IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'D' : NEW DELHI)

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1165/Del/2019
(Assessment Year : 2013-14)
ITA No.1166/Del/2019
(Assessment Year : 2014-15)

M/s. Russell Reynolds Associates Inc. C/o. Mr. S.K.Aggarwal, CA BSR & Co. LLP, Building No. 10, 8th Floor, Tower-B, DLF Cyber City, Phase-II, Gurgaon-1 PAN : AALFR6258C	Vs.	DCIT (International Taxation) New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri S.K.Aggarwal, CA
Revenue by	Sh. Sanjay Kumar, Sr. DR
Date of hearing:	06.04.2022
Date of Pronouncement:	26.04.2022

ORDER

PER ANUBHAV SHARMA, JM:

The assessee has preferred these appeals against the orders dated 13.11.2018 of the Commissioner of Income Tax (Appeal)- 43, New Delhi in

appeal no. 121/2016-17 for the assessment year 2013-14 and appeal no. 269/2016-17 for the assessment year 2014-15. The ITA No. 1165/Del/2019, A.Y. 2013-14 arises out of assessment order dated 07.04.2016 & the ITA No. 1166/Del/2019, A.Y. 2014-15 arises out of order dated 30.01.2017 passed by the Dy. Commissioner of Income Tax, International Taxation, Circle 3(1)(1), New Delhi. However, as the issues involved are common the same are taken up together for the convenience and to avoid contradictory findings but taking up grounds of ITA No. 1165/Del/2019 for A.Y. 2013-14 to be representative.

1. Background :

1.1.1 The Appellant was incorporated under the laws of the United States of America ("USA") on September 29, 1969. The Appellant is engaged in the business of providing human resources advisory services to its clients, on recruiting and retaining senior level executives and further assisting them in mitigating the risks associated with senior level appointment. It also provides management support services to its group companies.

1.1.2 The Appellant filed its Income-tax return for relevant assessment showing income being royalty income received from Russell Reynolds Associates India Private Limited ('RRAIPL') in terms of 'Licensing Agreement' for use of Intellectual Property Rights ('IPRs') like trademarks / trade names and 'Information Technology Licensing Agreement' for use of databases, etc. as per Article 12(3) of the India- USA DTAA.

1.2 The Deputy Commissioner of Income-tax, Circle 3(1)(1), International Tax, New Delhi (hereinafter referred to as the 'Ld. AO') passed the assessment

order under section 143(3) of the Income-tax Act, 1961 ('the Act'), assessing the income *inter alia* adding to income the amount of support services as per 'Services Agreement" and reimbursement of expenses as per 'Cost Reimbursement Agreement" as Fees for Included Services ('FIS') under Article 12(4)(b) of India-USA DTAA *(hereinafter also referred as 'the Treaty')* by holding that such services meet the condition of "make available" of technical knowledge, experience, skill, knowhow, etc.,

1.3 The appeal filed by the Appellant company against the above assessment order was disposed by the Learned Commissioner of Income-Tax (Appeals) wherein partial relief was granted but following additions to the income in the assessment order were confirmed.

1.4 In regard to the Support services as per 'Services Agreement'. The Ld. CIT(A) upheld the contention of the assessee that the said services do not meet the condition of "make available" in Article 12(4)(b) of India-USA DTAA but upheld the addition as FIS under Article 12(4)(a) of the treaty by alleging that the said services are ancillary and subsidiary to the application and enjoyment of the right in Article 12(3) of the treaty.

1.5 In regard to reimbursement of actual training expenses as per "Cost Reimbursement Agreement". Ld. CIT(A) confirmed the assessment order by holding that it meets the requirement of "make available" under Article 12(4)(b) of the treaty.

2. Aggrieved by the order of Ld. First Appellate Authority, Ld. CIT(A) the appeal has been preferred raising following grounds :

1. ***Amount received for providing 'Support Service' treated as Fees for Included Services (FIS)***

1.1. *The Hon'ble CIT(A), has erred on the facts and circumstances of the case and in law, in treating the amount received for providing 'support services' of Rs.1,607,675 as FIS under paragraph 4(a) of Article 12 of the India-USA Double Taxation Avoidance Agreement ("India-US DTAA") that is being ancillary and subsidiary to the application or enjoyment of the right, property or information for which royalty is received by the Appellant.*

1.2. *The Hon'ble CIT(A), has erred on the facts and circumstances of the case and in law, in applying provisions of paragraph 4(a) of Article 12 of India-US DTAA and having failed to appreciate that the support services are to be governed by paragraph 4(b) of Article 12 of the India-US DTAA and do not 'make available' technical knowledge, experience, skill, know-how to Russell Reynolds Associates India Private Limited ('RRAIPL') as per restrictive definition of FIS in Article 12 of India-US DTAA.*

1.3. *The Hon'ble CIT(A), has erred on the facts and circumstances of the case and in law, in categorizing the amount received for providing 'support services' from RRAIPL as fee for consultancy/technical services, without appreciating the fact that such services are rendered for day to day management of work of RRAIPL and qualify as 'managerial' services, which is not chargeable to tax as per Article 12 of India-US DTAA.*

1.4. *The Hon'ble CIT(A), has erred on the facts and circumstances of the case and in law, having failed to appreciate that receipts from support services is not 'income' per se in the hands of the recipient in absence of any profit element and accordingly is not chargeable to tax in India.*

1.5. *The Hon'ble CIT(A), has erred on the facts and circumstances of the case and in law, in not providing the Appellant any show cause or reasonable opportunity of being heard, while deeming receipt of Rs. 1,607,675, to be Appellant's taxable income under paragraph 4(a) of Article 12 of the India-US DTAA.*

2. ***Reimbursement of 'Training Expenses' treated as FIS***

2.1. *The Hon'ble CIT(A), has erred on the facts and circumstances of the case and in law, in treating the reimbursement of 'training expenses' of Rs. 919,388 from RRAIPL as FIS under paragraph (4)(b) of Article 12 of India-US DTAA.*

2.2. *The Hon'ble CIT(A), has erred on the facts and circumstances of the case and in law, having failed to appreciate that reimbursement of training expenses is not 'income' per se in the hands of the recipient in absence of any profit element and accordingly is not chargeable to tax in India.*

2.3. *The Hon'ble CIT(A), has erred on the facts and circumstances of the case and in law, in not appreciating the fact that, such 'cost reimbursements' of training expenses do not 'make available' technical knowledge, experience, skill, know-how to RRAIPL, as per restrictive definition of FIS in Article 12 of the India-US DTAA.*

The Appellant craves leave to add, alter, amend and / or modify any of the grounds of appeal at or before the hearing of the appeal.

The Appellant prays for appropriate relief based on said grounds of appeal and the facts and circumstances of the case."

3. Heard the ld. Counsel for the appellant-assessee and the ld. Sr. DR and perused the record. The determination of issues as raised ground wise is as follows :-

GROUND NO. 1

4. In regard to this ground it was contended that appellant merely provides support services like finance services, human resources services, information systems for use of worldwide systems of communications, corporate communication and legal services as per Service Agreement dated 12.03.2012 which was effective from 1st January, 2011 and the Indian Associate Company, RRAIPL, use to compensate the assessee for providing the aforesaid services for an amount equal to proportionate of the provider cost i.e. without any mark up. It was submitted that the support services are not ancillary and subsidiary to the services provided under the licensing agreement under Article 12 (4)(a) of the treaty as held by Ld. F.A.A. Ld. Counsel relied the provisions of treaty to submit that following conditions should be fulfilled for a receipt to be taxable as FIS :

i. The services should be technical or consultancy in nature (the definition excludes managerial services), and

ii. Such services should be ancillary and subsidiary to the applicable or enjoyment of a right, property or information for which payment for royalty is received [Article 2(4)(a)], or

iii. Such services should make available technical knowledge, experience, skill, know-how, etc. [Article 12(4)(b)].

4.1 It was submitted that the definition of FIS under Article 12(4) does not include managerial services and is restricted to only technical or consultancy services and this definition of FIS under Article 12(4) of 'The Treaty' is

narrower than the definition of FTS under section 9(1)(vii) of the Act. Ld. Counsel submitted that managerial services though fall in the definition of FTS under the Act. The same do not constitute FIS under 'The Treaty'. It was submitted that the nature of services were such which were required by the RRAIPL on day to day basis for running its business and are not managerial in nature. Ld. Counsel specially relied the observations of AAR in the case of ***Invensys Systems Inc. 317 ITR 438 (AAR)*** and referred to para 8.2 where AAR observed :

> *" Though some of the services required to be performed under the agreement have the trappings of technical or consultancy services, looking at the substance and the predominant nature of the services, they primarily fall under the category of 'managerial'." He also referred to the case of (i) Intertek Testing Services India (P.) Ltd. In re [2008] 307 ITR 418 (AAR-New Delhi) (ii) Invensys Systems Inc. 317 ITR 438 (AAR) (iii) J.K. (Bombay) Limited v. CBDT [1979] 118 ITR 312 (iv) P No 28 of 1999, In re (242 ITR 208)."*

4.2 Referring to the case of **Sterio India Ltd. [2016] 72 taxmann.com 1 (Delhi HC**), he submitted that the issue before Hon'ble Jurisdictional Delhi High Court was that Steria France was providing to Steria India centralized services like legal finance, human resources, communication risk control, information systems, controlling and consolidation, delivery and industrialization, technology and management information services. The issue was whether the above services are managerial in nature and therefore, do not fall under the definition of FIS under Article 13 of the India-UK DTAA. The

India-UK DTAA also exclude managerial services from the definition of FTS like Article 12(4) of India-USA DTAA. The Hon'ble Delhi High Court held:

> *"23. As regards the nature of the service being provided under the Management Services Agreement, again the Court is unable to find any case made out by the Revenue before the AAR that what was provided was anything other than the managerial service which in any event stands excluded in the definition of the "fees for technical services" under the Indo- UK DTAA. Consequently, this question also does not survive for consideration.*
>
> *24. For all of the above reasons, this Court finds that the impugned order dated 2nd May, 2014 of the AAR holding that the payment made by the Petitioner for the managerial services provided by Steria France should be treated as fee for technical services in respect of which tax had to be withheld under Section 195 of the Act, is unsustainable in law. The questions posed by the* I *Petitioner before the AAR are accordingly answered as under:*
>
> *(i) The payment made by the Petitioner to Steria France for the managerial services provided by: the latter cannot be taxed as fee for technical services; and*
>
> *(ii) The said payments are not liable to withholding of tax under Section 195 of the Act. "*

4.3 Ld. Counsel submitted that the MOU under the treaty provides for five factors which are relevant to determine the satisfaction to consider a service to be ancillary and subsidiary to the application or enjoyment of some right, property or information for which the payment described paragraph 3(a)(b) is made. It was submitted that these five factors are not fulfilled in the case of assessee.

4.4 On the other hand the Ld DR submitted that before the Ld. First Appellate Authority the assessee had submitted that the services are not managerial in nature and he referred to paragraph 5.5.3 of the order of CIT(A). It was submitted that now the assessee claims that services were managerial in nature and wants to take shelter of Article 12. It was submitted that in the original return of the assessee and entire receipts were submitted to tax but the revised return only the revenue received under the head royalty has been offered to tax and which shows that there was change of stands without any justification. It was submitted that the ld. First Appellate Authority has given cogent reasoning while interpreting the services agreement in terms of the memorandum to the treaty.

5 At outset it is reasonable to hold that there is no substance in the arguments submitted on behalf of the revenue that assessee cannot change stand as first all the receipts were submitted for tax but under revised return only royalty income was submitted because it is settled proposition of law that there cannot be any estoppel upon the assessee. If a particular income is not taxable under the Income Tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law; a particular income is either eligible to tax under the taxing statute or it is not. If it is not, the Tax Authority has no power to impose tax on the said income.

6. Now on merits of the ground. This ground primarily concerns services arising out of Service Agreement and it can be observed that the learned FAA primarily relied the memorandum to the India US Treaty along with example to reach to the conclusion that the consideration received for support serves are

in the nature of fee for included services to be categorised within paragraph 4(a) of the India US Treaty. As for convenience of discussion, the relevant para 3 and para 4 of 'The Treaty' are reproduced below :

"3. The term "royalties" as used in this article means :

a. payment of any kind received as consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use or disposition thereof; and

b. payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of article 8.

4. For purposes of this article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

a. 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; or

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

7. The bare perusal and patent interpretation of para 4 of Article 12 of 'The Treaty' makes it explicit that it is only in regard to "rendering any technical or consultancy services" a finding can be given that they are ancillary and subsidiary for the purpose of para 4(a). Learned FAA has fallen in error in distinguishing para 4(a) and para 4(b) in a manner that as for para 4(a) there is no requirement that the services should be of the nature technical or consultancy and only receipt of Royalty as per para 3 of the Treaty, makes para 4(a) applicable.

7.1 In this context, in para No. 5.9 of its order, learned FAA has observed that **"by implication",** the consideration which are received by the assessee need to be tested for taxability under paragraph 4(a) of Article 12 in terms of memorandum to the Treaty. Again, for the convenience, para 5.5.9 is reproduced along with findings given by the learned FAA in para 5.5.10 :

> *"5.5.9 In this case there is an admitted and undisputed consideration received which has been stated as royalty and taxed under paragraph 3 of Article 12 of the Treaty. Therefore, by implication the consideration which are received by the appellant need to be tested for the taxability under the paragraph 4(a) of the Article 12. The Example 7 quoted in the Sheraton order from the memorandum to the Treaty is also with reference to the Article 12(4)(b). The Memorandum to the India US treaty also explains the taxability under paragraph 4(a) through Example 1. This is quoted in the extract of the Memorandum hereunder.*
>
> *"Paragraph 4(a)*
>
> *Paragraph 4(a) of Article 12 refers to technical or consultancy services that are ancillary and subsidiary to the application or enjoyment of any right, property, or information for which a*

payment described in paragraph 3(a) or (b) is received. Thus, paragraph 4(a) includes a technical and consultancy services that are ancillary and subsidiary to the application or enjoyment of an intangible for which a royalty is received under a licence or sale as described in paragraph 3(a), as well as those ancillary and subsidiary to the application or enjoyment of industrial, commercial, or scientific equipment for which a royalty is received under a lease as described in paragraph 3(b).

It is understood that, in order for a service fee to be considered "ancillary and subsidiary" to the application or enjoyment of some right, property, or information ' for a payment described in paragraph 3(a) or (b) is received, the service must be related to the application or enjoyment of the right, property, or information. In addition, the clearly predoment purpose of the arrangement under which the payment of the service fee and such other payments are made must be the application or enjoyment of the right, property, or information described in paragraph 3. The question of whether the service is related to the application or enjoyment of right, property, or information described in paragraph 3 and whether the clearly predominant purpose of the arrangement is such application or enjoyment must be determined by reference to the facts and circumstances of each case. Factors which may be relevant to such determination (although not necessarily controlling) include :

1. The extent to which the services in question facilitate the effective application or enjoyment of the right, property, or information described in paragraph 3;

2. The extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties described in paragraph 3;

3. Whether the amount paid for the services (or which would be paid by parties operating at arm's length) is an insubstantial portion of the combined payments for the services

and the right, property, or information described in paragraph 3 ;

4. Whether the payment made for the services and the royalty described in paragraph 3 are made under a single contract (or a set of related contracts); and

5. Whether the person performing the services is the same person as, or a related person to, the person receiving the royalties described in paragraph 3 (for this purpose, persons are considered related if their relationship is described in Article 9 (Associated Enterprises) or if the person providing the service is doing so in connection with an overall arrangement which includes the payer and recipient of the royalties].

To the extent that services are not considered ancillary and subsidiary to the application or enjoyment of some right, property, or information for which a royalty payment under paragraph 3 is made, such services shall be considered "included services" only to the extent that they are described in paragraph 4(b).

Example 1
Facts :
A U.S. manufacturer grants rights to an Indian company to use manufacturing processes in which the transferor has exclusive rights by virtue of process, patents or the protection otherwise extended by law to the owner of a process. As part of the contractual arrangement, the U.S. manufacturer agrees to provide certain Consultancy services to the Indian company in order to improve the effectiveness of the latter's use of the processes. Such services include, for example, the provision of information and advice on sources of supply for materials needed in the manufacturing process, and on the development of sales and service literature for the manufactured product. The payment allocable to such services do not form a substantial part of the total consideration payable under the

contractual arrangement. Are the payments for these services fees for "included services"?

Analysis:

The payments are fees for included services. The services described in this example are ancillary and subsidiary to the use of manufacturing process protected by law as described in paragraph 3(a) of Article 12 because the services are related to the application or enjoyment of the intangible and the granting of the right to use the intangible as the clearly predominant purpose of the arrangement. Because the services are ancillary and subsidiary to the use of the manufacturing process, the fees for these services are considered for included services under paragraph 4(a) of Article 12, regardless of whether the services are described in paragraph 4(b). "

5.5.10 In fact the five determining factors for the classification of the consideration under paragraph 4(a) are clearly satisfied in the appellant's case. The predominant factor, in the appellant's case is the grant of license to use the name. This gives rise to royalty and all the other payments and agreements flow from the principle licensor - licensee arrangement. The considerations received for support services of Rs 16,07,675 are therefore in the nature of Fee for included services to be categorized within paragraph 4(a) of the Indo US treaty."

8. As the Bench gives thoughtful consideration to the aforesaid, what immediately strikes is that the example relied by the learned FAA was in regard to the contractual arrangement of US manufacturer who had agreed to provide certain **"consultancy services"** to the Indian company. Thus, there it was an admitted fact that nature of services was 'consultancy services' as those services were considered related to the application or enjoyment of tangible.

However, that is not the case in the present matter. There is no categorical finding of the Ld.FAA that the support services were in the nature of consultancy or technical services. Rather it observed in Para 5.5.3 " *In fact the receipts from services clearly indicate that the same cover a large spectrum of area and would necessarily qualify as managerial services."*. As managerial services are not mentioned in Article 12 of the Treaty, so certainly by classifying the receipts to be from managerial services and then to include them in FTS, on basis of sub-clause 4(a) of Article 12, the Ld. FAA has committed the error.

9. Furthermore, on perusal of licensing agreement effective from 1st January, 2012 submitted by the assessee on page No. 1 to 10 of the paper book (volume-2), it can be observed that the 'intangible' referred to in Article 1 means "the intellectual property set forth on appendix (i) hereto, which may be amended from time to time". Appendix I shows that it is a trade mark for use of which the licensing agreement was executed. There is no recital in the agreement which would indicate that the use of tangible by Indian Associate was in any way necessary for the effective application or enjoyment of right, property or information, for which the royalty was agreed to be paid. The services rendered were not customarily provided and it is also not so otherwise established by the Revenue on the basis of any cogent evidence that such services are customarily provided in cases of licensing agreements for the use of Trade Marks. The consideration for these services cannot be considered to be insubstantial portion, rather the matter of fact is that for assessment year 2013-14, the assessee received Rs.16,07,675/- in respect of support services and royalty income amounted to Rs.47,62,726/-. The most important factor

being that there are separate agreements for the licensing of the intangible and the service agreement. The copy of service agreement on record at page No. 50 – 58 of the paper book for the assessment year 2014-15, show that this agreement was effective from 1st January, 2011 while the licensing agreement was later in time in terms of being effective from 1st January, 2012. Thus, the learned FAA has fallen in error in squaring up the case of assessee in terms of memorandum to the Treaty and giving a finding that the predominant factor is the grant of license to use the name which gives rise to royalty and all other payments and agreement flow from principal licensor – licensee agreement. Thus the finding of Ld FAA, that the five determining factors for the classification of the consideration under paragraph 4(a) are clearly satisfied in the appellant's case is not sustainable. Thus, the findings of the learned FAA deserve to be reversed. The ground is sustained.

Ground no 2

10. On behalf of the appellant it was submitted that the assessee incurs administrative expenses for on behalf of RRAIPL towards third parties which are subsequently re-charged from RRAIPL on cost to cost basis so the same cannot be classified in the nature of technical or consultancy services. It was submitted that the training and workshops organized on behalf of the Indian Associate was essentially and on boarding programming for its new joiners to understand these job profile and business model. The costs incurred on boarding, travelling upon the trainees was recovered. Therefore, there was no income elements embedded in the receipts. He relied the judgments in **(i) Renaissance Services BV v. Deputy Director of Income-tax (International Taxation)-2(1), Mumbai [2018] 94 taxmann.com 465(Mumbai-Trib.) (ii)**

HITT Holland Institute of Traffic Technology B.V. v. Deputy Director of Income-tax (International Taxation)-1, Kolkata [2017] 78 taxmann.com 101 (Kolkata-Trib.) (iii) Lloyds Register Industrial Services (India) (P.) Ltd. v. Assistant Commissioner of Income-tax, 8(2), Mumbai [2010] 36 SOT 293 (MUM.) (iv) Income-tax Officer, International Taxation-II v. Veeda Clinical Research (P.) Ltd. [2013] 35 taxmann.com 577 (Ahmedabad-Trib.) (v) John Deere Equipment (P.) Ltd. v. Deputy Commissioner of Income-tax (IT)-1, Pune [2019] 108 taxmann.com 295 (Pune-Trib.) (vi) Reliance General Insurance Co. Ltd. v. Income-tax Officer (IT) TDS, Mumbai [2018] 97 taxmann.com 350 (Mumbai-Trib.) to contend that by the purpose of training to merely familiarize the employees of associates company with operation and business model there is no element of "made available" for the purpose of Article 12. On the contrary the Ld DR supported the findings of Ld. CIT(A).

11. At the outset reference can be made to the Mumbai Bench judgement in **Renaissance Services Bv, Mumbai vs Ddit (It) 2(1), Mumbai** (Supra) wher it held *"We find ourselves to be in agreement with the view taken by the ITAT, Bangalore in the case of ITO Vs. Veeda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang), that in order to successfully invoke the coverage of training fees by 'make available' clause in the definition of technical services, the onus is on the revenue authorities to demonstrate that the services do involve transfer of technology."* The Mumbai Bench had also considered following case laws;

(i). **Llyods Register Industrial Services (India) P. Ltd. vs. ACIT (2010) 36 SOT 293 (Mum)** where the Tribunal observed that the expenses incurred by

the assessee which was engaged in the business of survey of ships, on the training of its employees who would inspect various mechanical and electrical equipments in the ship and ultimately issued a fitness certificate, could not be held as payments made for technical services. The Tribunal while concluding as hereinabove, observed that the employees by taking training from the Principal company had acquired only inputs to enable them to perform their work with desired state of efficiency.

(ii). **Ershisanye Construction Group India (P) Ltd. vs. DCIT (2017) 84 taxmann.com 108 (Kol)** where the Tribunal had observed that payments which were made by a Chinese company in respect of training of Chinese engineers of the assessee in English language would not constitute FTS.

(iii). **ACIT Vs. PCI Ltd. (2011) 12 taxmann.com 59 (Delhi)** where The Hon'ble Delhi High Court observed that payments made by the assessee to a non- resident party for training its personnel or customers to explain to the proposed buyers the salient features of the products imported by the assessee in India and to impart training to the customers to use the equipments cannot be held to be FTS.

(iv)**. ITO Vs. Veeda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang),** where Tribunal held that training services to the employees of the assessee company was general in nature, not involving any transfer of technology, the fees for providing such services was not taxable as FTS as per Article 13 of India-U.K tax treaty.

(v). **Wockhardt Ltd. Vs. ACIT (2011) 10 taxmann.com 208 (Mum)** where Tribunal held that the services rendered by the employees of a non-resident

company being in the nature of sharing management experiences and business strategies could not be termed as technical services.

12. Now coming to the case in hand as with regard to the training receipts, the learned FAA in para 5.4 of its order observed as below :

> *"5.4. The examination of the aforesaid submission clearly shows that on boarding program annually enables the client to acquire the skills and extend the shop profile so that the are able to comfortably work as per the appellant's requirements. As a result, it is totally clear the training expenses clearly fall within the purview of Fee for included services as a skill is being imported to the receipt and at the same time to the Indian entity the service is being rendered. Therefore, the training receipts amounting to Rs.9,19,388 for 2013-14 satisfy the make available requirement and qualify as FIS under Article 12(4)(b) of the India US Treaty. Therefore out of the cost reimbursements of 1,57,780,599 the aforesaid amount of Rs.9,19,388 certainly makes available skill to the recipient and therefore is taxable @ 10% in India under the India US Treaty."*

13. Very apparently, the findings are not based on any cogent reasoning. The learned FAA had failed to appreciate that this training was not part of the main contract of licensing agreement for royalty and there was no corresponding recital in the licensing agreement, which required the Indian Associates and the assessee to enter into any agreement for providing the training. The appellant provided relevant training and workshops to newly recruited consultants who joined the Indian Associate and the purpose of this training was not to provide any specific technical training or share any technical knowledge, expenses, skills, know how or processes neither by way of training, there was any transfer of any technical plan or technical design.

The findings of Ld. FAA *"skill is being imported to the receipt and at the same time to the Indian entity the service is being rendered"* are not sustainable. The trainees were only sansitised to understand their job responsibility, the business model, policies and procedures, under which the new recruits were expected to work. The training cannot strictly be even called managerial or leadership training so as to enhance any productivity or profits, but were more of a orientation program at the time of induction of the new recruit. Merely because the training program was of boarding nature, that cannot change the nature of program to fall in the purview of services, for which consideration should be FIS. Rather the consideration was in the form of reimbursement of expenses on actual basis of constituents like travelling, food, boarding and lodging of consultants employed by Indian Counterpart. The cost of training recovered from the Indian Associate was due to these expenditures on the trainees. Thus, in regard to the additions to the extent of Rs.9,19,388/- in A.Y. 2013-14 and Rs. 10,94,422/- in A.Y. 2014-15 the findings of the learned FAA deserve to be reversed. The ground is sustained.

Consequently, sustaining both the grounds, both the appeals are allowed.

Order pronounced in open court on this 26th day of April, 2022.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:- 26th ..04.2022

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT, NEW DELHI