

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“I” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM, &  
SHRI AMARJIT SINGH, AM**

आयकरअपीलसं./ I.T.A. No. 5688/Mum/2019  
(निर्धारणवर्ष / Assessment Year: 2018-19)

ACIT (LTU-2), 29 <sup>th</sup> floor, Centre-1, World Trade Center, Cuffe Parade, Mumbai-400 005	<b>बनाम/</b> Vs.	M/s Reliance Industries Ltd. Maker Chamber IV, 3 <sup>rd</sup> Floor, 222, Nariman Point, Mumbai-400021
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAACR5055K		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थीकीओरसे/ <b>Appellant</b> <b>by</b>	:	Shri Milind Chavan, Ld. DR
प्रत्यर्थीकीओरसे/ <b>Respondent</b> <b>by</b>	:	Shri Nimesh Vora, Ld. AR
सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	11.05.2022
घोषणाकीतारीख / <b>Date of</b> <b>Pronouncement</b>	:	19.05.2022

आदेश / O R D E R

**Per Amit Shukla, Judicial Member:**

The aforesaid appeal has been filed by the revenue against the impugned order dated 27.06.2019, passed by Ld. CIT(A)-57,

Mumbai, u/s 195 of the Act for the AY 2018-19. The revenue has taken the following grounds of appeal:-

*1. "Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in holding that payments made by the assessee to PTAI for benchmarking services were in the nature of business profits?"*

*2. "Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was right in holding that payments made by the assessee to PTAI for benchmarking services cannot be regarded as 'Fees for included services or technical services' under the India-USA DTAA?"*

2. The facts in brief are that the assessee company is engaged in the business of oil exploration and refining of crude oil, manufacturing and trading of petrochemicals, polyester, fibers intermediate textiles, etc. The assessee filed an application u/s 195(1) on 16.06.2017 seeking authorization for payment to M/s Phillip Townsend associates Inc. (PTAI). The assessee stated that the deduction of tax at source should be at NIL rate for certain 'Benchmarking services' of Site Personnel Index (SPI) for five petrochemical sites at Patalganga, Noagothane, Hazira, Dahej, Vadodara and the refinery site at Jamnagar-DTA including RTF and

solids dispatch area, under an agreement /work order no. MJA/230026568 dated 08.03.2017.

2. Before the AO, it was stated that assessee has made payment for providing services by PTAI as fees, net of taxes. The total expected payment to be made in FY 2017-18 under the said work order was Rs. 4.50 crores approx. The assessee also filed the tax residency certificate of PTAI which was tax resident of USA and it was also stated that PTAI did not had permanent establishment in India, therefore, it was in the nature of business income of PTAI and hence not taxable in India. The payment was purely commercial in nature and there was no technical element or FTS involved in such Benchmarking services.

3. Ld. AO on perusal of the work order agreement noted the following nature and description of services to be rendered by PTAI to the assessee which are as under:-

*Job Description: Benchmarking Services of Site Personnel Index (SPI) for five Petrochemical sites (Patalganga, Nagothane, Hazira, Dahej, Vadodara) and the refinery site at Jamnagar -DTA including RTF and solids dispatch area.*

*This Agreement for Services (this "Agreement") is entered into between Phillip Townsend Associates Inc. ("PTAI") and Reliance Industries Limited ("owner"), and constitutes owner's agreement to participate in the multi-client service known as Site Personnel Index ("SPI") offered by PTAI on the terms and conditions set out herein. PTAI and Owner are sometimes referred to herein individually as a "Party" and collectively as the "Parties".*

*During the Term of Agreement (as defined Below), PTAI will provide the following services to Owner (collectively, the "PTAI Services"):*

*1. SPI Study for five Petrochemical sites at Patalganga, Nagothane, Hazira, Dahej, Vadodara and refinery site at Jamnagar-DTA including RTF and solids dispatch area. PTAI SPI benchmark services will include:*

*1.1 Web-based kick-off orientation session for all Reliance Industries site's focal point(s) and project leads to kickoff the program at Patalganga, Nagothane, Hazira, Dahaj, Vadodara and Jamnagar-DTA sites.*

*1.2 Development of the Reliance Industrj.es Patalganga, Nagothane, Hazira, Dahej, Vadodara and Jamnagar (DTA) site complexity (NSP) based upon both previous SPI study NSP values and listings of modifications provided by RIL. PTAI will estimate NSP values for these modifications and*

*adjust the NSP values from previous studies performed for these sites.*

*1.3 Web-based training to complete the data collection instruments (DCI).*

*1.4 Supplied data input manuals and data collection instruments (DCI) to allow Reliance Industries Patalganga, Nagothane, Hazira, Dahej, Vadodara and Jamnagar-DTA sites to collect work hours for employees and contractors.*

*1.5 Analysis and validation of the personnel work hours.*

*1.6 Development of internal and peer company comparisons for the 4 SPI areas (Overall, Operations, Maintenance, and Support) including the 22 skill groups.*

*1.7 Preparation of an electronic draft report for review.*

*1.8 PTAI will develop a management review presentation and gap analysis. PTAI will deliver the management presentation at Reliance Industries offices.*

*1.9 Publication of a final report incorporating any Reliance Industries Patalganga, Nagothane, Hazira, Dahej, Vadodara and DTA-Jamnagar site changes from the Management presentation.*

*1.10 PTAI will conduct a one-day workshop to guide Reliance Industries on the development of a strategic plan to be used to close their largest opportunity gaps.*

4. He further noted from the website of PTAI that benchmarking services of site personnel index (SPI), which consists of:-

- *Identify areas for manpower efficiency improvements between 25% to 50% on total hours worked in manufacturing facilities*
- *Guide your decisions on personnel levels before or following restructuring*
- ***Harmonize your organizational structures***
- ***Communicate best practices and benchmarks to highlight key drivers***
- ***Build networks within your company***
- *Set baseline targets, start "pacesetter" improvement programs and monitor changes in manpower efficiency year to year*
- *Drive a step change in manpower efficiency performance*
- *Design staffing levels for new facilities.*

5. Ld. AO deduced that it satisfies the conditions of Article 12(4)(b) of Agreement for Avoidance of DTAA between India and US of 'make available of technical service'. Thus, he hold that payments to be made by the assessee company would clarified as 'fees for included services' (FIS) as per Article 12(4)(b) of Indo-US DTAA and

directed the assessee company to deduct the TDS @ 10% (plus applicable surcharge and education cess) as per the rate provided in Article 12 of the DTAA Act.

6. Ld. CIT (A) after considering the entire gamut of facts and submissions made by the assessee and the observation of the AO, rejected the AO conclusions and held as under:-

*4.3.3 In my view, the conclusion drawn by the learned Assessing Officer in the order under section 195 of the Act that the benchmarking services 'make available technical service' is erroneous. I agree with the Appellant's submission that the website of PTAI states that the benchmarking study can help its clients to undertake further course of action to identify areas for manpower efficiency improvements, harmonize the organizational structures and communicate best practices and benchmarks to highlight key drivers. These aforesaid points are only the benefits that the prospective client would derive by implementing the benchmarking study and not what the benchmarking study report consists of.*

*4.3.4. PTAI is not a subject domain expert in the area the Appellant operates. It has only collected information from the Appellant and benchmarked it against the data collected from various other entities engaged in similar business. The*

*benchmarking study report does not give any technical or proprietary information to improve the efficiency in the Appellant's business. It only indicates the percentile in which the Appellant operates in terms of various facets of its operations as compared to its peers.*

*4.3.5. It can thus be concluded that PTAI has not provided any know how/ knowledge but has only prompted the Appellant to further take corrective action in various areas of its operations.*

*4.3.6. The issue involved in appeal has already been supported by the orders of several other decisions of the ITATs and High Courts in favour of the Appellant and I am inclined to follow the same. I accordingly hold as under:*

*4.3.7. In the case of non-resident, covered by DTAA, the provisions of DTAA would be applicable, if they are beneficial to non-resident as per section 90(2) of the Act. PTAI is a company incorporated and tax resident of USA under Article 4 of the India-USA Double Taxation Avoidance Agreement (DTAA).*

*4.3.8. Article 12(4) of the DTAA defines the term 'fees for included services' as payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including 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) of that Article 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*

*4.3.9. On perusal of the terms of the Agreement, it is clear that the payment/ credit made by the Appellant under the Agreement between PTAI and the Appellant is essentially towards benchmarking services, which are not ancillary or subsidiary to the application or enjoyment of any right, property or information and, therefore, the same are not covered by the said Article 12(4)(a). Further, the services rendered by PTAI do not make available technical knowledge, experience, skill, know-how or processes, nor consist of the development and transfer of a technical plan or technical design and, therefore the same are not covered by the said Article 12(4)(b) of the DTAA. Thus, services of PTAI are not covered by Article 12 as not being in the nature of 'fees for included services'.*

7. We have heard both the parties, perused the relevant findings given in the impugned order as well as the material placed on record. The Ld. DR strongly relied on the conclusion of the AO and submitted that nature and description of services rendered by PTAI to the assessee as incorporated in the AO (supra) clearly shows that

the PTAI make available technical skills to the assessee company by rendering such mentioned services which provides them acquire skills of based practices which clearly falls within the ambit of 'fees for included services'.

8. On the other hand, Learned for the assessee submitted that the AO has wrongly inferred the website of PTAI to hold that the said company as make available any kind of skills to the assessee company. He submitted that SPI methodology allows for the comparison of staffing levels and is the only benchmarking program focused solely on the efficiency of manpower utilization. He referred to the following description given in the website PTAI:-

*The Site Personnel index (SPI) methodology allows for the comparison of staffing levels across sites independent of size, location, or type of chemical process. SPI is the only benchmarking program focused solely on the efficiency of manpower utilization, one of the largest cash fixed costs for a process industry site. SPI can be used for an entire site or for different business units at a site. SPI was developed by Shell and licensed to Phillip Townsend Associates (PTAI) in 2009. SPI has since been used in over 300 sites and is part of the PTAI portfolio of benchmark solutions.*

9. Apart from that, he submitted that it only collected data from the assessee company and then do benchmarking with the data available and to give analysis and submission report. It only provides benchmarking and no skill or know how or experience is made available to the assessee company. He further contended that similar services have been rendered by the said entity in the earlier years and the similar application made u/s 195(1) has been accepted by the AO and in support, he relied on the orders u/s 195(2) dated 19.04.2013 for FY 2013-14 exactly for similar nature of payment from undertaking benchmarking services of SPI. Once the similar nature of payment not been treated as FIS, albeit as business income of the said non-resident entity which does not have PE in India, then the said payment cannot be taxed in India.

10. From the perusal of the agreement as well as nature of services rendered by the non-resident company PTAT, we find that the payment is purely towards benchmarking of the services of SPI and such benchmarking study merely enables the clients to undertake further course of action to improve its qualitative capacity of personnel which has been stated to be as under:-

- *Identify areas for manpower efficiency improvements between 25% to 50% on total hours worked in manufacturing facilities.*
- *Guide your decisions on personnel levels before or following restructuring.*
- *Harmonize your organizational structures.*
- *Communicate best practices and benchmarks to highlight key drivers.*
- *Build networks within your company.*
- *Set baseline targets, start "pacesetter" improvement programs and monitor changes in manpower efficiency year to year.*
- *Drive a step change in manpower efficiency performance.*
- *Design staffing levels for new facilities.*

11. Ergo, from the above it can be deduced that PTAI does not provide any know how or technical knowledge, albeit prompt its clients to take corrective action in the above areas. It merely provides implementing the benchmarking study in its organisation. PTAI is not a subject domain expert in the area in which the assessee operates. It only collects data from various entities engaged in similar business and makes benchmarking study report

which indicates the percentile in which the assessee operates in terms of various facets of its operations.

12. Article 12(4) of the Agreement for Avoidance of Double Taxation between India and USA (Indo-US DTA) defines the term '**fees for included services**' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including 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) of that Article 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.

12. Further MOU to the India US DTAA elaborates on the concept of "make available", which specifies that technology will be considered "made available" when the person acquiring the service is able to apply the technology. The fact that the provision of the service may require technical input by the person providing the

service does not per se mean that technical knowledge, skills, etc. are made available to the person 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. Thus, the services rendered by PTAI are neither ancillary nor subsidiary to the application or enjoyment of any right, property or information and therefore, same are not covered under Article 12(4)(a). Merely providing commercial information through a benchmarking study does not in any manner makes available any technical knowledge, experience, skill, know how or processes, nor consist of the development and transfer of a technical plan or technical design. Thus, the services of PTAI cannot be said to be FIS under covered Article 12.

13. Accordingly, we hold that the payment made by the assessee to PTAI towards benchmarking services constitute business profit which are not liable to tax in India under the provision of Article 7 of the India –USA DTAA and neither it has any business connection in India as defined in *Explanation 2* of Section 9(1)(i) of the Act.

Accordingly, the grounds of appeal raised by the revenue are dismissed.

14. In the result, the appeal filed by the revenue stands **dismissed**.

*Orders pronounced in the open court on 19<sup>th</sup> May 2022.*

Sd/-  
(Amarjit Singh)

Accountant Member

Sd/-  
(Amit Shukla)

Judicial Member

मुंबई Mumbai; दिनांक Dated : 19.05.2022

Sr.PS. Dhananjay

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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