

**THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI**

**SHRI BASKARAN BR, ACCOUNTANT MEMBER
&
MS KAVITHA RAJAGOAPAL, JUDICIAL MEMBER**

I.T.A. No.552, 553/Mum/2017

(A.Y. 2016-17)

BASF INDIA Ltd. Plot No.37, Chandivali farm Rd. Chandivali, Andheri (E) Mumbai- 400072 PAN AAACB4599E	Vs.	DDIT (IT) 1(2)(1) Scindia House, Ballard Estate, Fort, Mumbai-400010
(Appellant)		(Respondent)

I.T.A. No. 2070/Mum/2017

(A.Y. 2012-13)

BASF SE 14 th Floor, The Ruby, Senapati Bapat Marg, Dadar(West) Mumbai-400028 PAN AAFCB1511R	Vs.	DCIT (IT) 1(2)(1) 1 st Floor, Room No. 106, Scindia house, N.M. Marg, Ballard Peir, Mumbai-400038
(Appellant)		(Respondent)

Assessee by	Shri P.J. Pardiwala/ Heena Dohi
Department by	Shri Soumendu Kumar
Date of Hearing	17.10.2022
Date of Pronouncement	28.10.2022

ORDER**PER KAVITHA RAJAGOPAL :-**

The appeal in ITA No. 552 and 553 of 2017 have been filed by the assessee as against Ld. CIT(A) u/s 250 of the IT Act pertaining to the assessment year 2016-17. The assessee company has challenged the order of Ld. CIT(A) on the following grounds (ITA No. 552 of 2017 taken as the lead case)

General

1. *erred in assessing the total income of the Appellant at Rs 59,12,32,127/- as against the returned income of Rs 32,87,49,868/- and therefore, to the extent of addition made by the learned AO, the aforesaid assessment order is bad in law and ought to be quashed.*

Receipt from Cost Sharing Agreement

2. *erred in holding that services rendered by BASF to its Indian affiliates are technical services which fall within the ambit of the term "fees for technical services" under section 9(1)(vii) of the Act and Article 12(4) of the India-Germany Double Taxation Avoidance Agreement (DTAA).*

3. *erred in not appreciating that the consideration received from the Indian affiliates as per the cost sharing agreement are in nature of pure reimbursement of expenses from affiliate entities on cost to cost basis and hence the same is not the income of the Appellant company liable to tax in India.*

Levy of surcharge and cases on the rates prescribed under Double Taxation Avoidance Agreement ('DTAA')

4. erred in levying surcharge and education cases while computing the total tax payable on the assessed income of the Appellant chargeable to tax without appreciating the fact that the rates prescribed under Article 12 of the India-Germany DTAA are inclusive of surcharge and education cases.

Levy of interest under section 234B of the Act

5. Erred in levying interest under section 234B of the Act, without considering the fact that the Appellant is non-resident.

Initiation of penalty proceedings under section 271(1)(c) of the Act

6. Erred in initiating penalty proceedings under Section 271(1)(c) of the Act.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of the appeal hearing.

2. The brief facts are that the BASF group companies performed various activities for global or regional benefit along with various other group companies. For this purpose these group companies entered into a Cost Sharing Agreement (CSA) during FY 2000-01 and were further replaced in FY 2007-08. Several group companies joined a pool for the purpose of Sharing Cost for those activities, which are of common interest and for the benefit of all the members. The shared activities are provided by one or more pool members depending on type of service and the assignment of functions as per CSA. The activity performing units are

reimbursed for the cost occurring in connection with provision of the shared activities under the CSA by the benefiting pool members. The assessee company joined the said cost sharing activities effective from 01-01-2010 as per the Cost Sharing Agreement. The assessee was expected to share for each calendar year the cost allocated to it as invoice by BASF SE. The assessee company was required to remit USD 35,51,860/- to BASF SE, Germany. As per the Cost Sharing Agreement the assessee had made an application for non deduction of tax u/s 195(2) of the Act amounting to Rs. 2,22,34,485/- plus interest of Rs. 31,12,828/- while making payment to BASF SE, Germany. It is pertinent to point out that the assessee submitted that the said remittance was not in nature of reimbursement towards BASF share in the common cost under the CCS entered into with BASF SE, Germany. The assessee further stated that the remittance was in the nature of reimbursement of cost and that the said amount is not income chargeable to tax in India in the hands of recipient non-resident company that is BASF SE, Germany and assessee claimed NIL deduction of tax as per section 195(2) of the Act. The AO rejected the assessee's claim and directed the assessee to deduct tax @10% on such payments to be made to BASF SE, Germany on gross basis.

3. Aggrieved by this the assessee was in appeal before the Ld. CIT(A) who dismissed the appeal of the assessee on the ground that the payments made by the assessee for remittances are in the nature of fee for technical services and are liable for deduction of tax @10% as confirmed by the AO in order passed u/s 195(2) of the Act. Further to this Ld. CIT(A) relied on the decision of the Ld.

CIT(A) vide order dated 24-03-2015 in assessee's case for AY 2015-16 which was decided against the assessee on similar issue.

4. The assessee is in appeal before us as against the order of the Ld. CIT(A) in rejecting the claim of the assessee. During the appellate proceeding the Ld. AR for the assessee contended that the assessee may be given one more opportunity to be heard before the AO for filing additional evidences which were not filed before the lower authorities. The Ld. AR further stated that the assessee has got substantial evidences as additional evidences to support the claim of the assessee. The Ld. DR on the other hand relied on the decision of lower authorities and contended that the assessee was given sufficient opportunity before the lower authorities.

5. Having heard both the rival submissions and perused the materials on record we are of the considered opinion that the assessee may be given one more opportunity to furnish additional evidences before the AO in the interest of justice. We hereby remand this to the file of the AO for considering the additional evidence proposed to be filed by the assessee and to decide the issue on merits. Both these appeals are remanded back to the AO.

6. In the result, these appeals allowed for statistical purpose.

ITA No. 2070/Mum/2017

The assessee in this appeal is a foreign company incorporated in, and a tax resident of Germany. As the facts of the above appeal in ITA 552,553/Mum/2017 are the same and the assessee in ITA 552, 553/Mum/2017 are Associated Enterprise

(AE) of this assessee, we remand this appeal also along with the above mentioned appeals to the AO for adjudication on basis of the additional evidences proposed to be filed by the assessee and to decide the issue on merits.

In the result, this appeal is allowed for statistical purpose.

Order pronounced in the open court on 28.10.2022.

Sd/-

(BASKARAN BR)

ACCOUNTANT MEMBER

Sd/-

(KAVITHA RAJAGOPAL)

JUDICIAL MEMBER

Mumbai;

Dated : 28/10/2022

ANIKET RAJPUT (STENOGRAPHER)

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai