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

BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.1043/M/2017
Assessment Year: 2012-13

M/s. EOS Power India P. Ltd., (Formerly known as Celtronix Power India P. Ltd.), Unit No.57, SDF-II, SEEPZ, Andheri (East), Mumbai – 400 096 **PAN: AACCC3626K**	Vs.	DCIT Central Circle 9(1)(1), Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Ajay R. Singh, A.R.
Revenue by : Shri M.V. Rajguru, D.R.

Date of Hearing : 05.11.2018
Date of Pronouncement : 15.01.2019

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 29.11.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2012-13.

2. The various grounds raised by the assessee are as under:

"1. The Learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs, 32,25,963 in respect of legal & professional charges u/s 40(a)(i) r.w.s. 195 of the Income Tax Act.

2. The Learned Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs. 32,25,963 u/s. 40(a)(i) r.w.s. 195 of the Income Tax Act in relation to disallowance of certification & other charges paid to non-resident.

3. The Learned Commissioner of Income Tax (Appeals) erred in treating certification services rendered by non-resident certification agency as services as referred to in Article 12(4)(a) of Indo-US DTAA liable for withholding tax.

4. The Learned Assessing Officer erred in treating certification services rendered by non-resident certification agency as a services as referred in Article 12(4)(b) of Indo-US DTAA in the nature of 'make available'.

5. Appellant company prays that,
   a. Delete the addition of Rs. 32,25,963 made on account of disallowance of expenditure.
   b. Grant any other relief deemed necessary.

3. The only issue raised in the various grounds of appeal is against the confirmation of disallowance of Rs.32,25,963/- by Ld. CIT(A) as made by the AO in respect of legal and personal charges under section 40(a)(i) read with section 195 of the Act by ignoring the fact that the services were rendered by the non resident certification agencies outside India and therefore not chargeable to tax.

4. The facts in brief are that assessee is engaged in the business of manufacturing of switch mode power supplies and other computer peripherals in its factory located in SEEPZ and the products were being mainly exported to US and European countries. During the year the assessee filed the return of income on 28.09.2012 declaring income at nil after claiming set off of brought forward losses to the extent of Rs.6,70,45,966/- while declaring the profit under section 115JB at Rs.8,08,12,417/- which was revised on 01.10.2012. The case of the assessee was selected for scrutiny. During the course of assessment proceedings AO noticed from schedule 16 annexed to P & L account that assessee has made payments to non resident parties as per details below:

Sr. No.	Name of the non-resident payee	Nature of services rendered	Amount (Rs.)
1	NEMKOAS	Certification charges	597099
2	NEMKO USA INC.	Certification charges	1753161
3	Underwriters Laboratories Inc.	Certification charges	223282
6	VDE	Certification charges	66176
	Dennemerer & Co.	Certification charges	187037
	JRT International	Certification charges	60968
	FM Approvals LLC	Certification charges	338240
		TOTAL	32,25,963

The assessee replied during the course of assessment proceedings to the show cause notice issued by the AO that the aforesaid payments were made to non resident parties not by way of fees for technical services but for certification and professional services rendered outside India and therefore should not be disallowed by invoking the provision of section 40(a)(i) read with section 195 of the Act and explanation 2 to clause (vii) below sub-section (1) of section 9 read with Explanation to section 9(1) of the Act.

5. The Ld. A.R. submitted that as per the rules and regulations in US and European countries, the quality of products sold in the markets has to meet certain standard requirements before the same could be used in US and European markets which required the exporters to get their products certified by the authorised agencies in US. The Ld.

A.R. submitted that the said charges were paid by the assessee to non resident certification agencies for certifying the products sold outside India which were necessitated by US Regulation. The said charges are only for certification abroad and not utilised anywhere in the manufacturing processes of the assessee. However, the AO, not being satisfied with the contentions of the assessee, added the same to the income of the assessee.

6. In the appellate proceedings, the Ld . CIT(A) also upheld the order of the AO by observing and holding as under:

> "I have carefully considered the facts of the case, submissions made by the appellant. The ground of appeal is decided herein as under.
>
> During the year, the appellant company had paid Rs. 32,25,963 to various entities as mentioned above in USA for getting product certification services of switch mode power supplies and other computer peripherals manufactured by the appellant. The foreign entities were assigned this job since it had a specialized knowledge and facility for the requisite testing and certification. The AO was of the view that the said testing and certification was required to be utilized in the manufacturing activity of the assessee company. The appellant, while making the payment to the foreign entities, had not deducted TDS. On query by the AO, the appellant submitted before the AO that the payment had been made to the foreign entities for testing of their products and since the testing was done by a foreign company outside India, no income had accrued or arisen in India due to which, no TDS was deducted.
>
> The AO, however, was of divergent opinion and taken the opinion that the payments made by the appellant is liable to TDS. Accordingly, the AO has made the disallowance to the income of the appellant u/s 4o(a)(i).
>
> It is observed that in the present case, the testing report and certification, etc. were obtained in respect of products to be utilized for purposes of business of the appellant and that the testing was a highly-specialized job of technical nature, amounting to technical services offered and received by the appellant. It is further observed that since the foreign entities were based in the USA, the services and payments made were covered under, "fees for included services", as dealt within Article 12(4)(b) of the Direct Taxation Avoidance Agreement between India and the USA ("the DTAA", for short). It is further observed that the testing report and certification were in the nature of making available of technical knowledge,

expertise and skill of the foreign entities to the appellant, rendering such services to be "fees for included services" under Article 12(4)(b) of the DTAA, since the testing report and certifications were utilized in manufacture and sale of products in the appellants business. The appellant vide their submission itself has submitted as under:

"If for any reason the quality of the product is not of the required standard, the certification agency will not approve the same. Further, the mark is required to be embossed on its products for the benefit of end users that the product is duly certified and the required quality standards and norms are fulfilled.

Thus, it can be inferred from the above that unless the products manufactured by the appellant is certified from the above foreign entities, the appellant will not be able to sell the products in the US or European markets. Further, upon embossing the logo of the foreign entities, the appellant's product will be able to command added brand value in the foreign markets.

Further, Explanation(2) to section 9(i)(viii)(b) of the I.T. Act, "fees for technical services" means consideration for the rendering of any managerial, technical or consultancy services; that in 'Cochin Refineries Ltd. vs. CIT, reported in 222 ITR 354 (Ker.), it has been held that fees paid by an Indian company to a foreign company to evaluate the quality of certain products and to ascertain the suitability of such products for a specific industry, considered as reimbursement made by the Indian company, were part and parcel in the process of advice of a technical character and would fall for coverage in the definition of "fees for technical services", within the provisions of section 9(i)(vii) of the Act; that since the payment made by the appellant as fees for technical services was utilized in business in India, it would lead to income being deemed to accrue or arise in India; that since fees had been paid for obtaining technical services for the purposes of the appellant's business and it had also been utilized for the purpose of manufacture and sale of products in the business of the assessee, the provisions of section 195 of the Act were applicable to such payment and that therefore, the AO was correct in holding that deduction under u/s 40 (a) (i) was not allowable."

7. The Ld. A.R. vehemently submitted before us that the Ld . CIT(A) has grossly erred in upholding the order of AO. The Ld. A.R. stated that the services are rendered outside India and payments were made to non resident certification agencies outside India. It was stated that certification charges were paid to as stated hereinabove in this order to the parties who have rendered services of certification to assessee and are in the nature of certifying the products sold in the US market which

was a necessary requirement to export the products under the US and European Regulations. The Ld. A.R. submitted that the whole services were rendered from USA/Germany and also operations were carried out outside by way of certification and professional services India which are not in the nature of fee for technical services as envisaged by explanation (2) to section 9(1)(vii) & explanation to section 9(1) of the act. Therefore the provisions of section 195 are not applicable as payments made to non residents outside India are not chargeable to tax in India. The Ld. A.R. stated that the income does not accrue or arise in India since there was no business connection in India and no PE of the said party in India. Besides, remittances were made outside India. The Ld. A.R. submitted that all these residents do not have any permanent establishment in India and therefore under Article of "Business Profits" of Double Taxation Avoidance Agreement on such payments are not chargeable to tax in India unless it is made available to recipients of such services. The Ld. A.R. submitted that as per Article 12(4) of Double Tax Avoidance Treaty (DTAA) between India and USA such fees are chargeable to tax in India if such services "make available", technical knowledge, experience, skill, knowhow or a process or transfer of technical plants or design. The services rendered by all these parties were in the nature of certification and these agencies do not "make available" such technical knowhow etc. to the assessee. Therefore, the said services rendered by them are not chargeable to tax in India. The Ld. A.R. further stated that no withholding the tax required to be held under section 195 and therefore the assessee was not

required to deduct tax from the said payments to these parties and hence confirmation of disallowance under section 40(a)(i) of the Act is not justified. The Ld. A.R. relied on the decision in support of his contentions as under:

> DIT vs. TUV Bayren India Ltd. (2015) 234 Taxman 388 Bom

The Ld. A.R. further submitted that in the earlier years as well as in the subsequent years similar payments were made by the assessee and were by the department even in the scrutiny proceedings. The Ld. A.R. strongly relied on the principle of consistency by strongly arguing that unless and until there is a change in law or change of facts , the expenses can not be disallowed which were accepted by the department in the earlier and succeeding years. The Ld. A.R. relied strongly on the decision of Jurisdictional High Court in the case of Pr. CIT vs. Quest Investment Advisors Pvt. Ltd. in ITA No.280 of 2016 dated 28.06.2018 Bombay High Court. Similarly, the Ld. A.R. argued that the professional charges paid to JRT International Rs.60,968/- and FM approval LLC Rs.3,38,240/- as stated above in the table for the services rendered in USA with regard to the compilation of the documents at USA for the purpose of transfer pricing requirement in India. The said services were rendered outside India for which no income accrues and arises in India and accordingly does not qualify for withholding tax. The Ld. A.R. argued that the payments made for documentation and other procedural requirement services rendered would not fall within the term consultancy services and consequently remittance made to foreign parties would not come within the

ambit of phrase 'fees for technical services' u/s 9(1)(vii) of the Act. The Ld. A.R. relied on the following decisions:

1. DIT vs. TUV Bayren India Ltd. (2015) 234 Taxman 388 Bom
2. CIT vs. Grup Ism P. Ltd. (2015) 378 ITR 205 (Del)
3. Ernst & Young P Ltd. (2010) 323 ITR 184 AAR

7. The Ld. D.R., on the other hand, relied on the orders of authorities below. The Ld. D.R. submitted that since the assessee has made payments to foreign agencies/parties in connection with the services rendered by those foreign parties nonetheless availed outside India, but same are liable to be treated as fees for technical services under section 9(1)(vii) of the Act and assessee was liable to withhold tax on the said payments under section 195 of the Act as under Article 12(4)(b) of DTAA. The ld DR argued that the testing and certification are in the nature of making available of technical knowledge, expertise and skills of foreign entities to the assessee and therefore would amount to rendering such services as "fees" including services since the testing report and the certification were utilised in the rendering the products of the assessee marketable. Therefore, the Ld. D.R. submitted that the AO has rightly disallowed the expenditure of Rs.32,25,963/- under section 40(a)(i) read with section 195 of the Act and the order of Ld. CIT(A) deserves to be upheld.

8. We have heard the rival submissions of both the parties and perused the material on record. The undisputed facts are that assessee availed certification services from non residents in US for certifying its products to be sold in USA and Europe

which was a pre condition for selling the products in those markets as the assessee has to ensure that the products meet the minimum quality standard. For the said purpose the assessee paid Rs.29,77,958/- to five parties as mentioned above and to the remaining two parties assessee paid professional charges for compilation of documents in USA for the purpose of transfer pricing requirements. The assessee made the payment towards the services rendered out in USA by these certification agencies and professional firms. Now the dispute before us is whether the said constituted fee for technical services under section 9(1)(vii) and under 12(4) of Indo German DTAA. The AO treated the same as fees for technical services and stated the same to be covered under Article 12(4) of the DTAA between India and USA and accordingly held that withholding of tax was required under section 195 failing which the provisions of section 40(a)(i) of the Act were invoked and the expenditure was disallowed. Having considered the rival submissions and various case laws, we find that in the present case before us the payments were made to non residents for rendering services outside India and the recipients were not having any PE in India and thus income does not accrue or arise in India as there was no business transactions in India. Since the recipients do not have any PE in India and under Article of "Business Profit" of Double Taxation Avoidance Agreement such payments are not chargeable to tax in India unless the services were made available to the assessee in India. Article 12(4) of DTAA between India and USA, such fee is chargeable to tax in India if such services "make available", technical knowledge, experience, skill,

knowhow and a process or transfer of technical plans or designs. However, all these certification agencies and professional firms have not made available such services to the assessee such as knowhow. Therefore, service rendered by them outside India is not chargeable to tax in India and the provisions of section 195 of the Act are not applicable and consequently the assessee is not liable to deduct TDS at source. Therefore disallowance under section 40(a)(i) of the Act is not correct. The case of the assessee is supported by a series of decisions as mentioned above in the case of DIT vs. TUV Bayren India Ltd. (2015) 234 Taxman 388 Bom (supra) wherein the Hon'ble Bombay High Court has held that audit work and certification would not come within the realm of fees for technical services under section 9(1)(vii) and under 12(4) of Indo German DTAA. In the case of Diamond Services International P. Ltd. vs. UOI (2008) 304 ITR 201 (Bom.) it was held by the Hon'ble Bombay High Court that payment without TDS made for grading certificate issued by foreign company to Indian clients involving no transfer of technical knowledge or skill. There was no imparting of its experience by the institute in favour of client. Similarly, in the case of Inspectorate International Ltd. vs. Asst. CIT (2018) 95 taxmann.com 229 (Delhi Trib.) it was held by the co-ordinate bench of the Tribunal that where inspection and testing services rendered by a UK based company to Indian customers but no technical knowledge, etc. were made available so as to enable recipients to use those services independently, payments received could not be termed as fee for technical services. Moreover, on the principle of consistency also the Hon'ble

Bombay High Court has held in the case of Pr. CIT vs. Quest Investment Advisors Pvt. Ltd. (supra) that on the principle of consistency no disallowance is warranted when a fundamental aspect is accepted in other years. There is no change in facts and in law in the present case also. The expenses were allowed under similar facts by the Revenue in the earlier and succeeding years. Therefore, on this ground also disallowance is not called for. Accordingly, we are setting aside the order of Ld. CIT(A) and directing the AO to allow the deduction.

9. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 15.1.2019.

Sd/-	**Sd/-**
(Mahavir Singh)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 15.1.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.