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.2524/PUN/2017
निर्धारण वर्ष / Assessment Year : 2014-15

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| M/s. Sandvik AB<br>C/o. Sandvik Asia Private Limited,<br>Mumbai – Pune Road,<br>Dapodi, Pune – 411 012<br>PAN : AAHCS7486E | Vs. | DCIT (IT),<br>Circle-2, Pune |
| Appellant | | Respondent |

Assessee by Shri Nikhil Pathak
Revenue by Shri Navin Gupta

Date of hearing 05-01-2021
Date of pronouncement 06-01-2021

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final Assessment Order dated 11-08-2017 passed by the Assessing Officer (AO) u/s.144C(13) read with section 143(3) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2014-15.

2. Though the assessee raised two grounds in its Memorandum of Appeal but the ld. AR pressed only the first ground, which assails the impugned order on the taxability of receipts of Rs.22,43,630/- towards Human Resource and

Leadership training provided by the assessee to its Indian affiliate having been treated as "Fees for technical services" within the meaning of Article 12 of the India and Sweden Double Taxation Avoidance Agreement (hereinafter also called ` the DTAA') read with the Protocol thereto.

3. Succinctly, the assessee is a Sweden based company who filed its original return declaring total income of Rs.4.05 crore, being interest received on ECB loans. The assessee received, *inter alia,* a sum of Rs.22,43,630/- from Sandvik Asia Private Limited (SAPL) towards Training charges. The same was designated as Training fees (Non-technical services) not chargeable to tax as "fees for technical services" in India under the DTAA read with the Protocol as expanding to the DTAA between India and Portuguese. On being called upon to substantiate its stand, the assessee submitted copies of sample invoices indicating rendition of `Human Resource and Leadership training' to three employees of SAPL. The assessee emphasized that the Leadership training services imparted by it enabled the recipients to manage the affairs of its Indian affiliate more effectively and hence the managerial

services rendered by it did not fall within the meaning of Article 12 of the DTAA between India and Portuguese. The AO did not accept the assessee's contention of the latter's entitlement to the limited scope of the term `fees for technical services' as given in the India and Portuguese Tax Treaty. For this, he relied on the Authority for Advance Ruling in *Perfetti Van Melle Holding B.V., in Re [2012] 342 ITR 200 (AAR).* The AO opined the services rendered by the assessee to be in the nature of managerial, technical or consultancy services within the meaning of para 3(b) of Article 12 of the DTAA. More specifically, he held the services to be technical in nature, which made available the technical knowledge. To sum up, he held the training fees received by the assessee from its Indian affiliate as "fees for technical services" taxable under Article 12 of the DTAA. He fortified such a view by relying on the decision taken by the Dispute Resolution Panel (DRP) in the assessee's own case for the immediately preceding assessment year, 2013-14. The DRP also did not provide any succour to the assessee by primarily relying on its order in the assessee's own case for the assessment year 2013-14 and also holding on merits that the services relating to

Training were in the nature of technical or consultancy, which satisfied the mandatory condition of "*make available*". That is how, a sum of Rs.22,43,630/- was added by the AO to the assessee's total income in the final assessment order and taxed as fees for technical services at 10%. The assessee has come up in appeal before the Tribunal.

4. We have heard the rival submissions through Virtual Court and glanced at the relevant material on record. The controversy, in a nutshell, is that whereas the assessee is claiming that the Training fee received by it was in the nature of consideration for rendering `managerial' service and hence not chargeable to tax in terms of the India Portuguese DTAA, the Revenue has held that the benefit of India Portuguese DTAA cannot be extended and further the receipt is in the nature of fees for consultancy or technical services, which has the effect of making available the knowledge to the recipients and hence chargeable to tax. To put it straight, answer to following questions will resolve the controversy:

I. Whether benefit of India Portuguese DTAA can be allowed in terms of MFN clause in the Protocol to India Sweden DTAA?

II. Is Training fee a consideration for rendering Managerial services as claimed by the assessee?

III. Is Training fee a consideration for rendering Consultancy or technical services as held by the Revenue?

IV. If Training fee is not FTS, does it become immune from taxation?

5. We will espouse the above questions *ad seriatim* for consideration and decision. Before proceeding further, we want to clarify that the AO as well as the DRP, in holding the amount of Training fee as chargeable to tax as FTS, have relied on the view taken by the DRP for the immediately preceding year in the assessee's own case. The ld. AR candidly admitted that the unfavorable view bolstered by the DRP for the assessment year 2013-14 was accepted by the assessee without any further assail *albeit* because of smallness of the amount. This factor, in our considered opinion, is not either way decisive of the fate of the issue currently under consideration of the Tribunal.

I. Whether benefit of India Portuguese DTAA can be allowed in terms of MFN clause in the Protocol to India Sweden DTAA?

6. The assessee received a sum of Rs.22,43,630/- from SAPL for imparting `Human resource leadership training' to three of the employees of SAPL, which was claimed as not chargeable to tax in view of the Protocol and the resultant DTAA between India and Portuguese not covering `Managerial' services within the ambit of the FTS. Relying on the *Perfetti Van (supra)*, the AO held that the assessee cannot claim benefit of the Portugal Treaty. The AAR in this ruling has held that a treaty is a contract between two sovereign countries and any diversion from it will need the consent of both the contracting states. Further a contract with a certain country cannot be used to interpret a separate independent contract with another country. It also held that the Protocol attached to a treaty no doubt should be looked into for finding the meaning of an expression used in the treaty, but to refer to a treaty to which two countries are not parties, would not be appropriate. Similar view was reiterated by the AAR in *Re Steria (India) Ltd. 2014 364 ITR 381 (AAR).* The ruling in Steria (India) Ltd. was challenged by the assessee before the

Hon'ble Delhi High Court in *Steria (India) Ltd. Vs. CIT and another (2016) 386 ITR 390 (Delhi).* Overturning the ruling of the AAR, the Hon'ble High Court held that Protocol is a part of the DTAA and there is no need for separate notification incorporating the beneficial provisions of the other DTAA as forming part of the DTAA to which the Protocol is attached. We still further note that the Ruling in *Perfetti (supra)* has also been overruled by the Hon'ble Delhi High Court in *Perfertti Van Melle Holding. B.V. vs. AAR (2014) 52 taxmann.com 161 (Delhi).* Thus, there is a substance in the contention of the ld. AR that once two sovereigns have added Protocol to the DTAA between India and Sweden, which contains the Most Favoured Nation (MFN) clause, *inter alia, qua* Article 12, the sequitur is that the beneficial provisions contained in the DTAA between India and Portuguese is to be read in the DTAA between India and Sweden. The view point of the A.O. in this regard is *ex consequenti* vacated.

II. Is Training fee a consideration for rendering Managerial services as claimed by the assessee?

7. The case of the assessee before the authorities below has been that the Training fee is a consideration for `Managerial

services' and going by the Protocol to the DTAA read with the DTAA between India and Portuguese, the fee for managerial services does not fall within the scope of Article 12.

8. Having held *supra* that the Protocol has to be taken to the logical conclusion, now let us see its effect on the fact situation obtaining in the extant case. Relevant parts of Article 12 of the DTAA between India and Sweden, read as under:-

> "Royalties and Fees for Technical Services
>
> 1. …
>
> 2. Notwithstanding the provisions of paragraph (1) such royalties and fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.
>
> 3. (a)
>
> (b) The term "fees for technical services" means payment of any kind in consideration for the *rendering of any managerial, technical or consultancy* services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention.
>
> 4. to 6. …."

9. When we construe the meaning of the term `fees for technical services' as given in para 3(b) of Article 12 of the DTAA, it is manifested that the same includes, *inter alia,*

consideration for managerial services, which is contrary to the assessee's stand. That appears to be the reason propelling the assessee to invoke Protocol to the DTAA, relevant part of which reads as under:

> **"PROTOCOL**
>
> With reference to Articles 10, 11 and 12:
>
> In respect of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties and fees for technical services), *if under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD, India limits its taxation* at source on dividends, interest, royalties or *fees for technical services to a rate lower or a scope more restricted* than the rate or scope provided for in this Convention on the said items of income, *the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply under this Convention.*"

10. This part of the Protocol states that in respect of Article 12 (Royalties and fees for technical services), if India has, in a DTAA with another third State which is a member of the OECD, limited its taxation right on fees for technical services at a rate lower or a scope restricted than that in the India Sweden DTAA, then such restricted rate or scope shall apply to the DTAA. This is called the MFN clause. Portugal is a member of the OECD. India has entered into DTAA with Portuguese. Relevant part of para 4 of Article 12 of this

DTAA, which is parallel of Article 12 of the DTAA between India and Sweden, reads as under:

> "4. For the purposes of this Article "fees for included services" means payments of any kind, other than those mentioned in Articles 14 and 15 of this Convention, to any person in consideration of the *rendering of any technical or consultancy services* (including through the provisions of services of technical or other personnel) if such services:
>
> (a) …. or
>
> (b) *make available* technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or technical design which enables the person acquiring the services to apply the technology contained therein."

11. Two striking dissimilarities can be noticed from the definition of fees for technical services as given in the DTAA between India and Portuguese *vis-à-vis* the DTAA. The first is that unlike the definition contained in India Sweden DTAA, the word `managerial' is absent in the DTAA with Portuguese; and the second is that there is a `make available' clause contained herein. It is because of the first distinction that the assessee has tried to make out a case that Training fee is in nature of consideration for `managerial' services, so as to find an escape route from the definition of fees for technical services and the consequential taxation.

12. In order to decide whether the Training fees, in the given facts, is a consideration for managerial services, it is *sine qua non* to first comprehend the real nature of services rendered by the assessee, a Sweden company to three employees of SAPL. Copies of three invoices raised by the assessee for this purpose have been placed at pages 105 to 107 of the paper book which are pointer to the fact that the assessee rendered Training to Mr. Sunil Joshi vide invoice dated 27-03-2014; Mr Rajender Dhiman vide invoice dated 27-03-2014; and Mr. Nishar Imam vide invoice dated 22-05-2013. Sum of these invoices total up to the amount under consideration. In the Description column of the first two invoices, it has been mentioned "Programfee ONE SLP 7". In the third invoice, the Description has been given as "Programfee ONE SLP 4". On being called upon to provide a copy of the Agreement under which such services were rendered, the ld. AR submitted that no formal agreement was entered into for the purpose and the training was rendered pursuant to the oral understanding. The ld. AR took us through the e-mail from Helena Jonason dated 22-11-2013 addressed to Mr. Sunil Joshi and Mr. Rajendar Dhiman giving broad nature of training. The e-mail indicates that the assessee

imparted Sandvik Leadership Program (SLP) to the three employees of its Indian affiliate. The e-mail states that: "The ONE Sandvik Leadership program, ONE SLP, is a development program targeting experienced managers within Sandvik group…….". The Program serves as a general leadership program working with all 5 capabilities in the Sandvik Leadership model and the objectives of ONE SLP are `Support implementation of our business strategy and high performing organization; Support developing experienced individuals that lead others, managers/leaders or functions; Long term investment to enhance the leadership level and succession in Sandvik group; and To help building a ONE Sandvik culture.' It has further been mentioned that the Training program consists of four parts arranged at different intervals starting point with Webinar followed by Module 1 – `Me as a Leader working on ONE Sandvik' ; Module 2 – `Me as a Leader driving improvements while developing others'; and Module – 3 `Me as a Leader delivering result with ambition, speed and focus'. The above Webinar and Modules were conducted in December 2013, February 2014, May 2014 and October 2014. A copy of training presentation has also

been placed at pages 7 to 13 of the paper book, which lays emphasis on developing leadership qualities. Crux of the training given by the assessee to the employees of SAPL is that the same is in the realm of leadership skills. Plea of the assessee has been that since the object of the training imparted by the assessee to SAPL employees was to develop leadership qualities leading to better management of SAPL affairs, it rendered managerial services, which are outside the purview of Article 12 of the DTAA read with the Protocol.

13. In our opinion, the philosophy of equating the nature of training with the rendition of the same nature of service is unfounded. Ordinarily, training is conceived as passing on of some proficiency by the trainer to the trainee. It simply leads to honing up the skills of the other in the subject, which patently cannot be termed as an equivalent of rendering service in that field. For instance, acquainting someone in a formal manner with techniques to boost sales does not stand at par with rendering marketing services. Rendition of marketing services takes place when marketing activities are actually undertaken for and on behalf of an organization by practically

plunging into the field or doing some activity concerning the marketing. In fact, doing the activity is synonymous with rendering of service of that nature. Simply equipping or enabling the others for doing an activity is a step anterior to rendition of such services.

14. Coming to the context under consideration, the case of the assessee - that it imparted leadership training to three employees of SAPL, which, in turn, helped them in managing the affairs of SAPL in a better way and hence, it rendered managerial services to SAPL - in our considered opinion is not correct. We are constrained to hold that rendering leadership training to employees of SAPL cannot be said as rendering managerial services so as to fall outside the ambit of fees for technical services under Article 12 (3) of the DTAA between India and Sweden read with its Protocol and the resultant Article 12 of India and Portuguese treaty. The contention of the assessee is ergo dismissed as devoid of any merit.

III. Is Training fee a consideration for rendering Consultancy or technical services as held by the Revenue?

15. Now we turn to examining the case from the perspective of the Revenue. The DRP held that the services provided by the assessee relating to training were in the nature of technical or consultancy and the mandatory condition of "make available" was also satisfied as the very purpose of training was to impart knowledge etc., so as to enable the recipients to apply such knowledge etc., without recourse to the trainer. We have extracted above Article 12(4) of the DTAA between India and Portuguese, which defines the term "fees for included services". We also noted two striking dissimilarities between the language of the Indian DTAA with Sweden *por una parte* and Portuguese *por otra parte* and referred to the second dissimilarity of the Portuguese Convention containing a `make available' clause, which enables the person acquiring the services to apply the technology contained therein. This indicates that in order to fall within the purview of Article 12(4) of the DTAA between India and Portuguese, it is foremost important that the services rendered must not only be consultancy or technical in nature, but should also make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a

technical plan or technical design which enables the person acquiring the services to apply the technology contained therein.

16. The terms technical and consultancy services have not been defined either under the relevant section or the DTAA. Technical services generally require use of skill and specialized knowledge ordinarily in engineering field. Items mentioned in clause 4(b) of Article 12 between India and Portuguese after the words `make available', such as, technical knowledge, experience, skill, know-how or processes or a technical plan or technical design, strengthen the view that the technical services here largely cater to engineering field. Such a knowledge is acquired through a rigorous process of learning, sometimes also involving certain technical qualifications in specialized fields. In common parlance, Consultancy services are advisory services. To seek advice from the expert in the field is ordinarily viewed as availing consultancy services. If a patient goes to a doctor and consults him of his illness, he is consulting a doctor. Similarly, if a client goes to an Advocate and seeks his opinion, he can be considered as availing consultancy services from the

Advocate. However, what is pertinent to note here is that the common connotation of Consultancy services as noticed herein does not hold good in the context of the language of Article 12 of the DTAA between India and Portuguese. Even a cursory reading of para 4 of Article 12 of India Portuguese Convention deciphers that the clause (b) is attached to both the technical and consultancy services. Thus the `Consultancy services' in the present context would not be of the nature as understood commonly, but draw their colour from the items mentioned after the term `make available', more specifically, when these are also comprehended in the sense of making available experience or skill etc. to the recipient for using it at his own end. This shows that the technical knowledge, experience or skill etc., must be handed over to the acquirer for its later use by self as a pre-condition for falling within the purview of this Article.

17. Coming back to the factual position prevailing before us, we find that the leadership training provided by the assessee did not result in making available any technical knowledge, experience or skill etc. to the employees of SAPL, which could enable them to use it later on. In that view of the

matter, it is held that the Revenue authorities were not justified in considering Training fee as a consideration for rendering Consultancy or Technical services within the meaning of Article 12(4)(b) of the DTAA between India and Portuguese.

IV. If training fee is not FTS, does it become immune from taxation?

18. Having found that the Training fees received by the assessee is neither in the nature of consideration for managerial service as claimed by the assessee nor consideration for consultancy or technical services as held by the Revenue, the next question is would it consequently become non chargeable to tax? Simply because the amount does not fall within the purview of "fee for technical services" under Article 12 of the DTAA read with its Protocol, it cannot be said that its taxability is ousted. There are other Articles in the DTAA incorporating the basis for inclusion of a particular income in the total income. Article 7 with caption "Business profits" covers the profits of an enterprise of a contracting state. Para 1 of this Article states that the profits of an enterprise of a contracting state shall be taxable only in that State unless the enterprise carries on business in the other

contracting state through a permanent establishment situated therein. If the enterprise carries on business as aforesaid the profits of the enterprise may be taxed in the other state but only so much of them as are attributable to that permanent establishment. Para 6 of Article 7 makes it graphically clear that where profits include items of income which are dealt with separately in other Articles of this convention, then the provisions of those Articles shall not be affected by the provisions of this Article. In other words, if a particular income is covered within the scope of a specific Article, say, Article 12, then the same will be considered only within the purview of Article 12 and not Article 7. Only if the income does not get covered under Article 12, that it will revert for consideration under Article 7 of `Business profits' subject to the enterprise carrying on business in the other State through a permanent establishment as defined in Article 5. In such a scenario, the profits of the enterprise of Sweden may be taxed in India but only so much as are attributable to its permanent establishment in India.

19. Returning to the factual panorama of the case, we find that the assessee characterized the receipt of Training fee as a

consideration for `managerial' services within the overall ambit of Article 12 and the Revenue also accepted the same as falling under that Article but as `consultancy or technical' service. We have held *supra* that the Training fee received by the assessee does not fall within the purview of Article 12 of the DTAA with Portuguese inasmuch as it is neither fees for managerial services on one hand nor consultancy or technical services on the other. Thus, the taxability of the same is required to be tested within the meaning of Article 7 read with Article 5 of the DTAA. Since such an exercise of examining the case under Article 7 has not been undertaken by the AO, we would have ordinarily remitted the matter to the AO for its *de novo* adjudication.

20. However, it is noted that the assessee received total sum of Rs.41.82 crore from its associated enterprises including a sum of Rs.22,43,630/- from SAPL towards Training charges under consideration. Return of income was filed showing Interest received on ECB loan and interest of income-tax refund. All other receipts by the assessee from its AEs, such as, Management services fees of Rs.26.28 crore; IT Support services fee of Rs.8.83 crore were not offered for taxation on

the ground that it did not have any permanent establishment in India. The AO on page 17 of the draft order has taken note of this aspect of the matter. At the end of para 11, he has categorically noted that "In view of the above discussion, the contention of the assessee that the provisions of Article 7 of taxing the business receipts in India do not apply as the company does not have a PE in India and consequently the profits from receipts from SAPL cannot be taxed as `Business Income' is acceptable". Since the AO has himself accepted that the assessee did not have any PE in India, the amount of Training fee will also escape tax net as it cannot be taxed as "Business profit" under Article 7 in the absence of there being any PE in India in terms of Article 5.

21. In the result, the appeal is allowed.

Order pronounced in the Open Court on 06th January, 2021.

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

पुणे Pune; दिनांक Dated : 06th January, 2021
सतीश

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:**

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The CIT (IT/TP), Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**सी**" / 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 | 05-01-2021 | Sr.PS |
| 2. | Draft placed before author | 06-01-2021 | 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. | | |

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