IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "I", MUMBAI

BEFORE SHRI SAKTIJIT DEY (JM) AND SHRI N.K. PRADHAN (AM)
ITA No. 2178/MUM/2017
Assessment Year: 2013-14

Edenred Pte Limited, C/o SRBC Associates & LLP, 14th Floor, The Ruby, 29 Senapati Bapat Marg, Dadar (W), Mumbai - 400028 PAN : AACCE8636P	**Vs.**	The Dy. Commissioner of Income Tax- (International Taxation) – 2(2)(1), Room No. 1722, 17th Floor, Air India Building, Nariman Point, Mumbai - 400021
(Appellant)		**(Respondent)**

Assessee by : Shri Rajan Vora/Pranay Gandhi (ARs)
Revenue by : Shri Ganesh Bare (DR)

Date of Hearing: 14/10/2020
Date of Pronouncement: 23/10/2020

O R D E R

PER SAKTIJIT DEY, JM

Captioned appeal by the assessee arises out of assessment order dated 31.01.2017 passed u/s 143 (3) r.w.s. 144C(13) of the Income Tax Act, 1961 for the assessment year 2013-14, in pursuance to the directions of learned Dispute Resolution Panel (DRP)-I, Mumbai.

2. We have heard Shri Rajan Vora, learned Counsel appearing for the assessee and Shri Ganesh Bare, learned Departmental Representative. It is a common point between the learned Counsels appearing for the parties that the substantive issues, as raised in ground No. 2, 3 and 4, are fully covered by the decision of the Tribunal in assessee's own case in assessment years 2010-11 to 2012-13 vide order dated 20.07.2020 in ITA No. 1718/Mum/2014, ITA No. 254/Mum/2015 and ITA No. 507/Mum/2016. Keeping in view the aforesaid submissions of the parties, we proceed to dispose of the grounds raised in the appeal.

3. Ground No. 1 being a general ground does not require specific adjudication.

4. In ground No. 2, the assessee has challenged the taxability of Rs. 1,86,50,124/- received towards Infrastructure and Hosting Data Centre (IDC) charges by treating it as royalty.

5. Briefly the facts are, the assessee is a company incorporated in Singapore and is also a tax resident of that country. Basically, the assessee is engaged in 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 the internet, wireless technology and offline solutions to its clients. During the previous year relevant to the assessment year under dispute, the assessee provided three different categories of services to its three Indian group companies on payment basis, the services provided by the assessee to its Indian group companies are as under:-

(i) Infrastructure and Hosting Data Centre (IDC) services.

(ii) Management services.

(iii) Referral/others services.

6. In the return of income filed for the impugned assessment year on 30.11.2013, the assessee declared Nil income stating that the payment received by it from the Indian group companies is not taxable under Article 12 of India–Singapore Double Taxation Avoidance Agreement (DTAA). In so far as provision of IDC services is concerned, before the Assessing Officer the assessee explained that for providing such services, assessee has entered into an agreement with the core companies. Explaining further, it was submitted, under IDC services the assessee provides information technology, infrastructure management and mail box/website hosting services. It was submitted, the services are performed by assessee's own personnel in Singapore and the payment on account of such services were directly remitted by the Indian group companies to assessee's bank account in Singapore. To justify its claim of non taxability, the assessee submitted, while providing IDC

services, neither any processing is undertaken in Singapore nor the assessee maintains any central database for information. It was submitted, infrastructure data centre is not capable of information analytics, data management and web hosting main management. It was submitted, as part of IDC services, Indian group companies only receive standard services and no licenses in any software/right to use any software etc. is provided. Further, there is no sharing of any confidential information by the assesse with the Indian group companies. The Assessing Officer, however, was not convinced with the submissions of the assessee. He observed, the assessee and its Indian group companies are in the same business of managing prepaid CHM/PRM rewards, royalty and marketing solution for corporate houses. He observed, the services offered by the Indian group companies need a sophisticated computerised programme which can monitor, track and maintain such transaction and loyalty/rewards points earned by customers. He observed, for this purpose assessee is required to maintain customer's individual profile where their personal information as well as their transaction track can be kept. To facilitate this, the assessee has worldwide information processing centre at Singapore and it owns and maintains the said processing centre which require huge high tech computer complex being multiple mainframe computers and other related hardware and software facilities involving substantial investment and capable of very high volume storage and high processing of data. He observed, on receiving payment, assessee allows its Indian group companies and their approved customers to have access and to use its Central Processing Unit (CPU) at Singapore. The Assessing Officer observed, the use of CPU by the Indian group companies establishes strong business connection between the assessee and the group companies. He observed, not only the assessee allows use of its mainframe computers at Singapore but also allows incidental electronic mail access, consolidated data network access and consolidated data network services to the Indian group entities on payment basis. Thus, he concluded that the payment received by the assessee from IDC services is for use of or right to use design or model,

plan, secret formula or process or for information concerning industrial commercial or scientific experience within the meaning of the term royalty as per Article 12(3)(a) of the India Singapore (DTAA). Alternatively, he held, the payment received by the assessee can also be treated as royalty as it is for use of industrial, commercial or scientific equipment owned by the assessee at Singapore, hence, would be covered within the term royalty as per Article 12(3)(b) of the DTAA. Thus, after treating the payment received by the assessee towards IDC services as royalty, he brought it to tax while framing the draft assessment order. Being aggrieved with the aforesaid decision of the Assessing Officer, assessee raised objections before learned DRP. Relying upon its decision in assessee's own case in assessment year 2012-13, learned DRP upheld the decision of the Assessing Officer. In terms with the directions of learned DRP the Assessing Officer passed the impugned assessment order bringing to tax the amount of Rs. 1,86,50,124/- by treating it as royalty.

7. As could be seen from the facts discussed herein before, the issue in dispute is, whether the payment received by the assessee from provision of IDC services can be treated as royalty under Article 12 of India–Singapore DTAA. As we find, identical issue came up for consideration before the Tribunal in assessee's own case for assessment years 2010–11 to 2012–13. In fact, learned DRP has decided the issue in favour of the revenue by relying upon its decision in assessee's own case in assessment year 2012-13. However, while deciding the appeals of the assessee on identical issue in assessment years 2010-11 to 2012-13 the Tribunal, in the order referred to earlier in the order, has held that the payment received by the assessee from provision of IDC services is not in the nature of royalty. The observations of the Tribunal in this regard are as under:

> *"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 assesseebank 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."

8. Facts being identical, respectfully following the decision of the coordinate Bench in assessee's own case as referred to above, we hold that the amount received by the assessee from provision of IDC services cannot be treated as royalty either under the provisions of the Act or under India– Singapore DTAA, hence, cannot be taxed at the hands of the assesse. Accordingly, addition of Rs. 1,86,50,124/- deleted. This ground is allowed.

9. In Ground No. 3, the assessee has challenged the taxability of Rs. 1,31,83,758/- received towards management services fee by treating it as fees for technical services (FTS). Briefly, the facts are, during the year under consideration, the assessee has received an amount of Rs. 1,31,83,758/- from one of its Indian Group Company i.e. M/s SurfGold.Com (India) Pvt. Ltd. for providing management and consultancy services. As noted by the Assessing Officer, these services broadly include consultancy services in connection with the management of the Indian group Company's business and operation. During the assessment proceedings, the assessee submitted that for providing such services the assessee has entered into specific agreement with the Indian group company. By filing elaborate written submissions the assessee

submitted that since the services provided under agreement are not of the nature as provided u/s 9(1)(vii) of the Act as well as Article 12 of India–Singapore DTAA, they cannot be treated as FTS. Further, it was submitted, I course of providing such services the assessee has not made available any technical knowhow, knowledge, skill etc. Therefore, it cannot be treated as FTS under treaty provisions. The Assessing Officer, however, did not accept the submissions of the assessee. He held that as per the terms of the agreement the assessee is required to equip the employees at managerial level with core management skills relevant to managing the Indian business. He further observed, such training/support services are specific to the Indian group company and are not general in nature. He observed, such services are rendered to support the sale activities, to provide expertise knowhow in connection with business, development of sales and marketing strategies relating to the marketing of business and other services. Thus, he held that since the services provided is for equipping the employees of the Indian group company with core management skills and since, professionalism and an element of expertise are present at the back of such services, they have to be treated as technical and consultancy services. Further, he held, by providing services the assessee has also made available technical experience, skill, knowhow or processes to the Indian group company. Thus, ultimately, he held that the amount received by the assessee for providing management services is in the nature of FTS both under section 9(1)(vii) as well as under Article 12 of India–Singapore DTAA.

10. The learned DRP while considering assessee's objections on the issue, relied upon its decision on identical issue in assessee's own case in assessment year 2012-13 and upheld the decisions of the Assessing Officer.

11. Having perused the material on record, we find, identical issue arising in assessee's own case for assessment years 2010-11 to 2012-13 came up for consideration before the Tribunal in the order referred to in the earlier part of the order. While deciding the issue the Tribunal has held as under:

"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 Shell 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."

12. Facts being identical, respectfully following the decision of the coordinate Bench in assessee's own case, as referred to above, we hold that the management fee received by the assessee cannot be treated as FTS under Article 12(4) of the India–Singapore Tax Treaty. Therefore, we hold that the amount received by the assessee towards management fee is not taxable at the hands of the assessee. This ground is allowed.

13. In ground No. 4, the assessee has challenged the taxability of Rs. 1,08,56,405/- received towards referral fee by treating it as royalty and FTS.

14. During the year under consideration, the assesses had received an amount of Rs. 1,08,56,405/- towards referral fee from Indian group company M/s SurfGold.Com (India) Private Ltd. As per an agreement with the Indian group company the assessee refers its global clients interested in availing customer relationship management services in India to the Indian group company. As per the agreement, the Indian group company is required to provide services to the referred client from their office in India. Thus, by virtue of such agreement, the Indian group company provides the services to global clients and in terms of the agreement shares a part of the fee received by it with the assessee. Though, the assessee claimed that the amount received towards referral fee is neither royalty nor FTS under Article 12 of the Tax Treaty, however, rejecting the claim of the assessee, the Assessing Officer held that the payment received by the assessee is towards transfer of rights in respect of or the imparting of any information concerning or process or similar property. Thus, it has to be treated as royalty. Accordingly, he brought it to tax while framing the draft assessment order. While considering assessee's objections on the issue, learned DRP relying upon its decision in assessee's own case in assessment year 2012-13 held that the amount received by the assessee is in the nature of royalty and FTS.

15. Having considered the submissions of the parties and perused the material on record, we find that identical issue came up for consideration before the Tribunal in assessee's own case in assessment years 2010-11 to 2012-13. While deciding the issue the Tribunal, in the order referred to earlier, the Tribunal has recorded a categorical finding that the referral fee is neither in the nature of royalty nor FTS. The relevant observations of the Tribunal in this regard are reproduced here under:-

> *"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."

16. Facts being identical, respectfully following the aforesaid decision of the coordinate Bench in assessee's own case, we hold that the amount received by the assessee not being in the nature of royalty or FTS either under the Act or

under the tax treaty, is not taxable at the hands of the assessee. This ground is allowed.

17. In ground No. 5, the assessee has challenged the levy of education and secondary and Higher Education Cess. In view of our decision in Ground No. 2, 3 and 4, herein before, this issue has become purely academic in the present appeal. Therefore, there is no need to adjudicate the same. However, the issue is kept open for deliberation if it arises in any other appeal in future.

18. In ground No. 6, the assessee has raised the issue of short grant of TDS, whereas, in Ground No. 7 the assessee has raised the issue of short grant of interest u/s 244A of the Act.

19. Having heard the parties, we direct the Assessing Officer to verify the relevant facts and allow credit for TDS as well as interest on refund u/s 244A as per the provisions of the Act. Grounds are allowed for statistical purposes.

20. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 23rd October, 2020.

Sd/-	*Sd/-*
(N.K. PRADHAN)	(SAKTIJIT DEY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 23/10/2020

Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**