IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER
(THROUGH VIDEO CONFERENCING)

ITA No.6359/Del/2017
Assessment Year: 2014-15

DCIT (International Taxation), Circle – 1 (1) (1) New Delhi	**Vs**	**Cargill Incorporated 15407, Mc Ginty, Minnesota 05339, USA**
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh. Nageshwar Rao, Advocate Sh. Shaitanik Chakrabarty, Advocate
Respondent by	Sh. N. C. Swain, CIT DR

Date of hearing:	16/02/2022
Date of Pronouncement:	16/02/2022

ORDER

PER N. K. BILLAIYA, AM:

This appeal filed by the revenue is preferred against the order of the CIT(A)-42, New Delhi dated 31.07.2017 pertaining to A.Y. 2014-15

2. The grievance of the revenue read as under :-

1.1 That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in deleting the addition made by the AO.

1.2 That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in deleting the addition made by the AO, relying on the decision of the CIT(A) in earlier years, without consideration the facts of the year under consideration.

1.3 That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in holding Corporate IT recharges as mere reimbursements, without considering that these pertain to information concerning industrial, commercial and scientific experience, which were rightly taxed as Royalty.

1.4 That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in holding that Corporate IT recharges cannot be treated as Fee for Included Services (FIS) in the absence of fulfillment of the 'make available' clause without considering that if not held to be Royalty, this is alternatively taxable as FIS, because the services do 'make available' technical knowledge, experience, skill, know-how and processes related to food processing, which is covered in the description of services falling in Article 4(b) of the DTAA, as per the MOU concerning FIS dated 15.5.89, to the Indo-US DTAA.

1.5 That in that facts and in circumstances of the case, and in law, the Ld. CIT(A) erred in holding that as per the MOU concerning FIS dated 15.5.89, what is required to satisfy the 'make available' clause is that the technology can be independently made use of by the Indian entity, whereas the MOU only requires that 'the person acquiring the service is enabled to apply the technology', and the 'make available' clause was satisfied in this case.

2.1 That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in not unequivocally rejecting the assessee's claim Fee for Included Services (FIS) was mistakenly shown as taxable in its income-tax return, and in not unequivocally holding that this amount was taxable as Fee for Included Services.

2.2 That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in not unequivocally rejecting the assessee's claim that certain amount was wrongly shown to be taxable as FIS, and in not examining the nature of the amounts claimed to be not taxable.

2.3. That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in not unequivocally rejecting the assessee's claim that certain amount was wrongly shown as taxable, and in directing the AO to verify the amount from the invoices, without directing verification of the nature of the amounts claimed to be not taxable and whether it was FIS.

3. The appellant craves leave, to add, modify, amend or alter any grounds of appeal at the time of, or before, the hearing of appeal.

3. At the very outset the Counsel for the assessee stated that the impugned issues have been decided by this Tribunal in assessee's own case in earlier years.

4. Per contra the DR could not bring any distinguishing decision in favour of the revenue.

5. We have carefully perused the orders of the authorities below. We find that the CIT(A) while deciding the appeal in favour of the assessee has followed the decision given in A.Y.2002-03 to 2013-14.

6. We find that this Tribunal in ITA No.491/Del/2012, 492/Del/2012, 5647/Del/2011, 446/Del/2012, 447/Del/2012, 550/Del/2010 and 5648/Del/2011 for A.Y. 2002-03 to 2008-09 has considered the similar grievance and decided the issue in favour of the assessee and against the revenue. The relevant finding read as under :-

8. There is no dispute between the parties on the issue that the addition involved in assessment year 2009-10 to assessment year 2014-15 is same as involved in assessment year 2002-03 to 2008-09 before us. The fact that no appeal has been filed against the order of the Ld. CIT-(A) in assessment year 2009-10 to 2014-15, is also not disputed by the Ld. CIT(DR). The issue before us is that following the Rule of Consistency, whether the Revenue should still object these grounds of the assessee. On this issue, we take guidance from the decision of the Hon'ble Supreme Court in the case of RADHASOAMI SATSANG vs. COMMISSIONER OF INCOME TAX reported in 193 ITR 321. The relevant finding of the Hon'ble Supreme Court is reproduced as under:

> *"**9.** We are aware of the fact that, strictly speaking, res judicata does not apply to IT proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year **but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.***
>
> *One these reasonings, in the absence of any material change justifying the Revenue to take a different view of the matter—and, if there was no change, it was in support of the assessee—we do not think the question should have been reopened and contrary to what had been decided by the CIT in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under ss. 11 and 12 of the IT Act of 1961."*

> 9. We find that Hon'ble Supreme Court has clearly observed that once the parties have allowed the position to sustain by not challenging the order, it is not appropriate to allow the position to be changed in subsequent years. In our opinion same applies to the earlier years also. Since issue in dispute involved in grounds mentioned above in assessment year 2002-03 to assessment year 2008-09 is identical to issue decided by the Ld. CIT-(A) in assessment year 2009-10 to assessment year 2014-15, accordingly, the objections of the Revenue are rejected and we allow the grounds raised by the assessee as listed above.

7. On finding parity of facts, respectfully following the decision of the coordinate Bench (supra), the appeal of the Revenue is dismissed.

8. The order is pronounced in the open court on 16.02.2022 in the presence of both the rival representatives.

Sd/-	Sd/-
(ASTHA CHANDRA)	**(N. K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

NEHA
Date:-16.02.2022
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	16.02.2022
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	17.02.2022
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	