IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI

BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.A. Nos. 2588 & 2589/DEL/2015
(Assessment Years : 2009-10 & 2010-11)

ACIT, Central Circle-1(3)(1), International Taxation New Delhi – 110 002 **(APPELLANT)**	Vs	M/s. FCI Asia Pte. Ltd. C/o. PWC Sucheta Bhawan, Gate No. 2, 1st Floor, 11A Vishnu Digamber Marg, New Delhi – 110 002 (PAN : AABCF 5252 B) (**RESPONDENT)**

Appellant by	**Shri Satpal Gulati, CIT-D.R.**
Respondent by	**Shri Ravi Sharma, Adv.** **Shri Rishabh Malhotra, A.R.**

Date of Hearing	**02.01.2020**
Date of Pronouncement	**06.01.2020**

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the Revenue against the order of the Commissioner of Income Tax [Appeals]-42, Delhi dated 05.02.2015 for Assessment Years 2009-10 & 2010-11.

2. The Grounds of appeal are as under:-

ITA No.2588/Del/2015 :

1. *"Whether on the facts and circumstances of the case and in law, the CIT(A) has erred in holding that the payment towards centralized IT support services are not taxable as Royalty?*

2. *Whether on the facts and circumstances of the case and in law, not taking cognisance of amended Explanations 5 & 6 to section 9(l)(vi) of the IT Act, while reaching to the conclusion that such services are not taxable as royalties?*

3. *Whether on the facts and circumstances of the case and in law, the CIT(A) has erred in holding that the payment towards Business support services contribution are not taxable as fees for technical services?*

4. *Whether on the facts and circumstances of the case and in law, the CIT(A) has erred in deleting the interest u/s 234B of the Act?*

5. *The appellant craves to add, amend, modify or alter any grounds of appeal at any time or before the hearing of the appeal."*

3. The assessee is a non-resident company incorporated under laws of Singapore and is an investment holding company. The assessee is engaged in providing marketing management of various advisory and support services to its group companies in Asia-Pacific Region. For the A.Y. 2009-10, the Assessee earned receipts from its Indian group entity on account of information technology services, business support services and towards cost allocation. The assessee filed its return of income on 31.03.2011 declaring nil income and claiming that receipt of Rs.3,20,08,360/- and Rs.72,77,917/- from FCI OEN and FCI Tech respectively towards providing IT and business support services and cost allocation of CDC Division does not constitute income taxable in the hands of the assessee in India by virtue of India Singapore Double Taxation Avoidance Agreement. Scrutiny Assessment u/s 143(3) of the Income Tax Act, 1961 was completed and assessment order was passed on 06.02.2012 by treating the receipts towards IT support services and business support services/cost allocation is Royalties and Fees for Technical Services respectively as per the Act as well as Article 12 of India Singapore DTAA. For the A.Y. 2010-11, the assessee filed return of income u/s 139(4) of the Act on 23.08.2011. The Assessing Officer passed assessment order u/s 143(3) similar to A.Y. 2009-10 treating the amount received towards IT support Services as

'Royalties' as per the Act as well as Article 12 of the India-Singapore DTAA. Further, the receipts towards business support services were held to fall within the ambit of Fees for Technical Services ('FTS') both under the Act as well as Article 12 of the India-Singapore DTAA.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. The Ld. DR submitted that on a perusal of the agreements and submissions before the Assessing Officer by the assessee clearly set out that the nature of services under the IT Agreement relates to centralized data Centre, WAN bandwidth management, disaster recovery management, backup and offsite storage management and security management. The Ld. DR further submitted that from the perusal of the benefits arising to the Indian Boards, it can be said that the assessee is granting a license to have access to the data centre maintained by the assessee which is scientific, technical services, there is transfer of copyright to the extent of having acccess to the database maintained by the assessee. In other words, the Indian Parties are being given the uninterrupted access to the storage capacity owned and maintained by the assessee towards which payments are being made to the assessee. The other services relating to disaster recovery and bandwidth services are off-shoots of the primary function of the assessee to grant the right to use the capacity of bandwidth to its Indian counterparts. Further, these payments also covers "payments" for the use of, or the right to use, industrial, commercial or scientific equipment, as the assessee grants the right to the Indian parties to use its server space and other technological equipments. Thus the Assessing Officer was of the view that the payments made towards IT related services fall within the ambit of royalties as defined under section 9(1)(vi) of the Act and made addition of Rs.4,28,50,717/-. The Assessing Officer further made addition of Rs.1,47,39,918/- towards interest payment received by the assessee. The Ld. DR therefore, submitted that the Assessing Officer has rightly made additions as the payments towards IT support services and

business support services are taxable under the Income Tax Act, which was totally ignored by the CIT(A).

6. The Ld. AR submitted that the assessee received payments from its Indian Group Companies i.e. IT related services FCI OEN Connectors Limited and FCI Technology Services Limited vide an agreement dated 01.01.2007. The Ld. AR further submitted that these services include for rendering standardized IT related services such as centralized data centre, Wide Area Network (WAN) bandwidth management, disaster recovery management, backup storage services etc. to the Indian Companies. The Ld. AR further submitted that while Indian Companies may access this information technology infrastructure at Singapore, it cannot be said to confer the use of or the right to use the equipment at Singapore to these companies as the equipments are under the control of the assessee and the IT infrastructure is not deducted to the Indian companies. The Ld. AR submitted that the Indian companies did not get the right to use the equipment established from Para 3.2 of the respective agreement entered between the assessee and its Indian companies wherein the Indian companies are restricted to resell the services rendered under the agreement. The Ld. AR also relied upon the Article – 12 wherein it is expressed that payments for grant of limited user rights in respect of software would not be regarded as royalty but only as business profits under Article 7. The payments for IT support services thus would not fall within the ambit of the definition as no right to use is conferred to FCI OEN and FCIT tech Indian Companies. Hence, receipts for IT support services would not be taxable as royalty as per the Act. The agreement related to IT related services is entered with a view to facilitate all the FCI Group entities worldwide and it is not specific to FCI OEN and FCI Tech. Further, the receipts are in nature of reimbursement of expenditure incurred by the assessee and such fact was not disputed by the Assessing Officer. Further, no mark-up were charged by the assessee on such fee under the agreement and the amount represents pure cost to cost reimbursement. The Ld. AR submitted that IT Support services would not constitute FTS as such services do not enable Indian Companies to

apply the technical knowledge independently. Hence, the make available clause is not specified and such services are not taxable in India as FTS. As regards Ground No.3, the Ld. AR submitted that payments made to assessee are for rendering common services towards purchasing, communications and international relationship matters, legal and insurance support etc to Indian Group companies. FCI Group has intended to centralized these services in Singapore to avoid costs involved in creating the infrastructure and knowledge base required for the services in India. The Indian Companies are not enabled to perform the services independently in future without recourse to the assessee and these services, inter alia do not make available any technical knowledge, experience or skill to FCI OEN & FCI Tech enabling the Indian Companies to independently perform the services. Regarding cost contribution, the Learned AR submitted that it has a Communication Data Consumer Division which focuses on telecommunication, consumer, data and information systems markets with operations in America, Asia-pacific and Europe. The Group of companies have entered into a CDC agreement whereby all these companies shares sales and marketing costs, engineering costs and general as well as administrative cost in equitable manner. These services do not result in any training or transfer of any skill or technology to other entities such that other entities could carry out these activities on their own without recourse to the assessee. Hence, 'make available' clause is not satisfied and, therefore, the receipts are not in the nature of FTS.

7. We have heard both the parties and perused all the relevant materials available on record. As regards Ground No.1 & 2, the assessee is the IT Support services and not imparted with any services involving royalty aspect keeping in view the beneficial provisions of the Indian-Singapore DTAA. The agreement entered by the assessee, reveals that the nature of services under the IT agreement relate to the centralized data centre, WAN bandwidth management, disaster recovery management, backup and offsite storage management and security management. From the perusal of the agreement and the nature of services provided by the assessee-company it can be seen

that assessee was granting merely a facility and the consideration for the same cannot be construed as payment for 'Royalties'. Thus, the CIT(A) was right in deleting this addition. There is no need to interfere with the finding of the CIT(A). Hence, Ground No.1 & 2 are dismissed.

8. As regards Ground No.3 as per the support services and consultancy agreement, the services include common services towards purchasing, communications and international relationship matters, legal and insurance support, support on tax matters, internal audit, quality, financial and treasury matters, human resources, strategy and development services. The said services do not enable the service recipient to make use of the said technical or managerial services independently. There is no training involved under the agreement. Thus it is not a fee for technical services. Thus, the CIT(A) was right in deleting this addition. There is no need to interfere with the finding of the CIT(A). Hence Ground No.3 is dismissed.

9. In result, both the appeals of the revenue are dismissed.

Order pronounced in the Open Court on 06th day of January, 2020.

Sd/- Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 06/01/2020
Priti Yadav, Sr. PS *

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI