has rightly

made a disallowance in this regard. I uphold the disallowance made by the AO in this regard.

Payment of Rs 5,61,700/- made to M/s Elephant pepper Camp Ltd,

The appellant had, during the year under consideration, made payment of Rs.5,61,700/- to Elephant Pepper Camp Ltd, Kenya for conducting market research for exploring opportunities in the hospitality sector in Kenya. The assessing officer disallowed the said amount under section 40(a)(i) of the Act on the ground that no TDS was deducted therefrom while remitting the same. The appellant submitted that Elephant Pepper Camp Ltd. is a company operating a tourist facility in Kenya and had undertaken a market research for the appellant and that payment made to the non-resident was not taxable in India under India-Kenya DTAA.

The first question to be addressed is whether this market survey undertaken by the Kenya based company constitutes 'technical service'. The Madras High court as discussed supra has clearly held that a service rendered of such a nature will be technical service that will fall within the meaning of section 9(1)(vii). This has not been disputed by the appellant company. The appellant has simply submitted that no TDS was made as the payment made on account of the services rendered did not fall within the ambit of the Indo-kenya DTAA agreement.

The DTAA was examined. There is no specific clause on such services rendered. The appellant has taken the support of Article 16 of the DTAA agreement. This was examined and reads as under:

ARTICLE 16

INDEPENDENT PERSONAL SERVICES

1. *Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable on in that State unless-*

   (a) he has a fixed base, regularly available to him in the other Contracting State for the purposes of performing his activities, in which case so much of the income may be taxed in that other State as is attributable to that fixed base; or

   (b) he is present in the other Contracting State for the purpose of performing his activities for a period or periods exceeding in the aggregate 183 days in the calendar year concerned in the case of Kenya or the previous year

concerned in the case of India, in which case so much of the income may be taxed in that other State as is attributable to the activities performed in that other State.

2. The term 'professional services' includes independent scientific, artistic, educational or teaching activities, as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

As in the case of Rosamond Attwood here also the nature of services rendered by Elephant Pepper camp does not fall within the ambit of the Article 16. I, therefore, hold that the appellant company was required to deduct tax at source on this payment. I uphold the disallowance made by the AO in this regard."

11.4. Aggrieved with the said order, the assessee is in appeal before us.

12. In the appellate proceedings, the ld. AR filed a written submission which is reproduced as under:-

During the relevant previous year, the appellant, inter alia, made payment on account of legal and professional expenses amounting to Rs.15,26,700/-, to following non-residents:

Sl. No.	*Name of Parties*	*Amount*	*Nature of payment*
1	*Rosamond Freeman Attwood, Sri Lanka*	*Rs.9,65,000/-*	*Fee for providing Spa Consultancy and management services in relation to the hotels run by the appellant.*
2	*Elephant Pepper Camp Ltd. Kenya*	*Rs.5,61,700/-*	*Fee for conducting market survey in Kenya for promotion of business of appellant.*
		Rs.15,26,700	

The appellant was not obligated to withhold tax from the impugned payments made to non-resident parties since the same were not chargeable to tax in India as per the provisions of the Act and/or the provisions of applicable DTAA entered into with respective countries.

AO

In the assessment order, the assessing officer disallowed the aforesaid expenses under section 40(a)(ia) on the grounds that – (i) such payments, made to non-residents for services rendered outside India, were in lieu of obtaining technical services within the meaning of section 9(1)(vii) of the Act, which were deemed to accrue or arise in India and consequently were chargeable to tax in India; ii) consequently the appellant was obliged to withhold tax therefrom under section 195 of the Act; and iii) the appellant had failed to obtain certificate for lower/nil deduction of tax at source before making remittance without deducting tax at source.

CIT(A)

The CIT(A) upheld the said disallowance made by the assessing officer by holding that, the said payments constituted fee for technical services under section 9(1)(vii) of the Act. It was also held that the aforesaid services did not fall within the ambit of Article 14/16 of the DTAA's entered with Sri Lanka and Kenya dealing with 'Independent Personal Service' as the same covers only independent activity of physicians, lawyers, engineers, architect, dentists and accountants and the services rendered by non-resident parties are not covered under the said Article(s).

Submission

The aforesaid disallowances made in the aforesaid order is not based on correct appreciation of facts and legal position which deserves to be deleted for the following reasons:

Re i): Payment made to Rosamond Freeman-Attwood, Sri Lanka:

The appellant had entered into an agreements) dated 20.04.2011 and 16.07.2012 with Rosamond Freeman-Attwood, a resident of Sri Lanka, whereby the nonresident individual, was appointed as a Spa Consultant, for rendering services in the nature of spa training, spa audit, spa management etc. During the year under consideration, the appellant made payments aggregating to Rs.9,65,000/- in respect of the aforesaid services rendered by the non-resident. (Copy of agreements) dated 20.04.2011 and 16.07.2012 are enclosed at pages 82-83 and 84-85 respectively of the Paper book).

For the purpose of rendering such services, she was required to make visits of short spans in India and the aggregate number of days of her stay in India during the relevant financial year did not exceed 120 days. (Refer, Declaration filed by the non-resident individual stating that her stay did not exceed 120 days during the relevant year at pg. no. 114 of the paperbook)

A. No FTS Article in the DTAA, amount taxable as business income

In this regard, it is at the outset, respectfully submitted, that the impugned payment made to the non-resident was not taxable in India under Indo-Sri Lanka DTAA. It is pertinent to note that the Indo-Sri Lanka DTAA as existing at the time of making the said payment, did not contain an article dealing with 'Fees for technical services'.

Accordingly, in absence of clause relating to fee for technical services in a Treaty, recourse would have to be taken to Article 7 of the Treaty dealing with taxation of business profits, since the impugned payments would be in the nature of 'business profits' arising to the recipient in the ordinary course of his business of providing varying services. (Refer ACIT vs Paradigm Geophysical Pty Ltd: 117 TTJ 812 (Del Trib.), Bangkok Glass Industry Co. Ltd. vs ACIT: [2013] 34 taxmann.com 77 (Mad) Bharti Airtel Ltd vs ITO (TDS): [2016] 67 taxmann.com 223 (Del Trib.), DCIT vs Michelin ROH Co Ltd: (2022] 195 ITD 541 (Del Trib.), DCIT vs Welspun Corporation Ltd: [29017| 183 TTJ 697 (Ahd Trib.))

In view of the aforesaid, it is respectfully submitted that the amount received by Rosamond Freeman-Attwood from the appellant for the aforesaid services were not in the nature of FTS in absence of any Article in the DTAA relating to FTS and the same could at best, be said to fall under the head

"Business Profits". Since there is no fixed place/permanent establishment of the Appellant in India, the income arising to Rosamond Freeman-Attwood on account of the aforesaid payments is not taxable in India.

In view of the aforesaid, the amount paid to the non-resident cannot, it is submitted, be brought to tax in India. Accordingly, there was no default on the part of the appellant in not deducting tax at source from such payments, so as to warrant any disallowance under section 40(a)(i) of the Act and, therefore, disallowance made under section 40(a)(i) of the Act calls for being deleted on this ground alone.

B. Payments in the nature of "Independent Personal Service" ("IPS"); not liable to tax in India

Without prejudice and in the alternate, in case of absence of any specific clause in Indo-Sri Lanka DTAA dealing with taxation of fees for technical services, Article dealing with "Independent personal services" can be applied

In terms of Article 14 of Indo-Sri Lanka DTAA dealing with taxation of

'Independent Personal Services' ('IPS'), an income derived by a non-resident person in respect of professional service would be

ordinarily taxable in the contracting state of which such individual is a resident, the same would, however, be taxable in the other contracting state where in relation to the rendering of professional services, such person stayed in India for a period exceeding the specified period of 120 days.

In that view of the matter, since the professional fee towards spa consultancy paid to Rosamond Freeman-Attwood were covered by the Article 14 of the India -Sri Lanka DTAA dealing with 'Independent Personal Service' and in the absence of non-resident professional visiting India aggregating the specified period of 120 days as per the said DTAA, the said payments made were not taxable in India.

(Refer, Declaration at pg. no. 303 of the Paper book).

Accordingly, there was no default on the part of the appellant in not deducting tax at source from such payments, so as to warrant any disallowance under section 40(a)(i) of the Act.

The CIT(A) erred in holding that the Article relating to 'Independent Personal Service under the Indo-Sri Lanka DTAA only covers independent activity of physicians, lawyers, engineers, architect, dentists and accountants and thus, the services rendered by Rosamond Freeman-Attwood would not be covered under the said Article.

In this regard, it is submitted that on a careful perusal of the aforesaid Article 14 of the India -Sri Lanka DTAA, it is noticed that the same covers payments made for rendering professional services or other independent activities of a similar nature. Thus, an inclusive definition of the expression professional services' has been given in the said Article. The expression "other independent activities of a similar character" is to be read ejusdem generis with the expression "professional services". Article 14 of the DTAA, thus, it is submitted, covers (a) the services specifically mentioned in the inclusive definition of the expression "professional services"; (b) a service falling within the general definition and bearing the character of a professional service' though not specifically mentioned; and (c) any activity/ service even though not falling within the general scope and definition of professional service but is an activity/ service similar to being pursued/ carried on as profession.

Attention in this regard, is invited to the following decisions wherein the term 'professional services' contained in Article 14 was given a wide interpretation and services such as technical and marketing consultancy service, including consultancy services for improvement and upgradation of products manufactured by the assessee and even software development services, were held to fall within the ambit of "Independent personal services':

- Dieter Eberhard Gustav Von Der Mark v. CIT: 102 TAXMAN 368 (AAR -New Delhi

- Graphite India Ltd. v. DCIT: [2003] 86 ITD 384 (KOL- Trib.)

- Susanto Purnamo v. ITO: [2016] 73 taxmann.com 108 (AhmdO Trib.)

In view of the aforesaid, the services of Spa Consultancy and management services rendered by Rosamond Freeman-Attwood in relation to the hotels run by the appellant would fall within the ambit of professional services covered under Article 14 of the Indo - Sri Lanka DTAA, which cannot be brought to tax in India.

Re ii): Payment made to Elephant Pepper Camp Ltd., Kenya:

The appellant had, during the year under consideration, made payment of Rs.5,61,700/- to Elephant Pepper Camp Ltd, Kenya for conducting marketing research for exploring opportunities in the hospitality sector in Kenya. (Refer, bill @ page 115 of the paperbook)

In this regard, it is submitted that Elephant Pepper Camp Ltd. is a company operating a tourist facility in Kenya and had undertaken market research for the appellant.

It is at the outset respectfully submitted, that the impugned payment made to the non-resident was not taxable in India under India-Kenya DTAA. In terms of the Article 16 of the India-Kenya DTAA dealing with taxation of 'Independent Personal Services' ('IPS'), income derived by a non-resident person in respect of professional service would be ordinarily taxable in the state of residence, the same would, however, be taxable in the other contracting state where in relation to the rendering of professional services, such person has a fixed base through which such services were performed or has stayed in that state for a period exceeding the specified period of 183 days.

In the present case, Elephant Pepper Camp Ltd. has conducted the market survey in Kenya and has not rendered any service in India, thus no part of the income is attributable to India. Further, admittedly, Elephant Pepper Camp Ltd. does not have a fixed base in India.

In that view of the matter, since the professional fee paid towards market research and survey in Kenya paid to Elephant Pepper Camp Ltd. were covered by the Article 16 of the India-Kenya DTAA dealing with 'Independent Personal Service' and in the absence of a fixed base in India or visits in India aggregating the specified period of 183 days as per the said DTAA, the said payments made were not taxable in India. Accordingly, there was

no default on the part of the appellant in not deducting tax at source from such payments, so as to warrant any disallowance under section 40(a)(i) of the Act and, therefore, disallowance made under section 40(a)(i) of the Act calls for being deleted.

Re: Not-obtaining certificate for lower/nil deduction of tax

As regard the allegation of the assessing officer that since the appellant had not filed application under section 195(2) of the Act for obtaining lower/Nil withholding tax order, the appellant did not have the right to argue that such income was not taxable in India, it is respectfully submitted, that the provisions of that section shall not apply where no portion of the payment made is chargeable to tax in India and, accordingly, there would be no need to make application to the assessing officer to determine the rate at which tax needs to be deducted at source. [Refer GE India Technology Centre (P) Ltd. vs CIT: 327 ITR 456]

In terms of the aforesaid decision of the Supreme Court, since for the reasons stated hereinabove, the appellant was fairly certain that the aforesaid payments in question were not liable to tax in India; it was not required to approach the assessing officer for certificate under section 195(2) of the Act.

13. We have heard both the parties and perused the materials available on record. We find that the Assessing Officer was of the view that payment of Rs.9,65,000/- paid to Rosamond Freeman-Attwood, a resident of Srilanka and Rs.5,61,700/- paid to M/s Elephant Pepper Camp Ltd. Kenya was on account of "Fees for Technical Services" and was covered under section 9(1)(vii) of the Act. Further, the Assessing Officer was also of the view that if the assessee was of the view that the said amount was not taxable in India and no deduction of tax was required in respect of the said payments, then the assessee was required to obtain certificate for no deduction or lower deduction of tax on the aforesaid payments as required u/s 195(2) of the Act, which was not done by the assessee. The Assessing Officer also observed that the assessee had not submitted any document evidencing the service received from the

aforesaid persons and the purpose of the payment made to these parties. In view of the reasons, the Assessing Officer disallowed the aforesaid expenditure of Rs.15,26,700/- (Rs.9,65,000/- + Rs.5,61,700/-) u/s 40(a)(i) of the Act.

13.1. The ld. CIT(A) referred to the decision of the Hon'ble Madras High Court in the case of Skyceli Communications Ltd. 251 ITR 53 (Mad) wherein the Hon'ble Court discussed the scope of the term 'technical services' with reference to Article 13(4) of Indo-UK DTAA and Article 12(4) of Indo-US DTAA wherein it has been clearly held that any service which makes available technical knowledge, experience, skill know-how or processes, or consists of the development and transfer of a technical plan or technical design is a service that falls within the ambit of 'technical services'. She further held that the services enumerated by the Hon'ble Court in the cited case are in the nature of transfer of, training in of specialized skills pertaining to 'spa management, 'spa audit etc. and therefore as per the above discussion, the payment made by the assessee company to Rosamond Attwood was in the nature of 'Fee for Technical services' which requires tax to be deducted at source by the deductor-appellant company.

13.2. Further, the Ld. CIT(A) held that on perusal of Article 14 of India Srilanka DTAA, the services rendered by Rosamond Freeman-Attwood do not come under "Independent Professions Services" as the Ld. CIT(A) referred to Article 14 of India Srilanka DTAA and held that it was limited to independent activities of physicians, lawyers, engineers,

architectures, dentists and accountants and confirmed the action of the Assessing Officer.

13.3. For the similar reasons stated in the case of Rosamond Freeman-Attwood quoting Article 16 of the India Kenya DTAA regarding "Independent Personal Services" the Ld. CIT(A) held that the nature of services rendered by M/s Elephant Pepper Camp Ltd. Kenya does not fall within the ambit of Article-16. The Ld. CIT(A) held that in view of the decision of the Hon'ble Madras High Court as discussed above, the market survey undertaken by M/s Elephant Pepper Camp Ltd., Kenya will constitute 'technical services' within the meaning of section 9(1)(vii) of the Act. For these reasons, the Ld. CIT(A) confirmed the disallowance made by the Assessing Officer.

13.4. The above view of the Assessing Officer and the ld. CIT(A) has been carefully considered but not found to be acceptable. Explanation-2 of Article-9(1)(vii) reads as under:-

> *Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries" (emphasis supplied)*

13.5. In view of the submission of the assessee as reproduced in written submissions, the services rendered by Rosamond Freeman-Attwood and M/s Elephant Pepper Camp Ltd. will not fall under any of

the above three categories being managerial, consultancy or technical. The said submission of the assessee is reproduced as under:-

> (i) Managerial = Services essentially involving control, direction or administration of the business of the service recipient
>
> Refer: CIT vs Bharti Cellular Ltd: 319 ITR 139 (Del)
>
> (ii) Consultancy - Something akin to advisory services provided by the non-resident, pursuant to deliberation between parties| Refer: CIT vs Grup Ism (P) Ltd: 57 taxmann.com 450 (Delhi HC)
>
> (iii) Technical - Services provided through human intervention, involving or concerning applied and industrial science, requiring expertise in technology | Refer: CIT vs Kotak Securities Ltd: 383 ITR 1 (SC)

13.6. On the other hand, in the case of Susanto Purnamo vs ITO [2016] taxmann.com 108, the Co-ordinate Bench of the Tribunal Ahmeadad, quoting the decision of the Co-ordinate Bench of the Kolkata Tribunal in the case of Graphite India Ltd Vs DCIT [(2002) 86 ITD 384 (Kol)] held that the specific professions set out in Article 15 of the Indo US Tax Treaty relating to "Independent Personal Services" which is similar worded as Article 14 of India Srilanka Tax Treaty and Article 16 of India Kenya Tax Treaty held that a specific professions set out therein are only illustrative and not exhaustive. The relevant discussion in para no.7 and 8 are read as under:-

> *"7. The crucial question, therefore, is as to what constitutes 'independent personal services' for the purpose of article 15 and whether the services rendered by the assessee can fall in this category of services. This issue, regarding the scope of article 15 of Indo-US tax treaty, came up for consideration, almost one and a half decade ago, before a coordinate bench of this Tribunal in the case of Graphite India Ltd Vs DCIT [(2002) 86 ITD 384 (Kol)]. Speaking through one of us, i.e. the*

Accountant Member, the Tribunal had then, inter alia, observed as follows:

.....

8. There is no change in the legal position; nothing contrary to the decision so rendered has been brought to our notice. Viewed in the light, software development service rendered by an individual, which essentially requires predominantly intellectual skill, dependent on individual characteristics of the person pursuing software development, and based on specialized and advanced education and expertise, is also a professional service. As regards the objection of the Assessing Officer that software development is not specifically covered by article 15(2), as evident from the opening words of this provision to the effect "the term 'professional services' includes (emphasis, by underlining, supplied by us)", the specific professions set out therein are only illustrative and not exhaustive. The emphasis is essentially on the nature of services, but then, as we have noted above, that test is satisfied on the facts of this case. While dealing with the scope of services which are covered by article 15, it is important to bear in mind the fact that there could indeed be overlapping effect of the scope of services covered by the other articles but as long as the services are rendered by an individual or group of individuals, generally rendition of such services is covered by article 15. The exclusion clause set out in article 12(5)(e) typically exemplifies this approach....."

(emphasis supplied)

13.7. In view of the above decision and discussion, we are of the considered view that rendering of services by Rosamond Freeman-Attwood during the material period will be covered by "Independent Personal Services" as it is similar to the nature of services mentioned therein. These services as referred in Article 14 of India Srilanka Tax Treaty and Article 16 of India Kenya Tax Treaty are those in which out of special field of knowledge and learning a person develops an expertise to which he adds her/his exclusivity and thus becomes eligible to convert special knowledge into a special services. Thus, there is sufficient justification to accept the services availed by the assessee to be from

Independent Personal Services. Then assessee has submitted a copy of declaration dated 20.07.2012 made by Rosamond Freeman Attwood as appearing at page no. 114 of the paper book declaring that stay in India during the relevant financial year did not exist the threshold of 120 days. Further, in case of India Sri Lanka DTAA there was no provision for taxing the "Fees for Technical Services" during the said period and since a non-resident had no PE in India, the payment could not be taxable in India. Reliance is placed on the Co-ordinate Bench decision of the Tribunal in the case of ACIT vs Paradigm Geophysical Ltd. 117 TTJ 812 (Del. Trib.), where the relevant DTAA has been considered and held that FTS is not taxable under India Sri Lanka DTAA.

13.8. Therefore, in view of the above decision that services rendered by Rosamond Freeman-Attwood falls under the category of "Independent Personal Service and since, the stay was less than 120 days, therefore, the amount of Rs.9,65,000/- paid to Rosamond Freeman-Attwood was not taxable in India and therefore the assessee was not required to deduct the TDS u/s 40(a)(ia) of the Act. Therefore, the disallowance of Rs.9,65,000/- made by the Assessing Officer and confirmed by the ld. CIT(A) is deleted.

13.9. For similar reasons, in the case of M/s Elephant Pepper Camp Ltd., the services rendered outside India and similarly, the India Kenya DTAA did not contain the separate provisions for taxing of "Fees for Technical Services" during the relevant period the disallowance of R.5,61,700/- is not sustainable.

13.10. Therefore, the disallowance of Rs.5,61,700/- paid by the assessee to M/s Elephant Pepper Camp Ltd. is not taxable in India and therefore, the disallowance of Rs.5,61,700/- is deleted.

14. Regarding the contention of the Assessing Officer that it was imperative on the part of the assessee to make an application u/s 195(2) of the Act for taking a certificate u/s 195(2) of the Act in respect of any payment made to a non-resident irrespective of the fact that the amount was taxable in India or not is not acceptable. In this regard, the head note of the decision of the Hon'ble Supreme Court in the case of GE India Technology Centre (P.) Ltd. vs CIT (327 ITR 456) is reproduced as under:-

> *Section 195 of the Income-tax Act, 1961 - Deduction of tax at source - Payment to nonresident - Whether the moment a remittance is made to a non-resident, obligation to deduct tax at source does not arise; it arises only when such remittance is a sum chargeable under Act, i.e., chargeable under sections 4, 5 and 9 - Held, yes - Whether section 195(2) is not a mere provision to provide information to ITO(TDS) so that department can keep track of remittances being made to non-residents outside India; rather it gets attracted to cases where payment made is a composite payment in which certain proportion of payment has an element of 'income' chargeable to tax in India and payer seeks a determination of appropriate proportion of sum chargeable - Held, yes."*

14.1. Therefore, in the above case, the Hon'ble Supreme Court has held that section 195(2) of the Act gets attracted to cases where payment made is a composite payment in which certain proportion of payment has an element of 'income' chargeable to tax in India. However, as held earlier, the payment of Rs.9,65,000/- to Rosamond Freeman-Attwood and Rs.5,61,700/- to M/s Elephant Pepper Camp Ltd. is not taxable in India and therefore there was no requirement for the assessee to seek a certificate for non-

deduction of TDS in respect of the aforesaid payments u/s 195(2) of the Act.

14.2. Further, one of the ground for disallowance of payments to Mr. Yusuf Ansari, Rosamond Freeman-Attwood and M/s Elephant Pepper Camp Ltd. by the Assessing Officer was that the assessee had not submitted any document evidencing the service received from the aforesaid persons and the purpose of the payment made to these parties. The same is not acceptable firstly for the reason that the Assessing Officer made the disallowance u/s 40(a)(ia) of the Act and not under section 37(1) of the Act. Further, necessary documents regarding the services rendered have been submitted by the assessee on page-78 to 127 of the paper book.

14.3. Therefore, in view of the above facts, we hold that the Assessing Officer was not correct in making the disallowance of Rs.15,26,700/- (Rs.9,65,000/- + Rs.5,61,700/- and the same is deleted. Accordingly, ground no.3 along with sub grounds is allowed.

15. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 25th April, 2025.

Sd/-	**Sd/-**
[ANUBHAV SHARMA]	**[BRAJESH KUMAR SINGH]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated 25.04.2025.

Shekhar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)

5. DR

Asst. Registrar,
ITAT, New Delhi,