आयकर अपीलीय अधिकरण
मुंबई पीठ "आई", मुंबई
श्री प्रमोद कुमार, उपाध्यक्ष एवं
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI PRAMOD KUMAR, VICE-PRESIDENT &
SHRI VIKAS AWASTHY, JUDICIAL MEMBER
आअसं. 6046/मुं/2019 (नि. व.2016-17)
ITA NO.6046/MUM/2019 (A.Y.2016-17)

M/s. Essity Hygiene and Health AB,
(Formerly known as SCA Hygiene Products AB)
C/o. Sudik Parekh & Co.LLP, Urmi Axis, 6th Floor,
Famous Studio Lane, Dr. E. Moses Road,
Mahalaxmi, Mumbai 400 011
PAN: **AATCS 0899K** ..... अपीलार्थी /Appellant

बनाम Vs.

Dy. Commissioner of Income Tax (IT)-4(2)(1)
17th Floor, Room No.1708,
Air India Building, Nariman Point,
Mumbai 400 021. ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Jitendra Jain
प्रतिवादी द्वारा/Respondent by : Shri S.S. Iyengar
सुनवाई की तिथि/ Date of hearing : 11/02/2021
घोषणा की तिथि/ Date of pronouncement : 06/05/2021

<u>आदेश/ ORDER</u>

PER VIKAS AWASTHY, JM:

In this appeal the assessee has impugned assessment order dated 26/07/2019 passed under section 143(3) r.w.s. 144C (13) of the Income Tax Act, 1961 (in short 'the Act').

2. The brief facts of the case as emanating from records are: The assessee/ appellant is a Swedish company. The assessee is engaged in development, production and marketing of personal care products, tissues, packing solutions, paper and solid wood products. During the period relevant to assessment year under appeal, the assessee has receipts under various heads viz. sale of lab equipment, IT support services, consultancy services and SAP Licence charges from SCA India. The Assessing Officer issued notice under section 142(1) of the Act seeking reasons as to why the aforesaid receipts were not offered for tax. The assessee contended that the aforesaid amounts are merely reimbursements of expenditure by SCA India to the assessee. The assessee has supplied SAP Licence, consultancy services and IT support services on cost to cost basis without any mark up. The Assessing Officer rejected the contentions of the assessee and made following additions:

S.No	Particulars	Amount in Rs.
1.	Receipts from SAP Licence Charges held as Royalty	10,74,950/-
2.	Receipts from Consultancy services held as Fee for Technical Services (FTS)	2,81,41,234/-
3.	Receipts from IT support services held as FTS/Royalty	1,64,40,532/-

Aggrieved by the draft assessment order dated 06/12/2018, the assessee filed objections before the DRP. The DRP vide directions dated 29/04/2019 rejected the objections of the assessee and confirmed the additions. The DRP while rejecting assessee's objections placed substantial reliance on the directions of DRP in AY 2015-16. The DRP observed that the facts in the impugned assessment year are identical to the facts in assessment year 2015-16. The

Assessing Officer passed the impugned order in line with the directions of the DRP. Hence, the present appeal by the assessee.

3. Shri Jitendra Jain appearing on behalf of the assessee submitted at the outset that the grounds of appeal and the facts relating thereto in present appeal are identical to the one already adjudicated by the Tribunal in assessee's own case in ITA No.7315/Mum/2018 for assessment year 2015-16 decided on 08/01/2021. Therefore, the impugned order is liable to be set aside for parity of reasons.

4. Shri S.S. Iyengar representing the Department vehemently defended the impugned order. However, he fairly admitted that the grounds raised in the present appeal are identical to the grounds adjudicated by the Tribunal in assessee's appeal for assessment year 2015-16.

5. Both sides heard, orders of the authorities below examined. The ground No.1 raised by the assessee in appeal is against taxability of SAP Licence charges as royalty. Both sides are unanimous in stating that the issue raised in appeal and the facts giving rise to the additions are identical to assessment year 2015-16. This is also evident from the directions of the DRP. The DRP while deciding this issue has relied on the directions of the DRP in assessment year 2015-16. The Tribunal in assesse's appeal in ITA No.7315/Mum/2018 (supra) after examining the facts of the case concluded that the receipts of SAP Licence by the assessee from Indian subsidiary is reimbursement and is not taxable as royalty either under domestic tax laws or under the provisions of Indo-Swedish Tax Treaty. For the sake of completeness the relevant extract of the decision of Co-ordinate Bench on this issue is reproduced herein below:

"6. We find that it is a case in which the assessee has purchased the SAP software licence from a third party- namely "Be One Solutions, Switzerland," and even a copy of one of the purchase invoices is placed before us at page 17 of the paper-book. The finding of the DRP to the effect that it is a case of purchase of software through an AE of the assessee is thus factually incorrect. We have also taken note of the certificate dated 18th April 2018, signed by the Finance Director of the assessee company, which states that "this is to certify that we have provided SAP/SAP B1 licences to SCA Hygiene Products India Pvt Ltd (SCA-India) during year April 2014 to March 2015" and that "we further certify that the above-mentioned licences are provided to SCA-India on cost to cost basis without any mark up being charged." There is no, and perhaps rightly so, challenge to the factual element of its being a cost to cost reimbursement received by the assessee. What learned Departmental Representative contends is that if the Indian entity was to be directly supplied this licence by the actual product vendor supplying it to the assessee, the tax withholding by Indian entity would have come into play, and that tax withholding has been avoided by routing the purchase through the assessee. That issue, whether right or not, has no bearing on taxability of an income in the hands of the assessee. We reject this argument. As regards learned DRP's reliance on a decision of the coordinate bench in the case of AMD Research and Development Centre India Pvt Ltd (supra), we can only say that it was a case in which the coordinate bench came to the conclusion that the payment for a software licence to the group company was not on "cost to cost basis", as evident from the coordinate bench observations to the effect that "In the absence of these details as well as the basis of allocation of cost of software applications/licences, we find it difficult to accept the contention of the assessee that the amount in question paid by it to ATI Technologies, Canada towards its share of software applications/licences on cost to cost basis, without involvement of any element of profit, so as to say that the amount so remitted is not chargeable to tax in the hands of ATI Technologies, Canada in India, being merely in the nature of reimbursement of actual expenses incurred by the said company, without any profit element". This decision, therefore, does not support the case of the Assessing Officer anyway inasmuch as this decision supports the proposition that when the payment for software licence fees to a group entity is a reimbursement pure and simple, it will not be taxable as income of that group entity. It is quite elementary that what can be taxed in the hands of an assessee is not a receipt, by itself, but only the income element, and, therefore, when a receipt by the assessee is bereft of income element, as a pure reimbursement inherently is, it cannot be brought to tax in the hands of that assessee. Hon'ble jurisdictional High Court, in the case of CIT Vs Siemens AG [(2009) 310 ITR 320 (Bom)], have accepted this proposition and observed as follows:

> *That leaves us with the last contention as to whether the amounts by way of reimbursement are liable to tax. To answer that issue, we may gainfully refer to the judgment of a Division Bench of the Delhi High Court in Industrial Engineering Projects (P.) Ltd.'s case (supra). The learned Division Bench of the Delhi High Court was pleased to hold that reimbursement of expenses can, under no circumstances, be regarded as a revenue receipt and in the present case the Tribunal had found that the assessee received no sums in excess of*

expenses incurred. A similar issue had also come up for consideration before the Division Bench of the Calcutta High Court in Dunlop Rubber Co. Ltd.'s case (supra). The learned Division Bench was answering the following question:

> *"Whether, on the facts and in the circumstances of the case, the amounts received by the assessee (English company) from M/s. Dunlop Rubber Co. (India) Ltd. (Indian company) as per agreement dated 29-1-1957 constituted income assessable to tax?"*

On considering the issue the learned Bench noted that the Tribunal was of the view that what was recouped by the English company was part of the expenses incurred by it. The learned Court upheld the said finding. The learned Bench was pleased to hold that sharing of expenses of the research utilised by the subsidiaries as well as the head office organisation would not be income which would be assessable to tax. A similar view was taken in Stewarts & Lloyds of India Ltd.'s case (supra). We are in respectful agreement with the view expressed by the Delhi and Calcutta High Courts.

7. In view of the above discussions, as also bearing in mind entirety of the case, ***we hold that the receipt of software licence fees by the assessee, from its Indian subsidiary, is reimbursement of software licence fees paid by the assessee to a third party, and, therefore, it cannot constitute income taxable in the hands of the assessee. As this income is not taxable under the domestic law provisions in India, we see no need to deal with the other aspects of the matter with respect to non-taxation of this income under the provisions of the Indo Swedish tax treaty. We leave it at that****."*

The Revenue has not brought before us any distinguishing factor or contrary decision. Since, the facts are *pari materia,* we see no reason to take a contrary view. The ground No.1 of the appeal is allowed for parity of reasons.

6. In ground No.2 of appeal, the assessee has assailed taxability of consultancy services as FTS. Both sides have stated that the facts in impugned assessment year are identical to facts in AY 2015-16. We find that the assessee had raised identical ground of appeal in assessment year 2015-16. The Co-ordinate Bench decided the issue in favour of assessee by observing as under:-

"24. In order to decide whether or not the services rendered by the assessee fit the definition of 'fees for technical services', as applicable under the Indo Swedish tax treaty, the question that we must ask ourselves is not only whether the technical services are performed on the facts of this case, but whether "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 upon the provider." In this light when we analyze the nature of services, which are set out in detail earlier in this order, we find that in none of the cases, these services enable the recipient of these services to perform the same services, in the future, without recourse to the assessee. The consultancy services are in the nature of leading the setting up of factory, including planning and steering execution of work, being responsible for managing project within budget constraints, leading the project team from different locations, coordination and follow up with the contractors, securing communication and good flow of information between those directly or indirectly involved with the project, preparing project progress report and updating all concerned with the project progress. Just because the assessee renders these services does not mean, and by no stretch can imply, that the recipient can next time do all this work without recourse to the assessee. As regards learned DRP's observations that the project leading work "will include scheduling charts, timelines, bar charts which are contemplated in the case of the assessee under Project Administration….project and financing controls including necessary charts and controls for implementation of the project", that "the assessee is not executing the project but is rendering consultancy service to the AE", and that "when project implementation tools are provided to the employees of the AE, they are enabled to employ these tools in implementing their own project," these observations are factually incorrect inasmuch as the assessee's representative is executing the work and is the key person at the factory site who is doing all the needful and inasmuch as there is no mention anywhere of developing these tools and handing over the same to the recipient of services. In any case, ***just because the Indian entity is interacting with the project leader and getting inputs from him does not mean that the Indian entity is transferred the technology of being a project leader of this type and next time Indian entity can perform similar services without recourse to the same- which is the core test for the fulfilment of 'make available' clause. We are unable to approve the stand of the authorities below on this point. In our considered view, in the light of the discussions above, the make available clause is not satisfied, in the course of rendition of services by the assessee, and, as such, the consultancy fees of Rs 1,97,94,209 cannot be brought to tax, in the hands of the assessee, under article 12 of Indo Swedish tax treaty****."*

In the absence of any contrary material we respectfully follow the decision of Co-ordinate Bench and direct the Assessing Officer to delete the addition for parity of reasons. The assessee thus succeeds on ground no.2 of the appeal.

7. In ground No.3 of appeal, the assessee has assailed taxability of IT Support services as FTS /Royalty. We find that the Assessing Officer had made addition for similar reasons in assessment year 2015-16. The Co-ordinate

Bench after considering the facts, Indo-Swedish Tax Treaty and the terms of agreement held that the payments received on account of IT Support services are neither taxable as FTS nor Royalty. The relevant extract of findings of the Tribunal on this issue are as under:-

> *"25. That leaves us with the taxability of Rs 57,47,684 on account of Information Technology Services. The main reason for its taxability by the DRP is stated to be that "the services is found to be intrinsically linked with enjoyment of the SAP system and hence, would fall within the ambit of Article 12(4)(a)". In the assessment order, there is also mention about "resulting in overall improvement in business and the income generating capacity of SCA India, which is a clear enduring benefit" and about the stand that the rendition of these services are "also providing a skill level and relevant training which will be readily available to personnel of SCA India and thereby a clear enduring benefit is provided". It is also mentioned that "specific support in the form of implementation of SAP project and Project Vinadalloin the form of pre-implementation, testing, post implementation is also provided which is clearly technical in nature and intended to increase the efficiency and improve the functioning of SCA India". It is to be noted that so far as the enduring benefit and increase of efficiency in the recipient entity is concerned, that has nothing to do with the satisfaction of "make available" clause. As we have seen in our analysis earlier, what is important is transfer of technology and not the incidental benefit. Unless the recipient of a service is not enabled to perform that service on his own, without recourse to the service provider, the requirements of the make available clause are not satisfied. The concept of enduring benefit, increase in efficiency, improvement in income generating capacity and incidental skill development is wholly irrelevant for this purpose. The authorities below have been thus swayed by considerations not germane in this context. So far as these services being incidental to SAP system being the reason for taxation under article 12(4)(a) is concerned, we have noted that providing support services for SAP implementation is a small part of the services and in any case what article 12(4)(a) covers is the services which "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" and the information technology services, as set out in Annexure B to the agreement, cannot be described as ancillary and subsidiary to the SAP system. At best, a small part of these services could fall in that category, but that payment is not even separately identified. These things apart, 12(4)(a) would come into play when the assessee receives a payment in the nature of royalties under article 12(3) and the services ancillary and subsidiary to the application or enjoyment of that right, payment for which is described in article 12(3). In other words, the person receiving the money as royalty, such as the actual seller of the software in this case, and the person providing service ancillary or subsidiary to the enjoyment of that right, must be the same. That's not the case here.* ***In the present case, the payment received by the assessee has been held to be in the nature of reimbursement, which is outside the ambit of taxation. The person selling the SAP software is Be One Solution, Switzerland, whereas the person***

providing the services in question is the assessee. Article 12(4)(a) will not, therefore, come into play at all. In our considered view, therefore, the taxation under article 12 in the present case can come into play only when the "make available" clause is satisfied, but then the Assessing Officer's justification for the satisfaction of 'make available' clause, for the detailed reasons set out earlier in this paragraph, does not meet our judicial approval. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee on this point as well. Accordingly, we hold that the income of Rs 57,47,684 on account of Information Technology Services is also not taxable under article 12."

Since, the facts in impugned assessment year are identical to the facts in AY 2015-16, the findings of Tribunal for 2015-16 would *mutatis mutandis* apply to the impugned assessment year. Ergo, ground No.3 of appeal is allowed.

8. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on Thursday the 06th day of May, 2021.

Sd/-	Sd/-
(PRAMOD KUMAR)	(VIKAS AWASTHY)
उपाध्यक्ष/VICE PRESIDENT	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 06/05/2021
Vm, Sr. PS(O/S)

<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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(Dy./Asstt. Registrar)
ITAT, Mumbai