

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

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)
AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

I.T.A. No.7144/Mum/2017 - Assessment Year 2014-15
I.T.A. No.5744/Mum/2018 - Assessment Year 2015-16

Atos Information Technology Singapore Pte Ltd, Plant No.5, Godrej & Boyce Mfg Co. Ltd Pirojshanagar, ,LBS Marg, Vikhroli (W), Mumbai-400 079 PAN : AAHCA8215F	vs	Dy.CIT (International Taxation) Range-1(1)(2), Mumbai
APPELLANT		RESPONDENT

Appellant by	Shri Dhanesh Bafna, AR
Respondent by	Shri Sanjay Singh, [CIT (DR)]

Date of hearing	22-01-2021
Date of pronouncement	30-03-2021

ORDER

Per Saktijit Dey, (JM) :

Captioned appeals by the same assessee are against the final assessment order passed under section 143(3) r.w.s. 144C(13) for the assessment years 2014-15 and 2015-16, in pursuance to the directions of the learned Dispute Resolution Panel (DRP).

2. In these appeals the assessee, basically, has called into question the taxability of certain amount received from the Indian subsidiary, as royalty or/and fees for technical services (FTS). Of course, assessee has raised couple of more issues besides the main issue. Since, facts relating to the disputed issues are common in both the appeals, except, variation in figures, for the sake of brevity we will deal with the facts in ITA No. 7144/Mum/2018.

3. As far as the main issue of taxability or otherwise of certain amount received as royalty or/and FTS is concerned, relevant facts are, the assessee is a company incorporated in Singapore and is also a tax resident of that country. As stated by the assessing officer, during the year under consideration the assessee had provided certain services to its group concern in India, viz. Atos India Pvt Ltd (Atos India) and received payment. The details of services rendered and payment received are as under:-

1.	Project related services pertaining to Nokia Siemens Project	Rs.1,41,70,645/-
2.	Project related services pertaining to Standard Chartered Bank project	Rs. 69,93,459/-
3.	Services related to other projects	Rs. 6,86,078/-
4.	Cost recharge pertaining to salary of Thomas Boutard	<u>Rs. 10,67,392/-</u>
	Total	<u>Rs.2,29,17,574/-</u>

4. It is also a fact on record, the aforesaid services are provided to Atos India in pursuance to agreements executed between them. In the return of income filed for the impugned assessment year, the assessee did not offer the payment noted

above as income. In course of assessment proceedings, when the assessing officer called upon the assessee to explain as to why the payment received from the Indian group concern should not be treated as royalty/FTS and hence, made taxable in India, the assessee furnished detailed written submission stating that since the assessee is a tax resident of Singapore, it will be governed under the India-Singapore Double Taxation Avoidance Agreement (DTAA) and further, since the provisions of India-Singapore DTAA is more beneficial to the assessee, they would prevail over the provisions of the Income-tax Act, 1961. It was further submitted by the assessee, the services provided to the Indian entity are in relation to data centre/managed services which includes remote monitoring of server, database situated outside India, disaster recovery and services, delivery management etc. Referring to the definition of 'royalty' under Article 12(3) of the India-Singapore DTAA it was submitted by the assessee that since the payment received from Atos India does not come within the ambit of either royalty as defined under Article 12(3) of the Tax Treaty or FTS under article 12(4) of India-Singapore DTAA and can only be treated as business profit. Therefore, in absence of a permanent establishment (PE) in India, the amount received cannot be taxable in India. The assessing officer, however, did not find merit in the submissions of the assessee. He held that the payment received by the assessee would come within the ambit of royalty, both, under section 9(1)(vi) as well as under Article 12(3) of the India-Singapore DTAA as the payment was for the use of or right to use of information concerning industrial, commercial, scientific experience and copyright. The assessing officer also held that the amount received can be treated as FTS under Article 12(4) of India-Singapore DTAA

because the assessee has provided managerial and technical services to Atos India. Accordingly, he brought the amount received by the assessee to tax.

5. Assessee challenged the aforesaid decision before learned DRP. After considering the submissions of the assessee, in the context of facts and materials on record, learned DRP observed that each of the services rendered by the assessee are of distinctly different type; hence, cannot be clubbed together to determine their character. Learned DRP observed, the assessee has not made any effort to substantiate how various services rendered would not fall within the category of royalty/FTS with reference to the provisions of India-Singapore DTAA. Having so observed, the learned DRP went on to analyse and examine each of the services rendered by the assessee and observed that while rendering managed services, the assessee provides entire server hosting services and carries out support services of the server for enabling efficient and secured availability of server. They observed, the managed servers are leased out to the service recipient and is in control and possession of the lessee for all practical purposes. They observed, the provision of hosting service inherently involves use of assessee's hardware and software by the person who has rented the server. The access and control over the server are with the user and the assessee is merely required to ensure 24 hours availability of the server. While coming to such conclusion, learned DRP referred to certain information available in web. Thus, learned DRP concluded that the assessee provides equipment and associated software and services to manage the equipment, hence, such services clearly fall within the ambit of section 9(1)(vi) read with Explanation 4(a) as well as Article 12(3)(b) of the India-Singapore DTAA.

6. As far as project related services relating to Nokia Siemens projects and Standard Chartered Bank project, learned DRP observed, the assessee practically provides all the managed services relating to maintenance of servers of Atos India. Further, the assessee also provides access to its specialized software and application. Therefore, such right to use granted to Atos India falls within the ambit of royalty under Article 12(3) of the India-Singapore DTAA as it amounts to right to use literary, scientific or artistic work. Thus, ultimately, the learned DRP approved the decision of the assessing officer in treating the amount received from managed services and project related services royalty and FTS.

7. Insofar as cost recharge pertaining to salary of employee, viz. Thomas Boutard, learned DRP observed that the assessee did not provide the exact nature of services rendered by the said person. However, considering the submissions of the assessee that the said employee has provided assistance for finalization of annual accounting results of Atos India, learned DRP concluded that the person concerned has imparted technical knowledge, experience or skill to the employees of Atos India which would enable the employees to render the task in future without his assistance. Therefore, the amount received towards cost recharge is in the nature of FTS under Article 12(4) of the India-Singapore DTAA. Accordingly, learned DRP upheld the decision of the assessing officer in this regard.

8. Drawing our attention to the details of various services rendered by the learned Counsel for the assessee submitted, the project related service pertaining to Nokia Seimens project are in the nature of data service centre and windows services. Similarly, project related services pertaining to Standard Chartered Bank project are in the nature of managed services which require the employees of the

assessee to remotely maintain and monitor the servers and computer equipments. Further, the assessee is required to manage databases and carry out overall monitoring activity. The third kind of services provided in this project is service delivery management and support which includes timely delivery and problem resolution to the customers of Atos India. As far as the other projects are concerned, the assessee provided service in the nature of server hosting services and database management service. Thus, the learned Counsel submitted, the core activity of the assessee is to provide data centre/managed services to Atos India, which essentially are in the nature of Information Technology (IT) infrastructure management and mailbox hosting services to Atos India. He submitted, all these services are performed by assessee's employees in Singapore and from the data centers located in Singapore. To support his contention regarding the nature of services provided by the assessee, the learned Counsel drew our attention to certain documents placed in the paper book, stated to be the agreement executed for Nokia Seimens project and Standard Chartered Bank project. Referring to these documents, the learned Counsel submitted, the services rendered by the assessee cannot be termed as royalty.

9. Drawing our attention to Article 12(3) of the India Singapore DTAA, he submitted, while providing data centre / managed services, the assessee has not transferred any information concerning industrial, commercial or scientific experience. Further, he submitted, the assessee has also not allowed use or transferred any right to use of any copyright of a literary, artistic or scientific worth including cinematograph films or films or tapes used for television or radio broadcasting, any patent, trademark, design or model, plan, secret formula or process.

10. Further, drawing our attention to the agreement with Atos India relating to Standard Chartered Bank, the learned Counsel submitted, the ownership of intellectual property right remains always with the assessee and nothing is transferred to Atos India. He submitted, it cannot also be said that the assessee has allowed use or right to use of any industrial, commercial or scientific equipment. He submitted, while providing data centre services / managed hosting services with the help of sophisticated, scientific equipment viz. servers, neither Atos India nor any other party has any independent right to use it. It is only the assessee, who uses the equipment for rendering services. Thus, he submitted, the payment received for managed services and project related services cannot come within the purview of royalty under Article 12(3) of the tax treaty. In support of such contention he relied upon the following decisions:-

1. DCIT vs Suvvis Communications Corporation
158 ITD 750 (Mum)
2. Edenred Pte Ltd vs DCIT – ITA 1718/Mum/2014 dt 20-07-2020
3. Standard Chartered Bank vs DDIT 45 SOT 494 (Mum)

11. As regards the decision of the departmental authorities that the payment can also be regarded as FTS, the learned Counsel drawing our attention to Article 12(4) of the tax treaty submitted, while rendering project related services and managed services, the assessee has not made available any technical knowledge, experience, skill, know-how or process which would enable Atos India to apply the technology contained therein independently. Therefore, he submitted, the payment cannot be regarded as FTS under Article 12(4) of the tax treaty. In support of such contention, he relied upon the following decisions:-

1. Kotak Mahindra Primus Ltd vs DCIT 11 SOT 578 (Mum)
2. Diamond Services International P Ltd vs UOI
304 ITR 201 (Bom)

12. As regards the cost recharge pertaining to the salary of Mr. Thomas Boutard, the learned Counsel reiterating the stand taken before the departmental authorities submitted, the amount received cannot be treated as FTS. He submitted, the concerned person has assisted Atos India in consultation and finalization of accounts. While doing so, he has not made available any technical knowhow to Atos India's employees which can be used by Atos India independently. He submitted, this can be ascertained from the fact that in future years also, though, the assessee had received payment towards assistance provided to Atos India by Mr. Thomas Boutard, the assessing officer has not made any addition. Thus, he submitted, the amount received cannot be treated as FTS. For such proposition, assessee has relied upon the decision of Hon'ble jurisdictional High Court in case of Diamond Services International P Ltd vs UOI (supra).

13. The learned Departmental Representative submitted, the payment received by the assessee for various services rendered is clearly in the nature of royalty and FTS. In this context, he specifically referred to various observations of learned DRP. Further, he submitted, the terms "royalty & FTS" have to be interpreted as per the laws of the contracting state wherein they arise. That being the case, he submitted, the provisions of section 9(1)(vi) and 9(1)(vii) would apply. Referring to the aforesaid provisions, the learned Departmental Representative submitted, the payment received by the assessee squarely falls within the ambit of royalty & FTS as per the provisions of the Act.

14. Without prejudice, he submitted, even going by the treaty provisions, the amount received would be taxable in India, as by virtue of an amendment to the India Singapore DTAA in 2005, royalty & FTS can also be taxed in the contracting state wherein they arise and according to the laws of that contracting state, subject to the condition that if the recipient is the beneficiary of royalty or FTS, the tax to be charged will not exceed 10%. Thus, he submitted, the provisions of Income-tax Act relating to royalty & FTS including the clarificatory amendment have to be considered while determining the taxation and taxability of royalty & FTS.

15. Insofar as case laws cited by the learned Counsel for the assessee, the learned Departmental Representative submitted, the decisions being factually distinguishable, would not apply to the assessee's case.

16. In rejoinder, the learned Counsel for the assessee submitted, the meaning of the terms "royalty and FTS" have to be found as per the definition provided under Article 12(3) and 12(4) of the India-Singapore DTAA. He submitted, though, Article 12(2) of India-Singapore DTAA provides for taxability of royalty and FTS in the contracting state from where it is received, however, it is only for the purpose of withholding tax at source at the prescribed rates. He submitted, since the term, 'royalty and FTS' have been specifically defined under Articles 12(3) and 12(4) of the tax treaty, there is no need to refer to their definition under domestic law. In this context, he relied upon the decision of the co-ordinate bench in cases of ACIT vs Reliance Jio Infocom Ltd 111 taxmann.com 371; Capgemini Business Services India Ltd vs ACIT ITA No.7779/Mum/2011; ITC Ltd vs DIT ITA No.673/Kol/2013.

17. We have carefully considered the rival submissions in the light of number of judicial precedents cited before us and have perused materials on record. The

core issue which arises for consideration is, whether certain payments received by the assessee towards services rendered to Atos India is taxable as royalty and FTS. As discussed earlier, the payments received are for project related services pertaining to Nokia Siemens' project, project related services pertaining to Standard Chartered Bank project and services relating to other projects. Besides these, the assessee has also received payment towards cost recharge pertaining to salary of a person, viz. Mr. Thomas Boutard. There is no dispute between the parties that the assessee is a tax resident of Singapore; hence, is governed by the provisions of the India-Singapore DTAA.

18. Keeping the aforesaid factual position in perspective, we have to examine, whether each kind of payments received by the assessee qualifies either as royalty or FTS under the relevant provisions of India-Singapore DTAA. As far as the project related services rendered by the assessee, there is unanimity between the parties that they relate to data center and mailbox hosting services. What is meant by mailbox hosting services? It is a service where both incoming and outgoing emails are managed by a separate shared or dedicated server. All email messages and associated files of the client are stored on a server. Similarly, datacenter service encompasses all services and facility related components and activities that support the implementation, maintenance, operation and enhancement of a datacenter, which is an environment that provides processing, storage, networking, management and distribution of data within a enterprise.

19. As per the scope of work under the agreement, insofar as project related services pertaining to Nokia Siemens' project, the assessee is required to provide storage services for email and datacenter hosting. Similarly, for project related services to Standard Chartered Bank, the scope of services includes the

employees of the assessee in remotely maintaining and monitoring the server and computer equipment and in case of any breakdown in the server, to take immediate remedial measure for its smooth and continuous functioning. Further, the assessee is required to remotely manage databases and carry out overall monitoring activities. Further, the assessee has to ensure timely delivery and problem resolution to the customers of Atos India. As far as services relating to other projects are concerned, the assessee is required to provide server hosting services and carry out support services of the said server.

20. The departmental authorities have held, while providing the services the assessee has allowed the use or right to use of any industrial, commercial or scientific experience as well as allowed use or right to use of industrial, commercial or scientific equipment. According to the departmental authorities, the assessee has rented out the servers to Atos India which amounts to allowing use or right to use of an industrial, commercial, scientific equipment.

18. Keeping in view the aforesaid factual position, we have to examine whether the payments received by the assessee come within the ambit of "royalty and FTS", as per Articles 12(3) and 12(4) of India-Singapore DTAA. The term 'royalty' has been defined under Article 12(3) of the tax treaty and reads as under:-

"3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use :

(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information?

(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise / from activities described in paragraph 4(A) or 4(f) of Article 8."

21. A reading of the Article 12(3) makes it clear that it provides for three basic situations to consider a payment to be in the nature of royalty. Firstly, the payment must be for the use or right to use concerning industrial, commercial or scientific experience. Secondly, it must be for use or right to use any copyright of a literary, artistic or scientific work including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process. Thirdly, it must be for use or right to use any industrial, commercial or scientific equipment. It has to be examined, whether any of the aforesaid conditions either on stand-alone basis or cumulatively apply to the payments received by the assessee while rendering services to Atos India.

22. As could be seen from the facts on record, while rendering such services, none of the employees of the assessee have visited India. Not only the servers and other hardware are located outside India but the employees of the assessee have rendered such services remotely, while located in Singapore.

23. As discussed earlier, the assessee is simply providing mailbox hosting services and data centre services through servers maintained by it. The assessee is required to ensure proper functioning of the server with related software while providing such services. There is no material on record to suggest that while rendering such services, the assessee has allowed Atos India or any other party use of commercial or scientific experience. Further, there is no material to show that the assessee has allowed use or right to use of any copyright of literary, artistic or scientific work including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process. Further, though, the learned DRP has observed that the

assessee has allowed use or right to use of any industrial, commercial or scientific equipment by renting out the server; however, that finding is not based on any cogent evidence brought on record. The agreement entered by the assessee for project related services does not show that the assessee is renting out either the servers or any other equipment to Atos India while providing services. In this regard, we may refer to the agreement entered with Atos India for the Standard Chartered Bank project. As per clause 5.1 of the said agreement, it has been made clear that the ownership of the intellectual property rights would all along remain with the assessee and no part of it would be transferred to Atos India. Rather, as per clause 5.2 of the agreement, the assessee, if necessary, can use Atos India's intellectual property including any software for providing services. There is nothing on record to suggest that the assessee has either rented out its servers or allowed access to the servers to Atos India or any other party independently and in exclusion of the assessee.

23. Further, while rendering the managed services, the assessee has not allowed the recipient to use or right to use of any copyright of literary, artistic or scientific work including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process. The payment received is also not for use of information concerning industrial, commercial or scientific experience. In our considered opinion, the services rendered by the assessee are purely IT infrastructure management and mailbox hosting services and for rendering which the assessee has neither allowed use or right to use of any copyright of literary, artistic or scientific work, etc. or use of information concerning industrial, commercial or

scientific experience or has allowed use or right to use any industrial, commercial or scientific equipment.

24. In case of DCIT vs Suvvis Communication Corporation (supra), the co-ordinate bench has held, the true test for finding out whether the consideration is for rendition of services, though, involving the use of scientific equipment or the consideration is for use of equipment simpliciter. In the facts of the present case, there cannot be two opinions about the fact that, though, in course of rendition of services there may be involvement of or use of scientific equipments, but, the consideration received is not for use of equipment simpliciter, but for rendering services.

22. In case of Edenred Pte Ltd vs DCIT (supra), the co-ordinate bench, while considering a somewhat similar issue has held as under:-

“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 Edenred Pte Ltd. 11 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 of security systems (firewall, antivirus, access controls) which are also hosted on server in Singapore.

We further observe that examples of websites/applications/software 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) bandwidth and networking infrastructure is used by the appellant to render IDC services ; Indian companies only get the output of usages of such bandwidth 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.

Edenred Pte Ltd. 12 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 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 Edenred Pte Ltd. 13 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 '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 done 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, Edenred Pte Ltd. 14 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 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 Edenred Pte Ltd. 15 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 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 Edenred Pte Ltd. 16 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 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.”

25. The observations of the co-ordinate bench in the aforesaid decision would squarely apply to the facts of the present case. Therefore, we are of the considered opinion that the payment received by the assessee for rendering services relating to various projects would not qualify as royalty under Article 12(3) of the India-Singapore DTAA. Once it is held so, it becomes immaterial whether the payment qualifies as royalty under the domestic law as the treaty provisions being more beneficial to the assessee would override the provisions of domestic law as per section 90(2) of the Act.

26. Having held so, now let us examine whether the payment received can be treated as FTS. Before we proceed to decide the issue, it is necessary to look at the definition of FEES FOR TECHNICAL SERVICES as per Article 12(4) of the India-Singapore DTAA, which reads as under:-

“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.
For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person”

27. On a careful reading of Article 12(4) of the tax treaty, it becomes very much clear that Article 12(4)(a) and 12(4)(c) are not applicable to the present case. Insofar as Article 12(4)(b) is concerned, it clearly denotes that a payment can be treated as FTS, if it makes available technical knowledge, experience, skill, know-how or process which enables the person acquiring the services to apply the technology contained therein. Therefore, the most crucial factor which requires examination is, while rendering services, whether the assessee has made available any technical knowledge, experience, skill, know-how or process in terms of section 12(4)(b). In our view, the material on record would not persuade one to conclude so. The true meaning of the aforesaid provision is, not only the payment is received for providing technical or managerial services, but, while doing so the service provider also makes available any technical knowledge, experience, skill, know-how or process, etc. to the recipient of services, which enables the person acquiring such services to apply the technology contained therein independent of the service provider. In other words, the service recipient must be in a position to apply the technical knowledge, experience, skill, know-how, etc. without requiring the permission or presence of the service provider.

28. In the facts of the present case, there is nothing on record to suggest that Atos India can use any technical knowledge, experience, skill, know-how or process, etc. independently on its own without requiring the involvement of the assessee. Therefore, in our considered opinion, the tests and conditions of Article 12(4)(b) are not satisfied. That being the case, the payment received by the assessee from various projects related services would not qualify as FTS either. That being the case, the payment received by the assessee has to be treated as business profits; hence, would not be taxable in absence of a permanent establishment in India.

29. At this stage we must deal with the submission of learned Departmental Representative that as per Article 12(2) of the India-Singapore DTAA the amount received can be taxed in India in accordance with the domestic law. On a careful reading of Article 12 of India-Singapore DTAA as whole, it is found, Article 12(1) provides for taxation of royalty and FTS in the country of residence of the recipient. Definitions of royalty and FTS have been given under Article 12(3) and 12(4) of the tax treaty. Of course, Article 12(2) provides for taxation of royalty and FTS in the source country. However, in our considered view, Article 12(2) has to be read in conjunction with Article 12(1), 12(3) and (4) of the tax treaty and not on standalone basis. In our view, Article 12(2) will get triggered only if the amount received qualifies as royalty and FTS under the treaty provisions. Since, in the facts of the present case we have held that the payment received towards various project related services does not qualify as royalty and FTS under the treaty provisions, the applicability of Article 12(2) of the tax treaty would not arise.

30. As regards the payment of Rs.10,67,392/-, being the cost recharge pertaining to the salary of Mr. Thomas Boutard, we find from record, the learned DRP has very categorically observed that inspite of the fact that the assessee was specifically asked to provide the details of services rendered by Mr. Thomas Boutard, the assessee has neither furnished nature of services provided nor furnished other details. It is further observed, it is the case of the assessee that Mr. Thomas Boutard is an employee of the assessee, who assisted the employees of Atos India for finalizing annual accounts. However, the nature of services provided by Mr. Thomas Boutard needs to be examined. It also requires examination whether while rendering such services, the concerned person has made available any technical knowledge, skill, know-how, etc to the employees of Atos India to treat the payment received towards cost recharge as FTS. The learned Counsel has submitted before us that similar payment made to the concerned person in subsequent assessment years has been allowed by the assessing officer. All these factors need to be properly verified by the assessing officer to come to a definite conclusion, whether the payment received by the assessee towards cost recharge of salary paid to Mr. Thomas Boutard shall qualify as FTS under Article 12(4)(b) of India-Singapore Tax Treaty. Accordingly, this issue is restored to the assessing officer for fresh adjudication, after due opportunity of being heard to the assessee.

31. To sum up, the addition made of the payment received towards various project related services by treating them as royalty and FTS is hereby deleted in view of our detailed finding hereinabove. Whereas, the issue relating to payment

of cost recharge pertaining to salary of Mr. Thomas Boutard is restored back to the assessing officer. Grounds 1, 2 & 3 are disposed of accordingly.

32. In ground 4, the assessee has raised the issue of levy of surcharge and education cess on the tax liability computed. It is the case of the assessee that the total tax payable cannot exceed the tax rate as prescribed under Article 2 of India-Singapore Tax Treaty. In support of such contention, the learned Counsel for the assessee has relied upon the following decisions:-

1. DIC Asia Pacific Pte Ltd vs ADIT 52 SOT 447
2. Capgeni SA vs DCIT 160 ITD 13 (Mum)

33. Admittedly, this issue has been raised for the first time before us. Further, in case, the assessing officer decides the issue of cost recharge pertaining to the salary paid to Mr. Thomas Boutard in favour of the assessee, the issue will become academic. Keeping in view the aforesaid facts, we restore this issue to the assessing officer for adjudication after due opportunity of being heard to the assessee. Ground 4 is allowed for statistical purpose.

34. Ground 5 is on the issue of initiation of penalty proceedings u/s 271(1)(c) of the Act being premature at this stage, is dismissed.

35. In the result, appeal is partly allowed.

36. Grounds raised in ITA No. 5744/Mum/2018 being identical, our decision in ITA No. 7144/Mum/2017 would apply *mutatis mutandis* to this appeal as well.

37. In the result this appeal is also partly allowed.

38. To sum up, both the appeals are partly allowed.

Order pronounced on 30/03/2021.

Sd/-

sd/-

(N.K. PRADHAN)	(SAKTIJIT DEY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dt : 30/03/2021

Pavanoan

Copy to :

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

By Order

Asstt. Registrar, ITAT, Mumbai

