IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No.157/PUN/2021

निर्धारण वर्ष / Assessment Year: 2016-17

Alfa Laval Corporate AB, C/o. Alfa Laval (India) limited, Office No.301, Global Port building, Survey No.45/1-10, Mumbai Bangalore Highway, Baner, Pune 411 045 PAN : AAGCA3099N	Vs.	ACIT (International Taxation), Circle-1, Pune
Appellant		Respondent

Assessee by Shri Alisagar Rampurawala
Revenue by Shri Shubhakant Sahu

Date of hearing 19-07-2022
Date of pronouncement 20-07-2022

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final assessment order dated 16-03-2021 passed by the Assessing Officer (AO) u/s.143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') in relation to the assessment year 2016-17.

2. The first issue is against treating a sum of Rs.38,16,447/- received from HR and Marketing Consultancy services and

Employee Training services as chargeable to tax in India as 'fees for technical services' (in short 'FTS').

3. Pithily put, the facts of the case are that the assessee is a company incorporated in Sweden, which is an investment and IP holding company of Alfa Laval group. A return was filed declaring total receipts of Rs.7,31,79,228/-. During the draft proceedings, the Assessing Officer (AO) observed that the total receipts of the assessee amounted to Rs.8,54,99,826/-. The first receipt, not offered for taxation, that the AO espoused for consideration is a sum of Rs.38,16,447/-, which was from its two Associated Enterprises (AEs) in India, namely, Alfa Laval India Private Limited and Alfa Laval Support Services India Private Limited. On being called upon to explain as to why it should not be considered as FTS and included in the total income, the assessee submitted that the same was not chargeable to tax in the light of Article 12 of India-Sweden Double Taxation Avoidance Agreement (`the DTAA') read with the Protocol for importing Article 12 of the DTAA between India and Portuguese, as an OECD member nation, having more restricted scope of FTS. The assessee contended that since it rendered Managerial and Training services to its two Indian AEs, the amount of Rs.38.16 lakh did not

fall within the ambit of FTS under the DTAA read with DTAA between India and Portuguese. The AO refused to accept the assessee's contention of the applicability of India-Portuguese DTAA on the ground that the same was not separately notified. He, therefore, treated the amount as FTS. The AO went a step further by holding that the rendition of the above services by the assessee also "*made available*" technical knowledge to the Indian entities. The assessee remained unsuccessful before the Dispute Resolution Panel (DRP). Eventually, the AO made the addition in the impugned order.

4. We have heard both the sides and gone through the relevant material on record. Before ascertaining the taxability or otherwise of the amount in question, we need to first appreciate the nature of service rendered by the assessee, which is as under:

a. Rs.16,00,174/- in respect of HR and Marketing Consulting Services.
b. Rs.9,39,464/- in respect of recovery of Employee training expenses.
c. Rs.6,46,477/- in respect of employee benefit expenses.
d. Rs.6,30,332/- in respect of Legal & professional.

5. It can be seen from the above breakup that a major chunk is towards HR and Marketing Consultancy services. In addition, it also comprises of Employee training expenses and Legal and

Professional expenses. The nature of services, as such, has not disputed by the authorities. The moot question is whether the amount received by the assessee for rendering such services falls within the horizon of FTS.

6. Explanation 2 to section 9(1)(vii) of the Act, which defines the term ‘fees for technical services’, runs as under :-

> `For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

7. From the above definition, it is ostensible that managerial services along with technical and consultancy services are also covered within the ambit of FTS. It is not the case of the assessee that the receipt is not taxable under the Act. The assessee has made out a case that the sum is not chargeable to tax in the hue of the DTAA, which is more beneficial than the provisions of the Act and section 90(1) of the Act permits choosing a more beneficial provision.

8. Now we proceed to examine if the amount in question also falls within the definition of the ‘fees for included services’ under

the DTAA. Relevant part of Article 12 of the DTAA with Sweden is as under :

> "1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
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> 2. Notwithstanding the provisions of paragraph (1) such royalties and fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.
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> 3. (a) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.
>
> (b) The term "fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention."

9. Para 3(b) of the Article 12 defines the expression 'fees for technical services' to mean payment of any kind in consideration for rendering of managerial, technical or consultancy services including the provision of services by technical or other personnel. The definition of the term 'fees for technical services' in the DTAA, in the present context, does not help the assessee as it is

almost similar to that contained in Explanation 2 to section 9(1)(vii). However, at this stage, it is crucial to note the terms of the Protocol with reference to Article 12 of the DTAA, which provides that : `if under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply under this Convention.' This is in the nature of the Most Favoured Nation (MFN) clause in the DTAA between India and Sweden, which seeks to provide that if India has limited, *inter alia,* its scope of fees for technical services in a DTAA with any other OECD member country, then such limited scope will descend in and substitute it with the clause as per the DTAA with Sweden. Portuguese Republic is a member of the OECD, with which India has entered into a DTAA. The relevant part of the term 'fees for included services' has been defined in the Article 12(4) of the DTAA between India and Portuguese, which flows as under : -

> `For the purposes of this Article "fees for included services" means payments of any kind, other than those mentioned in Articles 14 and 15 of this Convention, to any person in consideration of the rendering of any technical or consultancy services (including through the provisions of services of technical or other personnel) if such services:….
>
> (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 which enables the person acquiring the services to apply the technology contained therein.'

10. A careful circumspection of the relevant part of the definition of the expression 'fees for included services' in Article 12 of the DTAA with Portuguese divulges that any consideration, to qualify as fees for included services, must necessarily result into making available technical knowledge, experience or skill etc. to the recipient of the service. The term *'make available'* has been widely interpreted by the Hon'ble Karnataka High Court in *CIT Vs. De Beers India Minerals Pvt. Ltd. (2012) 346 ITR 467 (Kar.)* holding that the payer of the services should be able to utilize the acquired knowledge or know-how at his own in future without the aid of its provider. The Authority for Advance Ruling in *Production resources group, in Re (2018) 401 ITR 56 AAR* has also held that "make available" connotes something which results in transmitting the technical knowledge so that the recipient could

derive an enduring benefit and utilize the same in future on his own without the aid and assistance of the provider. On going through the above judicial interpretation, it becomes palpable that in order to `make available' technical services, it is *sine qua non* that the recipient of the services must acquire such technical know-how etc. which he himself can use in future without any assistance of the provider and the same should not be anything which vanishes or disappears with its provision by the payee itself.

11. Adverting to the facts of the extant case, we find from the nature of services rendered by the assessee that these are primarily pertaining to Human Resources, Marketing Consultancy services and Training services etc. Obviously, managerial services are not part of Article 12(4) of the DTAA between India-Portuguese. As regards the other services, it can be seen that such services are albeit laced with some technical knowledge and lead to their sharing during the training etc., but do not "*make available*" any technical knowledge, know-how, experience, skill etc. to the Indian entities so as to apply it in future without any aid or assistance from the assessee. The AO has elaborately discussed the nature of services to be mainly as the HR; Marketing Consultancy; and Employee Training and held that such services

enabled the employees to upgrade their skills for future use. In our opinion, the conclusion drawn by the AO is not proper because the training simply advances the skill of the recipient-employees but falls short of providing any technical knowledge, experience, skill that enables the employees "*to apply the technology contained therein*". As such, we hold that that decision of the AO in treating Rs.38.16 lakh as FTS, is not correct because such consideration does not fall within the purview of FTS under Article 12(4) of the DTAA read with Article 12(4) of the DTAA between India-Portuguese. This addition is directed to be deleted.

12. The second issue is against the confirmation of addition of Rs.20,84,698/- that the assessee claimed to be reimbursement of expenses.

13. Succinctly, the factual panorama of this issue is that the assessee received a sum of Rs.20.84 lakh from its two Indian entities and claimed the same as 'Reimbursement' of expenses not involving any mark-up over the cost. The AO called upon the assessee to furnish necessary details to establish its case, which the assessee could not, leading to the AO treating the said amount as FTS. Certain additional evidence was filed before the DRP, which was sent to the AO for comments, who again reiterated that the

details furnished by the assessee did not satisfy the claim of reimbursement. This resulted in treating Rs.20.84 lakh as FTS thereby swelling the assessee's income *pro tanto*.

14. We have heard the rival sides and gone through the relevant material on record. The splitting-up of Rs.20.84 lakh is as under :-

Particulars	Amount (in INR)
Alfa Laval India Private Limited	
Recovery of advertising material and brochures	27,860
Recovery of corporate travel insurance	1,393,575
Recovery of officer's conference expenses	260,269
Alfa Laval Support Services India Private Limited	
Recovery of Miscellaneous expenses	400,994
Total Receipts	2,084,698

15. From the above details, it can be seen that the assessee claimed to have recovered advertising material and brochures cost, corporate travel insurance cost and officer's conference expenses along with miscellaneous expenses from its Indian Associated Enterprises. The AO has noted that the assessee failed to establish any correlation between the amount reimbursed from the AEs with the expenses incurred by the third parties. In order to fall within the purview of reimbursement, it is *sine qua non* that primarily, it should be a third party cost incurred by the first person which is recovered, as such, from the other; and, secondly, such recovery

should be without any mark-up. If the expenses are incurred by the assessee itself during the course of business and then allocated amongst its entities, these cannot be considered as reimbursement. Allocation of expenses ousts reimbursement.

16. Reverting to the factual scenario prevailing in the extant case, we find that though the assessee made out a case of reimbursement but could not successfully prove the same before the AO. The ld. AR submitted that the assessee has got all the relevant documents and can prove the same before the AO. Under the given circumstances, we set-aside the impugned order and remit the matter to the file of the AO for giving one more opportunity to the assessee to prove that sum of Rs.20.84 lakh was in the nature of reimbursement in the terms discussed above. Needless to say, the assessee will be allowed reasonable opportunity of hearing.

17. The last issue is against treating Rs.64,19,453/- as income chargeable to tax, as against the assessee's contention of the same being recovery of expatriates' salary cost.

18. The assessee claimed that Rs.64.19 lakh was in the nature of recovery of expatriate salary cost and hence, not taxable. It was stated that some employees were deputed to Indian entities, who functioned there and were on their Payroll. It was claimed that for

administrative convenience, certain amounts were deposited in the employees' account, which were recovered from Indian entities as such. Their salary was claimed to have been taxed in entirety in India including the amount under consideration. The AO did not accept the assessee's contention on the ground that no supporting evidence was produced to demonstrate as to how reimbursement of Rs.64.19 lakh was received from the Indian AE and further that it was offered for taxation by these employees as salary in India. The DRP did not provide any succour to the assessee.

19. Having heard the rival submissions and gone through the relevant material on record, it is seen that the assessee has canvassed a case that the amount in question was part of the salary of certain expatriates, who were on payroll of the Indian entities and that this amount was recovered from Indian companies without any mark-up. The assessee also contended that this amount was offered to tax in India by such employees.

20. Explanation 2 to section 9(1)(vii) provides that FTS includes any consideration for rendering managerial consultancy services etc., but does not include consideration `which would become income of the recipient chargeable under the head "Salaries"'. A perusal of the mandate of the above provision clearly ingrains that

any amount paid as a consideration which is income of the recipient chargeable to tax under the head "Salaries", cannot constitute FTS. Though the assessee has been arguing before the authorities below that the said amount of Rs.64.19 lakh was offered by the employees for taxation in India as their salary, but did not furnish any conclusive evidence to prove the same. It can be seen from the impugned order that the assessee filed certain details of the salaries paid by the employees but did not establish any correlation between the amount under consideration and the amount offered for taxation as `Salary' by such employees. Under these circumstances, we are of the considered opinion that it would be in the fitness of the things if the impugned order on this score is set-aside and the matter is remitted to the file of the AO. We order accordingly and direct him to decide this issue afresh as per law after allowing reasonable opportunity of hearing to the assessee.

21. In the result, the appeal is partly allowed.

Order pronounced in the Open Court on 20th July, 2022.

Sd/-	Sd/-
(PARTHA SARATHI CHAUDHURY)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 20th July, 2022
Satish

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The DRP-3, Mumbai-1, 2, & 3
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**C**" / DR 'C', ITAT, Pune
5. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	19-07-2022	Sr.PS
2.	Draft placed before author	19-07-2022	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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