

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

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)
AND
SHRI RAJESH KUMAR (ACCOUNTANT MEMBER)

I.T.A. No.6267/Mum/2019
(Assessment year 2016-17)

Edenred Pte Limited C/o Walker Chandiook & Co LLP 16 th Floor, Indiabulls Finance Centre Tower II, SB Marg, Elphinstone (West), Mumbai-400 013 PAN : AACCE8636P	vs	Deputy Commissioner of Income-tax, International Taxation-2(2)(1), Mumbai
APPELLANT		RESPONDENT

Appellant by	Shri Jitendra Singh, AR
Respondent by	Shri. N. Padmanabhan, DR

Date of hearing	09-09-2021
Date of pronouncement	22-09-2021

ORDER

Per Saktijit Dey (JM)

Captioned appeal by the assessee is against final assessment order dated 13-08-2019 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 for the assessment year 2016-17, in pursuance to the directions of the learned Dispute Resolution Panel (DRP).

2. The effective grounds raised by the assessee read as under:-

"Infrastructure data center charges taxed as royalty

3. Erred in considering infrastructure data center charges of INR 2,16,28,003 to be taxable as royalty under the Act as well as under the India - Singapore Double Taxation Avoidance Agreement ('DTAA').

Other service charges taxed as royalty

4. Erred in considering other service charges (referral fees) of INR 1,63,710 to be taxable as royalty under the Act as well as under the India - Singapore DTAA.

Member login fee taxed as royalty

5. Erred in considering member login fee of INR 1,00,98,887 to be taxable as royalty under the Act as well as under the India - Singapore DTAA."

3. At the outset, Shri Jitendra Singh, learned counsel appearing for the assessee and Shri N Padmanabhan, learned departmental representative agreed that all the issues arising in this appeal are of recurring nature and have been decided by the Tribunal in favour of the assessee in preceding assessment years. However, the learned departmental representative relied upon the observations of the assessing officer and learned Commissioner (Appeals).

4. Having considered rival submissions and perused facts on record, we find that the first issue as raised in ground 3 relates to taxability of infrastructure data centre (IDC) charges as royalty. As submitted by both the parties, this is a recurring dispute between the parties since assessment year 2010-11. In the latest order passed for assessment years 2014-15 and 2015-16, the Tribunal has deleted the addition with the following observations:-

"7. We have considered rival submissions and perused materials on record. Pertinently, identical issue relating to taxability of IDC charges as royalty came up for consideration before the Tribunal in assessee's own case in assessment years 2010-11, 2011-12 and 2012-13 in ITA No.1718/Mum/2014 & others dated 20-07-2020, The Tribunal, while deciding the issue has held, as under:-

"6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

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, (it) 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, (Hi) 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, (H) the Indian group companies neither access nor use CPU of the appellant, (Hi) no CDN system is provided under the /DC 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 id. 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 ArUde_12A 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, (Hi) 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 SPt, 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 id, 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 IT A 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. DOIT; DCIT v. M/s Reliance Jio Infocomm Ltd narrated at para 6.1 hereinbefore, it is quite iuculent 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."

8. Facts being identical, respectfully following the aforesaid decision of the coordinate bench, we hold that IDC charges received by the assessee is not in the nature of royalty. Accordingly, additions are deleted. Ground 2 in both the appeals are allowed."

5. There being no difference in the factual position in the impugned assessment year, respectfully following the earlier decisions of the Tribunal in assessee's own case, we delete the addition. This ground is allowed.

6. In ground 3, assessee has challenged the addition of other service charges (referral fee) as royalty. As could be seen, identical issue came up for consideration in assessee's own case in the preceding assessment years. In the latest order passed for the assessment years 2014-15 and 2015-16 (supra), the Tribunal has deleted the addition with the following observations:-

"23. We have considered rival submissions and perused materials on record. It is observed that identical issue came up for consideration before the Tribunal in assessee's own case in assessment year 2010-11, 2011-12 and 2012-13. While deciding the issue, the Tribunal, negating the stand of the departmental authorities held as under:-

"12. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions ore given below.

In the instant case, the appellant has received fees for referral services/other services of Rs.39,94,209/-from Surf Gold in the year under consideration.

It is relevant to mention here that as per the India-Singapore DTAA, the services in the nature of managerial, technical or consultancy nature are taxable as FTS, if such services are 'made available' to the service recipient. In the instant case, referral services/other

services are provided to support Surf Cold in carrying on its business. These services do not make available any technical knowledge, skill, knowhow or processes to Surf Gold because there is no transmission of the technical knowledge, experience, skill etc. from the appellants to Surf Gold or its clients.

In the case of *Cushman & Wakefield (S) Pte. Ltd. (supra)*, the applicant a foreign company based in Singapore is engaged in the business of rendering real estate services to its local and international clients. The applicant has developed certain international client relationships and in accordance with *Edenred Pte Ltd. 29 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016* global policy of the group, various offices provide referral services to other *Cushman & Wakefield (C&W) Offices*. The applicant entered into a referral agreement with Indian group company whereby the applicant refers/recommends potential customers desirous of obtaining real estate consulting and associated services in India, Further the applicant was not responsible for persuading the customers to avail the services of the Indian group company, nor negotiating or collecting fee charged by Indian group company from the referred customers. As consideration for such referral services, a percentage of the amount realized from the referred customers (i.e. 30% on gross amount realized) was paid to the applicant. The AAR held that "referral fee received in Singapore by the applicant, a Singaporean company from an Indian company for referring customers to the latter is neither business income u/s 9(l)(i) nor royalty u/s 9(l)(vi) nor fee for technical services u/s 9(l)(vii) r. w. Article 12(4)(b) of the DTAA between India & Singapore and, therefore, it is taxable as business income in Singapore only as the applicant has no PE in India; impugned receipt not being chargeable to tax under the provisions of the IT Act or under the provisions of DTAA, section 195 is not attracted".

In *Real Resourcing Ltd. (supra)*, the AAR, in the context of the India-UK DTAA, after relying on the *Cushman & Wakefield Ruling (supra)* held that referral fee received by a UK company (applicant) from India based recruitment agency for referring potential Indian clients and candidates was not royalty or FTS. The relevant observations of the AAR in the context of Article 13 dealing with royalty/FTS is as under:

Edenred Pte Ltd. 30 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 "10. Collecting data and analyzing it and making a database for providing information on suitable candidates for recruitment, even if they are in the nature of consultancy services, cannot be considered to be ancillary and subsidiary to the enjoyment/application of the right or information referred to in para 3(a). Moreover, by access to the database, it cannot be said that the information concerning industrial, commercial or scientific experience will be transmitted by the applicant to the recruiting agencies. If the contention of Revenue is accepted, it would amount to unwarranted expansion of the terms FTS and royalties. Consideration for providing information concerning industrial, commercial or scientific experience basically involves the sharing of technical know-how and experience which is not the case here.....

We do not think that the criterion envisaged by art. 13.4(a) of DTAA has been satisfied in the instant case."

In *Knight Front (India) (P.) Ltd. (supra)*, the Tribunal held that (i) where referral fees was received by foreign concern for introducing clients to assessee-Indian company, providing international real estate advisory and management services, since referral services were rendered entirely outside India, it would not fall within the scope of 'total income' of so id foreign concern as per section 5(2) and (ii) referral fees paid by assessee-Indian company for availing referral services which were rendered by foreign concern entirely in USA would constitute business profits of foreign company under Article 7 of the India-USA DTAA; in absence of PE in India, it was not taxable in India.

The distillation of precedents must now be applied by us to the facts of the present case. We are of the considered view that in the context of the above factual scenario

and position of law, the revenues under the referral Edenred Pte Ltd. 31 ITA Nos. 1718/M/2014 254/M/2015 & 507/M/2016 agreement is not taxable in the hands of the appellant as royalty under the Act and/or India-Singapore DTAA or FTS under the India-Singapore DTAA, Therefore, we delete the addition of Rs.39,94,209/- made by the AO towards referral fee and allow the 4th & 5th ground of appeal."

24. *Identical view was expressed by the Tribunal while deciding the issue again in assessee's own case in assessment year 2013-14 in ITA No.2178/Mum/2017 dated 23-10-2020.*

25. *Facts being identical, respectfully following the decisions of the Tribunal in assessee's own case as referred to above, we hold that referral fee received by the assessee is not in the nature of royalty. Accordingly, addition made in both the assessment years under dispute is deleted. Respective ground is allowed."*

7. There being no difference in factual position in the impugned assessment year, respectfully following the earlier decision of the Tribunal as referred to above, we delete the addition. This ground is allowed.

8. In ground 5, the assessee has challenged the addition of member login fee as royalty. Pertinently, identical issue came up for consideration in assessee's own case in assessment year 2015-16. While deciding the issue, the Tribunal deleted the addition with the following observations:-

"30. We have considered rival submissions and perused materials on record. It is observed that the assessee merely provides a standard facility to the Indian entity without granting any exclusive right in respect of any copyright, process, etc. It is further relevant to observe, learned DRP, while deciding the issue has clearly and categorically observed that member login services are similarly to IDC services. If that is the factual position, the member login fee cannot be treated as royalty since, while deciding assessee's appeal challenging the taxability of fees received towards IDC services, the Tribunal has consistently expressed the view that the services cannot be treated as royalty under the India-Singapore Tax treaty. In aforesaid view of the matter, we hold that member login fee is not in the nature of royalty under the treaty provision. Accordingly, addition is deleted. This ground is allowed."

9. There being no difference in factual position in the impugned assessment year, respectfully following the earlier decision of the Tribunal as referred to above, we delete the addition. This ground is allowed.

10. Grounds 1, 2 and 6 being general grounds, are dismissed.

11. In the result, appeal is allowed, as indicated above.

Order pronounced on 22/09/2021.

Sd/-

sd/-

(RAJESH KUMAR)	(SAKTIJIT DEY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dt : 22/09/2021

Pavanan

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2. Respondent
3. The CIT concerned
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By Order

Asstt. Registrar, ITAT, Mumbai