

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव,लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष  
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.497/PUN/2016

निर्धारण वर्ष / Assessment Year : 2009-10

The Deputy Director of Income Tax,  
(International Taxation), Circle-2,  
Pune.

.....अपीलार्थी / Appellant

**बनाम / V/s.**

M/s. Sandvik System Development AB,  
C/o. Sandvik Asia Limited,  
Mumbai Pune Road, Dapodi,  
Pune-411 012  
PAN : AAHCS7485H

.....प्रत्यर्थी / Respondent

**प्रत्याक्षेप सं./CO.No.122/PUN/2017**

**निर्धारण वर्ष/Assessment Year: 2009-10**

**(Arising out of ITA No.497/PUN/2016)**

M/s. Sandvik System Development AB,  
C/o. Sandvik Asia Limited,  
Mumbai Pune Road, Dapodi,  
Pune-411 012  
PAN : AAHCS7485H

..... प्रत्याक्षेपक/ Cross objector

**बनाम / V/s.**

The Deputy Commissioner of Income Tax,  
(International Taxation), Circle-2,  
Pune.

.....प्रत्यर्थी / Respondent

Revenue by : Shri T. Vijaya B. Reddy

Assessee by : Shri Nikhil Pathak

सुनवाई की तारीख / Date of Hearing : 17.07.2018

घोषणा की तारीख / Date of Pronouncement : 12.10.2018

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM**

This appeal has been filed by the Department against assessment order dated 18.02.2016 passed u/s.144C(13) r.w.s.143(3) r.w.s.147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for the assessment year 2009-10. The assessee has filed cross objection against the appeal filed by the Department.

2. The brief facts of the case as emanating from records are: The assessee is a foreign company incorporated in Sweden. The assessee does not have any office or place of business in India. No return of income was filed by the assessee/ appellant for the impugned assessment year. Notice, u/s. 148 of the Act was served on the assessee/appellant for the reason that the assessee has received fee for providing IT support services from Sandvik Asia Pvt. Ltd. (SAPL) in assessment year 2009-10 and the same was not offered to tax. The nature of payment received by the assessee is in the form of Royalty and Fees For Technical Services (FTS) as per provisions of section 9(1)(vi) & 9(1)(vii) of the Act as well as Article 12 of the DTAA between India and Sweden. In response to the aforesaid notice, the assessee filed return of income on 06.05.2014 declaring total income as 'Nil'. Addition of Rs.2,55,61,940/- was made by the Assessing Officer on account of FTS vide draft assessment order dated 24.03.2015. The assessee filed objections before the Dispute Resolution Panel (DRP) against the addition made in the draft assessment order, as well as on re-opening of assessment. The DRP

vide directions dated 23.12.2015 upheld the validity of re-opening of assessment. However, on merits of the addition, the DRP held that the payment received by the assessee is neither Royalty nor Fees For Technical Services. Hence, the same is not liable for tax. Accordingly, the Assessing Officer passed final assessment order on 18.02.2016 deleting the addition.

3. Now, the Revenue is in appeal before the Tribunal assailing the assessment order by raising following grounds:

*“1. Whether on the facts and in the circumstances of the case, the DRP, Mumbai erred in concluding that the services provided by the assessee do not qualify as Fees for Technical Service under clause (b) of para 4 of Article 12 of Double Taxation Avoidance Agreement between India and Portuguese Republic by referring to the Protocol of India –Sweden DTAA.*

*2. Whether on the facts and in the circumstances of the case, the DRP, Mumbai erred in concluding that the term “make available” means supplying or transferring of technical knowledge or technology to another.*

*3. Whether on the facts and in the circumstances of the case, the DRP, Mumbai erred in allowing assessee’s appeal without giving categorical findings as to how the services are not taxable in India as per India – Portuguese DTAA.*

*4. The appellant craves to leave to add to modify any of the grounds of appeal.”*

4. Shri Nikhil Pathak appearing on behalf of the assessee submitted at the outset that the issue raised by Revenue in appeal is identical to the one adjudicated by the Co-ordinate Bench of Tribunal in the case of assessee’s holding company, M/s. Sandvik AB Vs. DDIT in ITA No.1720/PN/2011 for the assessment year 2007-08 decided on 28<sup>th</sup> November, 2014. The DRP granted relief to the assessee by placing reliance on the decision of the Tribunal in the afore-mentioned case.

5. On the other hand, Shri T. Vijaya B. Reddy representing the Department vehemently supported the findings of Assessing Officer in draft

assessment order in making the addition. The ld. DR submitted that the DRP while granting relief to the assessee has failed to examine the nature of services rendered by the assessee to Sandvik Asia Pvt. Ltd. In fact, documents on record, nowhere suggests the nature of services rendered by assessee to the Indian entity.

6. We have heard the submissions made by representatives of rival sides and have perused the orders of Authorities below. The solitary issue emanating from the grounds raised in appeal by the Revenue is; Whether the payment made to assessee by SAPL for up-gradation of software is in the nature of Royalty or/and FTS. A perusal of the documents available on record indicate that the assessee had entered into an agreement dated 01.04.2002 with SAPL for providing maintenance services in respect of application internally developed namely SOPIC by assessee for Sandvik Group of Companies. During the period relevant to the assessment year under appeal, the assessee provides application development and maintenance services in respect of SOPIC. The cost of all development/up-dating application was recovered by the assessee from its user company along with maintenance service charges. In the present case, the amount of Rs.2,55,61,940/- was received by assessee from SAPL towards IT support services viz. software maintenance, system development, help-desk services, enterprise computing etc. The payments for the aforesaid services were held to be in the nature of Royalty/FTS.

7. The CIT(A) after analysing the agreement, nature of services and invoices raised by assessee on SAPL, came to the conclusion that the payments were received towards system development and software maintenance services rendered to SAPL. No payment was received by assessee for granting license to use any software application to SAPL.

Therefore, the payments do not fall within the ambit of definition of “Royalty” as defined in the DTAA or within the meaning of Explanation (2) under section 9(1)(vi) of the Act.

8. As regards holding the payments as FTS, the DRP placed reliance on the decision of Pune Bench of the Tribunal in the case of M/s. Sandvik AB Vs. DDIT (supra.). The DRP has discussed this issue in Para 4.20 & 4.21 of the direction. For the sake of completeness the same are extracted herein under:

*“4.20. It is therefore seen from the decisions mentioned above that in order to be considered as FTS, the services rendered by the assessee, apart from being technical or consultancy services, should also satisfy the condition that such services make available technical knowledge, experience, skill, know how or processes. The term “make available” has been interpreted to mean that the recipient of this service should be enabled to apply such technical knowledge, experience etc. by itself without recourse to the service provider in future.*

*4.21 In the present case, the IT support services rendered by the assessee to SAPL are in the nature of system development services and maintenance of internally developed applications. It is seen that the assessee merely provides development/updation and maintenance of the internally developed software applications owned by the assessee and this service in no way equips the recipient of the service i.e. SAPL to carry out such development/updation and maintenance activity by itself in future without recourse to the assessee. Hence, the receipt arising out of IT support services provided by the assessee does not fall under the ambit of “Fees for included services” as defined in the treaty.”*

The ld. DR has not been able to controvert the findings of DRP in deleting the addition. The Revenue has failed to show that the payments received by assessee from SAPL are either in the nature of Royalty or FTS. We do not find any infirmity in the impugned assessment order/directions of the DRP. Hence, the grounds raised by the Revenue in appeal are dismissed being devoid of any merit.

9. In the result, appeal of the Revenue is dismissed.

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**A.Y.2009-10**

10. The assessee has filed cross objection in support of the assessment order deleting the addition. Assessee has also assailed the findings of Assessing Officer/ DRP in rejecting assessee's contention with respect to re-opening. Since we have dismissed the appeal of the Revenue, grounds raised by the assessee in cross objection have become academic. Therefore, the same are dismissed.

11. To sum up, appeal filed by the Revenue and the cross objections filed by assessee, are dismissed.

Order pronounced on Friday, the 12<sup>th</sup> day of October, 2018.

Sd/-  
(**डॉ. करुणाकरा राव**/D. KARUNAKARA RAO)  
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-  
(**विकास अवस्थी** /VIKAS AWASTHY)  
न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 12<sup>th</sup> October, 2018

SB

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT( International Taxation), Circle-2, Pune.
4. The Pr. CIT-5, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,  
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.