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

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER
(THROUGH VIDEO CONFERENCING)

ITA No.4712 & 4713/Del/2017
Assessment Year: 2011-12 & 2012-13

Lease Plan India P. Ltd. C4C/332, Ground Floor, Janak Puri, New Delhi PAN No.AAACL6053B	**Vs**	**ITO Ward- 4 (3) New Delhi**
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh Nikhil Gupta, Advocate
Respondent by	Sh. Sanjay Kumar, Sr. DR

Date of hearing:	16/02/2022
Date of Pronouncement:	16/02/2022

ORDER

PER N. K. BILLAIYA, AM:

ITA No.4712/Del/2017 and 4713/Del/2017 are two separate appeals by the assessee preferred against the order of the CIT(A)-5, Delhi dated 03.05.2017 pertaining A.Y.2011-12 and 2012-13.

2. Since the first appellate authority has decided the captioned appeals by way of a consolidated order, both these appeal are disposed of by this common order for the sake of convenience.

3. The common grievance in the captioned appeals relates to the disallowances of guarantee commission on account of non-deduction of tax at source invoking provisions of section 40 (a) (ia) of the Act. The quantum may differ.

4. Briefly stated the facts of the case are that during the course of the scrutiny assessment proceedings the AO noticed that the assessee has made payment to Plan Corp. NV being reimbursement of guarantee charges on which no tax was deducted at source.

5. The AO was of the firm belief that the tax should have been deducted on the amount of reimbursement made u/s.195 of the Act. Invoking the provisions of section 40 (a) (ia) of the Act the AO made the disallowances of Rs.1,25,06,120/- in A.Y. 2011-12 and Rs.1,37,24,792/- in A.Y.2012-13.

6. Assessee carried the matter before the CIT(A) but without any success.

7. Before us the counsel for the assessee stated that similar disallowances were made in earlier assessment years where the

matter travelled up to the Tribunal and the Tribunal in ITA No.6461/Del/2015 and 6462/Del/2015 for A.Y.2009-10 and 2010-11 has decided the issues in favour of the assessee.

8. The DR fairly conceded to this.

9. We have carefully considered the orders of the authorities below. We have also perused the orders of this Tribunal (supra). An identical grievance was considered and decided by this Tribunal. The relevant findings read as under :-

18. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly in this case the assessee has obtained a corporate guarantee from its Netherland based associated enterprise for a fee. There is no dispute between the parties that the above sum is chargeable to tax as per the domestic law. It is not also in dispute that the recipient of the income is entitled to invoke the provisions of Double Taxation Avoidance Agreement. Now the issue is whether the corporate guarantee fee paid by the assessee to the non-resident entity is chargeable to tax as Fees for Technical Services under Article 12 of the Double Taxation Avoidance Agreement or under article 11 of the Double Taxation Avoidance Agreement, if at all it is chargeable to tax in India. Apparently, if the above sum is not chargeable to tax in India as per the provisions of Double Taxation Avoidance Agreement, assessee is not obliged to deduct tax at source under section 195 of the income tax act and therefore there cannot be any disallowance under section 40 (a) (i) of the income tax act. On the appreciation of the facts available before us, it is apparent that identical issue arose in the case of the assessee for assessment year 2006 – 07 to 2008 – 09 wherein the coordinate bench has set aside the whole issue back to the file of the learned CIT – A for assessment year 2006 – 07 and for assessment year 2007 – 08 and 2008 – 09, by the same order to the file of the learned Assessing Officer, for considering the additional evidence submitted by the assessee. Based on that for assessment year 2007 – 08 and 2008 – 09, the learned assessing officer has once again held that assessee should have deducted tax at source under section 195 of the income tax act as the sum paid by the assessee to the non-resident entity is in the nature of interest and fees for technical services. The appeal of the assessee for both these years i.e. assessment year 2007 – 08 and 2008 – 09 are pending before the learned CIT – A. For assessment year 2006 – 07, the coordinate bench set aside the same issue back to the file of the learned CIT – A with a direction to consider the additional evidence submitted before him. Thus for assessment year 2006 – 07 to 2008 – 09, the issue is pending before the learned CIT – A. Therefore, in the fitness of the things and in the interest of justice, it would not be appropriate for us to decide this issue here for the impugned assessment years before the decision is taken by the learned CIT – A in the earlier years, if the facts and circumstances of the case are similar. We are also conscious of the fact that for all these earlier years, the coordinate bench has set aside the issue to the file of the learned assessing officer as well as to the learned CIT – A for the purpose of consideration of additional evidences in the form

of corporate guarantee agreement, loan agreement et cetera. In the impugned appeals these documents were available before the CIT – A and he has considered the same. Thus we are sure that facts of these two years are similar but circumstances are not. Reason being that in these two years CIT (A) has considered all these documents and decided the issue. Further, on perusal of the reframed assessment orders passed by the learned assessing officer for assessment year 2007 – 08 and 2008 – 09, though they are not in appeal before us at present, it is on similar lines as decided by the CIT appeal in these impugned appeals before us. Thus we do not have option to set aside the issue back to the file of the ld CIT (A), as he has already considered the documents and evidences, which were not examined in earlier years and therefore coordinate bench set it aside.

19. Thus we examine the facts whether the Guarantee Fee paid by assessee to its AE in Netherlands can be considered as 'interest' in terms of Article 11 of the DTAA. It defines interest as

> *"6.* The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage, but not carrying a right to participate in the debtor's profits, and in particular, income from the Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article."

Broadly, all income earned from the 'provision of capital' by way of 'debt claim' constitutes interest and provision of capital in the 'non debt form', generally, constitutes 'dividend'. Therefore, to consider the income as 'interest', firstly, there should be 'debt' and there should be a 'claim' on that debt and 'form' which income should arise to qualify as 'interest'. Thus, two criteria need to be satisfied:-

(1) 'provision of capital' and

(2) It should be in the form of debt claim.

In the present case apparently, AE has not provided any capital to the appellant on which income is earned. It is a corporate guarantee , being a surety to the lender bank of the appellant that, if in a case, in future, the appellant fails to pay the due amount owed to those lenders, the Netherland Company will pay to those lenders. Thus, there was promise to reimburse the amount to those lenders on happening of an event i.e. failure of payments by the appellant of the dues owed to the lenders and lenders invoking the guarantee issued by the Netherlands company in favour of

those lenders. Therefore it needs to examine whether there is any provision of capital by the Netherland Company to Indian Company appellant, answer is in negative. Further, there should be a "debt claim and 'form' such claim income should arise to qualify as 'interest'. Thus the word 'debt claim "predicate the existence of debtor – creditor relationship [lender – borrower]. That relationship can arise only when there is a provision of capital. In view of this, we hold that guarantee fee paid by the assessee to Netherlands company, in the above facts, cannot be covered in the definition of interest as per Article 11 of The DTAA. Hon Bombay High court in Commonwealth Development Corporation

20. Further, we have perused decision of the Container Corporation Versus Commissioner of Internal Revenue of United States Tax Court Report [134 T.C. 122 (U.S.T.C. 2010) • 134 T.C. 5 Decided Feb 17, 2010]. On careful consideration of the decision of that court, the issue before the Court was whether the guarantee fee paid towards guaranteeing debt of a subsidiary company is "interest" or a "service". The court came to conclusion that guarantee are more analogous to services, like services, are produced by the obligee. It further held that in holding the guarantee fee as interest has too many shortcomings, as it does not approximate the interest on a loan. **It is merely a promise to possibly perform a future act and there was no obligation to pay immediately.** Thus, the court held that guarantee fee cannot be considered as an interest. However it was held to be a service. In view of this we hold that in absence of provision of capital and any debt claim between the parties the impugned guarantee fees paid by the appellant to the Netherlands based company cannot be held to be 'interest" in terms of Article 11 of the DTAA.

21. Now we proceed to examine whether such guarantee fee can be Fees for technical services within compass of Article 12 (5) of the DTAA. The ld CIT (A) has held it to be a 'Consultancy services'. In fact we are of the view that Provision of Guarantee is a service provided by the Netherlands Company to the assessee. US Court decision relied up on by the ld AR also says that provision of Guarantee is a 'service". But is it a consultancy service or not needs to be examined.

22. Article 12 (5) of the DTAA defines Fees For Technical services as under :-

> *5.* For purposes of this Article, "fees for technical services" means payments of any kind to any person in consideration for the rendering of

any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(*a*)	are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received; or
(*b*)	make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

23. Looking to the nature of 'Service' provided by the Netherlands company in providing guarantee, it is a financial service and can by no stretch of imagination is called a 'Consultancy services. Even otherwise, it does not cross the threshold of 'make available' in 12 (5) (b) of the DTAA. Therefore we also hold that, provision of Guarantee fees service is not fees for Technical services under article 12 of The DTAA.

24. Ld AR has also said that guarantee Fees is not chargeable to tax under Article 7 in absence of any permanent establishment of the Netherlands company. We fully agree with that as the revenue has not at all invoked article 7 in this case.

25. Now the ld AR has relied up on a decision in case of [2017] 88 taxmann.com 127 (Delhi - Trib.) Johnson Matthey Public Ltd. Company v. Deputy Commissioner of Income-tax (International Taxation), Circle 2(2)(1), New Delhi* where in the coordinate bench after holding that Guarantee fess commission paid by the assessee is not interest, nor Fees for technical services and also not business income ultimately held it to be chargeable in terms article 23 ' Other income ' as under :-

> "20. Having examined the issue of corporate/bank guarantee recharge with reference to Article 12(5) of the Indo U.K. Treaty and Section 2(28A) of the Act, we are of the considered opinion that the authorities below are perfectly justified in concluding that this payment does not fall within the expression of interest and in view of Clause 3 of Article 23 of the Treaty, in the absence of any specific provision dealing with corporate/bank guarantee recharge, the same has to be taxed in India as per the provisions of the Income tax Act, 1961. We do not find any illegality or irregularity in the reasoning given or conclusions reached by the authorities below. We, therefore, dismiss Ground Nos. 2 to 4 & 10."

> 26. We have carefully perused the above decision however, on reading it we did not find how the coordinate bench has dealt with the We are dealing with India Netherlands DTAA facts that whether income of Guarantee fess was "dealt with" in the forgoing articles of that convention or not. Whether the Guarantee fee income was 'not expressly mentioned' in earlier articles or not. It is also not coming out of the order whether circular no 787 of 2000 was cited and considered. India Netherland Treaty do not have article for 'Other income.' Therefore, in the impugned case the revenue authorities have also perhaps not tried to say that Guarantee Fees is "Other income". The India-Netherlands tax treaty presently does not have an Other Income article. Thus this issue does not arise before us.
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> 27. In view of this, we hold that assessee is not require, Orders of lower authorities are reversed and ld AO is directed to delete the disallowance for both the years.

10. On finding parity of facts, respectfully following the decision of this Tribunal (supra) we direct the AO to delete the impugned disallowances.

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

12. The order is pronounced in the open court on 16.02.2022 in the presence of both the rival representatives.

Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

NEHA
Date:- 16.02.2022
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	16.02.2022
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	17.02.2022
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	