

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

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

ITA No. 6697/DEL/2017 [A.Y 2013-14]
ITA No. 6698/DEL/2017 [A.Y 2015-16]

M/s Everest Global Inc Pvt Ltd
1sst Floor, Spaze Patinum Tower
Sector 47, Gurgaon

Vs.

The A.C.I.T.
Circle 1(2)(2)
New Delhi

PAN: AACCE 3597 R

(Applicant)

(Respondent)

Assessee By : Ms. Vandana Bhandari, CA
Department By : Shri Sanjay Kumar, Sr. DR

Date of Hearing : 30.05.2022
Date of Pronouncement : 30.05.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

These two separate appeals by the assessee are preferred against two separate orders of the ld. CIT(A) - 42 New Delhi dated 23.08.2017 and 29.08.2017 pertaining to Assessment Years 2013-14 and 2014-15 respectively.

2. Since identical issues are involved in both these appeals and were heard together, they are being disposed of by this common order for the sake of convenience and brevity.

3. The assessee is a global consulting firm that assists corporations in developing and implementing leading-edge sourcing strategies including captive outsource and shared services approaches and also provides business transformation, service optimization and service provider consulting services. The assessee was incorporated under the laws of the State of Texas in December 2001 and is headquartered in Dallas.

4. At the very outset, the ld. counsel for the assessee stated that in both the years, the quarrel is in respect of identical facts. It is the say of the ld. counsel for the assessee that the entire quarrel has been decided by this Tribunal in assessee's own case in Assessment Years 2010-11, 2011-12 and 2012-13. The ld. counsel for the assessee supplied copy of the decision of this Tribunal in ITA Nos. 2469/DEL/2015, 6137/DEL/2015 and 2355/DEL/2017 for Assessment Years 2010-11, 2011-12 and 2012-13 order dated 30.03.2022.

5. Per contra, the ld. DR vehemently stated that in so far as the quarrel relating to the consideration received by the assessee towards customized research advisory services is not taxable under the head “Royalty” is not as per the decision cited before the Tribunal as the same was delivered in respect of software royalty and, therefore, the decision of the Tribunal should not be followed.

6. We have given thoughtful consideration to the orders of the authorities below. The first common grievance relates to the addition on account of management fee amounting to Rs. 21,43,248/- in A.Y. 2013-14 and Rs. 24,90,375/- in A.Y. 2014-15.

7. A perusal of the order of the ld. CIT(A) shows that while confirming the findings of the Assessing Officer, he has followed the findings given by his predecessor in Assessment Year 2011-12. We have carefully perused the decision of the Tribunal in ITA No. 6137/DEL/2015 in Assessment Year 2011-12. This Tribunal, at Para 9.4 of its order has considered this issue and decided as under:

“9.4 Now coming to the facts of the present appeal, the assessee has rendered management support services of the description listed at Annexure C of Master Support Services Agreement to

Everest India on independent and non-exclusive basis. These services are centralized services which are being provided to all group entities in order to maintain uniformity and ITA Nos. 2469, 6137/Del/2015 2355/Del/2017 Everest Global Inc. vs DDIT rationalize and standardize the practices across global location. No element of profit is earned by the assessee in course of rendering these services. These services include-

1. Management Oversight a. Strategic direction b. Contract review c. Financial and legal guidance d. Client Relationship Management e. Insurance f. Peer Review

2. Marketing a. Brand Awareness b. Marketplace analysis c. Competitive analysis d. Webinars e. Leadership forum f. Speaking engagements

3. Finance and Accounting a. Payroll b. General ledger c. Employee time and expense d. Revenue and expense accruals e. Payables f. Accounts Receivables g. Cash Management h. Financial Reporting i. Budgeting j. Line of credit access management

4. Human Resource management a. Recruiting b. Compensation c. Benefits administration d. Legal

5. Information Technology a. Laptop Maintenance b. Help desk support c. Desk side support d. User Id and password e. Remote access f. System/antivirus g. Intranet h. Inter site communication links, email, voice mail etc i. Standard computer platform j. New hardware and software k. Training on IT

resources ITA Nos. 2469, 6137/Del/2015 2355/Del/2017
 Everest Global Inc. vs DDIT I. Licenses and compliance m.
 Computer and phone networks

6. Training a. Global training conferences b. Monthly training sessions c. Ad hoc training as required

7. Legal a. Contract review b. Litigation management c. Other legal services as required 9.5 We agree with the contention of the assessee that managerial services are outside the scope of the meaning of FIS under [Article 12\(4\)](#) of the India- USA DTAA. Wherever the intention of the legislature is to include managerial services within the scope of FTS/ FIS, the same has been expressly mentioned therein. This contention of the assessee finds support by the jurisdictional Delhi Court judgment in the case of Steria (supra). The relevant para of the judgment is reproduced below.

19. The next question that arises is concerning to extent to which the benefit under the India-UK DTAA can be made available to the Petitioner. As already noticed, the definition of "fee for technical services" occurring in [Article 13\(4\)](#) of the Indo-UK DTAA clearly excludes managerial services. What is being provided by Steria France to the Petitioner in terms of the Management Services Agreement is managerial services. It is plain that once the expression 'managerial services' is outside the ambit of 'fee for technical services', then the question of the Petitioner having to deduct tax at source from payment for the managerial services, would not arise. It is, therefore, not

necessary for the Court to further examine the second part of the definition, viz., whether any of the services envisaged under [Article 13\(4\)](#) of the Indo-UK DTAA are "made available" to the Petitioner by the DTAA with France."

9.6 The assessee's case also finds support from the MOU annexed to the India-USA DTAA explaining the FIS wherein it is clarified that clause 4(b) of [Article 12](#) excludes any service that does not make technology available to the person acquiring the service.

"Memorandum of Understanding (MOU) annexed to the India-USA DTAA dated 15.05.1989 concerning FIS states as under:

ITA Nos. 2469, 6137/Del/2015 2355/Del/2017 Everest Global Inc. vs DDIT [Article 12](#) includes only certain technical and consultancy services.

But technical services, we mean in this context services requiring expertise in a technology. By consultancy services, we mean in this context advisory services. The categories of technical and consultancy services are to some extent overlapping because a consultancy service could also be a technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in a technology is required to perform it. Under paragraph 4, technical and consultancy services are considered included services only to the following extent: (1) as described in paragraph 4(a), if they are ancillary and subsidiary to the

application or enjoyment of a right, property or information for which are royalty payment is made; or (2) as described in paragraph 4(b), if they make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design. Thus, under paragraph 4(b), consultancy services which are not of a technical nature cannot be included services. {emphasis supplied} Paragraph 4(b) Paragraph 4(b) of [Article 12](#) refers to technical or consultancy services that make available to the person acquiring the services, technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plant or technical design to such person. (For this purpose, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person). This category is narrower than the category described in paragraph 4(a) because it excludes any service that does not make technology available to the person acquiring the service. Generally speaking, 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 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 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. {emphasis supplied} Typical categories of services that generally involve either the development and

transfer of technical plans or technical designs, or making technology available as described in paragraph 4(b), include :

1. Engineering services (including the sub-categories of bio-engineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical, metallurgical, and industrial engineering) ;
2. Architectural services ; and ITA Nos. 2469, 6137/Del/2015 2355/Del/2017 Everest Global Inc. vs DDIT
3. Computer software development.

Under paragraph 4(b), technical and consultancy services could make technology available in a variety of settings, activities and industries. Such services may, for examples, relate to any of the following areas :

1. Bio-technical services ;
2. Food processing ;
3. Environmental and ecological services ;
4. Communication through satellite or otherwise ;
5. Energy conservation ;
6. Exploration or exploitation of mineral oil or natural gas ;
7. Geological surveys ;
8. Scientific services ; and
9. Technical training."

From the above, it is evident that none of the services provided by the assessee are in the nature of FIS.

9.7 Further, considering the services provided by the assessee (listed above), in our view, these are not technical services nor do they require any technological knowledge, skill or experience. There is no transfer of technology involved. Everest India is not enabled to apply any technology on its own without recourse to the service provider i.e. the assessee. These services have not resulted in any enduring benefit to Everest India by way of any knowledge which could be applied by it on its own in future without depending on the assessee. These are general managerial services which are received by the assessee on recurring basis. Therefore, the test laid down under [Article 12\(4\)\(b\)](#), in our considered view, are not satisfied in the present factual scenario.

9.8 Thus, management fee received by the assessee from Everest India is not taxable as FIS under the provisions of India-USA DTAA. Accordingly, this ground is allowed in favour of the assessee."

8. On finding parity of facts, we have no hesitation in following the decision of the co-ordinate bench (supra) and direct the Assessing Officer to delete the impugned addition. This ground is, accordingly, allowed.

9. Second grievance relates to the addition on account of subscription to published reports and customized reports.

10. A perusal of the order of the Id. CIT(A) shows that once again he has followed the findings of his predecessor given in Assessment Year 2011-12. We find that this Tribunal in Assessment Year 2011-12 [supra] has considered this quarrel as under:

"11. The next common ground (Ground 5) relates to addition made by AO on account of miscellaneous services rendered to third party clients. These services comprises of two components i.e. access to published research reports by subscribing to the same and customized research advisory.

11.1 The Ld. DR relied upon the findings of the Ld. CIT(A). The Ld. AR submitted that the assessee sold published research reports and provided custom research services to clients in India as per work orders / invoices which are on record. The published reports are general in nature and factual information is compiled from various secondary sources. Anyone in the public can subscribe to the database and on payment of requisite fee access these general purpose reports. The database and server of assessee is in USA. The database subscription is granted through a website, which allows download of published reports, annual market updates, white papers, data cuts. The published reports and database is copyright protected. The subscriber

gets a non-exclusive, non-transferable right and license to use the published report. The subscription material can be used by subscriber for business purpose only by and among subscriber's employees. The ownership of and the copyright to subscription material as well as the database remains vested in assessee, the subscriber cannot copy, reproduce, distribute, republish, display, post, or transmit in any form or by any means any of the subscription material or alter, modify, or change, the subscription material without the prior written permission of the assessee. Subscriber is permitted to use subscription material without alteration of factual content and properly attribute the name of assessee as the source of such information. Further, subscriber is legally bound to give copyright notice and bound not to remove and reproduce and include all copyright notices or confidential or proprietary legends in and all copies of subscription materials. Subscription to online database is same as purchasing online industry specific newsletters, journals, books, magazines. In substance, the transaction is that of purchase and sale of published report. The client gets access to view a particular published report subscribed by it and not to the full database owned and maintained by assessee. The Ld. AR relied upon jurisdictional Delhi HC judgment in DIT vs. Infrasoftware Ltd. [2013] 39 taxmann.com 88 (Delhi) and several other cases of Delhi ITAT wherein a clear distinction has been carved out between right ITA Nos. 2469, 6137/Del/2015 2355/Del/2017 Everest Global Inc. vs DDIT to use the copyright and right to use a copyrighted article so as to determine the taxability of the transaction as royalty under the relevant DTAA.

11.2 In respect of customized research advisory, the Ld. AR submitted that the custom research is advisory service rendered by assessee in relation to Outsourcing Industry. Assessee does not allow right to use any data base which is happened only in case of published reports. The advisory is on topics provided by client in advance that is why it is called customized. The output of custom research advisory is not provided through subscription mode/database access mode. The advisory under this head is given to client through emails or presentations. So the CIT(A) clearly erred on facts in taxing this under the head "Royalty". The AO and CIT(A) failed to consider the facts properly and, they mixed up the taxability of Published reports and Custom Research under the head "Royalty". Admittedly, clause (a) of [Article 12\(4\)](#) is not applicable to custom research services nor it is a case of Revenue. It is also not revenue's case that the impugned service has anything to do with [Article 12\(3\)](#). Further, the receipts under this head are not even taxable as FIS/FTS under [Article 12\(4\)\(b\)](#) of the India-US treaty.

11.3 We find force in the above submission of the assessee. By allowing access to database what assessee grants to customers is only a right to use a copyrighted material (i.e. published report). The assessee does not grant the right to use the copyright. Hence, consideration (subscription fee) received by the assessee is not taxable as royalty under the provisions of [Article 12\(3\)](#) of the India-USA DTAA. Similarly in customized research advisory services the assessee is providing only

advisory services through emails or presentations. The output of custom research advisory is not provided through subscription mode or data base access mode and, therefore, the question of access to data base does not arise at all. Further there is no transfer of any copy right to the customers. Thus, the considerations received by the assessee towards customized research ITA Nos. 2469, 6137/Del/2015 2355/Del/2017 Everest Global Inc. vs DDIT advisory services are not taxable under the head Royalty. This ground of appeal is allowed."

11. As mentioned elsewhere, the ld. DR has strongly opposed to the findings of this Tribunal in Assessment Year 2011-12 stating that in that year, this Tribunal has not considered that the decision relied upon was delivered in different contexts. We do not find any merit in this contention of the ld. DR. Therefore, we do not have any hesitation in following the order of the co-ordinate bench [supra].

12. However, in Assessment Year 2014-15, we find that the Assessing Officer has made addition of Rs. 3,85,10,715/- and the ld. CIT(A) having noted that the facts are identical to Assessment Year 2011-12, upheld the addition to the extent of Rs. 3,73,67,894/-. However, the ld. CIT(A) has not given any finding to the addition of Rs. 11,42,821/-

being sale of published reports and custom data set. Therefore, in the interest of justice and fair play, we restore this issue to the file of the ld. CIT(A) for limited purpose of adjudicating addition of Rs. 11,42,821/- and addition to the extent of Rs. 37,367,894/- has been deleted in light of the decision of this Tribunal for Assessment Year 2011-12.

13. In the result, the appeal of the assessee in ITA No. 6697/DEL/2017 is allowed and ITA No. 6698/DEL/2017 is allowed in part for statistical purposes.

The order is pronounced in the open court on 30.05.2022.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 30th May, 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	