IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI I BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Sandeep S Karhail (Judicial Member)]

ITA No. 144/Mum/2021
Assessment year: 2017-18

Michael Page International Recruitment Pvt Ltd ……Appellant
C/o Michael Page International Recruitment Pvt Ltd.,
5th floor, 2nd North Avenue, Maker Maxity, BKC,
Bandra (East), Mumbai 400 051 [PAN: AAHCM6965A]

Vs.

Deputy Commissioner of Income Tax
International Taxation 3(2)(2), Mumbai ……...……Respondent

Appearances by:
Dhanesh Bafna *along-with* **Pratik Shah** *for the appellant*
Milind Chavan *for the respondent*

Date of concluding the hearing : 05/04/2022
Date of pronouncing the order : 04/07/2022

O R D E R

Per Pramod Kumar VP

1. By way of this appeal, the assessee-appellant has challenged the correctness of the order dated 22nd December 2020 passed by the Assessing Officer under section 143(3) r.w.s. 144C (13) of the Income Tax Act, 1961, for the assessment year 2017-18.

2. Grievances of the assessee-appellant, as set out in the memorandum of appeal, are as follows:

> *1. On the facts and in the circumstances of the case and in law, the Learned Deputy Commissioner of Income-tax (International Taxation) 3(2)(2), Mumbai ('the Learned AO') and the Dispute Resolution Panel (the DRP') erred in holding the amount for business support services of INR 2,99,65,730 and referral fees of INR 6,46,900 as 'Fees for technical services' under Article 12 of the Double Taxation Avoidance Agreement entered into between India and Singapore ('the DTAA') despite the fact that the Appellant has not 'make available' any technical knowledge, experience, skill, know-how, processes to the Indian Associated Enterprise in terms of Article 12 of India-Singapore DTAA.*
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> *The Appellant hereby prays that the addition of INR 3,06,12,630 to the total income may be deleted in full.*

2. On the facts and in the circumstances of the case and law, the AO erred in not granting credit for Tax deducted at source (TDS') on interest on income tax refund amounting to Rs 19,102.

The Appellant hereby prays that the credit of TDS amounting to INR 19,102 be given in full.

3. On the facts and in the circumstances of the case and in law, the learned AO has erred in proposing to initiate penalty proceedings under section 270A of the Act without appreciating that none of the provisions of section 270A of the Act gets attracted in the facts of the Appellant's case.

3. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before us is a company incorporated in, and fiscally domiciled in, the Republic of Singapore, and is engaged in the business of, inter alia, providing executive search and recruitment services. The assessee is entitled to the benefits of the India Singapore Double Taxation Avoidance Agreement [(1994) 209 ITR (Statute) 1; **Indo- Singapore tax treaty**, in short]. During the relevant previous year, the assessee received Rs 3,06,12,626, from its Indian associated enterprise by the name of Michael Page International Recruitment Pvt Ltd (MP-India, in short). These services were in the nature of (i) fees for providing business support services, mainly consisting of management support, administrative support, finance, learning and development services, marketing and internet support, routine and adhoc level operational support services; and (ii) referral fees, when a group entity offers a job opening and where such opening is filled up by another group entity, the entity that offers the opening is paid a referral fee. The assessee did not offer the fees so received from the Indian entity to tax, on the short ground that as the services rendered by the assessee to the Indian entity, i.e. MP-India, does not amount to 'making available' the services so rendered, in terms of Article 12 of the Indo Singapore tax treaty, it cannot be taxed in India. The Assessing Officer was not impressed with this claim of the assessee, and the Assessing Officer required the assessee to show cause as to why this income not be taxed as fees for technical services under section 9(1) of the Income Tax Act, 1961, as also under Article 12 of the Indo Singapore tax treaty. Elaborate submissions were made by the assessee in support of the contention that as long as the provisions of the Indo Singapore tax treaty are more favourable to the assessee, the provisions of the Income Tax Act cannot be invoked at all, and that, in terms of the requirements of Article 12(4) of the Indo Singapore tax treaty, the fees for technical services can only be taxed in the source jurisdiction only when, inter alia, these services 'make available technical knowledge, experience, skill, know-how or process'. It was then submitted that the connotations of the expression 'make available' are well established in our jurisprudence, and unless the services enable the Indian entity, i.e. MP-India, to undertake these activities without recourse to the service provider, i.e. the assessee. The nature of services was explained in detail, and it was highlighted that there is no transfer of technology or skill, in the process of rendition of these services, which is a *sine qua non* for its taxability in India. References were also made to judicial precedents in this regard. None of these submissions, however, impressed the Assessing Officer. The Assessing Officer rejected these submissions on merits, and also noted that in the preceding assessment years, the assessee had offered the said income to tax and that there is no good reason to deviate from the stand so taken by the assessee in the immediately preceding assessment years. The Assessing Officer, inter alia, observed as follows:

2.6.3 So, there is element of "make available" in these services. The consultancy services being rendered by the assessee to the AEs, have been made available to them an enduring benefit and those consultancy/technical services could be used by them for the business purposes in succeeding years. It is clear that the assessee is providing all these service to the AEs which are

customized to the local needs on the basis of its expertise and global experience. Hence, on this count also the said services are rightly regarded as technical services and any sum received for it will be construed as 'Fees for Included Services".

2.6.4 It has also been pointed out above, that the assessee has itself offered the income for taxation, but later claimed it to be non taxable. It has also been checked from the records that the assessee has offered this income from FTS for taxation in the earlier assessment years 2015-16 and 2016-17 also. So, the sudden change in the stand of the assessee requires further explanation.

2.7 In view of the above discussion, the amount paid by MP India for the managerial/advisory/consultancy/technical support services provided by the assessee will be covered under "Fees for Included Services" as the 'make available' clause is fully satisfied. In the light of the above observations, the consideration of Rs. 3,06,12,626/- is held to be FTS income in hands of the assessee. It is therefore deemed to accrue or arise in India under Section 9(1)(i) of the Act. The amount charged is held to be FTS as per section 9(1) (vii)(c) r.w. Article 12 (4) of the India Singapore DTAA. Penalty proceedings u/s 270A of the I. T. Act, 1961 are initiated as I am satisfied that the assessee has under reported its income.

4. When the stand of the assessee, as noted above, was stated in the draft assessment order, the assessee raised grievances before the Dispute Resolution Panel, but without any success. The Dispute Resolution Panel confirmed the action of the Assessing Officer, and declined to interfere in the matter. Learned Dispute Resolution Panel, inter alia, observed as follows:

2.2.10 It has also been submitted by the assessee that payment of consideration would be regarded as FTS only if the twin tests of rendering services and making technical knowledge, etc. available are satisfied, where the recipient has all the rights to use technical knowledge, recipient of service could derive enduring benefit, etc. In the light of this, some of the services provided by the assessee are analysed below:

• Developing Local Business Strategies - This means the strategy is formulated by the assessee and passed on to its AE, viz. MPI, for execution.
• Future Outlook - This again is making a future which is passed on to MPI for execution.
• Preparing Budgets and Forecasts - The assessee is using its technical knowledge and experience to plan the budget and forecasts for the future.
• Assisting in publicity and marketing and designing local marketing strategies - This also shows that the assessee is formulating strategies for publicity and marketing.
• Implement Locally Group HR Policies relating to remuneration, benefits & promotion - The policies with regard to HR are made by the assessee and provided to MP for following.

All these services show that they are not day-to-day business support services, but are those which provide long-term enduring benefit to MPI. The assessee has described the services as assisting in strategic planning, budgeting and planning future outlook, developing local business strategies, building clientele, preparation of budgets and forecasting, preparing reports for management decisions. These assistances are of such nature that involve active consultations with concerned employees of the AE and the employees cannot be passive recipients of the services, given the nature and complexity of the tasks to be accomplished. These consultations are bound to enable and enrich the recipients in this regard and would be able to use this information independently and absorb, the technical knowledge, know-how, processes and skills and use them independently. The term used in the agreement is 'assistance', with respect to all the services, including marketing, HR, etc. The fruit of assistance would remain with the person utilizing these services and will definitely gain technical knowledge, expertise, experience and skill, which is but natural in the facts and circumstances of the instant case. Only because the agreement is recurring in nature does not automatically Imply that the recipients of the services

are not gaining the above technical knowledge, skills, experience and expertise. Clearly, the discussion between AE and assessee subsequently will be on better footing and more gainful. The assessee has not maintained proper documentation for proving its contentions that the 'make available' conditions are not satisfied in its case. It becomes much more relevant because in earlier years, when the provision still existed, the assessee offered this income to tax, which implies that the stipulated conditions are satisfied. The onus is squarely on the assessee now to prove otherwise with supporting and corroborative evidences, which has not been done by the assessee. The assessee was required to prove its claims with proper documentation and evidences, and the assessee has failed to substantiate its claims. It is, therefore, clear that the services rendered by the assessee fall under the purview of 'make available' clause as explained by the Hon'ble ITAT, Mumbai, in the case of Raymond Ltd. (supra.).

2.2.11 Noteworthy to mention, though no strictly relevant to the factual matrix of the year in question, is the fact that the assessee itself offered similar receipts to tax as FTS in earlier years. The assessee group or the assessee, along with its AEs, has been operating since 1998 and has the benefit of the advice of competent professionals and cannot be believed to be misguided. When the assessee itself considered these services as FTS, for obvious reasons, there is no plausible reason for it to change its stand in this year. The explanation of the assessee that it had offered this income on conservative basis, but subsequently reviewed its position, does not hold water.

2.2.12 In view of the facts discussed above, we are of the considered view that the services rendered by the assessee fulfil the 'make available' clause. Accordingly, we uphold the action of the TPO in treating the receipts of Rs. 3,06,12,630/- as FTS and bringing the same to tax in the hands of the assessee for the year under consideration.

5. The Assessing Officer thus proceeded to frame the impugned order, and bring to tax the receipts of Rs 3,06,12,630 as fees for technical services under article 12(4) of the Indo Singapore tax treaty. The assessee is aggrieved and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. While on this issue, it will be useful to refer to the following observations made by a coordinate bench, in the case of **Shell Global International Solutions BV Vs ITO [(2015) 64 taxmann.com 3 (Ahd)],** as follows:

17. As for the connotations of 'make available' clause in the treaty, this issue is no longer *res integra*. There are at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi High Court in the case of *DIT* v. *Guy Carpenter & Co Ltd.* [2012] 346 ITR 504 and Hon'ble Karnataka High Court in the case of *CIT* v. *De Beers India (P.) Ltd.* [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214 in favour of the assessee, and there is no contrary decision by Hon'ble jurisdictional High Court or by Hon'ble Supreme Court. In *De Beers India (P.) Ltd.* case (*supra*), their Lordships posed the question, as to "what is meaning of 'make available'", to themselves, and proceeded to deal with it as follows:

'.....The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill?, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services

> **offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. 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 that may require technical knowledge, skills, etc., does not mean that technology is 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. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.'**
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> **18. …….. In the case of *Boston Consulting Group* (*supra*), it was stated that "advising on "marketing strategies" is held to be outside the scope of technical services" and that as for the "business of rendering strategy consulting services, such as business strategy, marketing and sales strategy, portfolio strategy" carried on by the assessee "the nature of these services is materially similar". All these services were held to be outside the scope of fees for technical services taxable under the Indo-US tax treaty. In the case of *Bharat Petroleum Corpn. Ltd.* v. *Jt. DIT* [2007] 14 SOT 307 (Mum.), another coordinate bench of this Tribunal, *inter alia,* held that market study covering study of supply and demand analysis, domestic refining capacity, price forecast etc did not constitute fees for technical services as it did not transmit the technical knowledge. In the case of *Ernst & Young (P.) Ltd.* In re [2010] 189 Taxman 409/323 ITR 184 (AAR), the Authority for Advance Ruling, *inter alia,* observed that "some of the services enumerated have the flavor of managerial services" but "services of managerial nature are not included in Article 13 (of Indo-UK tax treaty, which is in *pari materia* with the treaty provision before us) unlike many other treaties". We are in considered agreement with the views so expressed by the Authority for Advance Ruling. On the same lines are various decisions of this Tribunal in the cases of *ICICI Bank Limited* v. *Dy. CIT* [2008] 20 SOT 453 (Mum.) and *McKinsey & Co. Inc* v. *Asstt. DIT* [2006] 99 ITD 549 (Mum.). What essentially follows, therefore, is that as long as the services rendered by the assessee are managerial or consultancy services in nature, which do not involve or transmit the technology, the same cannot be brought to tax as fees for technical services.**

8. Clearly, therefore, unless the recipient of the services, by virtue of rendition of services by the assessee, is enabled to provide the same services without recourse to the service provider, the services cannot be said to have made available the recipient of services. A mere incidental advantage to the recipient of service is not enough. The test is the transfer of technology, but then it is not even the case of the revenue that there is a transfer of technology, and what is highlighted is the incidental benefit to the assessee, which is treated as an enduring advantage. As observed in the binding judicial precedents referred to above, in order to invoke 'make available' clause, "**to fit into the terminology "making available", the technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end**" and "**the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider**". Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. In our considered view, that condition is not satisfied on the facts of the present case. We, therefore, hold that that 'make available' clause in the Indo-Singapore tax treaty cannot be invoked on the facts of the present case- as no case is even made out by the revenue that as a result of rendition of these services to the Indian entity, there is any transfer of skill or

technology. Once the taxability fails in terms of the treaty provisions, there is no occasion to refer to the provisions of the Income Tax Act, 1961, as in terms of Section 90(2), "where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee". The taxability of impugned receipts, under section 9, is thus wholly academic. We leave it at that.

9. As regards the question regarding a change in the stand of the assessee and the facts of the assessee's offering the same income to tax in the immediately preceding assessment years, nothing really turns on the stand of the assessee in the immediately preceding assessment years. There is no *res judicata* in the income tax proceedings and the mere fact of an assessee's offering an income to tax in an earlier year can be a reason enough to negate his otherwise lawful claim of non-taxability. The matter in required to be examined on merits, and once we find it to be an acceptable claim on merits, such taxability in the immediately preceding assessment years cannot come in the way of the assessee's lawful claim. This objection of the authorities below, therefore, does not deserve our approval either.

10. In view of the above discussions, as also bearing in mind entirety of the case, we uphold the plea of the assessee, and direct the Assessing Officer to exclude the sum of Rs 3,06,12,630 from his taxable income as fees for technical services. The assessee gets the relief accordingly. In the light of our this conclusion, other issues raised in the appeal are rendered academic and these do not call for any specific adjudication.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 04th day of July 2022.

Sd/-	Sd/-
Sandeep S Karhail	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 04th day of July, 2022

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai