

आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, PUNE

(Through Virtual Court)

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No.1311/PUN/2019
निर्धारण वर्ष / Assessment Year : 2016-17

Sandvik AB,
C/o. Sandvik Asia Private Limited,
Mumbai – Pune Road, Dapodi,
Pune, Maharashtra.

..... अपीलार्थी /
Appellant

PAN : AAHCS7486E.

बनाम v/s

The Asst. Commissioner of Income
Tax (International Taxation),
Circle – 2, Pune.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri Nikhil Pathak.

Revenue by : Shri A.M. Mahadevan Krishnan.

सुनवाई की तारीख / Date of Hearing : 16.06.2021

घोषणा की तारीख / Date of Pronouncement : 17.06.2021

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM

This appeal preferred by the assessee emanates from the directions of the Dispute Resolution Panel (DRP) dated 27.06.2019 for A.Y. 2016-17 as per the following grounds of appeal :

"1. Ground 1.

On the facts and circumstances of the case and in law, the Learned Dispute Resolution Panel (Ld. DRP) and the Learned Assessing Officer (Ld. AO) have erred in not following the favourable order of the Hon'ble ITAT for AY 2004-05, AY 2007-08, AY 2008-09, AY 2009-10, and AY 2010-11 in Appellant's own case pertaining to the taxability of receipts towards Management Service Fees C'MSF), merely on the ground that the Tax department has preferred an appeal before Hon'ble High Court against the aforesaid orders.

It is prayed that, the Hon'ble ITAT's order is binding on the Ld. AO and hence, the entire addition made by the Ld. AO and confirmed by the Ld. DRP, be deleted.

2. Ground 2

On the facts and circumstances of the case, and in law, the Ld. DRP has erred in confirming the action of the Ld. AO in taxing the receipts towards MSF provided to its Indian affiliate amounting to INR 50,04,75,842 to be in the nature of 'Fees for Technical Services' (FTS) within the meaning of Article 12 of the India- Sweden Double taxation Avoidance Agreement (DTAA) read with India- Portugal DTAA (via protocol).

It is prayed that the addition made by the Ld. AO and confirmed by the Ld. DRP, be deleted.

3. Ground 3

On the facts and circumstances of the case, and in law, the Ld. DRP has erred in confirming the action of Ld. AO to tax receipts of INR 45,14,326 towards HRS services (INR 4,72,405) and leadership training (INR 40,41,921) provided by the appellant to its Indian affiliate as FTS within the meaning of Article 12 of the India-Sweden DTAA read with India- Portugal DTAA (via protocol).

It is prayed that the addition made by the Ld. AO and confirmed by the Ld. DRP, be deleted.”

2. The grounds 1 and 2 pertains to the issue of Management Service Fees (MSF)

The brief facts in respect of these grounds are that the assessee is a non-resident foreign company incorporated in Sweden. The assessee has earned Management Service Fees, pursuant to the terms of agreement between Sandvik AB (SAB) and Sandvik Asia Private Limited (SAPL). SAB has rendered services which are in nature of commercial, management, marketing and administrative services which are rendered to support day-to-day functioning and to share the benefit of specialization to SAPL to improve the quality of performance. The assessee has stated that the amount received are not liable to tax as FTS in India under the Tax Treaty between India and Portugal (referred to via protocol attached to Double Taxation Avoidance Agreement (DTAA) between India and Sweden). Further, it is claimed that these services do not make available any technical knowledge, experience,

skill, knowhow, process to SAPL and these services do not fall within the ambit of FTS as defined under Article 12 of DTAA between India and Sweden read with protocol thereto. Assessee also has quoted various decisions of Pune Bench of the Tribunal in its own case wherein the ITAT, Pune Bench has held that the Management Service Fees are not taxable in nature as it do not make available in technical knowledge, experience, skill, knowhow to SAPL.

3. In fact, the learned counsel for the assessee placed before us a detailed Chart in respect of receipts of Management Service Fees and therein it can be observed that starting from A.Ys. 2004-05 to A.Y. 2014-15, the matter has been decided always in favour of the assessee as for the matter of fact that Management Service Fees are not taxable in India since managerial in nature and also the “make available” clause is not satisfied. The said list is made part of this order for ready reference.

AY	Amount of Management Service fees received from Sandvik Asia Pvt. Ltd (SAPL) (in INR)	Decision of the Assessing Officer (AO)	Directions of the Dispute Resolution Panel (DRP) / Decision of CIT(A)	Decision of the Hon'ble Income-Tax Appellate Tribunal (ITAT)
2004-05	48,582,800	Taxable	Appeal was filed before CIT(A) and the addition was confirmed by CIT(A)	Not taxable. (The Hon'ble ITAT held that the Management Service Fees are not taxable in India, since managerial in nature and also the 'make available' clause is not satisfied.)
2005-06	44,144,973	Taxable	Not Taxable (The Hon'ble DRP deleted the disallowance on the ground that the initiation of reassessment proceedings was invalid)	Not taxable – Department Appeal (The Hon'ble ITAT deleted the disallowance on the ground that the initiation of reassessment

				proceedings was invalid.
2006-07	56,774,012	Taxable	Not Taxable (The Hon'ble DRP deleted the disallowance on the ground that the initiation of reassessment proceedings was invalid)	Not taxable – Department Appeal (The Hon'ble ITAT deleted the disallowance on the ground that the initiation of reassessment proceedings was invalid.
2007-08	59,297,919	Taxable	Taxable	Not taxable. (The Hon'ble ITAT held that the Management Service Fees are not taxable in India, since managerial in nature and also the 'make available' clause is not satisfied.)
2008-09	86,002,251	Taxable	Taxable	Not taxable. (The Hon'ble ITAT held that the Management Service Fees are not taxable in India, since managerial in nature and also the 'make available' clause is not satisfied)
2009-10	188,690,886	Taxable	Taxable	Not taxable. (The Hon'ble ITAT held that the Management Service Fees are not taxable in India, since managerial in nature and also the 'make available' clause is not satisfied.)
2010-11	189,469,420	Taxable	Taxable	Not taxable. (The Hon'ble ITAT held that the Management Service Fees are not taxable in

				India, since managerial in nature and also the 'make available' clause is not satisfied.)
2011-12	222,968,588	Taxable	Not taxable. (The Hon'ble DRP held that the Management Service Fees are not taxable in India, since managerial in nature and also the 'make available' clause is not satisfied.)	Not taxable. (The Hon'ble ITAT held that the Management Service Fees are not taxable in India, since managerial in nature and also the 'make available' clause is not satisfied.)
2012-13	268,682,650	Taxable	Not taxable. (The Hon'ble DRP held that the Management Service Fees are not taxable in India, since managerial in nature and also the 'make available' clause is not satisfied.)	Not applicable
2013-14	364,560,456	Taxable	Not taxable. (The Hon'ble DRP held that the Management Service Fees are not taxable in India, since managerial in nature and also the 'make available' clause is not satisfied.)	Not applicable
2014-15	262,867,769	Not taxable	Not applicable	Not applicable
2015-16	499,849,243	Assessment not initiated	Not applicable	Not applicable

4. The Assessing Officer in his draft assessment order has discussed this issue at Para 2 of Page No.1, whereas the findings have been given at Para 4 of page 19 onwards and as per the reasoning contained therein already on record. That at Para 6.1 of the draft assessment order, it is evident that since

the Department has preferred an appeal before the Hon'ble Bombay High Court which is as on date subjudice in respect of the substantial question of law raised in that case of SAPL with regard to Management Service Fees against the findings of Tribunal. Therefore, in order to keep the issue alive, the addition was made by the Assessing Officer. Nonetheless, the demand determined would not be enforced since the decision of Dispute Resolution Panel (DRP) and Tribunal are in favour of the assessee in the earlier years. The DRP has discussed this issue from Page 4 onwards and concluded its findings at Page 6 of its order. That again here also, the DRP though realizing that the issue had been decided in favour of the assessee in the earlier years but for the fact that the Department cannot challenge the decision of DRP and considering that the appeals of the Department against the decision of Tribunal in assessee's own case are pending before the Hon'ble Bombay High Court, the addition made by the Assessing Officer in the draft assessment order was sustained.

5. We have perused the case records, heard the rival contentions, analyzed the facts and circumstances on this issue. We have also considered the judicial pronouncements placed on record. The fact as on date is that the issue in respect of Management Service Fees is well covered in favour of the assessee. The Revenue has preferred appeal before the Hon'ble jurisdictional High Court on the substantial question of law on the same issue. That however, the matter has not yet attained finality at the High Court level nor we find any contrary direction given by the Hon'ble High Court in respect of the issue of Management Service Fees vis-à-vis the ITAT orders in favour of the assessee. Therefore, it is clear that as on date, the issue decided is in favour of the assessee. That on this issue for A.Y. 2011-12 in ITA No.498/PUN/2016 the Tribunal has held as follows :

“6. Both sides heard. Orders of the authorities below perused. The solitary issue raised by the Revenue in appeal is against the findings of Assessing Officer/DRP in holding that the services provided by the assessee to Sandvik Asia Ltd. and Walter Tools India Pvt. Ltd. do not fall within the ambit of „fee for technical services“ under clause (b) of para 4 of Article 12 of Double Taxation Avoidance Agreement (DTAA) between India and Portuguese Republic. We find that the additions on this count were made by Assessing Officer in earlier assessment years as well. The matter travelled to the Tribunal for the first time in assessment year 2007-08. The Tribunal after analyzing the facts of case, DTAA between India and Portuguese Republic, Protocol to the Tax Treaty between India and Sweden and various case laws held that the payments received by assessee on account of management services fee from Sandvik Asia Ltd. and technical services fee from Walter Tools India Pvt. Ltd. cannot be brought to tax in view of principle of the most favoured nation (MFN) clause in the tax treaty. It is an undisputed fact that the nature of payments received by assessee in assessment year under appeal is identical to the one received in earlier assessment years. For the sake of completeness the relevant extract of the findings of Tribunal in assessee’s own case in immediately preceding assessment year i.e. assessment year 2010-11 are reproduced here-in below :

“12. We find no merit in the orders of authorities below that alternatively the receipts for management services be treated in the nature of dividend and taxed under Article 10 to the Tax Treaty between India and Sweden as well as under section 9(1)(iv) of the Act. The Tribunal in the case of payer i.e. Sandvik Asia Pvt. Ltd. in ITA No.1750/PUN/2013 with Cross Appeal in ITA No.1804/PUN/2013, relating to assessment year 2005-06 vide order dated 14.06.2017 held that management fees paid to Sandvik AB, Sweden i.e. the assessee before us was income on account of rendering of management services and could not be treated as dividend. Following the same parity of reasoning, we dismiss the alternative stand of the DRP/Assessing Officer in taxing the management service charges in the hands of assessee. The ground of appeal No.2 raised by the assessee is thus, allowed.” 5 ITA No. 498/PUN/2016, A.Y. 2011-12 7. Thus, for the aforesaid reasons we find that no merit in the appeal by the Department. Accordingly, the impugned order is upheld and the appeal of the Revenue is dismissed. 8. In the result, the appeal of Revenue is dismissed.”

6. Therefore, as on the fact of the matter stands as on date, the Tribunal had analyzed the DTAA between India and Portuguese Tax Treaty rendered to (via protocol) attached to the Tax Treaty between India and Sweden and had held that the payments received by the assessee on account of Management Service Fees cannot be brought to tax in view of the principle of most favoured nation (MFN) clause in the Tax Treaty. In view of the aforesaid discussion, we are of the considered view that Management Service Fees cannot be brought to tax in India. **Thus, grounds 1 and 2 are allowed.**

7. Ground No.3:

In ground No.3, the assessee is aggrieved by the action of the learned DRP in confirming the action of the Assessing Officer to tax receipts of INR 45,14,326/- towards HRS service (INR 4,72,405) and Leadership Training Fee (INR 40,41,921).

8. That at the very outset, the learned counsel for the assessee submitted that they are not pressing the ground on HRS Service Fee. After hearing the counsel for the assessee **this part of the ground No.3 i.e., HRS Service Fees is dismissed as not pressed.** Therefore, the only area of contention is with regard to the Leadership Training Fees of Rs.40,41,921/-.

9. The Assessing Officer in his draft assessment order vide Para 7 relied on the observations of the learned DRP in the case of Sandvik AB (SAB) for A.Ys. 2013-14 and A.Y. 2014-15 wherein they have held that since the services provided are in the nature of either technical or consultancy and considering that the condition of 'make available' is being satisfied, hence the receipts of the assessee on account of imparting training are clearly taxable as FTS and directed the Assessing Officer to tax on the amounts received on account of training fees as FTS. The Assessing Officer accordingly directed to tax an amount of Rs.40,41,921/- on account of training fees as FTS. The DRP has given its finding at Pages 24 to 26 of its order on this issue. The DRP in its finding reiterated its own order in the case of the assessee for A.Ys. 2013-14 and 2014-15 and had held that the essential condition of "make available" was satisfied and more so, because the condition "make available" is in built when the services that have been provided are of the nature of training.

10. The learned counsel for the assessee at the time of hearing vehemently submitted that in this case “make available” clause was not satisfied. The basic essence of “make available” has been discussed by the Tribunal in its order dated 06.01.2021 in ITA No.2524/PUN/2017 for A.Y. 2014-15 in the case of M/s. Sandvik AB Vs. DCIT (IT), Pune. In this case, on the similar facts, the Tribunal observed that the assessee is a Sweden based company and it had received amount from SAPL towards training charges, the same was designated as training fee (non-technical services) not chargeable to tax as fee for technical services in India under the DTAA read with (via Protocol) as extending to DTAA between India and Portuguese.

11 That since the assessee is a Sweden based company and SAPL has its registered office in India, basically they are covered by the India – Sweden Tax Treaty. That however, in the said tax treaty, there is a special protocol with respect to the Most Favoured Nation (MFN) clause and there is DTAA entered into between India and Sweden and now the parties of original DTAA agreement between India and Sweden would be governed by the provisions of DTAA between India and Portuguese Republic which they entered into through MFN clause. In this backdrop, the Tribunal in the afore-stated decision has held as follows :

“15..... 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."

12. That further, the learned counsel for the assessee submitted that let the matter be remanded to the file of Assessing Officer to re-adjudicate this issue after factual verification as per the legal proposition laid down by the order of the Tribunal (supra). The learned Departmental Representative did not raise any objection. In view of the above facts, we set aside the findings of the DRP on this issue of Leadership Training Service Fees to the file of Assessing Officer to re-adjudicate while complying with the principles of natural justice and as per law as indicated hereinabove. Thus, **this part of ground No.3 is allowed for statistical purposes.**

13. In the combined result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced on 17th day of June, 2021.

(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

(R.S. SYAL)
VICE PRESIDENT

पुणे / Pune; दिनांक / Dated : 17th June, 2021.
Yamini

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-13, Pune.
4. The Prl.CIT(5)-Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "सी" बेंच,
पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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