

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI (THROUGH VIDEO CONFERENCING]**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 8126/DEL/2018 [A.Y 2015-16]

M/s Autoliv ASP Inc.
3350, Airport, Ogden, Utah
Unites States of America

Vs.

The Dy. C.I.T
Circle - 1(1)(1)
International Taxation
New Delhi

PAN: AAMCA 4821 E

(Applicant)

(Respondent)

Assessee By : Shri S.K. Aggarwal, CA
Department By : Shri N.C. Swain, CIT- DR

Date of Hearing : 15.02.2022
Date of Pronouncement : 21.02.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 30.10.2018 framed under section 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to Assessment Year 2015-16.

2. The substantive grievance of the assessee is two-fold:
- (i) Firstly, the assessee is aggrieved by the addition of Rs. 70,01,452/- as Fees for Included Services [FIS]; and
 - (ii) Secondly, taxation of software reimbursements of Rs. 3,53,693/- as Royalty.

3. Representatives were heard at length. Case records carefully perused.

4. Briefly stated, the facts of the case are that the appellant is a company incorporated under the laws of the United States of America and is engaged in the business of providing design and development services and engineering services of vehicle safety systems.

5. During the year under consideration, the assessee has received Revenue from the following streams:

(i) Engineering fees	Rs. 7,001,452/-
(ii) Reimbursement on software costs	Rs. 353,693/-
(iii) Reimbursement of salary & related costs	Rs. 4,79,63,123/-

6. Return was filed on 31.03.2017 declaring NIL income. Return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee.

7. The assessee was asked to explain as to why Revenue from engineering fees, software costs, reimbursements and reimbursements of salary and related costs may not be treated as income from Royalty/FTS and taxed accordingly.

8. The assessee filed detailed reply explaining the nature of transactions and strongly contended that engineering fees is not taxable as FIS in India.

9. The detailed submissions of the assessee are extracted by the Assessing Officer in his assessment order. The detailed submissions of the assessee were dismissed by the Assessing Officer. The Assessing Officer was of the opinion that the services provided by the assessee are technical services. The Assessing Officer was of the firm belief that these services made available technical knowledge, skill etc and, accordingly, treated the revenue from engineering services as FTS in terms of Article 12 of the India - US DTAA.

10. In so far as the reimbursements of software costs is concerned, the assessee, in its reply, claimed that software reimbursements is not taxable in India as cost reimbursement does not constitute income. This claim also did not find any favour with the Assessing Officer and drawing support from the amendments brought in the statute, the Assessing Officer treated the revenue received by the assessee from reimbursement of software costs as income from royalty.

11. The assessee raised objections before the DRP but were dismissed by the DRP.

12. Before us, the ld. counsel for the assessee reiterated what has been stated before the lower authorities and the ld. DR placed strong reliance on the findings of the Assessing Officer /DRP.

13. Facts on record show that M/s Autoliv [India] Pvt Ltd [Autoliv] has made payments to the assessee for engineering services and certain reimbursement of costs. M/s Autoliv [India] Pvt Ltd undertook project to develop vehicle safety system for Ford brand of cars in India. As the technical centre of Ford group is based in the US, therefore, Autoliv India was required to co-ordinate/ interact with

the engineers/ technical personnel of the Ford technical centre in the US.

14. For administrative convenience, Autoliv India entered into sub contractor agreement with the assessee for availing itself of the related engineering services whereby the employees of the assessee company would co-ordinate/ interact with the engineers/ technical personnel of Ford technical centre in the US for gathering requisite inputs on the designing and development of the product.

15. In furtherance of the sub-contract, the assessee provided engineering services to Autoliv India. Facts on record show that the assessee rendered engineering services to Autoliv India from the US and none of the employees of the assessee visited India in connection with rendering of such engineering services to Autoliv India. The activities performed by the assessee primarily involved coordinating/interacting with the engineers/technical personnel of the Ford technical centre. The assessee performed analysis and provided the same to Autoliv India, which, in turn was used by Autoliv India in preparing prototype of the product for Ford brand of cars in India.

16. On a complete understanding of the factual matrix, we are of the considered view that the assessee had no occasion to transfer or make available any technology, skill, knowledge, process, etc. involved in carrying out the engineering services to Autoliv India. On the contrary, for every new project / requirement for the Ford brand of cars in India, Autoliv India has to invariably sub-contract the relevant portion of the Project to the assessee. The engineering fees earned by Autoliv US under the 'sub-contractor' agreement included costs which it had incurred on labor, depreciation, rent, materials, supplies and other resources and costs incurred by Autoliv US on transportation, food and lodging and was marked up by 7% on the internal costs.

17. In our understanding of the law, as per section 90(2) of the Act, the provisions of the tax treaty shall prevail over the provisions of the Act to the extent they are more beneficial to the taxpayer. As per Article 12 of the India - US DTAA, fees for included services "means payments of any kind to any person in consideration for the rendering of any technical or consultancy services, if such services:

a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment is received; or

b) make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design”.

18. The term ‘make available’ has been explained in the Memorandum of Understanding [‘MOU’] to the DTAA. As per the said MOU, technology will be considered ‘made available’ when the recipient of the service is enabled to apply the technology.

19. Facts, as explained above, show that for every project from Ford US, Autoliv India has to approach the assessee for engineering design etc., which means that even after receiving the services from the assessee, Autoliv is not enabled to apply technology for other projects. It is would be pertinent to refer to the judgment of the Hon'ble Karnataka High Court in the case of De Beers India Minerals [Pvt] Ltd 12 Taxmann.com 214 wherein the Hon'ble High Court held as under:

“The technical or consultancy service rendered should be of such a nature that it “makes available” to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology “making available”, the technical knowledge, skill, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. 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. Technology will be considered “made available” when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available.”

20. In light of the aforementioned judgment of the Hon'ble High Court of Karnataka, facts of the case in hand show that technical knowledge or skills provided by the assessee should be imparted to and absorbed by the receiver Autoliv India Pvt. Ltd so that the receiver can deploy similar technology or technique in future without depending upon the assessee.

21. In our considered view, technology only will be considered as made available when the person acquiring such knowledge is possessed of the same enabling him to apply in future at his own. If the services are consumed in the provision without leaving anything tangible with the payer for use in future, then it will not be characterized as 'making available' of the technical services notwithstanding the fact that its benefit flowed directly and solely to the payer of the service. We are further of the view that what is necessary is that the service provider should transmit the technical knowledge to the payer so that the payer makes use such technology in future without involvement of the service provider.

22. Considering the facts in totality in light of the relevant article of India - US DTAA, we are of the considered view that the engineering fees received by the assessee are not taxable in India. Ground No. 2 with all its sub-grounds is allowed.

23. The next substantive ground of the assessee relates to the taxation of software reimbursements as Royalty.

24. The underlying facts in this issue are that the assessee had centrally purchased software primarily consisting software AMC's from third-party vendors outside India for, and on behalf of, all of its group companies, including Autoliv India. Out of the software charges paid by the assessee to the vendor it had allocated Rs. 3,53,693/- towards charges recoverable from Autoliv India and claimed the same as reimbursement on an 'at-cost' basis and without any profit element. Therefore, the same was not offered for tax in the return of income filed by the assessee.

25. The Assessing Officer was of the firm belief that reimbursement of software charges are nothing but royalty under section 9(1)(vi) of the Act and under Article 12 of the DTAA based on the fact that Autoliv

India made payments for the software charges directly to the third-party vendors outside India.

26. The assessee strongly contends that reimbursements sought by the assessee represent recovery of expenses incurred by it, on behalf of Autoliv India, on an 'at-cost' basis. The assessee further contends that it has made payment of software charges to third-party vendors outside India and payments to third parties were made by the assessee and the same were reimbursed by its group companies including Autoliv. It has been pointed out that such reimbursements were not in connection with engineering services that the assessee has rendered to Autoliv under sub-contract agreement.

27. We find that in the case of A P Moller Maersk AS [2017] 392 ITR 186, the Hon'ble Supreme Court has, inter alia, held that the amounts received by the assessee company were in the nature of 'at-cost' reimbursements and no technical services were rendered by the assessee company to the Indian agents, and hence such reimbursements were not taxable as FTS.

28. In the case in hand, neither the AO nor the Id. CIT(A) has stated that there was any profit element embedded in the payments received by the assessee from Autoliv. In our considered view, once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax.

29. Further, we are of the view that since the assessee was not the ultimate beneficiary of the receipts, the assessee did not render any service in connection with reimbursements. Actual bills were paid by the recipients and were later on reimbursed and the assessee did not earn/make any profit on such reimbursements.

30. Having said all that, we are of the considered opinion that reimbursement towards software charges will not qualify as royalty u/s 9(1)(vi) of the Act as well as under DTAA for the simple reason that it is not a case of the assessee possessing any right for use or right to use computer software in the first place for it to transfer such right to Autoliv. Article 12(3A) of the India - USA DTAA provides royalty which means consideration received inter alia for use or right to use any copyright of a literary, artistic or scientific work.

31. In light of this article, we are of the considered view that the assessee has not received consideration for granting a right to use any copyright in computer software from Autoliv. We find that the lower authorities have heavily relied upon the amendment brought in the statute in 2012. But the facts of the case in hand are squarely covered in favour of the assessee and against the Revenue by the Hon'ble Supreme Court in a land mark judgment in the case of Engineering Analysis Center of Excellence Pvt Ltd. [2021] 432 ITR 471 wherein the Hon'ble Supreme Court has upheld the following with regard to Royalty:

"i) Section 14 of the Copyright Act provides that 'Copyright' is an exclusive right to do or authorize the doing of certain acts 'in respect of a work'. It indicates that the right to reproduce a computer programme and exploit the reproduction by way of sale, license, transfer, etc. is at the heart of the said exclusive right.

ii) Payer gets non-exclusive, non-transferable and restricted right to a copy of the software. It makes payment for the copyrighted article and not for the use of the 'copyright' of the owner.

iii) Where the end-user does not obtain any rights in the copyright under the license agreement, making a copy of the

software for the purpose of internal use and as permitted by the license does not involve grant of a right in the copyright nor amounts to infringement of copyright.

iv) Payment made by end-users and distribution is akin to payment for sale of goods and not for grant of license in copyright nor amounts to infringement of copyright."

32. Since the term 'Royalty' has been defined in the DTAA, definition of the term 'Royalty' under the Act cannot be applied. Considering the facts of the case in totality, we hold that reimbursement towards software charges received by the assessee from Autoliv is not taxable since the same does not represent any income in the hands of the assessee and further, in light the decision of the Hon'ble Supreme Court, in the case of Engineering Analysis Centre of Excellence Pvt Ltd [supra], reimbursement towards software charges are not taxable as royalty as well. We, accordingly, direct the Assessing Officer to delete the impugned addition. Ground No. 3, with all its sub grounds is allowed.

33. Ground No. 4 relates to non issue of refund and interest on income tax refund u/s 244A of the Act.

34. The assessee contends that it has not received any refund in its bank account and, therefore, there is no question of charging any interest u/s 244A of the Act.

35. We direct the Assessing Officer to verify the same and decide the issue afresh.

36. Ground Nos. 5 and 6 relate to the levy of interest u/s 234D of the Act and 234A of the Act.

37. This ground is consequential in nature. We direct the Assessing Officer to decide the issue afresh as per provisions of law.

38. In the result, the appeal of the assessee in ITA No. 8126/DEL/2018 is allowed.

The order is pronounced in the open court on 21.02.2022.

Sd/-

[ASTHA CHANDRA]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 21st February, 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
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	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	