IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “C”, PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.1310/PUN/2019
निर्धारण वर्ष / Assessment Year : 2016-17

Sandvik IT Services AB (Formerly known as Sandvik Information Technology AB) C/o Sandvik Asia Private Ltd. Mumbai – Pune Road, Dapodi, Pune – 411012 PAN: AADCA5375J	Vs.	ACIT (International Taxation), Circle – 2, Pune
Appellant		Respondent

Assessee by	Shri Nikhil Pathak
Revenue by	Shri Rajarshi Dwivedy, CIT
Date of hearing	24-11-2020
Date of pronouncement	25-11-2020

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final assessment order dated 25-07-2019 passed by the Assessing Officer u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as ‘the Act’) in relation to the assessment year 2016-17.

2. The only issue raised in this appeal is against the taxability of certain receipts by the assessee as ‘Fees for technical services’

within the meaning of Article 12 of India-Sweden Double Taxation Avoidance (hereinafter also called `the DTAA') read with India-Portugal DTAA (via Protocol).

3. Succinctly, the facts of the case are that the assessee is a Non-Resident Company incorporated in Sweden, who filed its return declaring Nil income. It rendered IT support services to four entities in India: Sandvik Asia Pvt. Ltd., Walter Tools India Pvt. Ltd., Seco Tools India Pt. Ltd. and Dormer Tools India Pvt. Ltd. for a total consideration of Rs.27,16,79,590. Such amount was claimed not chargeable to tax as not falling within the ambit of 'Fees for technical services' under Article 12 of the DTAA. The AO considered the Agreement dated 01-04-2002 between the assessee and Sandvik Asia Private Limited (hereinafter referred to as SAPL) under which the IT support services were provided to the latter. He treated such receipts as 'Fees for technical services' u/s 9(1)(vii) of the Act and further came to hold that since the technology was embedded in the hardware and if the Indian entity was enabled to use the same, it amounted to 'making available' technical services and know-how etc. The same was consequently held to be covered within Article 12 of the DTAA. He also took

note of the directions issued by the Dispute Resolution Panel (hereinafter referred to as `the DRP') for earlier years, in which, relying on its directions for still earlier years, the DRP held that the AO mistook the nature of services as related to any license fees paid software, whereas actually these comprised of data networking services, operational services backup and recovery services, help desk etc. and consequently held that the IT support services received from SAPL could not be taxed as Royalty/FTS under the Act as well as Article 12 of the DTAA. Thereafter, the AO observed that similar findings of the DRP in favour of the assessee for the A.Ys. 2009-10 and 2012-13 were contested by the Revenue in appeal u/s 253(2) of the Act before the Tribunal and such appeals were dismissed. Since the matter was pending before the Hon'ble High Court, the AO came to hold for the instant year that the payment received by the assessee from SAPL was covered under Article 12 of the DTAA. Such amount of Rs.25,61,71,850 was, therefore, held to be taxable. Similar view about taxability was taken *qua* the IT Support fees received by the assessee from the other three Indian entities. The assessee filed objections against the draft order before the DRP, who, vide its directions dated 27-

06-2019 noted the view taken by it in earlier years wherein the amount received from SAPL was held to be not chargeable to tax under Article 12 of the DTAA. However, considering the fact that the matter was pending before the Hon'ble Bombay High Court in the appeal filed by the Department for earlier years, the DRP for the extant year decided the similar issue against the assessee by holding that IT support services of Rs.25.61 crore received by the assessee from SAPL was covered under Article 12 of the DTAA. Similar view was taken in respect of the other amounts received from the three Indian entities. Aggrieved thereby, the assessee is in appeal before the Tribunal.

4. We have heard both the sides through Virtual Court and scanned through the relevant material on record. In total, the assessee, a non-resident, received IT Support service fees from four Indian entities. First we espouse for consideration a sum of Rs.25.61 crore received from SAPL. There is no dispute on the nature of services rendered by the assessee to SAPL, being, that of data communication, operational services backup and recovery services, help desk, etc. It is elementary that the amount in question would be chargeable to tax, if the same is taxable under

the Act and is not immune from taxation under the DTAA. The ld. AR fairly conceded that the receipt in question is covered u/s 9(1)(vii) of the Act as 'Fees for technical services'. He however, contested its chargeability under Article 12 of the DTAA. Before reaching any conclusion as to the applicability or inapplicability of section 9 or Article 12 of the DTAA in this regard, it is *sine qua non* to ascertain the true nature of services rendered by the assessee. While recording the facts *supra*, we have noticed that for some of the earlier years, the Tribunal had an occasion to examine the nature of services rendered by the assessee and adjudicate the same, which decision finally went in favour of the assessee whereby it was held that the case was not covered by Article 12 of the DTAA and hence such receipts from SAPL were not taxable in India. On being called upon to demonstrate the nature of services rendered during the year, the ld. AR invited our attention towards an Agreement dated 01-04-2002 between Sandvik Asia Limited (now SAPL) and the assessee with its earlier name. It was submitted that the same Agreement as entered into in the year 2002 continued to govern the year under consideration as well. On a pointed query, the ld. DR also accepted the factual position stated

on behalf of the assessee. This brings us to a point that the nature of services rendered by the assessee to SAPL continues to remain the same as was there in earlier years. In this regard, it is noted that for the A.Y. 2009-10, the AO treated sum of Rs.6.76 crore received from SAPL as 'Fees for technical services'. The DRP held such amount to be not chargeable to tax. In the appeal by the Revenue, the Tribunal decided this issue in favour of the assessee. A copy of the Tribunal's consolidated order for the A.Ys. 2009-10 and 2012-13 has been placed at page 1 onwards of paper book. For the A.Ys. 2010-11 and 2011-12, the AO again treated the amounts received from SAPL as chargeable to tax. The DRP again reiterated its view against the Department. Though the Revenue was competent, yet it did not choose to file further appeal before the Tribunal, thereby assigning finality to the directions of DRP. For the A.Y. 2012-13, we have already noted that the DRP held the amount to be not chargeable to tax and the Tribunal vide its combined order dismissed the Revenue's appeal. The assessment year under consideration is A.Y. 2013-14. Here, it is pertinent to note that for immediately two succeeding assessment years 2014-15 and 2015-16, the AO has himself treated the amounts received

from SAPL as not chargeable to tax. Copies of assessment orders for these two years have been provided at pages 100 to 149 of paper book. In view of the foregoing discussion, it is crystal clear that the amount received by the assessee from SAPL in the preceding/succeeding years has been either held by the Tribunal to be not chargeable to tax under Article 12 of the DTAA or the AO accepted the directions given by the DRP treating the same as not chargeable to tax or the AO himself treated such amounts as not chargeable to tax. As the facts and circumstances for the year under consideration are indisputably similar, we hold that sum of Rs.25.61 crore received by the assessee from SAPL is eventually not chargeable to tax under Article 12 of the DTAA even though the same is in the nature of 'Fees for technical services' covered u/s 9(1)(vii) of the Act. Thus, the issue is determined in favour of the assessee.

5. In addition to SAPL, the assessee also received IT support services fee from Walter Tools India Pvt. Ltd., Seco Tools India Pt. Ltd. and Dormer Tools India Pvt. Ltd. amounting to Rs.1.23 crores, Rs.7.84 lakhs and Rs.23.74 lakhs respectively. The AO has discussed this issue on page 22 of the draft order by observing that

the DRP for the A.Ys. 2013-14 and 2014-15 has held fees from Walter Tools India Pvt. Ltd. and Dormer Tools India Pvt. Ltd. as chargeable to tax under Article 12 of the DTAA inasmuch as the assessee failed to provide the correct nature of services and submitted only certain invoices by claiming that no formal agreement was entered into between the assessee and these two Indian entities. As regards the third entity, namely, Seco Tools India Pvt. Ltd., the AO followed the same course as the assessee failed to provide the correct nature of services. This led to inclusion of above referred three sums in the total income of the assessee, which were held to be chargeable to tax @ 10%. The assessee is before the Tribunal.

6. We have heard the rival submissions and gone through the relevant material on record. The factual matrix insofar as the receipt from these three entities is concerned, is that the assessee rendered IT support services but could not furnish proof of correct nature of services with the help of any Agreement etc. The assessee only furnished copies of certain invoices before the authorities below which did not facilitate the correct determination of the nature of services. This issue anent to Walter Tools India

Pvt. Ltd. and Dormer Tools India Pvt. Ltd. came up for consideration before the Tribunal for the A.Y. 2013-14 wherein the matter stood remitted to the file of the AO for fresh determination of nature of services. Similar view has been reiterated by the Tribunal in its order for A.Ys. 2014-15 and 2015-16. A copy of this order is available at page 19 onwards of paper book. Since the facts and circumstances of the nature of receipt from three Indian entities in this year are admittedly similar to those of two entities in preceding years, respectfully following the precedent, we set aside the impugned order and remit the matter to the file of the AO for a fresh determination of the issue in accordance with the directions given by the Tribunal for the preceding years.

7. In the result, the appeal is partly allowed.

Order pronounced in the Open Court on 25th November, 2020.

Sd/-	Sd/-
(S.S.VISWANETHRA RAVI)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 25th November, 2020
GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The DRP-3, Mumbai
4. The concerned CIT, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**C**" / DR 'C', ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	24-11-2020	Sr.PS
2.	Draft placed before author	24-11-2020	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

*