

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'G', NEW DELHI**

**Before Sh. Amit Shukla, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 851/Del./2014 : Asstt. Year : 2009-10**

M/s SABIC Innovative Plastics US, LLC, C/o SABIC Innovative Plastics India Pvt. Ltd., 9 <sup>th</sup> Floor, Tower B, Building No.9, DLF Cyber City, Phase-III, District Gurgaon-122002, Haryana	Vs	Deputy Director of Income Tax, Circle-2(2), Intl. Taxation, New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AAMCS9039C</b>		

**Assessee by : Sh. Nageswar Rao, Adv.**

**Revenue by : Sh. G. K. Dhall, CIT DR**

**Date of Hearing: 23.09.2019**

**Date of Pronouncement: 30.10.2019**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the assessee against the order dated 16.12.2013 passed by the AO u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

*"1. The AO/DRP have erred on facts and in law in concluding that the reimbursements of allocated costs received by the non-resident appellant under the Management Services Agreement with Sabic Innovative Plastics India Private Limited ('SABIC IP India') was in the nature of fees for technical services/fees for included services ('FIS') under Article 12 of the India- US Double Taxation Avoidance Agreement ('DTAA') and hence liable to be taxed in India.*

2. That in any case the AO/DRP completely failed to appreciate that the reimbursements made to the Appellant did not have any element of income contained therein and hence were not liable to be taxed.

3. The AO/DRP have erred in law and on the facts of the case in not appreciating that common services do not fall within the ambit of Article 12(4)(b) of DTAA between India and US read with Memorandum of Understanding thereto specifically in the absence of non-satisfaction of the 'make available' condition as contained in Article 12(4)(b) of the DTAA, such reimbursements could not partake the character of FIS under the DTAA.

4. The AO/DRP have also erred in law and on the facts of the case by drawing adverse inference from the fact that the appellant had offered reimbursements from "information management services" to tax without appreciating that the same was "without prejudice to its claim of non-taxability of such reimbursements & as a measure of abundant caution" and without appreciating that a wrong concession by the Appellant would not change the character of the reimbursements.

5. That the final order passed by the AO is erroneous in as much as it transcends the directions of the DRP under section 144C of the Act by holding that in the alternative that the said reimbursements were also in the nature of 'royalty' as defined under the DTAA between India and US when no such direction was given by the DRP.

6. The AO has erred in law and on the facts of the case in levying surcharge and cess without appreciating that the rate of tax could not exceed 10% as specified in Article 12 of DTAA between India and US.

7. That the Ld. AO grossly erred in levying interest under section 234B of the Act.

*8. That the Ld. AO grossly erred in initiating penalty proceedings under section 271(1)(c) of the Act.”*

3. The issue revolves around taxing of management services provided by the SABIC Innovative Plastics US LLC to SABIC Innovative Plastics India Pvt. Ltd. amounts to fee for technical services or not. Brief facts of the case are that during the year, the Assessing Officer brought to tax Rs.148,26,784/-, the assessee purported to have been received and treated as income under FTS. The assessee has offered an amount of Rs.925,564/- to tax which pertains to the amount received on account of Information Management (IM). The other services provided by the assessee are in the areas of

- Finance: It includes month-end and quarter end closing, standardizing processes, planning and facilitating entity reduction projects, consolidating budgets, driving and managing global systems roll out and maintenance; transfer pricing planning, compliance and documentation, effective rate management, compliance with FAS 109 (which is the financial reporting requirement of tax department). SABIC IP India is providing coordinated support to the group's external auditors and implementing various project such as IFRS conversion, Project Leopard and 1 SABIC
- Legal services: It includes helping in performing annual compliance review of policies, to find business solution, and to managed develop motivate legal team, develop individual performance and educating employees on legal and leadership issues.
- EHS issues: As per agreement, the assessee helps in setting performance expectations and policies for air,

water and waste management standards. It also provides global toxicology function which includes testing activities like physical chemical property testing, ecotoxicology, environmental fate, acute toxicity, genotoxicity, reproductive and development toxicity, repeat dose testing and a variety of specialized studies.

- **Quality:** The service includes review of steps involved in the translation of a new product from an existing SABIC-IP manufacturing site to the India manufacturing site.
- **Human Resources:** It includes assisting in functions such as learning and development in area of leadership and business skills, talent management, recruitment, work force/head count planning, organization structure designing and compensation planning of employees.
- **Sourcing and procurement:** It includes developing and implementing the sourcing strategy of direct materials used in the production process. Engaging in direct and indirect materials supplier search and price negotiation on direct materials. The direct material sourcing function relates to procuring hydro carbon and non hydro carbon materials used for manufacturing plastics.
- **Information Management (offered to tax)**

4. The Assessing Officer held that the payment for technical or consultancy services would fall within the scope of definition of FTS under the Indo-US treaty only if such services make available any technical knowledge, skill, know-how etc. to the recipient of service or it consists of development and transfer of technical plan or design. He held that 'make available' means the person acquiring the service is enabled to independently

apply the technology and held that these services are taxable under FTS/royalties.

5. Before us during the arguments, the Id. AR brought to our notice the order of the Id. CIT (A) for the assessment year 2008-09 in the assessee's own case wherein the similar addition has been deleted by the Id. CIT (A) and order of the DRP for the assessment year 2010-11 in the assessee's own case wherein the similar addition has been deleted by the DRP. The Id. DR supported the orders of the DRP for the instant assessment year 2009-10.

6. Heard the arguments of both the parties and perused the material available on record.

7. We have gone through the clauses of management services agreement dated September 1, 2007 entered between the assessee and the Indian counterpart. We have also gone through the provisions of Section 9(1)(vii) and Section 115A of the Income Tax Act and Article 12 of the Indo-USA DTAA. Further, we find that the Id. CIT (A) deleted the addition holding that *"firstly, the category 'management' is missing in definition of FIS and services provided by the appellant being in nature of management services do not fall in definition of FIS. Further, 'make available' clause has not been satisfied in present case and hence consideration is not in nature of FTS/FIS. These arguments of the appellant have been duly considered by me. I have gone through various documents furnished by the appellant indicating nature of services provided by the appellant. The services provided in present case mostly resemble with those in case of Ernest & Young (P) Ltd. AAR 820*

*of 2009. It appears that most of the services are in nature of management services, though some of the services may be considered to be of technical nature. However, from terms of the service agreement and also from conduct of the parties, it cannot be said that 'make available' requirement has been satisfied. The Assessing Officer has not elaborated on this aspect. As per provisions of Article 12(4) of DTAA, unless 'make available' clause is satisfied, consideration for any consultancy or technical service per se shall not become FTS/FIS."*

8. Similarly, in the assessee's own case for the assessment year 2010-11, the Id. DRP has deleted the similar addition made by the Assessing Officer. On this issue, the DRP held as under:

*"From scope of services as mentioned in 'Management Service Agreement' dated 01.09.2007, it can be seen that there is no intention on part of agreeing parties of 'making available' technical expertise to the service recipient so that Indian company could have applied these services in future on its own without resorting to the assessee. There is no clause for training of personnel off the Indian company. The AO has not highlighted how 'make available' clause has been satisfied in this case. DRP has also noted that CIT(A) has decided the issue in favour of the assessee for AY 2008-09. However, DRP has not concurred with the assessee for AY 2009-10 on the same issue. After duly considering facts of the present case, DRP is of the considered view that 'make available' clause has not been satisfied and hence services do not qualify as FIS under Article 12(4) of Indo-USA DTAA. The AO is therefore directed to grant the relief."*

9. The revenue has accepted the orders of the Id. CIT (A) for the A.Y. 2008-09 & DRP for the A.Y. 2010-11 and no appeal has been preferred in this case. Having gone through the provisions of Article 12(4)(b) and Article 5 of DTAA pertaining to fees for included services and after going

through the management service agreement and the clauses thereof, we are of view that the by the management services provided by the assessee cannot be taxed under fee for technical services. All the grounds are treated as adjudicated.

10. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 30/10/2019.

Sd/-

**(Amit Shukla)**  
**Judicial Member**

**Dated: 30/10/2019**

\*Subodh\*

Copy forwarded to:

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

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**

