IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI

BEFORE SHRI RAVISH SOOD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 1718/MUM/2014
Assessment Year: 2010-11
&
ITA No. 254/MUM/2015
Assessment Year: 2011-12

Edenred Pte Ltd., C/o SRBC Associates & LLP, 14th floor, The Ruby, 29 Senapati Bapat Marg, Dadar (W), Mumbai-400028.	Vs.	The Deputy Director of Income Tax (International Taxation)-3(2), 1st floor, R. No. 132, Scindia House, Ballard Estate, Mumbai-400038.
PAN No. AACCE8636P		
Appellant		**Respondent**

ITA No. 507/MUM/2016
Assessment Year: 2012-13

Edenred Pte Ltd., C/o SRBC Associates & LLP, 14th floor, The Ruby, 29 Senapati Bapat Marg, Dadar (W), Mumbai-400028.	Vs.	The Deputy Commissioner of Income Tax (International Taxation)-2(2)(1), 1st floor, R. No. 132, Scindia House, Ballard Estate, Mumbai-400038.
PAN No. AACCE8636P		
Appellant		**Respondent**

Assessee by : Mr. RajanVora &
Mr. Pranay Gandhi, ARs
Revenue by : Mr. Nishant Samaiya &
Mr. V. Vinod Kumar, DRs

Last Date of Hearing : 17/01/2020
Date of Pronouncement: 20/07/2020

ORDER

PER N.K. PRADHAN, A.M.

The captioned appeals filed by the assessee are directed against the order u/s 143(3) r.w.s. 144C(13) of the Income Tax Act 1961 (the 'Act') dated 10.01.2014 passed by the Dy. Director of Income Tax (International Taxation)-3(2), Mumbai (hereinafter 'the AO'). As common issues are involved, we are proceeding to dispose them off through a consolidated order for the sake of convenience. We begin with the AY 2010-11

2. The grounds of appeal filed by the assessee read as under:

On the facts and circumstances of the case and in law, the AO, as per the direction of DRP has:

1. erred in assessing total income at Rs.2,09,18,639/- as against NIL returned income;
2. erred in considering infrastructure data centre charges of Rs.95,62,479/- to be taxable as royalty under the Act as well as under India-Singapore Double Taxation Avoidance Agreement (DTAA);
3. erred in considering management services fees of Rs.73,61,951/- to be taxable as FTS under India-Singapore DTAA;
4. erred in considering referral fees of Rs.39,94,209/- to be taxable as royalty under the Act as well as under India-Singapore DTAA;
5. without prejudice to the above, erred in considering referral fees also to be taxable as FTS under India-Singapore DTAA;
6. erred in not granting credit for TDS of Rs.17,42,513/-;
7. erred in levying interest under section 234A of the Act amounting to Rs.2,92,861/- without granting the credit of taxes withheld;

8. erred in levying interest under section 234B of the Act disregarding the fact that the Appellant is a non-resident assessee and its entire revenues/ receipts are subject to tax withholding in India under section 195 of the Act and the Appellant is not liable to pay advance lax in respect of such revenues;
9. without prejudice to the above, erred in levying Interest under section 234B of the Act amounting to Rs.9,62,258/- ignoring the taxes withheld;
10. erred in levying interest under section 234C of the Act disregarding the fact that the Appellant is a non-resident assessee and its entire revenues/ receipts are subject to tax withholding in India under section 195 of the Act and the Appellant is not liable to pay advance tax in respect of such revenues.
11. without prejudice to the above, erred in not appreciating that interest under section 234C of the Act can be levied only on returned income and hence, appellant is not liable for any interest under section 234C of the Act;
12. without prejudice to the above, erred in levying interest under section 234C of the Act amounting to Rs.1,05,638/- ignoring the taxes withheld.

3. Briefly stated, the facts of the case are that the appellant is a company incorporated in and tax resident of Singapore. It is engaged in the business of provision of services relating to developing, marketing and implementing incentive based strategies and technologies to build loyalty and to reward long-term relationships through the utilization of internet, wireless technology and offline solutions to its clients. The appellant's key offering range from pure consulting to all aspects of communication development and implementation- including sourcing of loyalty rewards and their fulfillment for its clients. In addition to the above, the appellant is also engaged in providing following services to its Indian group companies [i.e. Edenred (India) Pvt. Ltd. ('EPIL'0; Royal Images Direct Marketing Pvt. Ltd.('RID') ; Surf Gold.Com (India) Pvt. Ltd.('SurfGold')] :

- IDC Services ;
- Management Consultancy Services ;
- Referral Services for regional customers.

During the course of assessment proceedings, the appellant submitted before the AO that during the year under consideration, it had entered into IDC agreement with its Indian group companies [EPIL; RID ; SurfGold].

In the return of income, the appellant claimed non-taxability of revenues from Infrastructure Data Centre ('IDC'), Management Services and Referral Services by claiming benefit under Article 12 of the India-Singapore Double Taxation Avoidance Agreement ('DTAA').

The summary of the revenues claimed by the appellant as non-taxable is as under:

Nature of transaction	Amount in Rs.			
	EIPL	RID	SurfGold	Total
IDC charges	31,70,166	35,20,225	28,72,088	95,62,479
Management Service Fees	NIL	NIL	73,61,951	73,61,951
Referral Fee	NIL	NIL	39,94,209	39,94,209
Total	**31,70,166**	**35,20,225**	**1,42,28,248**	**2,09,18,639**

The AO, after incorporating the direction of the Dispute Resolution Panel (DRP) passed a final assessment order dated 10.01.2014 by taxing (i) IDC charges of Rs. 95,62,479 as royalty as per provisions of the Act and the India-Singapore DTAA, (ii) management charges of Rs. 73,61,951 as Fees for Technical Services ('FTS') as per provisions of the Act and the India-Singapore DTAA and (iii) referral fees of Rs. 39,94,209 as royalty as per provisions of the Act and the India-Singapore DTAA and as FTS as per provisions of the India-Singapore DTAA.

To summarize, the positions pertaining to each revenue stream of the appellant are tabulated as under :

Nature of transaction	**Return of income**	**Draft Assessment Order**	**DRP directions**	**Final Assessment order**
IDC charges Agreement dated Nov 2009	Claimed as not taxable	Taxable as royalty under the Act and India- Singapore DTAA	Taxable as royalty under the Act and India-Singapore DTAA	Taxable as royalty under the Act and India- Singapore DTAA
Management Service fee Agreement dated Dec 2008	Claimed as not taxable	Taxable as FTS under the Act and India- Singapore DTAA	Taxable as FTS under the Act and India- Singapore DTAA	Taxable as FTS under the Act and India- Singapore DTAA
Referral Fee Agreement dated Jan 2008	Claimed as not taxable	Taxable as royalty under the Act and India-Singapore DTAA	Taxable as royalty under the Act and India- Singapore DTAA. Also held to be taxable as FTS under the India Singapore DTAA.	Taxable as royalty under the Act and India- Singapore DTAA. Also held to be taxable as FTS under the India Singapore DTAA.

4. The 1st ground of appeal is general in nature. We begin with the 2nd ground of appeal i.e. claim of IDC charges of Rs.95,62,479/- made by the appellant as non-taxable.

Before us, the Ld. counsel for the assessee submits that the appellant has entered into Infrastructure and Hosting Data Centre (IDC) agreements with its Indian group companies and has received revenues from them and under the said IDC agreement the appellant essentially provides IT infrastructure management and mail box/website hosting services to its Indian group companies and these IDC services are performed by the appellant's personnel in Singapore. It is stated that the Indian group companies directly remit IDC service payments towards appellant's bank account in Singapore.

Elaborating further, the Ld. counsel submits that (i) IDC is an ISO 27001 certified data centre owned by Edenred Pte. and located in Singapore ; IDC services are provided using the IDC and IT/security team in Singapore; (ii) IDC server is a metal hardware with no computing power ; it is connected to network devices (such as router, switch etc.) by using cables ; IDC server is then configured and loaded with critical programs; users are able to access the applications after firewall is configured ; (iii) IDC by itself cannot process data, it can only host websites, web applications, firewalls, mail boxes etc.

It is further stated that the services under IDC agreement are classified under 3 sub-heads :

- Administration and supervision of central infrastructure
- Mailbox hosing services
- Website hosting services

It is explained that the gamut of IDC services are rendered with the help of servers located in Singapore and seasoned security professionals who understand global IT and security systems ; the IDC services ensure 100% uptime for critical external facing applications which need highly secured web environment and dedicated team of security experts to ensure 100% uptime of security systems (firewall, antivirus, access controls) which are also hosted on server in Singapore.

The Ld. counsel gives the following illustrative examples of websites/applications/softwares hosted by Indian group companies on the Data Centre in Singapore :

- Web ordering application (www.ticketonline.co.in)

- Corporate website (www.edenred.co.in) or (http://www.accentivrewards.com/)
- Websites created for customers of Edenred India entities while making a loyalty program for them (e.g. – http://www.ideachampionsclub.com).

4.1 The Ld. counsel argues that the appellant being a non-resident has an option u/s 90(2) of the Act to be governed under the provisions of the Act or the provisions of the India-Singapore DTAA, whichever is more beneficial and accordingly to establish the non-taxability of IDC charges, the appellant wishes to rely on the narrower definition of 'royalty' under the said DTAA. To put is simply the contention is to rely on Article 12(3) of the said DTAA as it is more beneficial *vis-à-vis* the Act [Explanation 2 to section 9(1)(vi)]. Relying on the decision in the case of *New Skies Satellite BV & Ors* 382 ITR 114 (Delhi HC), *Nokia Networks OY* 358 ITR 259 (Delhi HC), it is stated by the Ld. counsel that provisions of DTAA shall prevail over provisions of the Act, if they are more beneficial.

Further, it is explained that the appellant does not have a Permanent Establishment (PE) in India under the India-Singapore DTAA as the said IDC services are provided wholly from Singapore and hence, the amount of IDC charges is not chargeable to tax in India as business profits.

Further, referring to definition of royalty under Article 12(3) of the said DTAA, it is explained that payment received for IDC is not taxable. In this regard reliance is placed on the order of the Tribunal in *People Interactive (I) P Ltd.* (2012) 33 CCH 0261; *M/s Vishwak Solutions Pvt. Ltd*. (ITA Nos. 1935, 36/Mds/2010, CO No. 187/Mds/2013 & ITA Nos. 67 & 1634/Mds/2012) dated 30 January 2015.

Reliance is further placed on the decision in *Bharati Axa General Insurance Co. Ltd*. 326 ITR 477 (AAR); *Standard Chartered Bank v. DDIT* (International Taxation) (2011) 11 ITR 721; *ExxonMobil Company India (P.) Ltd. v. Addl. CIT* (2018) 92 taxmann.com 5 (Mumbai-Trib.); *DCIT v. M/s Reliance Jio Infocomm Ltd*. (ITA No. 936/Mum/2017).

Explaining that the definition of royalty under Article 12 of the DTAA between Indian and USA and the DTAA between India and Singapore includes "consideration for the use or right to use any industrial, commercial or scientific equipment", the Ld. counsel submits that the above rulings are squarely applicable to the appellant's case.

It is further stated that the appellant has filed a management declaration certifying that no patents, IPR, secret process, trademark, copyright is registered in the name of the appellant. Further, it is clarified that by virtue of the confidentiality clause inserted in the IDC agreement, there is an explicit understanding that the website/applications/data therein are to be kept as confidential and this clause is a typical clause inserted in IDC agreements purely with a view to facilitate smooth provisioning of IDC services to group companies and therefore by no means it should be construed so as to allow the other party to use or provide right to use any secret formula or process. To clarify further, it is stated that the management declaration to the effect that no confidential information was shared by Indian group companies under the IDC agreement has already been filed.

In view of the above, the Ld. counsel submits that the revenues under the IDC agreement ought not to be taxed in the hands of the appellant as royalty under the Act and/or India-Singapore DTAA.

5. On the other hand, the Ld. Departmental Representative (DR) submits that on perusal of the three IDC agreements, it is evident that the agreements are identical and they have been entered into for providing IT infrastructure management and hosting services; the agreement is non-transferable/non-assignable and cannot be sub-licensed without appellant's prior written approval. It has further been provided in this agreement that the IDC's skill and experience relating to the services shall remain the sole property of the assessee-company and will not constitute a transfer of proprietary rights. As per the agreement, in consideration for these facilities, the Indian entities shall pay to the appellant-company technical IT services fees.

Referring to the details of services to be provided as given in '*Appendix - 2'* ,the Ld. DR refuting the appellant's claim that it has not granted any right to access CPU situated in Singapore under the IDC agreement, explains that the same is not tenable as the purpose of the agreement is to assist Indian entities for providing IT infrastructure management and hosting services. As per the said agreement as well as the '*Appendix*', the Indian entities would be using IT infrastructure of the Singapore company *via* web portal and it is not material whether the right to access has been granted by the assessee-company or not, specifically in a written form. It is argued that for the purpose of taxation, what is important is to see whether the equipment/facilities in the form of IT infrastructure are being used by the payers for consideration or not for their business in India. As per him, the plain reading of the agreement makes it

abundantly clear that the Indian companies are using the IDC of the assessee-company for their business in India.

Thus the Ld. DR submits that the facilities being provided by the appellant are in the nature of royalty as per the provisions of the Act and as per the DTAA between India and Singapore and therefore, the addition of Rs.95,62,479/- made by the AO towards IDC charges be confirmed.

The Ld. DR, in support of his above contentions, relies on the decision in *Cargo Community Network (P.) Ltd*. 289 ITR 355 (AAR), *IMT Labs (India) (P.) Ltd.* 287 ITR 450 (AAR) and *Thought Buzz (P.) Ltd*. 346 ITR 345 (AAR).

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

We find that (i) under the said IDC agreement, the appellant, essentially provides IT infrastructure management and mail box/website hosting services to its India group companies; these IDC services are performed by the appellant's personnel in Singapore ; the Indian group companies directly remit IDC service payments towards the appellant's bank account in Singapore, (ii) IDC is an ISO 27001 certified data centre owned by Edenred Pte. and located in Singapore ; IDC services are provided using the IDC and IT/security team in Singapore, (iii) the services under the IDC agreement comprise of administration and supervision of central infrastructure ; mailbox hosting services and website hosting services, (iv) IDC services ensure 100% uptime for critical external facing applications which need highly secured web environment and dedicated team of security experts to ensure 100% uptime

of security systems (firewall, antivirus, access controls) which are also hosted on server in Singapore.

We further observe that examples of websites/applications/softwares hosted by Indian group companies on the data centre in Singapore are web ordering application, corporate website, websites created for customers of Edenred India entities while making a loyalty program for them.

A perusal of the documents filed before the AO and DRP clearly indicate that (i) appellant has an infrastructure data centre, not information centre at Singapore, (ii) the Indian group companies neither access nor use CPU of the appellant, (iii) no CDN system is provided under the IDC agreement, no such use/access is allowed, (iv) the appellant does not maintain any such central data (v) IDC is not capable of information analytics, data management, (vi) appellant only provides IDC service by using its hardware/security devices/personnel ; all that the Indian group companies received are standard IDC services and not use of any software, (vii) bandwith and networking infrastructure is used by the appellant to render IDC services ; Indian companies only get the output of usages of such bandwith and network and not its use, (viii) consideration is for IDC services and not any specific program and (ix) no embedded/secret software is developed by the appellant.

Against the above factual backdrop, let us discuss below the case laws relied on both sides.

6.1 We begin with the case laws relied on by the Ld. counsel. A plethora of precedents on the subject in which we are presently concerned compels us, in order to avoid prolixity, to refer only a few decisions below.

In the case of *Bharati Axa General Insurance Co. Ltd*. (supra), the appellant, an Indian company carrying on business of general insurance entered into a service agreement with a Singapore company AXA ARC for receiving assistance such as business support, market information, technology support services and strategy support etc. from the latter. The AAR held that (i) though the services rendered by AXA ARC may well be brought within the scope of the definition of FTS under the IT Act as they answer the description of consultancy services or some of them may be categorized as technical services but the qualifying words "make available technical knowledge, experience, skill, know-how, which enables the recipient of services to apply the technology contained therein" in Article 12.4 of the DTAA make material difference, (ii) all technical or consultancy services cannot be brought within the scope of this definition unless they make available technical knowledge, knowhow etc. which in turn facilitates the person acquiring the services to apply the technology embedded therein, (iii) services provided by AXA ARC to the applicant do not fulfill the requirements of the definition of FTS in the DTAA, (iv) even assuming that they are technical or consultancy services, it cannot be said that the applicant receiving the services is enabled to apply the technology contained therein, (v) also there is nothing in the IT support services that answers the description of technical services as defined in the DTAA, (vi) therefore, the fees paid to AXA ARC by the applicant does not amount to fees for technical services within the meaning of the DTAA, (vii) as regards the payments made for providing access to software applications and to the server hardware system hosted in Singapore for internal purposes and for availing of related support services under the terms of the service agreement, same cannot be brought within the scope of the definition of

'royalty' in Article 12.3, (viii) there is no transfer of any copyright in the computer software provided by AXA ARC and it cannot be said that the applicant has been conferred any right of usages of the equipment located abroad, more so, when the server is not dedicated to the applicant.

Similarly, in the case of *Standard Chartered Bank* (supra), the assessee-bank entered into an agreement with a Singapore company SPL, for the provision of data processing support for its business in India and that data processing is down outside India. Application software by which data is transmitted to hardware at Singapore and processed by SPL at Singapore is owned by the assessee. Thus what is used by the appellant is the computer hardware owned by SPL. The Tribunal held that (i) payment in question can be said to be a payment for a facility which is available to any person willing to use the facility, (ii) system software which is embedded in the computer hardware by which the computer hardware functions is not owned by SPL and SPL only has a license to use the system software ; (iii) consideration received by SPL is for using the computer hardware which does not involve use or right to use a process, (iv) there is nothing on record to establish that the hardware could be accessed and put to use by the assessee by means of positive acts, (v) therefore, it cannot be said that the payment by the assessee to SPL is royalty within the meaning of Article 12 of the treaty.

In *ExxonMobil Company India (P.) Ltd*. (supra), the assessee had paid certain amount to 'EMCAP', Singapore towards global support fees. The AO opined that payment made by the assessee was in the nature of FTS as defined in Explanation 2 to section 9(1)(vii) of the Act. The Tribunal observed that as per terms of agreement, EMCAP had to provide management consulting,

functional advice, administrative, technical, professional and other supporting services to the assessee; however, there was nothing in agreement to conclude that in course of such provision of service, EMCAP had made available any technical knowledge, experience, skill, knowhow or process which enabled assessee to apply technology contained therein on its own. Therefore, the Tribunal held that payment made by the assessee could not be considered as FTS as defined under Article 12(4)(b) of the India-Singapore DTAA.

In *M/s Reliance Jio Infocomm Ltd*. (supra) for AY 2016-17, the Tribunal observes that though the India-Singapore Tax Treaty is amended by Notification No. SO 935(E) dated 23.03.2017, however, the definition of 'royalty' therein has not been tinkered with and remains as such.

6.2 Now we turn to the case laws relied on by the Ld. DR. In the case of *Cargo Community Network (P.) Ltd*. (supra), the assessee, a non-resident company has its registered office at Singapore. It is engaged in the business of providing access to an internet based air cargo portal known as Ezycargo at Singapore. The applicant received payments from an Indian subscribers for providing password to access and use the portal hosted from Singapore. The AAR held that payments made for concurrent access to utilize the sophisticated services offered by the portal would be covered by the expression royalty.

We find that subsequently, after considering the decision in *Cargo Community Network (P.) Ltd.* (supra), Mumbai ITAT in the case of *Standard Chartered Bank* 11 ITR 721 and *Yahoo India Pvt*. 140 TTJ 195 held that no part

of the payment could be said to be for use of specialized software on which data is processed as no right or privilege was granted to the company to independently use the computer.

In the case *IMT Labs (India) (P.) Ltd*. (supra), the assessee, an Indian company, entered into an agreement with a non-resident American company for securing license of a particular software, which the applicant is entitled to use. The applicant has to pay license fee for usage of software to the American company. The AAR held that 'Smarterchild' application software on the American company's server platform is scientific equipment licensed to be used for commercial purposes and therefore, payments made for producing and hosting 'Interactive Agent' applications would be covered by the expression 'royalties' as used in Article 12.

However, we find that in the instant case, appellant only provides service by using its hardware/security devices/personnel and not use of any software and therefore the above case is distinguishable from the present appeal.

In *ThoughtBuzz (P.) Ltd*. (supra), the applicant, a Singapore company was engaged in providing social media monitoring service for a company, brand or product. It was a platform for users to hear and engage with their customers, brand ambassadors etc. across the internet. The applicant offered service on charging a subscription. The clients, who subscribe, can login to its website to do a search on what is being spoken about various brands and so on. The AAR held that the amount received from offering the particular

subscription based service is taxable in India as 'royalty' in terms of paragraph 2 of Article 12 of the DTAC between India & Singapore.

However, we find that in the instant case, the appellant is only providing IDC service which includes administration and supervision of central infrastructure, mailbox hosting services and website hosting services and therefore, the ratio laid down in the above ruling is not applicable to the facts of the appellant's case.

6.3 From the enunciation of law in *Bharati Axa General Insurance Co. Ltd*; *ExxonMobil Company India (P.) Ltd*; *Standard Chartered Bank v. DDIT*; *DCIT v. M/s Reliance Jio Infocomm Ltd* narrated at para 6.1 hereinbefore, it is quite luculent that revenues under the IDC agreement ought not to be taxed in the hands of the appellant as royalty under the Act and/or India-Singapore DTAA. Therefore, we delete the addition of Rs.95,62,479/- made by the AO towards IDC charges and allow the 2nd ground of appeal.

7. Then we turn to the claim of management service fees of Rs.73,61,951/- made by the appellant as non-taxable.

During the year under consideration the appellant has received management fee from SurfGold. The services provided under the 'Management Agreement' broadly include :

- Consultancy services to support the sales activities of SurfGold
- Legal services
- Financial advisory services
- Human resource assistance

The Ld. counsel submits that both the AO as well as the DRP have held the management services to be fees for technical services (FTS) under the Act and the India-Singapore DTAA. It is clarified by him that under the provisions of section 9(1)(vii) of the Act, rendering of management services will be taxable as FTS. However, Edenred by virtue of section 90(2) of the Act is eligible to rely on the provisions of the India-Singapore DTAA, should the same be more beneficial than the provision of the Act.

Refuting the finding of the AO at para 9.3 of the assessment order that the services provided by Edenred are in the nature of support services "to equip the employees at managerial levels with core managerial skills relevant to managing the Indian business" as incorrect, the Ld. counsel explains that these services are purely consultancy in nature to support various functions of Surf Gold and not to equip SurfGold employees with core managerial functions.

7.1 Referring to Article 12 (4) of the said DTAA, the Ld. counsel submits that the criteria to determine whether a service would qualify as FTS are as under :

- Mere rendering of services is not roped into FTS unless the person utilizing the services is able to make use of the technology contained in the technical knowledge etc. by himself in his business or for his own benefit and without recourse to the performer of the services in future.
- The technical knowledge, experience, skill etc. must remain with the person utilizing the services even after the rendering of the services has come to an end.
- The language of the DTAA also indicates transmission of the technical knowledge etc. from the person rendering the services to the person utilizing the same, including some sort of durability or permanency of the result of the 'rendering of the services' which will remain at the disposal of the person utilizing the services.

Thus the Ld. counsel submit that as per the said DTAA, the services in the nature of managerial, technical or consultancy nature are taxable as FTS, if such services are 'made available' to the service recipient. In this regard, reliance is placed by him on the decision in the case of *De Beers Minerals (P.) Ltd.* 346 ITR 467 (Karnataka High Court), *Intertek Services* 307 ITR 418 (AAR), *M/s Bharati Axa General Insurance Co. Ltd*. 326 ITR 477 (AAR), *Measurement Technology Ltd.* (AAR No. 966 of 2010), *Ernst & Yong Pvt. Ltd*. 323 ITR 184 (AAR), *Invensys Systems Inc* 317 ITR 438 (AAR).

Regarding the direction of the DRP that since the appellant is providing facilities for computer infrastructure as per the IDC agreement, which has been held to be royalty, the said management services would also be taxable as FTS as per clause 12(4)(a) of the said DTAA, the Ld. counsel clarifies that the IDC services are not taxable as royalty as per the submissions made earlier. Further, it is explained by him that Article 12(4)(a) of the said DTAA will apply only where the predominant purpose of the arrangement under which the payment of the service fee and such other payment are made must be the application or enjoyment of the right, property, or information described in Article 12(3).

In view of the above, the Ld. counsel submits that the revenues under the management agreement ought not to be taxed in the hands of the appellant as FTS under the provisions of the India-Singapore DTAA.

8. On the other hand, the Ld. DR submits that as per the said agreement the appellant company employees personnel with substantial experience in marketing and sales expertise relating to the business as well as office

administration and management and the Indian entity is desirous of engaging the assessee to provide management services in connections with the management of its business and operations. Stating that the core business of the Indian entity is marketing of services and the appellant-company is providing support services to equip the employees at managerial level with core managerial skills relevant to managing the Indian business, the Ld. DR submits that the order passed by the AO be affirmed. Further, relying on the direction of DRP he submits that since the assessee is also providing facilities for computer infrastructure which has been held to be taxable as royalty, the management service fees should also be taxable as FTS as per clause 12(4)(a) of the said treaty.

In support of his above contentions, the Ld. DR relies on the case laws in *US Technology Resources Pvt. Ltd*. 37 CCH 0161 (Cochin ITAT), *Shell India Markets (P.) Ltd.* 342 ITR 223 (AAR) and *Perfetti Van Melle Holdings BV* 342 ITR 200 (AAR).

9. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

We find that the services provided under the management agreement broadly include (i) consultancy services to support the sales activities of Surf Gold, (ii) legal services, (iii) financial advisory services and (iv) human resource assistance. There is no dispute here that under the provisions of section 9(1)(vii) of the Act, rendering of management services will be taxable as FTS. However, Edenred, by virtue of section 90(2) of the Act, is eligible to rely on the provisions of the India-Singapore DTAA, should the same be more

beneficial than the provisions of the Act. In this regard, we fruitfully rely on the judgment of the Hon'ble Delhi High Court in the case of *New Skies Satellite BV & Ors* (ITA No. 473/2012) wherein it is held that provisions of DTAA shall prevail over the provisions of the Act, if they more beneficial.

At this moment, we refer to Article 12(4) of the India-Singapore DTAA which explains the expression 'make available' as under :

> "Article 12(4):
>
> The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:
>
> a. are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or
> b. make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein; or
> c. consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein."

Thus as per the India-Singapore DTAA, the services in the nature of managerial, technical or consultancy nature are taxable as FTS if such services are 'made available' to the service recipient.

We find that in the instant case, the management services are provided only to support SurfGold in carrying on its business efficiently and running the

business in line with the business model, policies and best practices followed by the Edenred group. These services do not make available any technical knowledge, skill, knowhow or processes to SurfGold.

9.1 Now we discuss the case laws relied on both sides.

We begin with the reliance placed by the Ld. counsel. In the case of *De Beers Mineral (P.) Ltd.,* the Hon'ble Karnataka High Court has observed as under :

> "The technical or consultancy services rendered should be aimed at and result in transmitting of technical knowledge etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending on the provider."

In the case of *Intertek Services* (307 ITR 418), the AAR has observed on the term 'make available' as under :

> "By making available the technical skills or know-how, the recipient of service will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. In other words, to fit into the terminology 'make available', the technical knowledge, skills etc. must remain with the person receiving the services even after the particular contract comes to an end. The services offered may be the product of intense technological effort and lot of technical knowledge and experience of the service provider would have gone into it. But, that is not enough to fall within the description of services which make available the technical knowledge, etc. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver

can deploy similar technology or techniques in future without depending on the provider."

In the case of *M/s Bharati Axa General Insurance Co. Ltd*., the AAR has ruled as under :

"9. The definition of FTS as contained in clause (b) of Article 12.4 is explicitly designed to restrict the scope and ambit of the technical and consultancy services. Even if we proceed on the basis that some of the services have the flavour of imparting technical knowledge and experience to the recipient of service, the further question is whether such provision of services enables the person acquiring the services to apply the technology contained therein. This test specifically laid down in clause (b), in our view, is not satisfied and the legal position clarified by this Authority while interpreting more or less similar Treaty provisions applies with greater force to the present case in view of the narrow language employed in the India-Singapore DTAA.

Providing comments and suggestions after reviewing the strategies and plans developed by the Applicant, giving suggestions to the Applicant to improve the product developed by it so as to bring it in line with the common practices followed by other AXA entities across the globe, providing HR support assistance, assisting the Applicant in choosing cost effective re-insurance partners, reviewing the actuarial methodologies developed by the Applicant and providing suggestions and inputs to achieve standard actuarial practices and processing guidelines in connection with the settlement of claims, marketing and risk analysis, fall short of the requirements laid down in the definition of fees for technical services in DTAA between India and Singapore. It will be too much to say that by providing such services (assuming they are technical or consultancy services), the Applicant receiving the services is enabled to apply the technology contained therein i.e. the technology, knowledge, skills, etc. possessed by the service provider or technical

plan developed by the service provider. We do not find anything in the IT support services that answer the description of technical services as defined in the Treaty."

9.2 Then we turn to the case laws relied on by the Ld. DR. in *US Technology Resources Pvt. Ltd.* (supra), in terms of management service agreement between the assessee and the USA company, the latter provides highly technical services which are used by the assessee for making managerial decision, financial decision, risk management decision etc. The service of technical input, advice, expertise etc. rendered by the USA company are technical in nature as provided in clause 4(b) of the Article 12 of the DTAA. It is found that this case is reversed by the Hon'ble Kerala High Court in 97 taxmann.com 642 dated 09.08.2018, wherein it is held that fees for management services received by US company would not be taxable in India as there is no transfer of technical knowledge by US company to Indian company.

In S*hell India Markets (P.) Ltd*. (supra), the applicant is an Indian company, it has a network of retail fuel stations in India. SIPCL is a group company of assessee incorporated in UK. It is in the business of providing consultancy services to various group companies. The applicant has entered into Cost Contribution Agreement (CCA) with SIPCL for provisions of General Business Support Services (BSS). While providing General BSS, SIPCL works closely with the employees of the applicant and supports/advices them. Thus, General BSS is made available to the applicant. However, we find that subsequently, after considering the decision in the case of *Shell India* (supra), the Mumbai ITAT in the case of *Linklaters LLP* (ITA No. 1690/Mum/2015) dated 31.01.2017 held that from none of legal advisory services it can be said

that technical knowledge, skill, experience, knowhow or process remained with the clients to whom services were rendered by the assessee, even after the rendition of services was completed and agreement came to an end. These services were of purely legal advisory nature; it cannot be said that recipient of the services was in a position to duplicate similar skill or technology or techniques in future without the aid or assistance of the assessee for carrying out similar assignments.

In the case of *Perfetti Van Melle Holdings BV* (supra), the applicant is a company based in Netherlands and it is in the business of manufacture and sale of sugar confectionary and gun. It also provides operational and other support services for the benefit of companies of Perfetti group situated in various countries. It has entered into a service agreement with the group company (Perfetti India). The AAR held that when the expertise in running the industry run by the group is provided to the Indian entity in the group to be applied in running the business, the employees of the Indian entity get equipped to carry on that business model on their own without reference to service provider, when the service agreement comes to an end. It is not as if for making available, the recipient must also be conveyed specially the right to continue the practice put into effect and adopted under the service agreement on its expiry. It is found that this case is reversed and set aside for fresh adjudication by the Hon'ble Delhi High Court in 52 taxmann.com 161 dated 30.09.2014 and hence cannot be made applicable.

9.3 We find that in view of the factual matrix delineated at para 9 above, the case laws narrated at para 9.1 hereinbefore i.e. *De Beers Mineral (P.) Ltd*; *Intertek Services*; *M/s Bharati Axa General Insurance Co. Ltd.* are applicable to

the instant case. Therefore, we delete the addition of Rs.73,61,951/- made by the AO towards management services fees and allow the 3rd ground of appeal.

10. Next we turn to the claim of the appellant of referral fees of Rs.39,94,209/- as non-taxable.

During the year under consideration, the appellant has received fees for referral services/other services of Rs.39,94,209/- from SurfGold. It is stated by the Ld. counsel that the appellant has received the above referral fee from SurfGold on account of the following :

> "- Appellant has entered into an global agreement with its global clients (viz. Hewlet Packard, Maritz, OC Tanner) who are interested in availing customer relationship.
>
> - At India level, SurfGold provides certain services to Edenred's clients.
>
> - To service Edenred's clients in India, SurfGold obtained certain support services from the Appellant for which the Appellant invoiced to Surfgold.
>
> - Surfgold pays 50% or such other percentage as may be agreed of the amount invoiced to its clients to Edenred for the support services provided."

It is stated that the above reference is provided by the appellant from Singapore and the fees received by the appellant are directly remitted from SurfGold to the appellant's bank account in Singapore. Further, it is explained that the appellant does not own any brand/trademark/patented process and although the AO/DRP has held that the high quantum of payment by SurfGold to appellant is due to brand value, since there can be no brand/trademark owned by the appellant, there is no question of assigning any such value to the brand/trademark to SurfGold so as to be construed as royalty under the

Act/India-Singapore DTAA. Further, our attention was drawn to the certificate which has filed by the appellant that it does not own any brand/trademark.

On the proposition that revenues from 'referral services' are not taxable, the Ld. counsel relies on the decision in *ADIT v. Antewerp Diamond Bank NV* (2015) 153 ITD 391 (Mumbai-Trib.), *Standard Chartered Bank v. DCIT* (2011) 11 ITR 721 (Mumbai-Trib.), *Kotak Mahindra Primus Ltd. v. DDIT* 105 TTJ 578 (Mumbai-Trib.), *Bharti Axa General Insurance Co Ltd. in Re* 326 ITR 477 (AAR).

Also the Ld. counsel argues that as per the India-Singapore DTAA, the services in the nature of managerial, technical or consultancy nature are taxable as fees for technical services ('FTS'), if such services are 'made available' to the services. In this regard, it is stated that the referral services/other services are provided only to support SurfGold in carrying on it business and additionally, these services do not make available any technical knowledge, skill, know-how or processes to SurfGold on account of the following reasons :

- Surf Gold or its clients would not be able to apply the technology or make use of the technical knowledge by itself and will have to take assistance of the appellant for the abovementioned services in future;
- There is no transmission of the technical knowledge, experience, skill etc. from the appellant to SurfGold or its clients and
- SurfGold or its clients will have to continue availing these services from Edenred on a regular basis.

Further, it is stated that meaning of the term "make available" is explained in the decision in *Raymond Limited v. DCIT* (86 ITD 791), *Intertek*

Testing Services (307 ITR 418) (AAR), *Anapharma Inc* (305 ITR 394) (AAR), *Sandvik Australia Pty. Ltd*. (141 ITD 598) (Pune ITAT), *M/s Bharati Axa General Insurance Co Ltd*. (supra).

Finally, the Ld. counsel explains that referral services are not FTS under the India-Singapore DTAA as held in *Cushman and Wakefield (S) Pte Ltd* (305 ITR 208) (AAR)., *Real Resourcing Ltd.* (2010) (322 ITR 558), *Knight Frank (India) (P.) Ltd*. *v. ACIT* (2019) 107 taxmann.com 363 (Mumbai-Trib.)

In view of the above, it is submitted by the Ld. counsel that revenues under the referral agreement ought not to be taxed in the hands of the appellant as royalty under the Act and/or India-Singapore DTAA or FTS under the said DTAA.

11. On the other hand, the Ld. DR submits that the appellant-company and the Indian company are engaged in the same business. Moreover, the appellant is also providing IDC facilities and management services to the Indian company other than earning referral fees. It is stated by him that both these enterprises are associated enterprises as per the provisions of the Act and hence the whole arrangement is to be seen in this perspective rather than in isolation. It is further submitted that the appellant is referring its global clients to Indian entity and its brand and image is at stake, if the services are not to the satisfaction of its clients. It is argued that all the infrastructure, data processing, IT platform and storage are being done by the Indian entity at the appellant company's place in Singapore. Moreover, it has already entered into management agreement wherein the assessee would provide all the services including training to its manpower for best practices, technical support and

other support in its business and hence by entering into these agreements, the appellant has ensured that the services being rendered by the Indian company are world-class. Referring to the direction of the DRP, the Ld. DR submits that since the appellant is also providing facilities for computer infrastructure, which has been held to be taxable as royalty, the same would also be taxable as FTS as per clause 12(4)(a) of the treaty. Thus the Ld. DR explains that the AO has rightly brought to tax Rs.39,94,209/- towards referral fees.

12. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the instant case, the appellant has received fees for referral services/other services of Rs.39,94,209/- from Surf Gold in the year under consideration.

It is relevant to mention here that as per the India-Singapore DTAA, the services in the nature of managerial, technical or consultancy nature are taxable as FTS, if such services are 'made available' to the service recipient. In the instant case, referral services/other services are provided to support Surf Gold in carrying on its business. These services do not make available any technical knowledge, skill, knowhow or processes to SurfGold because there is no transmission of the technical knowledge, experience, skill etc. from the appellant to SurfGold or its clients.

In the case of *Cushman & Wakefield (S) Pte. Ltd*. (supra), the applicant a foreign company based in Singapore is engaged in the business of rendering real estate services to its local and international clients. The applicant has developed certain international client relationships and in accordance with

global policy of the group, various offices provide referral services to other Cushman & Wakefield (C&W) Offices. The applicant entered into a referral agreement with Indian group company whereby the applicant refers/recommends potential customers desirous of obtaining real estate consulting and associated services in India. Further the applicant was not responsible for persuading the customers to avail the services of the Indian group company, nor negotiating or collecting fee charged by Indian group company from the referred customers. As consideration for such referral services, a percentage of the amount realized from the referred customers (i.e. 30% on gross amount realized) was paid to the applicant. The AAR held that "referral fee received in Singapore by the applicant, a Singaporean company from an Indian company for referring customers to the latter is neither business income u/s 9(1)(i) nor royalty u/s 9(1)(vi) nor fee for technical services u/s 9(1)(vii) r.w. Article 12(4)(b) of the DTAA between India & Singapore and, therefore, it is taxable as business income in Singapore only as the applicant has no PE in India ; impugned receipt not being chargeable to tax under the provisions of the IT Act or under the provisions of DTAA, section 195 is not attracted".

In *Real Resourcing Ltd*. (supra), the AAR, in the context of the India-UK DTAA, after relying on the *Cushman & Wakefield Ruling* (supra) held that referral fee received by a UK company (applicant) from India based recruitment agency for referring potential Indian clients and candidates was not royalty or FTS. The relevant observations of the AAR in the context of Article 13 dealing with royalty/FTS is as under :

"10. Collecting data and analyzing it and making a database for providing information on suitable candidates for recruitment, even if they are in the nature of consultancy services, cannot be considered to be ancillary and subsidiary to the enjoyment/application of the right or information referred to in para 3(a). Moreover, by access to the database, it cannot be said that the information concerning industrial, commercial or scientific experience will be transmitted by the applicant to the recruiting agencies. If the contention of Revenue is accepted, it would amount to unwarranted expansion of the terms FTS and royalties. Consideration for providing information concerning industrial, commercial or scientific experience basically involves the sharing of technical know-how and experience which is not the case here.....

We do not think that the criterion envisaged by art. 13.4(a) of DTAA has been satisfied in the instant case."

In *Knight Frant (India) (P.) Ltd.* (supra), the Tribunal held that (i) where referral fees was received by foreign concern for introducing clients to assessee-Indian company, providing international real estate advisory and management services, since referral services were rendered entirely outside India, it would not fall within the scope of 'total income' of said foreign concern as per section 5(2) and (ii) referral fees paid by assessee-Indian company for availing referral services which were rendered by foreign concern entirely in USA would constitute business profits of foreign company under Article 7 of the India-USA DTAA; in absence of PE in India, it was not taxable in India.

The distillation of precedents must now be applied by us to the facts of the present case. We are of the considered view that in the context of the above factual scenario and position of law, the revenues under the referral

agreement is not taxable in the hands of the appellant as royalty under the Act and/or India-Singapore DTAA or FTS under the India-Singapore DTAA. Therefore, we delete the addition of Rs.39,94,209/- made by the AO towards referral fee and allow the 4th & 5th ground of appeal.

13. The 6th ground of appeal concerns with not granting credit for TDS of Rs.17,42,513/-. The Ld. counsel submits that the appellant has claimed credit of TDS of Rs.17,42,513/- in the return of income, whereas the AO has not granted credit of TDS while computing the net tax liability under the Act while issuing the final assessment order post DRP directions. It is also stated that the appellant has filed a rectification application before the AO, which is still pending for disposal.

In this context, we direct the AO to grant credit of TDS of Rs.17,42,513/- to the appellant after due verification.

14. The 7th ground of appeal relates to levying interest u/s 234A of the Act amounting to Rs.2,92,861/-. It is stated by the Ld. counsel that after granting credit of TDS of Rs.17,42,513/-, interest levied u/s 234A of the Act will correspondingly reduce. It is further stated that the appellant has filed a rectification application before the AO, which is pending for disposal.

In this context, we direct the AO to compute consequential levy of interest u/s 234A as per law after granting TDS credit due to the appellant.

15. The 8th & 9th ground of appeal relate to levying interest u/s 234B of the Act amounting to Rs.9,62,258/-.

In the case of *Boston Scientific International v. DIT* (90 DTR 357), the Hon'ble Bombay High Court has held that when entire income of assessee was subjected to deduction of tax at source, no interest could be imposed u/s 234B & 234C.

In the instant case, as mentioned earlier, we have decided that the revenues from IDC agreement, management agreement and referral agreement are not taxable in India and therefore, the appellant is not liable to pay advance taxes. Accordingly, the levy of interest of Rs.9,62,258/- made by the AO u/s 234B is deleted.

16. The 10th, 11th & 12th ground of appeal relate to levying of interest of Rs.1,05,638/- by the AO u/s 234C of the Act.

In the instant case, as mentioned earlier, we have decided that the revenues from IDC agreement, management agreement and referral agreement are not taxable in India and therefore, the appellant is not liable to pay advance taxes. Accordingly, the levy of interest of Rs.1,05,638/- made by the AO u/s 234C is deleted.

The above findings sum up the grounds of appeal for AY 2010-11. Similar grounds of appeal are there in AY 2011-12 & AY 2012-13. Only exception is the 5th, 6th & 7th ground of appeal for AY 2012-13. The AO is directed to verify the contentions of the appellant that in AY 2012-13, he erred in (i) recovering refund of Rs.37,03,301/- which has never been received by the appellant, (ii) erred in recovering in interest of Rs.3,51,813/- u/s 244A when the alleged refund was never received and neither was the interest thereon received by the appellant, (iii) levying interest of

Rs.4,46,063/- u/s 234D when the related amount has never been received by the appellant. We direct the AO to pass consequential order on the above for AY 2012-13, after due verification.

17. Facts being identical, our decision for the AY 2010-11 applies *mutatis mutandis* to AYs 2011-12 & 2012-13.

18. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 17.01.2020, this order thereon is being pronounced today, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid-19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid-19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and *vide* order dated 6.5.2020 read with order dated 23.3.2020, extended the

limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020".

The Hon'ble Bombay High Court itself has, *vide* judgment dated 15th April 2020, held that "while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly".

Viewed thus, the exception to 90 day time limit for pronouncement of orders inherent in Rule 34(5)(c) clearly comes into play in the present case.

19. In the result, the appeals filed by the assessee are allowed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-	Sd/-
(RAVISH SOOD)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 20/07/2020
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai