IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
(DELHI BENCH 'D' : NEW DELHI)
BEFORE SH. G.S.PANNU, HON'BLE PRESIDENT
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 316/Del/2021
(Assessment Year: 2017-18)

M/s. Salesforce. Com Singapore Pte. Ltd. C/o MNK & Associates LLP, Company Secretaries, G-41, Ground Floor, West Patel Nagar, New Delhi PAN : AAOCS2588L	Vs.	Assistant Commissioner of Income Tax, Circle 3(1)(2), International Taxation, New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Ms. Sumisha Murgai, Adv.
Revenue by	Sh. Sanjay Kumar, Sr. DR

Date of hearing:	28.07.2022
Date of Pronouncement:	30th .08.2022

ORDER

PER ANUBHAV SHARMA, JM:

The assessee has come in appeal against order dated 13/11/2020 of Dispute Resolution Penal-2, New Delhi in regard to assessment year 2017-18 and the final assessment order dated 30.01.2021 passed by Circle Int. Tax, 3(1)(2), u/s 143(3) r.w.s. 144(c) (13) of the Income Tax Act, 1961.

2. The facts in brief are the assessee is a tax resident of Singapore and has claimed that assessee is providing a comprehensive array of on-demand CRM services, which enable customers and subscribers to systematically record, store and act upon business data and to help business manage customer accounts, track sales leads, evaluate marketing campaigns and provide better post-sales service. The services enable companies to generate reports and summaries of this data and share them with authorized individuals across functional areas. Saiesforce.com Singapore Pte Ltd (SFDC Singapore) delivers its enterprise business applications via the World Wide Web. SDFC Singapore has entered into Master Services Agreement with various customers in India for provision of CRM services. SDFC Singapore derives income in the nature of subscription fees for providing such CRM services. During the FY 2016-17 relevant to AY 2017-18, it is submitted by the assessee that it has received a sum of Rs. 224,21,58,428/- from various customers in India in the nature of subscription fees, on account of provision of CRM services. These receipts are received in Singapore and interest income of Rs. 3,09,88,428/- making a total of Rs. 227,31,46,856/-. However, as per AIR report as on 27.11.2019 total receipts are of Rs, 227,41,59,429/-.

2.1 In the original return filed on 30.11.2016, the assessee has shown its income chargeable to tax at special rates to the tune of Rs. 225,78,49,645/- which were appearing in Schedule SI of the return but for taxation has offered only Rs. 3,09,88,428/- @15% on account of interest income. Further, the credit of TDS of Rs. 22,40,46,740/- was also claimed as refund.

2.2 It is pertinent to mention here that in the previous years, i.e. AY 2013-14, AY 2014-15, AY 2015-16 & 2016-17 the AO has treated the entire receipts of the assessee as Royalty. The facts and circumstances of the year

under consideration are identical to that of last years. In view of above, vide notice dated 15.11.2019, the AR of the assessee company was show caused as to why assessment order for earlier assessment years should be followed in the year under consideration treating the entire amount of Rs. 224,31,71,001/- (227,41,59,429 - 3,09,88,428) reflecting in 26AS details as Royalty as per provisions of section 9(1)(vi)(b) of the Act, and Article 12(3)(b) of DTAA between India and Singapore.

3. The claims set up by the assessee on the basis of business model was not accepted and following previous years the ld. AO followed directions of DRP and recomputed the taxable income of the assessee while treating receipts of income as royalty to be taxed @ 10% and interest income to be taxed @ 15%.

4. The assessee is in appeal raising following grounds :-

1. "The order passed by the learned Assessing Officer ('learned AO') under section 143(3) of the Income-tax Act, 1961 ('the Act') and the directions passed by the Honorable Dispute Resolution Panel ('Hon'ble DRP') under section 144C(5) of the Act, to the extent prejudicial to the appellant are bad in law, contrary to facts and circumstances of the case.

2. That on facts and circumstances of the case, the learned AO in the final assessment order pursuant to the directions of the Hon'ble DRP erred in bringing to tax, subscription fees for provision of Customer Relationship Management ('CRM') services of INR 2,243,171,001 by treating the same as income chargeable to tax in India.

3. The learned AO / Hon'ble DRP erred In treating the impugned subscription fees as 'royalty'.

4. That the learned AO / Hon'ble DRP erred in holding that subscription fees for provision of CRM services, as consideration

for imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill and accordingly covered under sub clause (iv) and (vi) of Explanation 2 to section 9(l)(vi) of the Act, as well as Article 12(3) of the India-Singapore Double Taxation Avoidance Agreement ('DTAA').

5. That the learned AO / Hon'ble DRP has erred in disregarding the contentions of the Appellant that the use of software by the customers is in the course of availing the CRM services and not for the use of any copyright.

6. Notwithstanding and without prejudice to the above, the learned AO / Hon'ble DRP erred in not considering revised total subscription fee amounting to INR 2,242,158,428 as per the tax return filed under section 139(9) of the Act, as against INR 2,243,171,001 as per the AIR Report.

7. The learned AO erred in not granting full credit of TDS in the final assessment order. The learned AO has granted TDS of INR 215,064,023 as against the taxes claimed amounting to INR 230,273,323 in the return of income.

8. The learned AO erred in levying interest under section 234B of the Act without considering the fact that the Appellant had a refund as per the return of income.

9. The learned AO erred in not granting refund due as per the return of income filed by the appellant and consequential interest under section 244A of the Act.

10. The learned AO erred in initiating penalty proceedings under section 270A(8) of the Act.

The Appellant craves leave to add, alter, rescind and modify the grounds provided above or produce further documents, facts and evidence before or during the course of hearing of this appeal."

5. Heard and perused the record.

6. It was submitted on behalf of the assessee that in regard to assessee's own case for the assessment year 2010-11 to 2016-17, the issue relating to treatment of subscription fees received by the assessee has been settled in favour of the assessee vide ITA No. 4915 and Ors vide order dated 25.03.2022. This fact could not be disputed by the Ld. Sr. DR appearing for the revenue. Ld. Counsel representing the assessee submitted that the ground no. 6 and 7 may be allowed with directions to the AO for verification and ground no. 8 and 9 are consequential while ground no. 10 is not pressed being premature.

7. Giving thoughtful consideration to the matter on record it comes up that in assessee's own case for the assessment year 2010-11 to 2016-17 a co-ordinate Bench, on which one of us 'the Judicial Member', was in quorum had considered the issue giving rise to ground no. 1 to 5 and had observed in para 13 to 30 as under :

"13. We have given thoughtful consideration to the contentions of the ld. DR and have duly considered the written submissions. In our understanding of the facts, the assessee provides web-based online access to its customer's data hosted on servers located in data centers maintained by the assessee outside India. The assessee does not have any data centers in India and hence it cannot be considered to have a fixed place of business in India. The assessee neither has a place of management in India nor has any equipment or personnel in India. This fact has also been accepted by the ld. CIT(A) in his order. Therefore, in the absence of granting any control over the equipment belonging to the assessee to its customers, the allegation of the AO that the amount so received will constitute 'Royalty' is not acceptable.

14. Further, the assessee does not provide any information concerning industrial, commercial, scientific experience. The assessee only processes the proprietary data of the customers and provides the result in form of desired reports etc. On this count also, it cannot be said that consideration for CRM services are in the nature of royalty.

15. In our considered opinion, if the services have been rendered de hors imparting of knowledge or transfer of any knowledge, experience or skill, then such services will not fall within the ambit of Article 12 of the treaty.

16. Further, by granting access to the information forming part of the database, the assessee neither shares its own experience, technique or methodology employed in evolving databases with the users, nor imparts any information relating to them.

17. In our considered view, the income earned by the assessee from the Indian customers with respect to the subscription fees for CRM cannot be taxed as royalty as per section 9(1)(vi) of the Act as well as Article 12(3) of the treaty.

18. The lower authorities have also placed strong reliance on the AAR decision in the case of Thought Buzz (P) Ltd 346 ITR 345. We find that in that case, the assessee was in the business of gathering and collating of data which was obtained from various sources and shared via report with the users, whereas in the case in hand, the assessee is using the data provided to it by the customers and then generates desired reports.

19. The co-ordinate bench in the case of American Chemical Society vs. DCIT [2019] 106 taxmann.com 253 (Mumbai – Trib) had the occasion to consider similar grievance. The relevant findings of the co-ordinate bench read as under:

> *"8. As discussed earlier, in the instant case, the assessee merely identifies, aggregates, and organizes publicly disclosed chemistry related scientific information or publishes research work submitted by scientists worldwide. Thus, this information is clearly not undivulged; rather, it is an information which is available in public domain, as is also evident from the factual position noted by the Assessing Officer himself in the assessment order. Further, chemistry and related scientific information accumulated by the assessee in the form of a database is the experience of various scientists, researchers and various other persons and not that of the assessee. Thus, what the assessee collates is experience of others and provides access thereto. The database does not provide any information arising from assessee's own previous experience or knowledge of the subject.*

The assessee's experience lies in the creation and maintaining the database, which cannot be labelled as industrial or commercial or scientific in any way in the context of the receipts in question. In fact, it is nobody's plea that such experience is shared by the assessee with the Indian customers. The Indian customers do not make payments for availing the knowledge of assessee's experience of creating/maintaining database; what they pay for is access to information that such database encompasses. By granting access to the information forming part of the database, the assessee neither shares its own experience, technique or methodology employed in evolving databases with the users, nor imparts any information relating to them.

9. In this context, the learned Counsel pointed out that similar situation has been considered by the AAR ruling in the case of Dun & Bradstreet Espana S.A. (supra), which has been upheld by the Hon'ble Bombay High Court in the case of Dun & Bradstreet Information Services India (P.) Ltd. (supra). In this case, the applicant, a non-resident company of Spain was engaged in the business of compilation and selling Business Information Reports ('BIR') in their local markets and to other associate companies worldwide. On the issue of whether the payment made for the purchase of BIRs would be in the nature of Royalty, the AAR opined that the applicant has rightly equated the transaction of sale of Business Information Reports in electronic form to a sale of book, which does not involve any transfer of intellectual property and held that the payment to non-resident company for downloading BIRs is not in the nature of Royalty or fee for technical services. The AAR held that the purchase of standardized reports publicly available on the internet upon payment of subscription charges is akin to payment for a copyrighted article and accordingly does not constitute Royalty. Relevant extract of the AAR ruling is as follows:

"1. This application ……DB US is the leading seller of BIRs enabling business-to-business commerce for about 160 years. The operating subsidiaries and associates of D&B US in each country are engaged in compilation and selling BIRs in their local markets and to other associate companies worldwide as their core business. Each associate company of D&B compiles

the information in respect of companies functioning in its country in the standardized D&B format which is electronically uploaded on the server of the associates companies and is copied (mirrored) on the Central data base server situated in US. DBIS is also engaged in a similar business of compilation and selling BIRs in respect of business entities, either they are incorporated in their respective countries or doing business in their country. The US server farm is owned and operated by D&B US and it contains mirror servers of all the D&B associate companies. The modus operandi of the business of DBIS is that whenever an Indian customer places an order for a BIR in respect of a company situated in Spain, DBIS would access the master server of D&B US. Thereupon, the master server would identify DBIS and would allow access to connect to the mirror server of the applicant which is situated in US server farm. It was then DBIS would request the applicant for a BIR of the company for which the Indian customer has placed an order. On locating the required BIR, DBIS would download, print and deliver a copy thereof to the customer. DBIS is under an obligation not to take additional copies or reproduce the BIR in any manner or sell it to any customer other than Indian customer on whose requisition the BIR is ordered because the BIR is copyright protected with the copy right vested in the applicant who prepares the BIR. There is further obligation on the Indian customer to use the BIR for its own purpose, the copyright in the BIR would neither be licensed nor assigned to either the DBIS or the Indian customer ……

7. It will be ……..

The instant case it is not a case of paying consideration for the use of or right to use any copyright of literary, artistic or scientific work or any patent trade mark or for information of commercial experience. The Commissioner sought to bring the payments under royalty/fees for technical service for the reason that the BIRs are copyright protected and end-users are required to use for their own purpose and the analysis of raw data provided in the BIRs would be similar to that of providing a technical or consultancy services. We have already mentioned above that a BIR is a standardized product of D&B, it provides

factual information on the existence, operation, financial condition, management and experience line of business, facility and location of a company; it also provides special events like any suit, lien, judgment or previous or pending bankruptcy. Further, banking relationship and accountants, information like whether it is a pa tent company or authority concerned, has any branches etc. It also gives a rating of the company. The informations that are provided in a BIR are said to be publicly available; they are collected and complied by D&B associates. A BIR is accessible by any subscriber on payment of requisite price with regular internet access for which no particular software or hardware is required. The applicant states that access to data base of the applicant is available to public at large at a price as in case of buying a book and it is not a pre-requisite, that BIR must be downloaded by DBIS only and in fact some clients, such as Expert credit guarantee corporation, in fact, access the server themselves to download BIR. The applicant does not have any server in India for the use of DBIS. Indeed the applicant has specifically averred that the copyright in the BIR would neither be licensed nor assigned to either the DBIS or the Indian customer. From these aspects it is clear that the aforementioned ruling of the Authority is distinguishable on facts. If a group of companies collects information about the historical places and places of interest for tourists in each country and all information are maintained on a central computer which is accessible to each constituent of the Group in each country, can a supply of such information electronically on payment of price be treated as royalty or fee for technical services ? We think not."

20. In another case, the co-ordinate bench in the case of GECF Asia Ltd ITA NO. 8922 /(MUM.)/2010 48 Taxmann.com 148 has held as under:

"10. From the above, it can be gathered that the royalty payment received as consideration for information concerning industrial, commercial, scientific experience alludes to the concept of knowhow. There is an element of imparting of knowhow to the other, so that the other person can use or has right to use such knowhow. In case of industrial, commercial and scientific experience, if services are being rendered simply as an advisory

or consultancy, then it cannot be termed as "royalty", because the advisor or consultant is not imparting his skill or experience to other, but rendering his services from his own knowhow and experience. All that he imparts is a conclusion or solution that draws from his own experience. The eminent author Klaus Vogel in his book "Klaus Vogel On Double Tax Convention" has reiterated this view on difference between royalty and rendering of services in the following manner:-

'Imparting of experience: Whenever the term "royalties" relates to payments in respect of experience (knowhow) the condition for applying art. 12 is that the remuneration is being paid for "imparting" such knowhow…. In contrast, the criterion used to distinguish the provisions of know-how from rendering advisory services is the concept of imparting. An advisor or consultant, rather than imparting this experience, uses it himself (BFH BStBI.II 235 (1971); Minister des Relations exterieures, Reponses a M. Bockel, 36 Dr. Fisc. Commn. 1956 (1984). All that he imparts is a conclusion that he draws interalia from his own experience. His obligation to observe secrets, or even his own interest in retaining his "means of production' will already prevent a consultant from imparting his experience. In contrast to a person using his own know-how in providing advisory services, a grantor of know-how has nothing to do with the use, the recipient makes of it.'

11. The thin line distinction which is to be taken into consideration while rendering the services on account of information concerning industrial, commercial and scientific experience is, whether there is any imparting of knowhow or not. If there is no "alienation" or the "use of" or the "right to use of" any knowhow i.e., there is no imparting or transfer of any knowledge, experience or skill or knowhow, then it cannot be termed as "royalty". The services may have been rendered by a person from own knowledge and experience but such a knowledge and experience has not been imparted to the other person as the person retains the experience and knowledge or knowhow with himself, which are required to perform the services to its clients. Hence, in such a case, it cannot be held that such services are in nature of "royalty". Thus, in principle

we hold that if the services have been rendered de– hors the imparting of knowhow or transfer of any knowledge, experience or skill, then such services will not fall within the ambit of Article– 12. Since neither the Assessing Officer nor the DRP has examined the nature of service rendered by the assessee from this angle therefore, we are of the opinion that the matter should be restored back to the file of the Assessing Officer to examine the nature of services in line of the principles discussed above. If such services do not involve imparting of knowhow or transfer of any knowledge, experience or skill, then it cannot be held to be taxable as royalty. Since the issue of FTS is not the subject matter of dispute after the direction of the DRP, hence, we are not expressing any opinion on FTS. Thus, ground no.1 and 2, are treated as partly allowed for statistical purposes."

21. In yet another case Kotak Mahendra Primus Ltd ITA No. 2714 & 2001/2011 SOT 578, the co-ordinate bench held as under:

"16. We now come to the provisions of article 12(3)(c) of the India Australia tax treaty. It provides that where the payment is for "the supply of scientific, technical, industrial or commercial knowledge or information", the same shall be considered as 'royalty' for the purposes of article 12 of the treaty. By no stretch of logic, it could be said that the payment is made to the Australian company for the supply of any knowledge or information or any nature whatsoever. Learned Departmental Representative could not point out any legally sustainable reasons on the basis of which the payment can be said to be covered by article 12(3)(c). We have also carefully considered factual matrix of the case and are of the considered view that the payment in question cannot be said to be for the supply or any knowledge or information. The information is in fact furnished by the Indian company, the same is processed in Australia and transmitted back to the Indian company. This activity only involves processing, and not supply of information. Accordingly, the provisions of article 12(3)(c) will also not have any application in the matter.

17. It is not also the case of the revenue that remaining parts of article 12(3), i.e., article 12(3)(d) to article 12(3)(l), will have any application in the matter. No specific arguments are

advanced in this regard in any event, we have also carefully considered these provisions as also the facts of the case before us, and we are of the considered view that these provisions also have no application in the present situation. The impugned payment cannot be said to be for consultancy services, in terms of the provisions of article 12(3)(d). This payment cannot also be said to be for making available any technical knowledge, experience, skill, know-how or processes etc. in the sense that recipient of services, i.e., Indian company, is not enabled to make use of technical knowledge on its own, without recourse to the provider of service, which is sine qua non for making available' technical knowledge, experience, skill, know-how etc. in terms of provisions of article 12(3)(g). It is also not covered by any other clause of the article 12 either. As regards learned Departmental Representative's reliance on the ruling given, by the Hon'ble Authority for Advance Ruling in the case of ABC (supra), in the light of the detailed reasons set out above, we see no need to deal with the same separately. The Assessing Officer had adopted the reasoning approved by the Hon'ble Authority for Advance Ruling and we have dealt with the same in the course of our consideration to the matter. The prescription of section 245S is unambiguous. Section 245S of the Act provides that the Advance Ruling pronounced by the Authority under section 245R will be binding only on the applicant who had sought it, in respect to the transaction in relation to which the ruling had been sought, on the Commissioner, and the income-tax authorities subordinate to him, in respect to the applicant and the said transaction. It is, therefore, obvious that, apart from whatever its persuasive value, it would be of no help to us. We are not inclined to disturb our conclusions merely because the conclusions arrived at above, and in the light of detailed reasons set out earlier in the order, are at variance with the conclusions arrived at in the said ruling. We have carefully perused the esteemed views of the Hon'ble Authority for Advance Ruling, and, with respect but without hesitation, we are not persuaded.

18. In view of the above discussions, in our considered view, the impugned payment cannot be held to be covered by the scope of expression 'royalty' under article 12(3) of the India Australia Double Taxation Avoidance Agreement. Since the Australian

company admittedly does not have any permanent establishment (PE) in India, this payment cannot also be taxed as a business profit of the Australian company in India. It is so in view of the fact that article 7(1) of the applicable tax treaty specifically provides that, "The profits of the enterprises of one of the Contracting States shall only be taxable in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein". This leads us to the conclusion that the right of Indian tax jurisdiction does not extend to taxing the impugned payment of A$ 3,25,000 to the Australian company, i.e., FCAL, for specialized data processing of information furnished by the Indian company."

22. In light of the aforesaid discussion, we will now revert to the master subscription agreement wherein "Customer Data" has been defined as:

> *"all electronic data or information submitted by the customer to the service"*

23. Users Means:

> *"individuals who are authorized by Customer to use the Service, for whom subscriptions to the Service have been purchased, and who have been supplied user identifications and passwords by Customer (or by SFDC at Customer's request). Users may include but are not limited to employees, consultants, contractors and agents of Customer or its Affiliates."*

24. Proprietary Rights means:

> *"Reservation of Rights - Subject to the limited rights expressly granted hereunder, SFDC reserves all rights, title and interest in and to the Service, including all related intellectual property rights. No rights are granted to Customer hereunder other than as expressly set forth herein."*

25. Save to the extent expressly permitted by this Agreement and applicable law, notwithstanding this limitation, customer shall not :

(i) modify, copy or create derivative works based on the Service;

(ii) frame or mirror any content forming part of the Service, other than on Customer's own intranets or otherwise for its own internal business purposes;

(iii) reverse engineer the Service; or

(iv) access the Service in order to

(A) build a competitive product or service, or

(B) copy any, features, functions or graphics of the service common.

26. Customer Data means:

"As between SFDC and Customer, Customer exclusively owns all rights, title and interest in and to all Customer Data. Customer Data is deemed Confidential Information under this Agreement. SFDC shall not access Customer's User accounts, including Customer Data, except to respond to service or technical problems or at Customer's request."

27. Return of customer data means:

"Upon request by Customer made within 30 days after the effective date of termination, SFDC will make available to Customer for download a file of Customer Data in comma separated value (.csv) format along with attachments in their native format. After such 30-day period, SFDC shall have no obligation to maintain or provide any Customer Data and shall thereafter, unless legally prohibited, delete all Customer Data in its systems or otherwise in its possession or under its control."

28. Considering the facts of the case in totality, in light of the Master Subscription Agreement, we are of the considered view that the customers do not have any access to the process of the service provider i.e. the assessee, and the assessee does not have any access

except otherwise provided in the master subscription agreement to the data of the subscriber.

29. In our considered opinion, all the equipments and machines relating to the service provided by the assessee are under its control and are outside India and the subscribers do not have any physical access to the equipment providing system service which means that the subscribers are only using the services provided by the assessee.

30. In light of the above discussion, we have no hesitation to hold that the subscriber fees received by the assessee do not fall within the ambit of royalty u/s 9(1)(vi) of the Act nor under Article 12 of the India – Singapore DTAA. The Assessing Officer is accordingly directed to delete the impugned additions."

8. The bench can also place reliance on the order dated of a co-ordinate Bench, in ITA **no 1553/Del/2016; Microsoft Regional Sales Pte. Ltd. V. Assistant Commissioner of Income-tax, Circle-2(2)(1), Intl. Taxation, Delhi,** in which also one of us 'the Judicial Member', was in quorum had considered the issue of payments made to cloud services as subscription and held ;

"*7.1 Giving thoughtful consideration to the matter on record, the bench is of considered view that the cloud base services do not involve any transfer of rights to the customers in any process. The grant of right to install and use the software included with the subscription does not include providing any copy of the said software to the customer. The assessee's cloud base services are though based on patents / copyright but the subscriber does not get any right of reproduction. The services are provided online via data centre located outside India. The Cloud services merely facilitate the flow of user data from the front end users through internet to the provider's system and back. The ld. AO has fallen in error in interpreting it as licensing of the right to use the above Cloud Computing Infrastructure and Software (para 10.5 of the Ld. AO order). Thus the subscription fee is not royalty but merely a consideration for online access of the cloud computing services for process and storage of data or run the applications."*

8. Accordingly the substantive ground no. 1 to 5 stand decided in favour of the assessee. Further ground no. 6 and 7 are also allowed with a direction for the verification and to be allowed by the Ld. AO in accordance with law and ground no. 8 to 10 are dismissed as not pressed.

Order pronounced in the open court on 30th August, 2022.

Sd/-	**Sd/-**
(G.S.PANNU)	**(ANUBHAV SHARMA)**
PRESIDENT	**JUDICIAL MEMBER**

Date:- 30th .08.2022

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI