IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH, KOLKATA

Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Viswanethra Ravi, Judicial Member

I.T.A. No. 112/Kol/2016
Assessment Year: 2011-12

Koninklijke Philips N.V……Assessee
[PAN : AACCK 0806 B]

DCIT(IT) -1(2), Kolkata……Revenue

&
I.T.A. No. 87/Kol/2017
Assessment Year: 2012-13

Koninklijke Philips N.V……Assessee
[PAN : AACCK 0806 B]

ACIT(IT), Circle-1(2), Kolkata……Revenue

&
I.T.A. No.2474/Kol/2017
Assessment Year: 2013-14

Koninklijke Philips N.V……Assessee
[PAN : AACCK 0806 B]

ACIT(IT), Circle-1(2), Kolkata……Revenue

Appearances by:
Shri P.J. Pardiwala, Sr. Advocate & Navneet Misra, Adovacate, appearing on behalf of the assessee.
Shri P. K. Srihari, CIT-DR, appearing on behalf of the Revenue.

Date of concluding the hearing : January 10th, 2019
Date of pronouncing the order : February 20th, 2019

O R D E R

Per J. Sudhakar Reddy :-

These three appeals are filed by the assessee for the Assessment Years 2011-12, 2012-13 & 2013-14.

2. As the issues arising in all these appeals are common, for the sake of convenience they are heard together and disposed off by way of this common order.

3. The assessee is a non-resident foreign company and has filed its return of income on 29.11.2011 declaring a total income of Rs.72,08,27,627/- for the Assessment Year 2011-12. Similarly, for the Assessment Year 2012-13, it filed its return of income on 28.11.2012 declaring total income of Rs.137,54,64,750/- for the Assessment Year 2013-14, the assessee filed its return of income on 29.11.2013 declaring total income of Rs.143,82,85,470/-. In all these three years, the assessment order passed u/s 143(3) r.w.s 144C of the Act.

4. The ld. Senior Advocate, Shri P. J. Padriwala, submitted that only two issues arise in all the three years and they relate to taxability of receipts under Research and Development Agreement ('RDCA') which are as follows:

> *"1. Taxability of receipts under Research and Development Co-operation Agreement ('RDCA') with Philips India Limited ('PIL') [Earlier known as 'Philips Electronics India Limited']*
>
> *2. Taxability of receipts under Management Support Services Agreement ('MSSA') with PIL."*

4.1 He submitted that both these issues are same as those that were adjudicated before the Tribunal in the case of the assessee for the Assessment Years 2008-09, 2009-10 & 2010-11 in ITA No.1889/Kol/2012, 565/Kol/2014 & ITA No.381/Kol/2015 order dated 25.10.2018, and that both the issues are covered in favour of the assessee by these orders of the ITAT. He took this Bench through the order of the Assessing Officer and the directions of the DRP as well as findings of the Tribunal, for the Assessment Years 2008-09, 2009-10 & 2010-11 on both the issues to demonstrate that the facts are identical.

5. The ld. DR, Shri P. K. Srihari, on the other hand opposed the contention of the assessee and submitted that it is wrong to argue that this is a case of

reimbursement. He submitted that the term 'reimbursement' is a misnomer and that neither the TPO or DRP had said so. He relied on the decision of the Hyderabad 'B' Bench of the Tribunal in the case of *Kirby Building Systems India Ltd., [2014] 52 taxmann.com 409 (Hyderabad – Trib.)* for the proposition that where it is not a case of pure reimbursement of cost but cost sharing exercise was involved for the services, a markup was warranted under the transfer pricing provisions. On a query from the Bench, though not leaving his ground, the ld. CIT-DR submitted that both these issues were adjudicated by the Coordinate Bench in the case of this assessee for earlier Assessment Years.

6. After hearing rival contentions and perusing the papers on record and the orders of the authorities below, as well as case laws cited, we hold that the issue is squarely covered by the decision of this Bench in ITA No.1889/Kol/2012 for the Assessment Year 2008-09, ITA No.565/Kol/2014 for Assessment Year 2009-10 and ITA No.381/Kol/2015 for Assessment Year 2010-11 order dated 25.10.2018. Ground No.1 has been adjudicated by the ITAT in the following manner:

> *"19. After going through the terms and conditions of the RDCA Agreement, we note that the royalty payments received by the assessee from various group companies are in the nature of reimbursements, as it is evident from the various clause of the RDCA agreement. These payments received by the assessee company, by no stretch of logic could be viewed as payments for right to use research findings. Where there is no transfer of the right to use, therefore, the payment made cannot be treated as royalty. In the assessee`s case under consideration, the assessee does not transfer right to use. By way of research and development, the group companies are entitled to enjoy certain services, such as product developments, maintenance of product quality, uniform handling, packing, storage and marketing methods, therefore these services by itself did not result in any use of or right to use and there is no transfer of copy right therefore, there cannot be any occasion to hold it as royalty. In any event, so far as the transaction between the assessee and PEIL India is concerned, it is simply in the nature of reimbursement of expenses incurred by KPENV, on behalf of the group companies and it is not an income for the KPENV. During the course of hearing before us, when we put this position to the ld. DR, he did not have much to say beyond placing reliance on the stand of the Assessing Officer. Hence, the payment received by the assessee company from various group companies are in the nature of reimbursement as evident from the details taken from various terms and*

conditions of RDCA agreement. The RDCA agreement has no income element, hence a cost sharing agreement cannot be converted into the terminology of 'royalty'.

20. We note that in the alternative, assuming, that the amount received under RDCA is not considered to be a reimbursement, we note that it is not 'Royalty' under section 9(1)(vi) of the Act, or 'Royalty' as defined under Article 12 of the India-Netherlands DTAA. The Article 12 of the India-Netherlands DTAA deals with taxability of Royalties and Fees for technical services. Article 12(4) defines Royalty as under:

> *"The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience."*

The above definition covers three categories of payments received: to fall within the purview of the term 'Royalty'. They are consideration for the use of, or the right to use:

(i) any copyright of literary, artistic or scientific work including cinematograph films;

(ii) any patent, trade mark, design or model, plan, secret formula or process; or

(iii) for information concerning industrial, commercial or scientific experience.

In the case of the Assessee the research and development services for which the Assessee receives the shared costs clearly has to be considered in category (iii) and clauses(i) and (ii) plainly do not apply and has never even been disputed/invoked by the tax authorities as well. This category of the Royalty definition deals with "information concerning industrial, commercial or scientific experience". The meaning and ambit of the phrase "information concerning technical, industrial, commercial or scientific knowledge, experience or skill" appearing in Article 12 of the India-USA DTAA defining Royalty was dealt with by the Hon`ble Bombay High Court in Diamond Services International (P.) Ltd vs. Union of India [2008] 169 Taxman 201 (Bom.). In that case the question that arose was the issue for consideration was whether the issuance of grading reports by GIA can be termed as impartation or granting of right to use information of a technical commercial or scientific experience to the clients/customers who send their diamonds for grading and certification to the GIA laboratories outside India. The Hon`ble Bombay High Court held as follows:

> *"8. The grading report by GIA is a statement of fact as to the characteristics of the diamond. Does this report amount to transfer of any industrial or commercial experience of GIA to the petitioner or to an agent of the petitioner. The report gives the attributes of the diamond and includes an analysis of the diamond's dimensions, clarity, colour, polish, symmetry and other characteristics. There is nothing on record before us to show that GIA through its grade report assigns or transfers any industrial or commercial experience to its customers. Therefore, the question would be whether the grading report would amount to any transfer of any experience by GIA to the clients. The term "experience" is not defined either under the Act or under the DTAA and consequently we shall have to consider the normal dictionary meaning. The expression "experience" in The Oxford English Reference Dictionary has been explained as "knoweldge or skill resulting from actual observation of or practical acquaintance with facts or events." In*

the Chambers Dictionary the expression "experience" has been explained as "knowledge or practical wisdom gained from what one has observed, encountered or undergone". In Webster's Encyclopedic Unabridged Dictionary "experience" is explained as "The process or fact of personally observing, encountering or undergoing something." As per the dictionary meaning of the term "experience" it is clear that "experience" is a cumulation of knowledge and observation gathered over a period of time. Term "experience" has also been judicially interpreted by the Supreme Court in Shesharao Bagde vs. Bhaiyya (1991) Supp. 1 SCC 367 as under :

"Normally when we talk of an experience unless the context otherwise demands, it should be taken as experience after acquiring minimum qualifications required and will, therefore, necessarily have to be posterior to the acquisition of the qualification."

The grading certificate which is issued does not involve any transfer of commercial interest to the party paying or getting the right to use the experience of GIA. There is also no transfer of any skill or knowledge of GIA to the customers in the issuance of grading reports. The payments received is not the one for the use or the right to use experience, but is instead one for the application of experience to a certain factual situation i.e. GIA shall apply its expertise to the diamonds submitted by the clients and determine its true feature.

For that purpose we may consider the expression "use" as defined in various dictionaries. In the Oxford English Reference Dictionary it is defined as "exploit for one's own ends, employ, apply. "In Chambers Dictionary it is defined to mean "Use to employ for some purpose. Apply to one's own purpose. The act so employing, using or putting into service". The nature of the transaction between GIA and its client does not invest the party making payment with any right as regards the use of the cumulated experience of GIA. The payment in question does not involve a payment for the use or the right to use the industrial, commercial or scientific experience of GIA. The activity of grading or certification is merely the application of this knowledge/experience in a professional stream as applicable to a particular diamond or set of diamonds which are offered for certification or grading. The definition of royalty under the DTAA under art. 12(3) as defined therein, that uses the expression "or for information concerning industrial, commercial or scientific experience". There is no parting of information concerning industrial, commercial or scientific experience by GIA when it issues the grading certificate. Under sub-cl. (4) the payments received must be in consideration for services of managerial, technical or consultancy nature. That could include to the application or enjoyment of the right, property or information. This is not the case here. Neither is it making available technical knowledge, experience, skill, etc., to enable the person acquiring the service to apply the technology contained therein."

The Hon`ble Bombay High Court then went on to consider whether a service tendered for a price could be considered as imparting of industrial experience or skill. It negated this contention in the following words:

"9. The question that remains to be answered is whether there is imparting of specific experience by GIA to the person. Impart in Webster's Encyclopaedic Unabridged Dictionary has been defined "to give, to bestow; communicate; to grant a part or share of. In Oxford English Reference Dictionary it is prescribed as "give a share of (a thing)". A plain reading, therefore, of the meaning of the word "impart" implies that it means to give, to bestow, communicate, to grant a part or share of or give a share of a thing.

> *Considering that the term royalty envisages grant or share of industrial or commercial experience. In other words there should be a transfer of "industrial or commercial experience" from assignor to the assignee for a consideration. Therefore, to fall within the meaning of the term royalty under Article 12 of the DTAA it must envisage the person who is the owner of any intellectual property right, designs, or model, plan, secret formula or process, etc. to retain the property in them and permit the use or allow the right to use such patents, designs or models, plans, secret formula, etc. to another person. Where there is no transfer of the right to use, payment made cannot be treated as royalty"*

It then Hon`ble Bombay High Court considered whether using experience knowledge or skill in the rendering of a service is tantamount to imparting such knowledge experience or skill. This too was rejected in the following words:

> *".As discussed earlier it is true that GIA may have the experience of grading. However, does it impart its experience to its client? In our opinion there is no imparting of its experience in favour of the client. What the client receives is the report where the GIA uses its commercial or technical knowledge to give a report to the client. Illustrative example would be a lawyer giving advise to his client, a doctor giving his medical opinion, a laboratory submitting blood analysis report and the like. These cannot be said to be imparting of information by the person who possesses such information. What such person does is uses his experience and technical know-how for a consideration without parting with that information."*

The Hon`ble Bombay High Court therefore concluded that the using knowledge, experience and skill is very different from imparting knowledge and skill. In the assessee's case under consideration, the Assessee uses knowledge, experience and skill but does not impart such knowledge, experience and skill to Philips India. Therefore, it cannot be construed as imparting any information concerning technical, industrial, commercial or scientific knowledge, experience or skill of the supplier to satisfy the definition of royalty laid down under clause (iv) of Explanation 2 to s. 9(l)(vi) of the Act. The said principle equally applies to Article 12(4) of the India-Netherlands DTAA since it covers payment for the use of, or the right of use, information concerning industrial, commercial or scientific experience.

We note that the services under RDCA provides various types of information and results arising and emanating from various research, programs and laboratories, the same does not result in the Assessee imparting any of its industrial, commercial or scientific experience. Hence, the payments under RDCA cannot be classified under this category as well. Therefore, we are of the view that the payments received by the Assessee from Philips India under RDCA do not qualify, as Royalty as defined under Article l2(4) of the India-Netherlands DTAA and accordingly, the same is not taxable under Article 12 (4). The contention of the DR regarding the exclusivity and confidentiality of the Research shared is fully explained as Article 4 clearly shows that the use of the benefits arising from the research and development program undertaken by the Assessee are granted to all Philips Group entities on a non- exclusive, non-transferrable and indivisible basis to manufacture and sell products at no additional cost as all such Philips Group entities availing the benefits of the research which are also sharing the cost of development of such R&D programs. Article 5 of the RDCA clearly shows that all the assistance, information and advice

given under the RDCA are for the exclusive use only by all participating Philips Group entities and the only reason for restriction on sharing with the third parties is to protect the interests of the Philips Group as a whole. Therefore, we are of the view that the receipts under RDCA are not taxable as the same is not 'Royalty' under Article 12(4) of the India-Netherlands DTAA, and it is a cost sharing agreement, in nature of reimbursement, hence we delete the addition of Rs.242,653,150/-. "

7. Consistent with the view taken and respectfully following the order of the Coordinate Bench of ITAT in the assessee's own case, we allow Ground no.1 in in all the three assessment years.

8. Ground No.2 has been adjudicated by the ITAT in the following manner:

*"36. We note that the term **'make available'** is not defined in the India-Netherlands DTAA. However, the term **'make available'** has been explained in the Memorandum of Understanding ('MOU') concerning 'fees for included services' in Article 12 of the India-USA DTAA. The definition of FTS under India-Netherlands DTAA is in pari materia to that under the India-US DTAA. Therefore, the meaning of the expression 'make available' as per the MOU to the India-USA DTAA equally applies to Article 12(5)(b) of the India-Netherlands DTAA. The Amending Notification No. SO 693 (E) dated 30 August 1999 issued by the Government of India specifically provides that the MOU and the confirmation of understanding, dated 12 September 1989, with reference to paragraph 4 of Article 12 of the India - USA DTAA will apply mutatis mutandis the definition of FTS under Article 12 of India-Netherlands DTAA. In any case it is now a well-settled proposition that MOU to the India-USA DTAA can be used while interpreting other DTAAs which have similar "make available" clause under FTS Article. [CIT vs. De Beers India Minerals (P.) Ltd. 21 taxmann.com 214 (Kar), C.E.S.C Ltd. vs. DCIT 87 ITD 653 (Kol - TM), Raymond Ltd. vs. DCIT 86 ITD 791 (Mum)] The MOU explains 'make available' as follows:*

> *"Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se means that technical knowledge, skills, etc. are made available to the person purchasing the service, within the meaning of para 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available."*

Example 7 given in the MOU reads as follows:

> *"Facts :*
>
> *The Indian vegetable oil manufacturing firm has mastered the science of producing cholesterol-free oil and wishes to market the product world wide. It hires an American marketing consulting firm to do a computer simulation of the world market for such oil and to advise it on marketing strategies. Are the fees paid to the US company for included services ?*

Analysis :

The fees would not be for included services. The American company is providing a consultancy service which involves the use of substantial technical skill and expertise. It is not, however, making available to the Indian company any technical experience, knowledge or skill, etc. nor is it transferring a technical plan or design. What is transferred to the Indian company through the service contract is commercial information. The fact that technical skills were required by the performer of the service in order to perform the commercial information service does not make the service a technical service within the meaning of para 4(b)."

*We note that if we apply the aforesaid well settled meaning of the term 'make available' to the facts of the assessee`s case under consideration, the nature of services covered under Article 2 of the MSSA are in the area of commercial, accounting, auditing, financial, social and legal matters, human resources, insurance etc. and it can be seen that the services provided do not "**make available"** technical knowledge/skill/expertise, etc. Therefore, by providing these services the assessee cannot be said to have been **"make available"** any knowledge, skill, etc. In other words, the Assessee, through the provision of said services, cannot be said to equip the recipient in a manner such that can independently perform these functions itself in future, without recourse to the Assessee.*

9. Consistent with the view taken therein, we allow Ground No.2 raised by the assessee in all the three assessment years.

10. Ground Nos.3, 4 & 5 for the Assessment Year 2011-12 had not been argued during the course of hearing. Similarly, Ground Nos.3, 4 & 5 for the Assessment Year 2013-14 and other grounds for the Assessment Year 2012-13 have not been argued. Hence, these are dismissed.

11. In the result, the appeals of the assessee, in all the assessment years, are allowed in part.

Kolkata, the 20th February, 2019.

Sd/-	Sd/-
[**S.S. Viswanethra Ravi**]	**[J. Sudhakar Reddy]**
Judicial Member	Accountant Member

Dated : 20.02.2019
(RS, Sr. PS)

Copy of the order forwarded to:

1. ***Koninklijke Philips N.V, C/o Deloitte Haskins & Sells LLP, Bengal Intelligent Park, Building Alpha, Block EP & GP, 1st Floor, Sector V, Salt Lake Electronics Complex, Kolkata – 700 091.***

2. DCIT(IT) -1(2), Kolkata, Aayakar Bhawan Poorva, 110, Shanti Pally, Kolkata – 700 107.

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

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By order

Assistant Registrar
ITAT, Kolkata Benches