IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA Nos.: 2320 & 2321/CHNY/2018
Assessment Years:2010-11 & 2012-13

M/s. Penta Media Graphics Ltd., 'TAURUS', No.25, First Main Road, United India Colony, Kodambakkam, Chennai – 600 024.	v.	**The DCIT / ACIT,** Media Circle – 1 / Non-Corporate Circle - 20, Chennai - 34.
PAN : AAACP 1647B Appellant		Respondent

Appellant by	:	Ms. S. Sree Lakshmi Valli, Advocate
Respondent by	:	Shri Varuvooru Sreedhar, Addl.CIT
Date of Hearing	:	06.06.2022
Date of Pronouncement	:	15.06.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VP:

These two appeals by the assessee are arising out of different orders of Commissioner of Income Tax (Appeals)-14, Chennai in ITA No.116/CIT(A)-14/2014-15 & 148/CIT(A)-14/2015-16, orders of even date 28.05.2018. The assessments were framed by the DCIT / ACIT, Media Circle - 1, Chennai for the assessment years 2010-11

& 2012-13 u/s.143(3) r.w.s. 92CA of the Income Tax Act, 1961 (hereinafter the 'Act') vide orders dated 20.03.2014 & 30.03.2014.

2. The first common issue in these two appeals of assessee is as regards to the orders of CIT(A) confirming the action of AO in making disallowance of expenses in respect of software development expenses paid to two entities in Mauritius for non-deduction of TDS u/s.195 of the Act and thereby made disallowance by invoking the provisions of section 195 of the Act and thereby made disallowance by invoking the provisions of section 40(a)(i) of the Act. For this issue, assessee has raised identically worded grounds in both the years and facts & circumstances as admitted by ld.counsel as well as ld. Senior DR are identical, hence will take the facts and issue from assessment year 2010-11. The relevant grounds raised reads as under:-

> 1.1 The Commissioner of Income Tax (Appeals) erred in confirming the disallowance u/s 40(a)(i) of the IT Act in respect of software development expenses to 2 entities in Mauritius.
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> 1.2 The Commissioner of Income Tax (Appeals) erred in not appreciating that the payments were made out of income earned outside India, falling outside the scope of section 195 of the Act.
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> 1.3 The Commissioner of Income Tax (Appeals) erred in not considering that the 2 entities do not have any permanent establishment in India and that the services were rendered and received outside India.

1.4 The Commissioner of Income Tax (Appeals) erred in not considering that the India Mauritius DTAA included Fees for Technical services only w.e.f. 01.04.2017 and hence the same was not taxable in this A. Y.

1.5 The Commissioner of Income Tax (Appeals) erred in stating that the Appellant did not furnish the required particulars, when the same were produced before the AO itself.

3. Brief facts are that the AO noticed that the assessee has claimed software development expenses amounting to Rs.7,16,29,306/- for the year ending 31.03.2010. The assessee filed ledger extracts from the books of the assessee company, from where the AO noted that the above amount constitutes Rs.6,69,59,378/- as software consultancy charges and balance amount as salary allowances and incentives. The AO noted from the ledger amount that this payment for software development consultancy charges was made to Esoftcom Mauritius Ltd., Num TV Limited, Mauritius and Blazeway LLC. The AO noted that the assessee has not deducted TDS under the provisions of section 195 of the Act and required the assessee to explain. The assessee explained vide letter dated 21.03.2013 stating that these are expenses that are incurred in foreign exchange for providing technical services abroad and these expenses are in the nature of pay roll for staff, conveyance and small purchases for the particular

project which is being done abroad. It was stated that the vendor/customer makes payment directly to the concerned person and debit the same to the assessee's account. According to AO, this explanation holds no ground as the assessee except furnishing ledger extracts and giving the above submissions, has not filed any documentary evidence despite various opportunities. According to AO, the assessee case squarely falls under the provisions of section 195 of the Act, as the payments made under software development expenses falls within the ambit of these provisions and assessee company is liable to deduct TDS while making such payment. Accordingly, he invoked the provisions of section 40(a)(i) of the Act and made disallowance. Aggrieved, assessee preferred appeal before CIT(A).

4. The CIT(A) during appeal proceedings specifically asked the assessee to file following details:-

(a) Nature of service rendered by the subsidiary company abroad.
(b) Copy of agreement / work order with description of service rendered.
(c) Nature of payment
(d) Details of bank advice and e-mail correspondence in connection with the service provided.
(e) DTAA between USA and Mauritius.
(f) Copy of ledger account

The CIT(A) noted that the assessee has not filed these details and hence, he has no alternative except to confirm the action of the AO as the assessee's case squarely falls within the ambit of 'fee for technical service' as per section 9(1)(vii) of the Act. Hence, he confirmed the action of the AO by observing in para 4.3.3 as under:-

> 4.3.3 In spite of reasonable opportunity given, the appellant's AR could not furnish the above particulars. It is admitted that the payment abroad was made for 'software consultancy charge' which squarely falls within the definition of Fee for technical service' as per Sec.9(1)(vii) of the IT Act. The appellant's contention that the subsidiary company had no business connection in India is not acceptable in view of Explanation to Sec.9(2) in which it is clearly stated that the Revenue need not prove the business Connection of the payee in India for bringing it to tax u/s 9(1). In this case, the income has accrued and arisen to the foreign subsidiary company in India and therefore, TDS u/s 195 was warranted. Since the appellant has failed to comply with the said TDS provision, I concur with the AO's disallowance u/s 40(a)(i), of the IT Act.

Aggrieved, now assessee is in appeal before the Tribunal.

5. Before us, ld.counsel for the assessee could not answer as why the documents asked by CIT(A) i.e., nature of services rendered, copy of agreement or work order, description of services rendered, nature of payments were not filed or even now they can file or not. The ld.counsel for the assessee stated that these are very old documents and even now the assessee cannot file these documents.

We specifically informed the ld.counsel for the assessee that without these documents the matter cannot be decided or it is presumed that the payments made abroad for software consultancy charges are fee for technical service as per section 9(1)(vii) of the Act. The ld.counsel could not reply. On the other hand, the ld. Senior DR heavily relied on the assessment order and the order of CIT(A). He reiterated the same arguments.

6. After hearing rival contentions and going through the facts and circumstances, we noted that the assessee failed to prove the nature of payments and assessee did not file any evidence neither before AO nor before CIT(A). Even now, the assessee is reluctant to file these details and hence, we presume that the payment made abroad for software consultancy charges are in the nature of fee for technical service as per section 9(1)(vii) of the Act and the assessee's case squarely falls under the provisions of section 195 of the Act. The assessee is subject to TDS but failed to deduct the same. We confirm the orders of lower authorities on this issue and dismiss this ground of assessee's appeal. Similar are the facts for the assessment year 2012-13. Hence, taking a consistent view, we

confirm the orders of lower authorities on this issue and dismiss this ground of assessee's appeal for both the assessment years.

7. The next common issue in these two appeals of assessee is as regards to disallowance of expenses relatable to exempt income by invoking the provisions of section14A r.w.rule 8D of the Rules. For this, assessee has raised identically worded grounds in both the years, issue and facts are similar, as admitted by ld.counsel for the assessee as well as ld. senior DR. Hence, we will take the facts and issues from assessment year 2010-11. The relevant ground reads as under:-

> 2.1 The Commissioner of Income Tax (Appeals) ought to have held that that the provisions of section 14A is not to the investment in shares of the 2 foreign subsidiaries.
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> 2.2 The Commissioner of Income Tax (Appeals) ought to have noted that the dividend from the 2 foreign subsidiaries are not exempt and as such it is out of the purview of Sec.14A.

8. At the outset, the ld.counsel for the assessee stated that the assessee has received dividend income in regard to investment in shares of two foreign subsidiaries and this is admitted fact. We noted that the assessee has made investment in overseas subsidiaries i.e., in Num TV Ltd E &Softcom, which are foreign

companies whose dividend income is not exempt from tax. The ld.counsel for the assessee filed copy of Tribunal's order in assessee's own case for the assessment years 2007-08 & 2009-10 in ITA Nos.1406 & 1407/Chny/2015, order dated 08.05.2020, wherein the investment in foreign companies, the disallowance made u/s.14A r.w.rule 8D of the Rules is deleted. We noted that even otherwise the issue is very simple that the dividend received from foreign subsidiaries is always taxable and it is not exempt. Once this is the position, addition cannot be made. Hence, this issue on both the appeals is allowed.

9. The only issue remains in ITA No.2321/CHNY/2018, assessment year 2012-13 is as regards to the order of CIT(A) restricting the depreciation claimed on digital content @ 25% as against claimed by assessee at 60% treating the same as intangible asset. For this, assessee has raised following grounds:-

> 2.1 The Commissioner of Income Tax (Appeals) erred in restricting the depreciation claimed on digital content to 25% instead of 60%, treating the same as intangible assets.
>
> 2.2 The Commissioner of Income Tax (Appeals) ought to have noted that the digital content is software eligible for depreciation at a higher rate of 60%.

2.3 Alternatively, the Commissioner of Income Tax (Appeals) ought to have allowed the entire cost of digital content as revenue expenditure.

10. At the outset, the ld.counsel as well as ld.Senior DR admitted that this issue is covered by Tribunal's decision in assessee's own case in ITA Nos.1406 & 1407/Chny/2015, order dated 08.05.2020, wherein the Tribunal for the assessment years 2007-08 & 2009-10 held that the assessee is eligible for depreciation @ 25% and Tribunal in para 6 at the end observed as under:-

> The scope of 'Information Technology Software' as is referred to in Hon'ble Supreme Court judgment in assessee's own case was in context of Customs Laws which was very vide definition and hence we cannot draw analogy in the 1961 Act read with 1962 Rules. Thus, to say that digital contend developed by assessee can be equated with computer program is far fetched but rather it is a copyrighted material developed by assessee which is stored in computer. This digital content was manipulated by assessee to be used in different films but still it cannot be categorized t a higher pedestal of being termed as 'computer program' rather it still retains the character of copyrighted material being intangible asset and in our considered view, the assessee is eligible for depreciation @ 25% as these copyrighted material developed by assessee being 'Digital Content' which is used by the assessee in various films etc. . Thus, we concur with the view of learned CIT(A) who has passed well reasoned order which we affirm and dismiss the appeal of the assessee on this issue. Thus, ground number 2 to 8 stand dismissed. The ground number 1 and 10 are general in nature and does not require separate adjudication while ground number 9 is consequential in nature. We order accordingly.

As the issue is squarely covered by the decision of this Tribunal, we dismiss this issue of assessee's appeal.

11. In the result, both the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 15th June, 2022 at Chennai.

Sd/-	Sd/-
(MANOJ KUMAR AGGARWAL)	
ACCOUNTANT MEMBER	**(MAHAVIR SINGH)**
	VICE PRESIDENT

Chennai,
Dated, the 15th June, 2022

RSR

Copy to:

1. Appellant	2. Respondent	3. CIT(A)
4. CIT	5. DR	6. GF.