

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "D" NEW DELHI]

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं .I.T.A Nos. 7694/Del/2019
निर्धारण वर्ष/Assessment Years : 2016-17

Gensler Singapore Private Limited, Fifth Floor, 2, Peck Seah Street, Air View Building, Singapore.	<u>बनाम</u> Vs.	JCIT, Circle : 1(3)(1) International Tax, New Delhi.
PAN No. AAFCG8738F		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारित की ओरसे / Assessee by :	Shri Rony Antony, C. A.;
राजस्व की ओरसे / Department by :	Shri Vizay B. Vasanta, [CIT] - D. R.;

सुनवाई की तारीख/ Date of hearing :	20.06.2023
उद्घोषणा की तारीख/ Pronouncement on :	25.08.2023

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. This appeal is filed by the assessee against the assessment order dated 23.07.2019 passed under section 143(3) read with

section 144C(13) of the Income Tax Act, 1961 (the Act) pursuant to the directions of the DRP order dated 7.06.2019 passed under section 144C(5) of the Act.

2. The assessee has raised the following substantive grounds of appeal:-

“Ground No.1

The learned Joint Commissioner of Income tax ("JCIT") has erred in law and on facts by concluding that the service provided by the Appellant to Reliance Corporation IT Park Limited would be regarded as Fees for Technical Services under Article 12 of India - Singapore Double Tax Avoidance Agreement.

Ground No.2

The learned JCIT has erred in law and on facts by mentioning the returned income as INR 3,39,42,926 instead of INR 48,53,503 thereby computing the total income as INR 6,30,32,353 and taxing the same income twice.

Each of the above ground are independent and prejudice to one and another.“

3. Ground No. 1 of grounds of appeal is in treating the services provided by the assessee to Reliance Corporation IT Park Limited and the payment received as Fees for Technical Services under Article 12 of India - Singapore Double Tax Avoidance Agreement.

4. Brief facts are that the assessee is a tax resident of Singapore and is in the business of providing design services to customers in the Asia Pacific region. During the assessment year under consideration the assessee has provided the services to its Indian Associated Enterprises - Gensler Design India Pvt. Ltd. This

service included designs, technical and consulting services, marketing support services and services related to evaluation of certain project properties. Receipts in lieu of these services have been offered to tax as Fees for Technical Services (FTS) @ 10% in accordance with Article 12 of Indo Singapore DTAA. In the course of assessment the Assessing Officer noticed that the assessee has received Rs.2,90,89,423/- from Reliance Corporation IT Park Limited (RCITP) and in Form 26AS it is reflected that TDS @ 10% has been deducted by the payer on the said amount. Assessee was asked to explain why the said receipts have not been included in the taxable income. Assessee stated that the income received from RCITP is not taxable as per the Treaty. The assessee contended that the remittance being RCITP is towards design services and this service could be considered to be technical in nature and the remittance for these services could be categorized as fees for technical services as per Explanation 2 to section 9(1)(vii) of the I.T. Act. It was further contended that the proposed remittance being payment towards technical services received would not be categorized as fees for included services as per Article 12(4) of the treaty as the services do not make any technical know-how, experience, skill know-how or process which enable the person acquiring the services to apply the technology contained therein.

5. However, not convinced with the submissions and contentions of the assessee the Assessing Officer held that from perusal of work order it is clear that the role of the assessee involved development and transfer of a technical plan and technical design to RCITP while applying or has applied into the final making of its building. The

designs and plans are supplied by the assessee along with the transfer of the technical plan or design. RCITP also acquired the rights to apply into its project the technology enhancement the design or blue print. On analyzing the work order the Assessing Officer concluded that the said receipts get covered in the scope and ambit of the term 'fees for technical services' as laid down in Article 12 of the Treaty. The Assessing Officer also concluded that the receipts are also covered in the scope of clause (b) of clause 4 of Article 12 because through its work as interior designer for the RCITP Twin Tower Project the assessee is making available a technical process to the client as interior designs or plans also describe the process by which his design or blue print will come to actual realization. Thus, the Assessing Officer in the draft assessment order dated 28.12.2018 passed under section 144C of the Act held that the income of Rs.2,70,89,423/- is in the nature of fees for technical services both under the Income Tax Act and the Indo - Singapore DTAA.

6. Assessee filed objections before the DRP and the DRP by order dated 7.06.2019 sustained the view of the Assessing Officer holding that the transfer of technical plan or design enabled RCITP to acquire the rights to apply into its project the technology enhancement in the design or blue print. This technology was a combined product of the expertise of the assessee and inputs acquired from the clients and got embedded into the technical designs or plans that were made by the assessee. The DRP held that when the client uses the designs it uses the technology i.e.

enhancement in the designs and plans and, therefore, the requirements of Article 12 of the DTAA are met.

7. Before us the Id. Counsel for the assessee reiterated the submissions made before the Assessing Officer and the DRP. Id. Counsel further submits that the design services provided by the assessee to RCITP are not making available the technical knowledge as every time a design service is being provided for a particular project the same design cannot be utilized for different project by relying as design are made project specific. Therefore, the transaction does not fall under Article 12(4)(b) of the Treaty. Id. Counsel further submits that as per Article 12(4)(c) technical design services will only be included if the person who is acquiring these services applies the technology contained therein and in the given case RCITP uses only the design for its construction and nowhere uses the technology used to create the design. Therefore, the said transaction also cannot attract Article 12(4)(c) of the Treaty. Strong reliance was placed on the decision of the Mumbai Bench Tribunal in the case of DCIT Vs. Forum Homes (P.) Ltd. [(2022) 192 ITD 184 (Mumbai-Trib.)]. Reliance was also placed on the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. De Beers India Mineral Private Limited [(2012) 346 ITR 467 (Kar)].

8. On the other hand, the Id. DR referring to page Nos. 99 to 101 of the work order dated 30.06.2015 containing various clauses submits that as per the work order the principal designer co-ordinate with the contractors and other third parties appointed by RCITP and integrate the services with the services and work rendered by various contractors and third parties to ensure an

integrated project. Further referring to clause 2.9 of the work order the Id. DR submits that as per the said clause the principal designer the assessee grants RCITP a perpetual irrevocable non-exclusive royalty free fully paid-up right and license to use copy modified and prepare derivative works of the principal designers intellectual property rights incorporated in the deliverables for the use of the Reliance and its affiliates and third parties and, therefore, satisfies the condition of make available clause as per Article 12(4) of the Indo - Singapore DTAA. The Id. DR, therefore, submits that the lower authorities have rightly brought to tax the fee received by the assessee from Reliance as fees for technical services under Indo - Singapore DTAA itself for technical services. Further reliance was also placed on the decision of the Kolkata Bench Tribunal in the case of Gentex Merchants (P.) Ltd. Vs. DDIT (International Taxation) [(2005) 94 ITD 211 (Kol.)] in support of his contentions.

9. Heard rival submissions perused the orders of the authorities below. The assessee entered into a contract/work order with RCITP on 30.06.2015, according to which the assessee will provide interior design consultants and associate design consultancy for the Twin Tower Project of Reliance Corporation IT Park Limited, Ghansoli, India. The Twin Tower Project as described in the work order comprises of two towers one having 28 and the other having 26 floors. RCITP will set up a world class office complex along with a business centre in the Twin Tower. The assessee was required to provide/prepare designs for the interior office/business sets in the Twin Tower Building. The assessee was to prepare

designs for all areas of the building such as lobby, visitors experience centre, business centre, private offices, cabins and work stations, conference meeting rooms, cafetoria, storage areas etc. The assessee was required to work in close co-ordination with the project/building architects, engineers and other teams of experts involved in the Twin Tower Projects. The question now is as to whether the services provided by the assessee to RCITP falls under Article 12 (4) of Indo - Singapore DTAA as fees for technical services. For quick reference clause (4) of Article 12 of Indo - Singapore DTAA which defines the term 'Fees for Technical Services' is reproduced as under:-

“4. The term fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial technical or consultancy nature (including the provision of such services through 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 3 is received; or
- (b) make available technical knowledge experience skill know-how or processes which enables the person acquiring the services to apply the technology contained therein; or
- (c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.”

10. As could be seen from the above sub clause (b) of clause (4) of Article 12 payments of any kind to any person in consideration for services of a managerial technical or consultancy nature (including the provision of such services through technical or other personnel)

if such services make available technical knowledge, experience, skill know-how or process which enables the person acquiring the services to apply the technology contained therein shall fall under fees for technical services under Article 12(4)(b). Similarly under such clause (c) of clause (4) of Article 12 payments of any kind to any person in consideration for services of a managerial technical or consultancy nature (including the provision of such services through technical or other personnel) if such services consists of the developmental and transfer of a technical plan or technical design but excludes any service that does not enable the person acquiring the service to apply the technology contained therein shall be treated as fees for technical services.

11. The work order dated 30.06.2015 consists of the following clauses which are relevant for the purpose of deciding the issue:-

“2.7 PRINCIPAL DESIGNER shall assist COMPANY in identifying contractors and other third parties for performing services and/or work in relation to the PROJECT, and shall, on request by COMPANY, recommend persons or assist in soliciting bids for such services or work. PRINCIPAL DESIGNER shall assist COMPANY (i) negotiate contracts with such contractors and other third parties and (ii) determine their respective scope of work.

2.8 The PRINCIPAL DESIGNER hereby acknowledges and agrees that neither the PRINCIPAL DESIGNER nor any ASSIGNED PERSONNEL shall have any rights, title or interest in any INTELLECTUAL PROPERTY RIGHTS created (whether wholly or partly) by the PRINCIPAL DESIGNER or sub-consultant in relation to the performance of the SERVICES or other obligations under the AGREEMENT. The PRINCIPAL DESIGNER hereby assigns and transfers and shall cause the ASSIGNED PERSONNEL to assign and

transfer to COMPANY, all rights, title and interest in all such INTELLECTUAL PROPERTY RIGHTS created.

2.9 The PRINCIPAL DESIGNER hereby assigns and transfers to the COMPANY, from the moment of creation, all right, title and interest in all DELIVERABLES, but excluding specifically the PRINCIPAL DESIGNERS INTELLECTUAL PROPERTY RIGHTS incorporated in the DELIVERABLES. The PRINCIPAL DESIGNER hereby grants the COMPANY a perpetual, irrevocable, non-exclusive, royalty-free, fully paid-up right and license to use, copy, modify and prepare derivative works of the PRINCIPAL DESIGNER S INTELLECTUAL PROPERTY RIGHTS incorporated in the DELIVERABLES, for the use of the DELIVERABLES by the COMPANY and its AFFILIATES and third parties engaged by the COMPANY in connection with the business operations of the COMPANY and its AFFILIATES.”

Further the deliverables for the purpose of the above clause 2.9 is defined as under:-

“1.13 DELIVERABLES means any and all reports, analyses, tests, tables, plans, drawings or other documents to be delivered or provided by the PRINCIPAL DESIGNER in any form, including in electronic or printed form, under this AGREEMENT. “

12. As could be seen from the above by virtue of clause 2.9 the assessee who is the principal designer assigns and transfer to RCITP all right title and interest in all deliverables from the moment of creation and the principal designer the assessee grants RCITP a perpetual irrevocable non-exclusive royalty-free fully paid-up right and license to use copy, modify and prepare derivative works of the principal designer intellectual property rights incorporated in the deliverables for the use of the deliverables by the RCITP and its affiliates and third parties engaged by RCITP in connection with the business operations of the RCITP

and its affiliates. This clearly shows that the assessee is making available RCITP all reports, analysis, tests, tables, plans, drawings or other documents in any form including electronic or printed form for the use of RCITP which enables RCITP to apply and use all these deliverables for its business purposes which specifies the conditions of sub clause (b) and (c) of clause (4) of Article 12 of Indo - Singapore DTAA. Thus, the payments received by the assessee from RCITP are fees for technical services falls under sub clause (4) of Article 12 of Indo - Singapore DTAA. Thus, the lower authorities have rightly treated the amounts received by the assessee from RCITP as fees for technical services under Article 12 (4) of Indo - Singapore DTAA and was rightly brought to tax at 10%. The case laws relied on by the Id. Counsel for the assessee are distinguishable on facts and have no application to the case on hand. Thus, we dismiss ground No. 1 of grounds of appeal of the assessee.

13. Coming to ground No. 2 of grounds of appeal the assessee contended that the Assessing Officer wrongly taken returned income of the assessee as Rs.3,39,42,926/- instead of Rs.48,53,503/- thereby taxing the same income twice.

14. This ground is restored to the file of the Assessing Officer who shall examine the contention of the assessee and pass an appropriate order. This ground is allowed for statistical purpose.

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

Order pronounced in the open court on : 25/08/2023

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

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 25/08/2023.

MEHTA

Copy forwarded to :

1. Appellant;
2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	16.08.2023
Date on which the typed draft is placed before the dictating member	18.08.2023
Date on which the typed draft is placed before the other member	25.08.2023
Date on which the approved draft comes to the Sr. PS/ PS	25.08.2023
Date on which the fair order is placed before the dictating member for pronouncement	25.08.2023
Date on which the fair order comes back to the Sr. PS/ PS	25.08.2023
Date on which the final order is uploaded on the website	25.08.2023
Date on which the file goes to the Bench Clerk	25.08.2023
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	