

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", 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.189/PUN/2017
निर्धारण वर्ष / Assessment Year : 2013-14

M/s. Sandvik IT Services AB,
C/o Sandvik Asia Pvt. Ltd.,
Mumbai-Pune Road, Dapodi,
Pune – 411012
PAN: AADCA5375J

.... अपीलार्थी/Appellant

Vs.

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

.... प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri S.B. Prasad, CIT

सुनवाई की तारीख / Date of Hearing : 27.03.2019	घोषणा की तारीख / Date of Pronouncement: 03.05.2019
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by assessee is against the order of DCIT (International Taxation), Circle-2, Pune, dated 29.11.2016 relating to assessment year 2013-14 passed under section 144C(13) r.w.s. 143(3) of the Income-tax Act, 1961 (in short 'the Act').

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

1. Ground 1:

On the facts and circumstances of the case and in law, the Hon'ble Dispute Resolution Panel ('Hon'ble DRP') have erred in upholding the action of the Ld. AO to tax receipt of Rs 72,95,001 from providing IT support services as Fees for Technical Services ('FTS') within meaning of Article 12 of the India-Sweden Double Taxation Avoidance Agreement (DTAA or the treaty) read with protocol thereto.

It is prayed that the addition made by the Ld. AO and confirmed by the Hon'ble DRP be deleted.

2. Ground 2:

On the facts and circumstances of the case, and in law, Hon'ble DRP have erred in upholding the action of the Ld. AO to tax receipt of Rs.72,95,001 from providing IT support services as 'Royalty' within the meaning of section 9(1)(vi) and Article 12 of the India-Sweden Double Taxation Avoidance Agreement ('DTAA' or 'the treaty').

It is prayed that the addition made by the Ld. AO and confirmed by the Hon'ble DRP be deleted.

3. Ground 3:

Without prejudice to the above grounds should the addition be confirmed and on the facts and circumstances of the case, and in law, Ld. AO has erred in levying education cess on the rate of tax specified in the tax treaty.

It is prayed that education cess levied by Ld. AO be deleted.

4. Ground 4:

Without prejudice to the above grounds should the addition be confirmed and on the grounds and circumstances of the case, and in law, Ld. AO has erred in not allowing credit of taxes deducted at source as appearing in 26AS.

It is prayed that the AO be directed to give credit of the amount of TDS as appearing in 26AS.

3. The assessee is aggrieved by the orders of authorities below in holding that receipts of ₹ 72,95,001/- received for providing IT support services are to be taxed in the hands of assessee as Fees for Technical Services and / or Royalty within meaning of section 9(1)(vi) of the Act and Article 12 of India-Sweden DTAA.

4. Briefly, in the facts of the case, the assessee was resident of Sweden and had filed the return of income declaring income at Nil. The case of assessee was taken up for scrutiny. During the year, the assessee had received ₹ 18.60 crores from Sandvik Asia Pvt. Ltd. on account of IT support service fees, ₹ 71,92,192/- from Walter Tools India Pvt. Ltd. and ₹ 1,02,809/- from Dormer Tools India Pvt. Ltd., totaling ₹ 19.33 crores (approx.). The assessee in the Notes appended to computation of income had declared that certain management services were provided to the above said concern, which were in the nature of IT support services and the assessee was of the view that these were not liable to deduct tax as FTS in India under the Tax Treaty between India and Portugal as referred to via Protocol attached to DTAA between India and Sweden, as the services did not make available any technical knowledge, experience, skill, know-how or process. The assessee was show caused as to why the payments received by it should not be treated as royalty and taxed accordingly. In response thereto, the assessee pointed out that IT support service fees paid were not taxable in India as the 'make believe' condition was not satisfied. Such a condition is provided in the Tax Treaty between India and Portugal referred to in Protocol attached to Tax Treaty between India and Sweden. The assessee also explained that Dispute Resolution Panel (DRP) in assessment year 2010-11 had held that IT support service fees received by assessee were not taxable in India as the 'make believe' condition was not satisfied. The assessee also explained the services provided to recipients. However, the Assessing Officer was of the view that payments received by assessee constitute 'royalty' and 'Fees for Technical Services' as per section 9(1)(vi) and 9(1)(vii) of the Act as well as Article 12 of DTAA between Indian and Sweden. The license fees received for use of

software from Sandvik Asia Pvt. Ltd., as per the Assessing Officer, partake the nature of 'royalty'. Further, the Assessing Officer referred to the amendment in Finance Act, 2012, wherein Explanations 4 to 6 have been added and in view of the amendment the payment received by assessee, as per the Assessing Officer, constitute royalty and was taxable in the hands of assessee. The TPO also held that from the terms of Treaty, it is clear that the amount was Fees for Technical Services and to be assessed in the hands of assessee. Hence, draft assessment order was passed by the Assessing Officer in this regard. The assessee raised objections before the Dispute Resolution Panel (DRP). Vide its directions, the DRP held that receipts from Sandvik Asia Pvt. Ltd. once held to be not taxable as FTS under Article 12 of India Sweden Treaty, was needed to be examined whether it is taxable as business income under the provisions of Article 7 of India and Sweden Treaty. They noted that the same would be taxable if the assessee has Permanent Establishment (PE) in India and to the extent such business profits were attributable to such PE. However, since the Assessing Officer had not made enquiry in this regard, directions were given to the Assessing Officer for necessary verification. The Assessing Officer noted the contention of assessee that since assessment year 2007-08 onwards the assessee company did not have any PE in India and the said aspect had been verified in earlier years and accepted and further since there was no change in facts as compared to earlier years, it was held that provisions of Article 7 of DTAA of taxing business receipts in India do not apply. Since the assessee did not have any PE in India and consequently, receipts from Sandvik Asia Pvt. Ltd. could not be taxed as business receipts. However, fees received from Walter Tools India Pvt. Ltd. and Dormer Tools India Pvt. Ltd. were taxed as royalty and FTS by the Assessing Officer while passing final assessment order.

5. The assessee is in appeal against the same and has challenged the taxability of receipts of totaling ₹ 72,95,001/- in its hands.

6. The learned Authorized Representative for the assessee pointed out that the DRP had not accepted the plea of assessee on the ground that no invoices of Walter Tools India Pvt. Ltd. and Dormer Tools India Pvt. Ltd. were filed. However, the assessee points out that additional evidence is being filed along with application for admission of additional evidence. He then referred to para 2 of assessment order, where the Assessing Officer has accepted the nature of services provided by Sandvik Asia Pvt. Ltd. and other two concerns i.e. Walter Tools India Pvt. Ltd. and Dormer Tools India Pvt. Ltd. were the same. The learned Authorized Representative for the assessee further stated that though DRP gives his finding but no details were ever asked for. The learned Authorized Representative for the assessee fairly pointed out that matter may be verified by the Assessing Officer in line with findings with respect to other concern i.e. Sandvik Asia Pvt. Ltd.

7. The learned Departmental Representative for the Revenue strongly objected and pointing to the finding of DRP at page 16 pointed out that no second innings is to be allowed to the assessee.

8. The learned Authorized Representative for the assessee in rejoinder referred to page 1 of assessment order and pointed out that in the chart itself, the nature of services are mentioned to be IT support services and the Assessing Officer was not disputing the nature of services provided.

9. We have heard the rival contentions and perused the record. The assessee admittedly, was providing IT support services to the entities in India. In respect of first entity, to which major services have been provided by assessee the transaction has been accepted not to be in the nature of royalty or FTS and also not taxable as business receipts under Article 7 of DTAA between India and Sweden. There is no appeal by the Revenue against the findings of DRP in this regard and the final assessment order passed by the Assessing Officer, following the directions of DRP. In respect of other two concerns i.e. Walter Tools India Pvt. Ltd. and Dormer Tools India Pvt. Ltd., objection of DRP in not accepting the plea of assessee was in the absence of invoices being filed by assessee, the learned Authorized Representative for the assessee has strongly stressed that the nature of services are identical as is clear first from the perusal of invoices which are being filed and also from the fact that the Assessing Officer had acknowledged them to be IT support services along with receipts from Sandvik Asia Pvt. Ltd. The assessee before us has furnished additional evidence in this regard and perusal of aforesaid additional evidence reflects the assessee to have filed invoices which are raised against dues from Walter Tools India Pvt. Ltd. and Dormer Tools India Pvt. Ltd. The assessee has also filed invoices raised on Sandvik Asia Pvt. Ltd. and has drawn our attention to the nature of services being provided to all the concerns which are same. Since the invoices were not before the lower authorities, we are of the view that it would be appropriate for the Assessing Officer to verify the claim of assessee. In case the nature of services provided by assessee to Sandvik Asia Pvt. Ltd. on one hand and to Walter Tools India Pvt. Ltd. and Dormer Tools India Pvt. Ltd., on the other hand, are of same nature, then the said receipts from Walter Tools India Pvt. Ltd. and Dormer

Tools India Pvt. Ltd. are not to be taxed as royalty / FTS in the hands of assessee and / or business receipts in the hands of assessee, which is non-resident entity, since the said entity do not have PE in India. For this limited purpose, the matter is set aside to the file of Assessing Officer, who shall afford reasonable opportunity of hearing to the assessee in this regard. The grounds of appeal raised by assessee are thus, allowed for statistical purposes.

10. In the result, the appeal of assessee is allowed for statistical purposes.

Order pronounced on this 3rd day of May, 2019.

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 3rd May, 2019.

GCVSR

आदेश की प्रतिलिपि अद्येषित/Copy of the Order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The DRP-3, Mumbai;
4. The CIT(IT&TP), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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