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

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.62/PUN/2014
निर्धारण वर्ष / Assessment Year : 2009-10

Sandvik Asia Pvt. Ltd.,
Mumbai-Pune Road,
Dapodi, Pune – 411012 …. अपीलार्थी/Appellant

PAN: AACCS6638K

Vs.

The Dy. Director of Income Tax
(International Taxation)-II, Pune …. प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.51/PUN/2014
निर्धारण वर्ष / Assessment Year : 2009-10

The Dy. Director of Income Tax
(International Taxation)-II, Pune …. अपीलार्थी/Appellant

Vs.

Sandvik Asia Pvt. Ltd.,
Mumbai-Pune Road,
Dapodi, Pune – 411012 …. प्रत्यर्थी / Respondent

PAN: AACCS6638K

Assessee by : Shri Nikhil Pathak
Revenue by : Shri Sudhendu Das

सुनवाई की तारीख / **Date of Hearing : 13.02.2019**		घोषणा की तारीख / **Date of Pronouncement: 30.04.2019**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The cross appeals filed by assessee and Revenue are against order of CIT(A)-IT/TP, Pune, dated 11.10.2013 relating to assessment year 2009-10 against order passed under section 201(1) and 201(1A) of the Income-tax Act, 1961 (in short 'the Act').

2. The cross appeals filed by assessee and Revenue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee in ITA No.62/PUN/2014 has raised the following grounds of appeal:-

Ground 1;

The Ld. CIT(A)/AO has erred in treating the Appellant as 'assessee in default' under section 201(1) of the Act for not deducting tax at source on following payments made for IT support services during FY 2008-09 (AY 2009-10) to its overseas group companies.

Sr No.	*Group company*	*FY 2008-09 (INR)*
1a	*AB Sandvik Materials Technology, Sweden*	*6,71,703*
1b	*AB Sandvik Tooling Sverige, Sweden*	*83,36,130*
1c	*Sandvik Australia Pty Ltd., Australia*	*60,51,642*
1d	*Sandvik Systems Development AB, Sweden*	*2,71,29,994*
1e	*AB Sandvik Coromant, Sweden*	*7,79,156**
1f	*Sandvik AB, Sweden*	*49,04,467**
1g	*Sandvik Mining and Construction Tools AB, Sweden*	*56,56,389*
1h	*Sandvik Mining and Construction Pte Ltd., Singapore*	*28,90,733*
1i	*Sandvik SMC Distribution Ltd., Ireland*	*7,683*

** The overseas entities have been assessed in India for the relevant assessment year and the receipt for IT support services has been taxed in its hands. The respective overseas entity is in appeal before the Hon'ble Tribunal separately against the aforesaid orders. In the order under section 201(1) and 201(1A), SAPL's liability has been restricted to interest payable on the TDS not deducted and paid by SAPL.*

The above IT Support payments have been erroneously held to be in the nature of Royalty/ Fees for Technical Services ('FTS') as defined under section 9(1)(vi) and 9(1)(vii) of the Act respectively and as per the relevant article of the respective tax treaties, by the Ld.CIT(A)/AO.

Your Appellant prays that the Appellant should not be held as 'Assessee in default' under section 201(1) and the order be quashed.

4. The Revenue in ITA No.51/PUN/2014 has raised the following grounds of appeal:-

1) The Learned CIT(A) erred in concluding that the appellant was not required to deduct tax on payments made to Sandvik Information Technology AB Sweden as these are not taxable in India as per DTAA between India and Sweden ignoring the fact that Article 12 of the DTAA between India and Sweden does not have the 'make available' clause.

2) The Learned CIT(A) erred in concluding that the appellant was not required to deduct tax on payments made to Sandvik Information Technology AB Sweden as these are not taxable in India as per DTAA between India and Sweden read with the Protocol and thus placing reliance on the India - Portugal DTAA ignoring the fact that India-Portugal DTAA does not have any Article on Fees for Technical Services but instead has an Article on Fees for Included services, which as per the protocol between India and Sweden cannot be considered as restricting the scope of Article 12 of the India Sweden DTAA.

3) Without prejudice to the above, the Learned CIT(A) further erred in holding that the 'make available' clause in the India Portugal DTAA is the same and identical to the 'make available' clause used in the India USA DTAA ignoring the fact that the relevant Articles are drafted differently in the two DTAAs and under India Portugal DTAA the condition of make available is satisfied if the recipient of the services is able to 'apply the technology contained therein'. In the instant case Sandvik Information AB supplied technologies relatable to anti virus software, operating systems, SAP etc and the assessee could apply these software etc in his functioning. Hence even the make available condition as stipulated under India Portugal DTAA was satisfied.

4) Without prejudice to the above the Learned CIT(A) erred in concluding that the appellant was not required to deduct tax on payments made to Sandvik Information Technology AB Sweden as these are not taxable in India as per DTAA between India and Sweden without considering the fact that the services provided included providing data network services through internet etc and were taxable in India as per the DTAA as royalty.

5. The issue which arises in the cross appeals filed by assessee and Revenue is in relation to the liability of assessee to deduct tax at source out of payments made for IT support services during the year under consideration to overseas group companies. The case of assessee is that all the overseas

group companies have been assessed to tax in India for the relevant assessment year and the receipts for IT support services in the hands of non-resident entities were held to be not royalty. Once it is held to be not royalty, then there is no merit in the orders of authorities below in holding that royalty/fees for technical services are covered under the provisions of section 9(1)(vi) and 9(1)(vii) of the Act and as per the relevant Articles of respective tax treaties, in the hands of assessee.

6. The Revenue is aggrieved by the order of CIT(A) in holding that the assessee was not required to deduct tax on payments made to Sandvik Information Technology AB, Sweden as these were not taxable in India as per DTAA between India and Sweden.

7. Briefly, in the facts of the case, the assessee was engaged in the business of manufacture of tools needed for drilling and machining; high resistance wires, ribbons and heating elements; seamless tubes and pipes and resale of finished goods i.e. import and resale of finished goods. During the year under consideration, the assessee had made payments for IT support services provided by various foreign group companies. The Assessing Officer noted that though these payments were made to the non-resident companies but no tax was deducted at source at the time of credit of income to their respective accounts or at the time of payments thereof. The details of foreign concerns and the amounts paid during the year 2009-10 totaling ₹ 12,00,37,769/- are tabulated at page 2 of order passed under section 201(1) and 201(1A) of the Act. The Assessing Officer was of the view that as the IT support services were liable to tax in India in the hands of foreign companies as fees for technical services under the provisions of Income Tax Act as well as according to DTAA between India and their respective countries, the assessee

was asked to explain as why it should not be treated as assessee in default for not deducting tax under section 201(1) and 201(1A) of the Act. In response, the assessee explained the nature of services availed by it from various concerns and the reply of assessee is reproduced at pages 3 to 13 of order passed under section 201(1) and 201(1A) of the Act. The plea of assessee was that the payment for IT support services was not taxable in India as royalty, since it was paid for use of copyrighted article and not against copyright. Further, it was also pleaded that the payments were not taxable as FTS as services do not make available any technical knowledge, experience, skill, know-how, etc. to the assessee. It was also pointed out that the payment for IT support services was not taxable in India under the respective treaties also and hence, the provisions of section 195 of the Act do not apply and the assessee had rightly not deducted in India while making such remittances. The Assessing Officer had individually considered the payments made by the assessee to the respective parties and has held that the payments made to the foreign companies by the assessee for IT support services were liable to be taxed as royalty / FTS within the meaning of section 9(1)(vi) and 9(1)(vii) of the Act as well as under respective Articles under DTAA between India and different countries. The Assessing Officer thus, held that the provisions of section 195 of the Act were clearly applicable and since the assessee had failed to deduct tax before remitting the sums to the foreign companies, the assessee was in default under section 201(1) and 201(1A) of the Act. The Assessing Officer thus, computed the default under section 201(1) and charged interest under section 201(1A) of the Act.

8. The CIT(A) held that the services were undoubtedly, technical in nature and were taxable under section 9(1)(vi) and 9(1)(vii) of the Act. He further observed that right to use software was made expressly taxable by

retrospective amendment to the Act on the provision of royalty. Therefore, the payments were taxable either as fees for technical services or royalty depending on the nature of payments under the Income Tax Act. However, as far as taxability under DTAA was concerned, the contention of assessee was that it had not made available knowledge, know-how, skill, etc. to it, hence were not taxable under the relevant DTAAs as fees for technical services. The CIT(A) did not agree with the contention of assessee with respect to services provided by AB Sandvik Tooling Sverige (ABSTS), Sandvik AB, Sandvik Mining & Construction Tools AB, Sweden, AB Sandvik Coromant, Sandvik Mining & Construction Pte Limited, Singapore and Sandvik SMC Distribution Limited, Ireland. However, with respect to payments made to Sandvik Information Technology AB, the CIT(A) observed that it strictly related to technical services rendered by non-resident company, which has been taxed by Assessing Officer as FTS. He thus, held that various provisions of agreement do not satisfy the test of 'make available' as laid down in DTAA. Therefore, he held that the assessee was not required to deduct tax on payments made to Sandvik Information Technology AB.

9. Both the assessee and Revenue are in appeal against respective decisions of CIT(A) before us.

10. The learned Authorized Representative for the assessee pointed out that the CIT(A) had allowed the claim of assessee in respect of payments made to Sandvik Information Technology, AB. In respect of other payments made to different foreign companies, the learned Authorized Representative for the assessee pointed out that in the hands of non-resident recipient, the DRP/Tribunal had held that the payments received was not taxable as royalty. He thus, stressed that once the amount received is held to be not royalty in the

hands of recipient foreign company, there is no reason to hold that the assessee should have deducted tax at source out of such payments made. He also referred to different orders passed by the Tribunal in respect of four concerns viz. AB Sandvik Materials Technology, Sandvik Australia Pty Ltd., Sandvik Systems Development AB and AB Sandvik Coromant. In respect of Sandvik AB, the learned Authorized Representative for the assessee fairly pointed out that the issue has not been yet decided in the hands of recipient. He also pointed out that invoices could not be submitted before the Assessing Officer and CIT(A). He then, referred to additional evidence filed which are placed at pages 325 to 354 of Paper Book and stressed that the matter may be verified in this regard. Coming to Sandvik Mining and Construction Tools AB and Sandvik Mining and Construction Pte Ltd., he made similar propositions and pointed out that invoices would be submitted and the matter may be remitted for verification to the Assessing Officer. He stressed that in line with the decision in the hands of other concerns, the issue needs to be decided and the payments for availing IT support services were not in the realm of royalty or FTS. In this regard, he placed reliance on the orders of Tribunal at pages 285 and 311 of Paper Book. He also submitted that in respect of payments to Sandvik SMC Distribution Ltd., the issue is not pressed. Coming to last foreign concern AB Sandvik Tooling Sverige, he refers to the order of CIT(A), who had mentioned that no invoices have been filed. However, our attention was drawn to page 247 of Paper Book and he stressed that these invoices were filed before the CIT(A) and the payment was made for maintenance of software system. Such maintenance was not royalty or FTS and hence, no question of any deduction of tax at source. He thus, said when there was no requirement for deduction of tax at source, then there is no default under section 201(1) and 201(1A) of the Act.

11. The learned Departmental Representative for the Revenue on the other hand, strongly relying on the order of CIT(A) pointed out that the issue has been deliberated upon by him elaborately. In respect of the issue raised in Revenue's appeal i.e. payment to Sandvik Information Technology AB, he said that the findings of CIT(A) are not correct and he placed reliance on the order of Assessing Officer.

12. We have heard the rival contentions and perused the record. The limited issue which arises in the present appeal is in relation to deduction of tax at source under section 201(1) of the Act and interest charged under section 201(1A) of the Act. Under the provisions of section 201(1) of the Act, it is provided that where there is liability to deduct tax at source and the payer has failed to so deduct the tax at source or after deducting, has failed to deposit the same in the Government Treasury, then such a person is held in default and demand is to be raised under section 201(1) of the Act. In case of default, it is further provided that interest is to be charged as per provisions of section 201(1A) of the Act. In order to invoke the aforesaid provisions i.e. section 201(1) and 201(1A) of the Act, the basic condition is that there should be failure to deduct tax at source. In other words, the payer while making certain payments, was obliged to deduct tax under different provisions of the Act and if he has failed so to deduct tax, then the said person is in default and is liable for demand to be raised under section 201(1) of the Act and charging of interest under section 201(1A) of the Act. The basic condition thus, to be fulfilled is that there has to be failure to deduct tax under the relevant provisions of the Act. The corollary to the same is that in case the income is held to be not deductible to tax in the hands of recipient, then payer cannot be held to be in default for non deduction of tax at source.

13. Coming to the facts of present case, the assessee during the year under consideration had made certain payments to foreign concerns for various IT support services, which have been received by it during the year. The details of payments made by assessee to non-resident entities during the year were as under:-

Sr. No.	*Name of the Party*	*Amount (Rs.)*
1	*AB Sandvik Materials Technology*	*6,71,703*
2	*AB Sandvik Tooling Sverige*	*83,36,130*
3	*Sandvik Australia Pty Ltd.*	*60,51,642*
4	*Sandvik Systems Development AB*	*2,71,29,994*
5	*AB Sandvik Coromant*	*7,79,156*
6	*Sandvik AB*	*49,04,467*
7	*Sandvik Mining and Construction Tools AB*	*56,56,389*
8	*Sandvik Mining and Construction Pte Ltd.*	*28,90,733*
9	*Sandvik SMC Distribution Ltd.*	*7,683*
10	*Sandvik Information Technology*	*7,21,18,414*

14. The case of Revenue was that IT support services which were claimed by the assessee were in actual, payment of royalty or fees for technical services and hence, liable for tax deduction at source under section 195 of the Act. The Assessing Officer also held them taxable as per DTAA between respective countries. In the hands of recipients also, the issue arose vis-à-vis nature of remuneration received by them respectively; as to whether the said receipts were royalty or fees for technical fees and hence, taxable in their hands accordingly.

15. The Tribunal vide different decisions in the case of non-resident entities have decided the issue and held that the amount received by said non-resident entities on providing IT support services to the concerns in India was neither royalty nor fees for technical services and hence, not taxable in India. The first such order is placed at pages 123 to 136 of Paper Book in the case of M/s. AB Sandvik Materials Technology. The Tribunal in ITA No.1719/PUN/2011,

relating to assessment year 2008-09, order dated 24.03.2017 has held the receipts to be not taxable as royalty or fees for technical services. Further, the Tribunal in the case of Sandvik Australia Pty. Ltd. Vs. DDIT (IT) in ITA No.93/PN/2011, relating to assessment year 2007-08, order dated 31.01.2013 had similarly held and the copy of the said order is placed at pages 149 to 166 of Paper Book. The orders of Tribunal in assessment years 2006-07 and 2008-09 in ITA Nos.250 and 251/PUN/2015 in the case of Sandvik Australia Pty Ltd., order dated 18.08.2017 are also placed on record at pages 167 to 178 of Paper Book. Further, the Tribunal in the case of M/s. Sandvik System Development AB in ITA No.464/PUN/2015, relating to assessment year 2008-09, order dated 10.11.2017, placed at pages 207 to 221 of Paper Book and in ITA No.497/PUN/2016, relating to assessment year 2009-10 vide order dated 12.10.2018 placed at pages 222 to 227 of Paper Book, have dismissed the appeal of Revenue and held that payments are not in the nature of royalty or FTS and not taxable in India. Further, in respect of M/s. Sandvik Information Technology the Tribunal in ITA Nos.500 & 501/PUN/2016, relating to assessment years 2009-10 & 2012-13, vide order dated 08.08.2018 has decided the issue. The copy of the order is placed at pages 237 to 246 of Paper Book. The CIT(A) has allowed the claim of assessee in respect of this concern. Further, in the case of M/s. AB Sandvik Coromant Vs. DCIT in ITA No.1718/PN/2011, relating to assessment year 2007-08 and in M/s. AB Sandvik Coromant Vs. DDIT(IT) in ITA No.270/PN/2013, relating to assessment year 2009-10, order dated 16.05.2016, the Tribunal has remitted the issue back to the file of Assessing Officer for verification. The copy of said order is placed at pages 251 to 272 of Paper Book. However, we find that the issue is similar to the issue arising in the hands of other concerns and following the same parity of reasoning, we hold that where the payment was not in the nature of royalty or FTS, there was no requirement to deduct tax at source. In view of

the issue having already been decided in the hands of recipients to the extent that remuneration received for IT support services was neither royalty nor FTS and not taxable in India, then corollary to the same is that in the hands of payer i.e. assessee payment for IT support services, was not in the nature of royalty or FTS. Hence, the assessee was not obliged to deduct tax at source under the respective sections of the Act and for such non deduction of tax at source, the assessee cannot be held to be in default under section 201(1) and 201(1A) of the Act. Accordingly, we hold so and delete the demand raised by authorities below in respect of payments made to AB Sandvik Materials Technology, Sandvik Australia Pty Ltd. and Sandvik Systems Development AB and AB Sandvik Coromant.

16. Now, coming to payments made to AB Sandvik Tooling Sverige, wherein the CIT(A) observed that the assessee has failed to provide any invoices. However, the learned Authorized Representative for the assessee has drawn our attention to invoices placed at page 247 to 250 of Paper Book. The narration reflects the same to be for maintenance cost of software system, which is very clear from the copies of invoices filed by assessee. Once the charges have been paid by assessee for the purpose of maintenance of software system, then it cannot be in the realm of royalty or FTS. Accordingly, we find no merit in the orders of authorities below in holding the assessee to be in default for non deducting the tax at source and raising the demand under section 201(1) of the Act and charging interest under section 201(1A) of the Act. We reverse the order of CIT(A) with regard to above said concern. Further, we find that the Tribunal in M/s. Sandvik Tooling Sverige AB Vs. DCIT(IT) in ITA Nos.195 to 197/PUN/2017, relating to assessment years 2010-11, 2011-12 & 2013-14, order dated 29.03.2019 have held the payments are neither ‘royalty’ nor ‘FTS’.

17. Now, coming to the next set of concerns i.e. Sandvik AB, Sandvik Mining and Construction Tools AB and Sandvik Mining and Construction Pte Ltd., for which the assessee admits that the issue has not been decided by the Tribunal till now. He also fairly admits that invoices in this regard were not filed before the Assessing Officer and CIT(A), though the same have been filed by way of additional evidence before us. In respect of additional evidence filed before us with regard to Sandvik AB and Sandvik Mining and Construction Pte Ltd., he stressed that payments were in the same nature and assessee may be allowed to submit the copies of invoices for verification before the Assessing Officer. We find merit in the plea of assessee especially where the payments were in the same nature of provision of IT support services; the Assessing Officer shall verify the invoices submitted by assessee and in case the services were for IT support services, then following the dictate of Tribunal in different orders, verify the claim of assessee. In case the payments were for IT support services, then there was no question for raising the demand by holding them to be in the nature of royalty or FTS, since the issue has been decided in the hands of other foreign companies in favour of assessee. Reasonable opportunity of hearing in this regard shall be afforded to the assessee. In respect of Sandvik SMC Distribution Ltd. i.e. payment of ₹ 7,683/-, the learned Authorized Representative for the assessee has not pressed the same. Consequently, the grounds of appeal raised by assessee are allowed in respect of five concerns and in respect of three concerns, the issue is remitted back to the file of Assessing Officer as mentioned in the paras above. The grounds of appeal raised by assessee are thus, allowed.

18. Now, coming to the appeal filed by Revenue, wherein it was aggrieved by the order of CIT(A) in holding that the payment made to Sandvik Information

Technology is not royalty or FTS. We have already referred to the order of Tribunal in this regard, which is placed at pages 237 to 246 of Paper Book and in view of the ratio laid down by the Tribunal in the hands of service provider, we find no merit in the orders of authorities below in holding the assessee to be in default for non-deducting tax at source out of such payments, which are neither 'royalty' nor 'FTS'. Accordingly, the grounds of appeal raised by Revenue are dismissed.

19. In the result, the appeal of assessee is allowed and appeal of Revenue is dismissed.

Order pronounced on this 30th day of April, 2019.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 30th April, 2019.

GCVSR

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u> :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-IT/TP, Pune;
4. The DIT(TP/IT), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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