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.1442/PUN/2017
निर्धारण वर्ष / Assessment Year: 2010-11

Groupo Antolin Irausa S.A. C/o. B-25, MIDC, Ranjangaon, Shirur, Pune 412 220 PAN : AADCG9626L	Vs.	DDIT (International Taxation)-1, Pune
Appellant		Respondent

Assessee by: Shri J.D. Mistri, Sr. Advocate
Revenue by: Shri Piyush Kumar Singh Yadav

Date of hearing 27-07-2022
Date of pronouncement 28-07-2022

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the order passed by the CIT(A)-13, Pune on 23-03-2017 in relation to the assessment year 2010-11.

A. RENDITION OF INTRA-GROUP SERVICES

2. The first issue is against the confirmation of addition of Rs.3,99,18,072/- towards intra-group services fees received by the assessee, having been claimed as Managerial services fees not chargeable to tax but treated by the Assessing Officer (AO) as `fees for technical services'.

3. Succinctly, the facts of the case are that the assessee is a non resident company incorporated in Spain. It is engaged mainly in sale of cemented carbide and high speed steel tools for automobile industry. The return was filed declaring total income of Rs.74,92,799/-. During the course of assessment proceedings, the AO observed that a sum of Rs.3,99,18,072/- was received by the assessee from its Indian entity, namely, Grupo Antolin Pune Private Limited, which was not included in the total income. On being called upon to explain the reasons, the assessee submitted that the amount was consideration for rendering certain services including Human resources, Finance, Legal, I.T., Marketing, Research and Purchasing etc., which did not fall within the tax-net. The AO's proposed view that it was chargeable to tax as 'fees for technical services' (FTS) u/s.9(1)(vii) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') was countered by the assessee with the mandate of Article 13 of the Double Taxation Avoidance Agreement between India and Spain (hereinafter also called `the DTAA'). The assessee also contended before the AO that the Protocol to the DTAA enabled it to invoke corresponding beneficial relevant clause under the DTAA between India and the USA, under which, it was necessary that technical services must be

'*made available*' so as to attract taxation. Since no services were claimed to have been '*made available*' to the Indian group entity, the assessee contended that the consideration was not chargeable to tax under the DTAA. The AO held the amount to be falling within the command of section 9(1)(vii) of the Act and also Article 13 of the DTAA. Without prejudice, the AO also treated the amount of Rs.3.99 crore and odd as 'Dividend' chargeable to tax in the hands of assessee under Article 11 of the DTAA and without further prejudice to the above, also chargeable under Article 23(3) of the DTAA as 'Other income'. The ld. CIT(A) examined the nature of services rendered by the assessee and finally held them to be advisory in character and thus covered under Article 13 of the DTAA. In view of his decision upholding the treatment of the amount as FTS, the ld. CIT(A) did not go into the AO's alternate taxability either as 'Dividend' or 'Other income' under the DTAA.

4. We have heard both the sides and gone through the relevant material on record. The assessee rendered certain services to its group entities across the globe including the one in India, for which a sum of Rs.3.99 crore and odd was received. The AO treated such amount as chargeable to tax as `Fees for technical

services' under the Act as well as the DTAA; Dividend under the DTAA; and also `Other income' under the DTAA. We will proceed to examine the view point of the authorities, one by one, under the following heads:

I. Whether the receipt is FTS under the Act?

II. Whether the receipt is FTS under the DTAA?

III. Whether the receipt is Dividend under Article 11 of the DTAA?

IV. Whether the receipt is `Other income' under Article 23(3) of the DTAA?

I. <u>Whether the receipt is FTS under the Act?</u>

5.1. Section 9(1) of the Act states that the following incomes shall be deemed to accrue or arise in India: - (vii) income by way of fees for technical services payable by— (b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India. Explanation 2 to section 9(1)(vii), defines the term 'fees for technical services', 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".

5.2. In order to decide the taxability or otherwise of the amount under the Act, it would be paramount to first consider the precise nature of services rendered. The services comprise `General services' of formulating the group's internal audit plan and assistance in implementation of the same; `Financial services' of providing assistance in formulation of financial policies and strategies, managing financial operations at group level; `Legal services' of providing legal assistance in litigious issues; `Human resources services' of providing performance evaluation procedures and forms with administrative support; `Quality and environment related services' of defining, managing and supervising the quality and environment strategy of the entire group; `Marketing services' of developing marketing policy, providing of new market data; `Research services' of defining and supervising research procedures and policies; `Purchase services' of defining, implementing and supervising purchase policy and

procedures of the group; and `I.T. Support services' of defining the policy of group information system. From the above description of the services from the Agreement, it turns out that they refer to rendition of services by the assessee to its world-wide group entities and such services are aimed at formulating plans and policies in different spheres of the business to be followed by its world-wide entities so as to have consistency in approach.

5.3. Our attention has been drawn by the ld. AR towards certain e-mail exchanges between the assessee and the Indian entity, whose copies have been placed in the paper book. Pages 231 to 234 demonstrate e-mail exchanges between the assessee and the Indian entity discussing the stiffness of HDL's with Expanded foam having an acceptable strength. The assessee informing the Indian entity that the test was conducted and it was eventually found that fogging as per Tata specs was OK but for GM specs was not OK. Pages 240 and 241 are again e-mail exchanges between the assessee and Indian entity concerning with the running trials of materials AB 4235/50 and AB NS by the Indian entity on its Plant. The assessee responded by stating that it wants an urgent feedback for this issue as the samples were sent in mail and there was no feedback till November, by specifically mentioning that

"this situation is absolutely unacceptable". To this, the Indian entity responded that it took trial on the above adhesive which is giving good bonding but was facing air gap in the package tray packet area. They requested the assessee for further input. Pages 242 to 243 deal with the Indian entity communicating to the assessee that they have got Canon G-300 series PU foaming machine which was calibrating manually by means of calibration nozzle provided by Canon. It further states that "we are in process of clearing Formal Q-audit and securing VW polo business". This was responded by the assessee stating that from the view of quality explanations to customer, there was no issue if machine is manual or automatic. It was further responded by the assessee that `GA guarantees the ratio control for both cases manual/automatic foaming machines and the only penalty is that with manual machines we lose much more time for calibrating so that we usually work with these machines at some ratio'. Finally, the assessee directed in its next communication to "set machine to a given nominal value and pour 5-10 times and record the values. Calculate CpK and let us know whether we're OK or not." Pages 254 and 255 contain e-mails by which the assessee stated to the Indian entity that there was an issue which cropped up lately after

new audits by writing that: "We observe a worrying profusion of software development at Grupo Antolin plants worldwide. These developments very frequently support critical process and overlay functionality with corporate tools or platforms. As a rule, this is in place to provide standardized and secure environment. . . . . In case of your plants, the following licenses must be removed". Thereafter, the Indian entity expressed some difficulties in removing the software. However, the assessee eventually prevailed over the Indian entity by writing that "you can remove this software immediately. Of course keep us informed any problem in SAP. We would not want to disrupt our service to the customer". Page 258 is again e-mail exchanges between the assessee and the Indian entity about certain hardware procurement. Pages 260 and 261 are e-mails between the assessee and Indian entity about purchase of certain goods. The Indian entity sent new price. The assessee after certain calculations responded that the pricing was not proper and there was a need to renegotiate the price with the suppliers. Pages 264 to 267 are certain e-mail exchanges on Human resources by which the Indian entity was directed by the assessee to furnish particulars of certain employees and also expressing its displeasure over the Indian entity not

responding timely. Pages 268 and 269 are copies of e-mail exchanges between the assessee and Indian entity in connection with the IT services, discussing about difference in the information under SAP system and the report by which the Indian entity was questioned and called upon to change the information in SAP and report in uniform manner. Pages 270 and 271 again deal with e-mail exchanges between Indian entity and assessee. The Indian entity attached monthly cost reduction plan duly updated for May 2009 for information of the assessee. The assessee required it to submit all information in new format which was attached in the e-mail. Similar is the position regarding other e-mail exchanges placed on record.

5.4. With the above understanding of the nature of services, we now proceed to determine the taxability of the amount under the Act, which encompasses consideration, *inter alia,* for managerial, consultancy or technical services. The term `manage' in the context of business, connotes administering and supervising the affairs of a business, encompassing Planning, Execution and Performance evaluation. *Ex consequenti*, the term `Managerial services' contemplate services in connection with administration and supervision of the business, starting with establishing proper

management systems, policies, standards and procedures in the business areas, such as administration, purchasing, marketing, and Human Resources; then executing the implementation of such systems either through self or someone else; and at the end, ensuring that the systems or policies so formulated have been properly adhered to. Thus, it can be seen that the term `managerial services' is like a package of planning services, execution services and evaluation services to ensure implementation in the business administration fields. Consultancy services, on the other hand, refer to giving some professional advice on a subject, in which the expert advice is sought and given. Once the expert advice is given, the consultancy service comes to an end. Technical services cover giving expert services in the field of technology. Contextually, consultancy and technical services, being separate species of technical services u/s 9(1)(vii) of the Act, need to be viewed separately from managerial services. Even though, the line may be blur in some cases and a service may appear to be both managerial *por ona parte* and consultancy or technical *por otra parte*, the consultancy or technical services need to be characterized as such independent of the managerial services for the purposes of this section.

5.5. On an overview of the above e-mails exchanges between the assessee and the Indian entity read in conjunction with the services as described in the Agreement, it becomes overt that the services mainly envisage i) formulating the global policies in the spheres of the business, including, Administration, Purchases, and Human resources so as to have world-wide uniformity in compliance; ii) ensuring application of the such policies by all the global entities including the Indian AE; and iii) evaluating their compliance. The services also cater to giving expert advice on certain matters to the Indian entity, such as, Legal services (falling within the domain of consultancy services) and also giving expert technical opinion on Quality and environment, Research and I.T. Support (falling within the domain of technical services). Thus consideration received by the assessee is partly for the managerial and partly for the consultancy or technical services. Ergo, it satisfies the requirement of taxability under the Act.

II. <u>Whether the receipt is FTS under the DTAA?</u>

6.1. The assessee 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.

6.2. The AO held that the consideration for the services is FTS under the DTAA between India and Spain. The assessee's contention for taking recourse to the Protocol to the DTAA and the consequential adoption of the relevant favourable Article of the DTAA between India and USA, was jettisoned by the AO.

6.3. Relevant part of Article 13 of the DTAA between India and Spain runs as under:

Article 13

Royalties and fees for technical services

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.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law 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 :

…..

3.

4. The term "fees for technical services" as used in this Article means payments of any kind to any person other than payments to an employee of the person making the payments and to any individual for independent personal services mentioned in Article 15 (Independent Personal Services), in consideration for the services of a technical or consultancy nature, including the provision of services of technical or other personnel.

6.4. Para 4 of Article 13 clearly provides that the term 'fees for technical services' contextually means "*consideration for the*

services of technical or consultancy nature". On going through the definition of FTS under Explanation 2 to section 9(1)(vii) in juxtaposition to the definition given under Article 13(4) of the DTAA, it becomes clear that though the Act covers consideration for managerial, technical or consultancy services within the horizon of FTS, Article 13 covers only "*consideration for the services of technical or consultancy nature"*, thereby excluding consideration for managerial services. In that view of the matter, the consideration received by the assessee towards managerial services gets excluded at the very threshold itself in terms of Article 13(4) of the DTAA. However, it has been noted above that the consideration in the present case is not only for managerial, but also for consultancy and technical services.

6.5. The assessee invoked India-USA DTAA to claim immunity from taxation, which was negated. At this juncture, it would be fruitful to note the terms of para 7 of the Protocol with reference to Article 13 of the DTAA between Indian and Spain, which provides that : `if under any Convention or Agreement between India and a third State which is a Member of the OECD, which enters into force after 1-1-1990, India limits its taxation at source on 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 incomes, the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention with effect from the date on which the present Convention comes into force or the relevant Indian Convention or Agreement, whichever enters into force later.' This is the Most Favoured Nation (MFN) clause in the DTAA between India and Spain, which seeks to provide that if India has, *inter alia,* limited its scope of fees for technical services in a DTAA with any other OECD member country, then such limited scope will descend in here and substitute the clause as per the DTAA with Spain. The assessee harped on resorting to the Indo-USA DTAA before the AO. The USA is a founder member of the OECD, with which India has entered into a DTAA. That being the position, we do not find any reason, in principle, for not permitting the assessee to take recourse to the corresponding provisions of the India-USA DTAA.

6.6. The relevant part of the term 'fees for included services' has been defined in the Article 12(4) of the DTAA between India and the USA, which reads as under : -

> 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) …….
>
> (*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.

6.7. The ld. AR argued that the services provided by the assessee did not `make available' any technical know-how etc. to the Indian entity. The term *'make available'* has been 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' such 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.

6.8. However, it is significant to note the command of para (b) of Article 12(4) of the India-USA DTAA, which says that fees for included services means consideration for rendering any technical or consultancy services, if such services make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design. On an analysis of the clause (b), it turns out that it covers two broader segments: viz., one where such services `make available technical knowledge, experience, skill, know-how, or processes' and two, where such services `consist of the development and transfer of a technical plan or technical design'. The first use of the word `or' between the words `know-how' and `processes' and the terms `technical knowledge, experience, skill' all preceding the word `know-how' and joined by commas between themselves, indicate that the term `make available' is applying to the words starting from `technical knowledge' and ending with 'processes'. The second use of the word `or' in clause

(b) after the word `processes' and before `consist of the development and transfer of a technical plan or technical design' deciphers that a new independent context is starting after the second `or', which deals with the services that consist of the development and transfer of a technical plan or technical design. The sole requirement to rope in an amount within the ambit of `fees for included services' under the second segment of para 5(b) of Article 12 is that the consultancy or technical services should consist of the development and transfer of a technical plan etc. to the payer. Unlike the first segment, there is no further requirement of satisfying the test of `make available'.

6.9. We have noted above that the assessee rendered a mixed bag of managerial, consultancy and technical services. Obviously, managerial services are not covered even under the DTAA between India and Spain and also the India-USA and hence consideration for them gets excluded from the taxability at the threshold. In so far as consideration for consultancy and technical services is concerned, the same will fall within the ambit of the India-USA DTAA, either if such services `make available technical knowledge, etc.' or if such services `consist of the development and transfer of a technical plan or technical design'.

Both the segments are independent of each other. The assessee pointed out the nature of services rendered by it before the ld. first appellate authority, which has been reproduced at pages 11 onwards of the impugned order. In addition to the description of General services, Financial services etc., the assessee gave an account of the services rendered under the following heads, which is reproduced as under:

> v. Quality and Environment Related Services
>
> This division of services would inter alia include ***defining***, managing and supervising *the Quality and Environment strategy, coordinating the team of quality auditors for the entire group companies*, assistance in conducting the internal environment audits.
>
> vii. Research services
> This division of services would inter alia include ***defining*** and supervising *the research procedures and policies preparing a research plan in support with the engineering and project team*, participating in the forums and coordinating with the official institutions ***on the subject of technological policies.***
>
> ix. IT Support services
> This division of services would inter alia include ***defining*** *of group information systems policy, strategy, planning and management tools*. Further, it will involve coordination of information technology strategy and planning actions, optimization and standardization of resources, ***defining*** *software and hardware standards to be applied within the group* and support and cooperation in resolution of incidents.

6.10. It can be seen that the Research services rendered by the assessee, *inter alia*, include *defining the research procedures and policies* by *preparing a research plan in support with the engineering and project team on the subject of technological policies* to be followed. The word `define' in Black's Law Dictionary has been explained as: `to state or explain explicitly'. The term `technical plan', in common parlance, implies the input of technical effort in drawing a plan on a given subject. So, *defining* the research procedures *on the subject of technological policies* under consideration means developing technical plan for the procedures on technological policies. As technical effort is involved in developing technological policies, the output is nothing but a technical plan. The very fact that the compliance of such a developed policy is also mandatory shows that it envelopes developing the plan and then transferring it for adherence.

6.11. Similarly, Quality and Environment Related Services encompass, *inter alia, defining* the *quality and environment strategy* to be followed also by the Indian entity. So *defining* a quality or environment strategy would mean developing technical plan of quality and environment strategy in detail and then transferring it for compliance.

6.12. In the like manner, IT Support services include *defining the group information systems policy, strategy tools*. It also provides for *defining software and hardware standards to be applied within the group*. This again divulges that the assessee developed technical plans of the information systems policy and strategy tools, meant to be followed also by the Indian entity, which is not possible without the technical input.

6.13. The above services, *ex facie*, fall within the realm of `development and transfer of a technical plan or technical design'. However, what is further pertinent to note is that the subject matter of the latter part of Article 12(4)(b) of the India USA DTAA is the consideration only for development and transfer of a technical plan or technical design. We have set out above the nature of services as submitted by the assessee before the ld. CIT(A) *qua* the three services consisting not only of developing and transferring the technical plan, but also managing and supervising their application. As a result, only the consideration for development and transfer of technical plan or design gets covered under `fees for included services' and not the consideration for their management or supervision.

6.14. Before parting with this issue, we clarify that since the services, on the basis of their brief narration given by the assessee before the ld. CIT(A), fall within the purview of the second segment of the Article 12(4)(b) of the India-USA DTAA, being, the services consisting of the development and transfer of a technical plan or technical design, we desist from examining if the above services are also making available any technical knowledge, experience, skill, know-how, or processes covered under the first segment of the Article. The *raison d'etre* is that the answer to this can be found out only after examining the detailed nature of the *defined Quality and Environment strategy; the defined research procedures and policies on the subject of technological policies; and the defined group information systems policy, strategy, planning and management tools* and then seeing, how they were actually used by the Indian entity to find out if they make available any technical knowledge, experience, skill, know-how, or processes. No such detail is available on record.

6.15. In the hue of the above discussion, it is held that though the assessee, in principle, can seek the benefit of the India-USA DTAA, but the consideration for the `development and transfer of a technical plan or technical design' in the terms discussed above,

falling under the second part of the Article 12(4)(b) of the India-USA DTAA, would qualify for taxation. Since such amount is not readily ascertainable from the material on record, we set aside the impugned order *pro tanto* and direct the AO to work out such taxable amount on some rational basis, after allowing a reasonable opportunity of hearing to the assessee.

7. The ld. CIT(A), after holding the amount falling under FTS and hence chargeable tax in India, did not examine the alternate viewpoints of the AO of taxing the same as Dividend under Article 11 or `Other income' as per Article 23(3) of the DTAA. He held that: `Since I have confirmed the learned AO's decision to tax the services, I do not discuss the Appellant's arguments on the learned AO's decision to tax the receipt on an alternative basis as either `dividend' or as `other income' under the relevant article of the DTAA. As the decision of the ld. CIT(A) on the intra-group services, being, in the nature of FTS stands partly modified, we need to examine if the amount can be considered as Dividend or Other income under the India Spain DTAA. Non-adjudication by the ld. CIT(A) on this issue has to be considered as determining the issue against the assessee and requiring adjudication by the Tribunal in the hue of *CIT Vs. India Cements Ltd. (2020) 424 ITR*

410 (Mad), which has been invoked by the ld. AR requesting our adjudication on the issue of Protocol to the DTAA, which was also not decided by the ld. CIT(A) and we have dealt with the same *supra*. On both the scores – Protocol; and taxability as Dividend/Other sources - the AO has returned the findings against the assessee. It is not a case in which such issues are being raked up for the first time and no discussion on them is available in the orders of the authorities below. We, thus, espouse these issues also for consideration and decision.

III. Whether the receipt is Dividend under Article 11 of the DTAA?

8.1. Turning to the applicability of the Article 11 applied by the AO for treating the amount received for group services as Dividend under Article 11 of the DTAA, we find that the AO gave this treatment by noticing that `the assessee has not provided any evidence to prove that it has provided the actual advisory services, therefore, it is held that the assessee has received Rs.3,99,18,072/- without providing any services to Grupo Pune'. *Au contraire,* the ld. CIT(A) has not disputed that the assessee did render the services, which he categorized as Advisory and proceeded to determine the issue accordingly.

8.2. Article 11(2) provides that: `such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State…'. Para 3 of the Article defines the term "dividends" as used in this Article to mean: ` income from shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.' Testing the facts of the case on the touchstone of the definition of the term `dividend', it transpires that the consideration received by the assessee is for rendition of intra group services and not either as income from shares etc. or income from other corporate rights or from any participation in profits. Thus, the amount under consideration cannot be characterized as `dividend' income falling under Article 11 so as to magnetize taxability.

IV. <u>Whether the receipt is `Other income' under Article 23(3) of the DTAA?</u>

9.1. The AO has taken another without prejudice view that the amount received by the assessee also falls under Article 23(3) of

the DTAA. It would thus be prudent to examine the mandate of Article 23(3) which is as under :

> `Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Convention, and arising in the other Contracting State may be taxed in that other State.'

9.2. Para 3 of Article 23 starts with a non obstante clause *qua* paras 1 and 2 and states that the items of income of a resident of Spain not dealt with in the foregoing articles of this convention and arising in India may be taxed in India. The crucial words used in para 3 are the items of income "*not dealt with in the foregoing articles of this Convention*". To put it simply, if a particular item of income is covered in an earlier Article of the DTAA, that cannot find place under Article 23(3). The item of income under view is consideration for rendition of services. If it is in the nature of FTS, then it falls under Article 12, otherwise it assumes the character of `Business profits' under Article 7 of the DTAA. As the income from intra-group services falls either under Article 13 or Article 7, it cannot be covered within the purview of Article 23(3).

10. To sum up, the consideration of Rs.3.99 crore and odd is chargeable to tax u/s 9(1)(vii) of the Act, but the India USA DTAA

will restrict the chargeable amount as discussed. It is neither dividend nor other sources income as per the DTAA.

B. LEASED LINE CHARGES

11. Ground No.2 is against the confirmation of addition of reimbursement on leased line charges amounting to Rs.52,16,989/- as Royalty u/s.9(1)(vi) of the Act and also under Article 13 of the DTAA.

12. The factual matrix of this ground is that the assessee received leased line charges from its Indian entity which were claimed as reimbursement and hence, not chargeable to tax. The AO treated such amount as Royalty within Explanation 2(iva) and also Explanation 2 read with Expl. 6 to section 9(1)(vi) of the Act. In addition, he also held that the receipt was covered under Article 13(3) of the DTAA as consideration for the use or right to use industrial, commercial or scientific equipment. The ld. CIT(A) echoed the assessment order on this issue.

13. We have heard the rival submissions and gone through the relevant material on record. The factual elaboration of this ground is that the assessee entered into an agreement with Telefonica, an international leased line service provider, for allotting leased line to all group entities on payment basis. Telefonica raised bill on the

assessee for the total amount, which the assessee recovered from its group entities including the Indian entity on cost to cost basis. We have examined relevant invoices of 6500 euros per month raised by the assessee on the Indian entity. It is the exact amount which has been charged by Telefonica from the assessee for providing leased line to the Indian entity. Thus, one-to-one correlation is established between the payment made by the assessee and the amount recovered from the Indian entity without any markup.

14. The ld. DR contended that it is a case of payment by the Indian entity to Telefonica through the assessee and hence cannot be considered as reimbursement. The Department has made out a case that the amount received by the assessee is chargeable to tax under the Act as falling under Explanation 2(iva) and also Explanation 2/6 of section 9(1)(vi) of the Act.

I. Is it covered under clause (iva) of Expl.2 to sec. 9(1)(vi)?

15.1. Firstly, we examine the applicability or otherwise of clause (iva) of Explanation 2 to section 9(1)(vi), which provides that: `For the purposes of this clause, "royalty" means consideration … for—(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section

44BB'. Obviously section 44BB is not applicable in the extant case. The AO held it to be a case of use of the network of Telefonica indirectly by the Indian entity through the assessee, which made the amount fall under this provision. In order to categorize an amount within the ambit of consideration for use or right to use any industrial, commercial of scientific equipment, it is essential that there should be an equipment of the nature described, which should be used.

15.2. Leased line is a dedicated communication channel that easily interconnects two or more sites ensuring uninterrupted data flow from one point to another. It is a dedicated, fixed-bandwidth data connection, which allows users to have a reliable, high-quality internet connection. In the instant case, all the Grupo Antolin entities have been provided leased lines by Telefonica so as to facilitate the free flow of information between them. Unlike IT Infrastructure facility set up by a group company with the help of software, hardware and networking equipments for processing the raw data and enabling the group entities to get the processed results; and the consideration for use of such IT Infrastructure facility having been held as royalty covered under Explanation 2(iva) to section 9(1)(vi) in certain cases including *Vanderlande*

Industries Private Limited Vs. ACIT dated 09-02-2022 (ITA No.48 /PUN /2018) and *Bekaert Industries Private Limited Vs. DCIT* (ITA No.1003/PUN/2017 dated 13-12-2021, we are instantly confronted with a situation in which Telefonica has simply provided dedicated leased lines for the flow of the data of the group entities between themselves. The facility of Telefonica does not process the data but simply facilitates its free flow between the group companies through its leased lines. Neither the processing of information is warranted nor is the essence of the transaction. The assessee and the group companies are not paying for using any industrial, commercial or scientific equipment of Telefonica but simply for getting the leased line provided by it with the help of its facility. As such, Explanation 2 (via) is not applicable to the facts of the instant case.

II. <u>Is it covered under Expls. 2/6 of sec. 9(1)(vi)?</u>

16.1. The next view point of the ld. CIT(A) is that the amount paid for the use of leased line falls under Explanation 2 read with Expl. 6 to section 9(1)(vi) of the Act. To be more specific, the ld. CIT(A) has held the amount to be in the nature of payment for a `process', thereby covering it under Explanation 2 providing that

"royalty" means consideration …for— (iii) the use of any patent, invention, model, design, secret formula or *process* or trade mark or similar property. Thereafter, recourse has been taken to Explanation 6 defining the term `process', which has been inserted by the Finance Act, 2012 with retrospective effect from 01-06-1976. It provides that:

> `For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret'.

16.2. The term 'process' as usually understood in common parlance does not include transmission of data by cable, optic fibre or any other similar technology. However, on going through the Explanation 2 read in conjunction with the Explanation 6, it becomes clear that the expression '*process*' includes and shall be deemed to have always included consideration for transmission, *inter alia,* by cable, optic fibre or any other similar technology whether or not such process is secret. Explanation 5 has also been simultaneously inserted to further clarify that the royalty includes and has always included consideration in respect of any right, property or information, whether or not— (a) the possession or

control of such right, property or information is with the payer; (b) such right, property or information is used directly by the payer; (c) the location of such right, property or information is in India. When we consider Explanations 5 and 6 read with Explanation 2 to section 9(1)(vi), it becomes graphically clear that the leased line charges paid for *transmission by any technology* get covered within the definition of term `process' and thus bring the consideration within the ambit of Expl. 2, so as to give it a colour of 'Royalty' under the Act. Thus, the receipt of Rs.52,16,989/- gets covered within the ambit of Royalty u/s.9(1)(vi) of the Act.

16.3. Now we proceed to examine if the amount is also covered under the DTAA. For this purpose, we note down the mandate of Article 13(3) of the DTAA which defines the term 'Royalties' as under:-

> `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 cinematographic films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or *process*, or for the use of, or the right to use, industrial,

commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.'

16.4. On a perusal of the above definition under the DTAA, it can be seen that it has certain features of the definition of the term `royalty' as given in section 9(1)(vi) of the Act. The term `process' has been used in the definitions - both under the Act as well as the DTAA. However, the important point to accentuate here is that unlike the definition of the term '*process*' as given in Explanation 6 amplifying the scope of the term `process', applying to the Explanation 2 to section 9(1)(vi), there is no similar definition of the term `process' as given in Article 13(3) of the DTAA.

16.5. At this stage, it is pertinent to note that some treaties link certain clauses of the Articles with domestic law. In those cases, the prescription of the concerned section under the Act is automatically imported in the concerned DTAA. Per contra, if a DTAA does not refer to domestic law and gives its own mandate, the provisions of the Act become irrelevant for construing the ambit of the provision under the DTAA. Coming to the Indo-Spain DTAA, it is axiomatic that the domestic law has not been linked with the definition of the term `royalties' as given in the Article. The definition in the Article simply stops at receipt, *inter alia,* for

use or right to use any '*process*'. In that view of the matter, we cannot read Explanation 6 to section 9(1)(vi) of the Act in the definition of the term `royalties' under the Article. Though the term '*process*' under the Act also includes payment for leased line charges in the light of Explanation 6, but absence of any analogous provision in para 3 of Article 13 of the DTAA, does not commend us to read the extended scope of the term `process' in the DTAA. The contrary view espoused by the ld. CIT(A), ergo, cannot be accorded imprimatur.

C. <u>REIMBURSEMENT OF SOFTWARE CHARGES</u>

17. The next ground is against the confirmation of addition of Rs.1,42,270/- towards reimbursement of software charges. The facts anent to this issue are that the assessee purchased software license of Norton Antivirus firewall on worldwide basis to be used by the group entities. The amount spent for procuring the Antivirus software for the Indian entity was recovered to the tune of Rs.1,42,270/-, as such, without any mark-up. The AO held such amount to be chargeable to tax as 'Royalty' by considering retrospective amendment to section 9(1)(vi) of the Act. The ld. CIT(A) echoed the decision of the AO relying on the judgment of Hon'ble Karnataka High Court in the case of *CIT Vs. Samsung*

Electronics Pvt. Ltd. (2012) 345 ITR 494 by holding that import of shrink wrapped software/off-the-shelf software under a software license agreement was in the nature of Royalty.

18. After considering the rival submissions and going through the relevant material on record, it is seen that there is no disputation on the nature of transaction, which is crystal clear inasmuch as the assessee purchased Norton Antivirus software for its entire group. The cost of such software, having been provided to Indian entity, was recovered as such without any mark-up. What the assessee procured from Norton was a software product and not any copyright in the software. Recently, the Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 472 (SC)* has reversed the decision in *Samsung Electronics Pvt. Ltd.(supra)* by holding that payment for use of a software product does not constitute Royalty. This position was fairly admitted by the ld. DR as well. In view of the binding precedent available on this issue, we delete the addition.

D. <u>INTEREST U/S 234B</u>

19. The last ground is against the charging of interest u/s.234B of the Act. Section 234B provides for levying interest for default in

payment of advance tax. The liability of payment of advance tax is governed by section 209 of the Act. Clause (d) of section 209(1), prior to its amendment by means of insertion of proviso by the Finance Act 2012 w.e.f. 01-04-2012, provides that the advance tax would be computed by deducting the amount of income-tax payable under relevant clauses as reduced by the amount of income-tax "deductible" etc. at source during the said financial year. Thus, the requirement of payment of advance tax in the context of a non-resident cannot arise because of section 195 providing for deduction of tax at source in all cases of payments made to them. If income tax is deductible at source, whether or not actually deducted, the stipulation of section 209(1)(d) gets satisfied. As the assessee is a non-resident and any payment made to it is otherwise tax-deductible, there can be no liability for interest u/s.234B.

20. At this stage, it is significant to note that an amendment has been carried out to section 209(1) by insertion of proviso w.e.f. 1.4.2012 providing, *inter alia*, that for computing liability for advance tax, income-tax calculated under clause (a) or clause (b) or clause (c) shall not be reduced by the aforesaid amount of income-tax which would be deductible during the said financial year under

any provision of this Act from any income, if the person responsible for deducting tax has paid or credited such income without deduction of tax. The essence of the amendment is that the earlier position of non-levy of interest u/s.234B where the income in question is otherwise liable for deduction of tax at source, irrespective of the fact that whether the tax was actually deducted or not, has been dispensed with. As the amendment is applicable from 1.4.2012, it will not administer the instant assessment year 2010-11 under consideration. We, therefore, direct not to charge interest u/s.234B of the Act.

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

Order pronounced in the Open Court on 28th July, 2022.

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

पुणे Pune; दिनांक Dated : 28th July, 2022
Satish

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr.CIT-5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**C**" / DR 'C', ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

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

		Date	
1.	Draft dictated on	27-07-2022	Sr.PS
2.	Draft placed before author	28-07-2022	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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