

आयकर अपीलिय अधिकरण
मुंबई पीठ " आई "
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री गगन गोयल, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
आअसं.1781/मुं/2022 (नि.व. 2019-20)
ITA NO.1781/MUM/2022(A.Y.2019-20)

NTT Asia Pacific Holdings Pte Ltd.
(Formerly known as Dimension Data Asia
Pacific Pte. Ltd.)

C/o. Dhruva Advisors LLP
1101 and 1102, 11th Floor, One World Centre,
Tower 2B, 841 Senapati Bapat Marg,
Elphinstone Road, Mumbai 400 013.

PAN: AADCD – 4348-L

..... अपीलार्थी /Appellant

बनाम Vs.

The Asstt. Commissioner of Income Tax
(International Taxation) 2(1)(2),
Room No.1612, 16th Floor, Air India Building,
Nariman Point, Mumbai 400 021.

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Sunil Moti Lala

प्रतिवादी द्वारा/Respondent by : Shri Soumendu Kumar Dash

सुनवाई की तिथि/ Date of hearing : 08/09/2022

घोषणा की तिथि/ Date of pronouncement : 21/09/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 26/05/2022 passed u/s. 143(3) r.w.s. 144C (13) of the Income Tax Act, 1961 (in short ' the Act'), for the Assessment Year 2019-20.

2. Shri Sunil Moti Lala appearing on behalf of the assessee submitted at the outset that the primary issue raised in this appeal in ground No.1 is, that the income earned by the assessee by way of management fee has been wrongly assessed to tax as Fees for Technical Services (FTS). The Id.Counsel for the assessee submitted that the assessee is a company based in Singapore. The assessee is providing business support services to its Indian subsidiary in accordance with Business Support Agreement dated 1st April,2014 (Page 11 to 22 of paper book). The Assessing Officer and the Dispute Resolution Panel (DRP) held that the amount charged by the assessee for providing such services fall within the meaning of FTS, and the conditions necessary to activate “make available clause” are also satisfied. Hence, the amount is taxable under the provisions of the Act. The Id.Counsel for the assessee pointed that for similar reasons the addition was made in Assessment Year 2017-18. The assessee carried the issue in appeal before the Tribunal in ITA No.1212/Mum/2021. The Tribunal vide order dated 04/07/2022 held that the amount received by the assessee from its Indian subsidiary does not fall within the meaning of FTS and hence, directed the Assessing Officer to delete the addition. The Id. Authorized Representative for the assessee pointed that in the preceding Assessment Year, the assessee was providing management services to the Indian entity in accordance with same Business Support Agreement, hence, the facts are identical. The Id.Counsel for the assessee further referred to the directions of the DRP in impugned assessment year para 4.3 to show that the DRP has followed the directions of DRP in Assessment Year 2017-18.

3. Per contra, Shri Soumendu Kumar Dash representing the Department vehemently supported the Assessing Officer and directions of the DRP. The

Id. Departmental Representative pointed that there are changes in the agreement, the Tribunal has not considered the changes in agreement while passing the order in assessment year 2017-18. The Id. Departmental Representative submitted that the matter can be restored to Assessing Officer for fresh examination.

4. Both sides heard, orders of authorities below examined. The assessee is providing management support services to the Indian entity by virtue of agreement dated 01/04/2014 (supra). The contention of the assessee is that the facts in the impugned assessment year are identical to the facts in Assessment Year 2017-18. In support of the submissions, the assessee has referred to findings of the DRP. We find that in para 4.3.1 of DRP directions, the DRP has observed that the issue of payment of management fee taxable as FTS was considered by the DRP in Assessment Year 2017-18. The DRP in the impugned assessment year has thereafter quoted the entire findings of the DRP for Assessment Year 2017-18 and finally concluded that material facts are same during the year under reference. The assessee, aggrieved by the assessment order for Assessment Year 2017-18 carried the issue in appeal before the Tribunal. The Co-ordinate Bench in ITA No.1212/Mum/2021 (supra) has discussed the issue threadbare and held as under:

“ 7. 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.

8. 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.'

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.

9. *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. It is not a question of, as the learned DRP put it, enriching “the service recipient, making him wiser to face similar challenges in future on his own and acquiring the skills to deal with these issues”, but the test is whether the rendition of these services per se enables the recipient to provide the similar services, without recourse to the service provider, in future. An incidental benefit or enrichment which may add to the capabilities is not sufficient; the critical factor triggering the taxability in the source jurisdiction is the transfer of skills. That is what the Hon'ble'ble Karnataka High Court has held in the case of De Beers (supra), and this judicial precedent, in the absence of anything to the contrary having been held by Hon'ble'ble jurisdictional High Court, is binding on this forum. That condition about the transfer of skills and absorption of skill by the recipient of service, in our humble understanding, is not satisfied. 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.

10. In view of the above discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee, and direct the Assessing Officer to exclude the sum of Rs 121,14,85,623 from his taxable income as fees for technical services. The assessee thus gets the relief accordingly."

5. The Revenue has failed to show any distinguishing fact in the impugned assessment year. Respectfully following the decision of Co-ordinate Bench, ground No.1 of the appeal is allowed for parity of reasons.

6. In ground No.2 of appeal the assessee has assailed short grant of TDS against demand raised for assessment year 2019-20. This issue is restored to Assessing Officer with a direction to re-examine and allow TDS credit after reconciliation in accordance with law. Hence, ground No.2 of the appeal is allowed for statistical purpose.

7. In ground No.3 of appeal, the assessee has assailed charging of interest u/s 234B of the Act. Interest u/s. 234B of the Act is mandatory and consequential hence, ground No.3 of the appeal is dismissed.

8. In ground No.4 of appeal, the assessee has assailed levy of surcharge and education cess. The Id.Counsel for the assessee has not pressed this ground. Consequently, ground No.4 of the appeal is dismissed as such.

9. In ground of appeal No.5, the assessee has assailed inadequate opportunity granted by the DRP/Assessing Officer while passing the directions/

assessment order. No submissions were made by the Id. Counsel for the assessee on this ground, hence, the same is dismissed.

10. In ground No.6 of appeal, the assessee has assailed initiation of penalty proceedings u/s.274 r.w.s. 270A of the Act. The challenge to penalty proceedings is premature at this stage, hence, ground No.6 of the appeal is dismissed.

11. In the result, appeal by assessee is partly allowed.

Order pronounced in the open court on Wednesday the 21st day of September, 2022.

Sd/-

(GAGAN GOYAL)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 21 /09/2022

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)/ Sr. Private Secretary
ITAT, Mumbai