IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH, PUNE

SHRI R.S. SYAL, VICE PRESIDENT
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No. 488PUN/2022 : A.Y. 2019-20

Faurecia Automotive Holdings
Plot No. T-187 Pimpri Industrial Area
(B.G. Block)
Behind Bhosari Police Station,
Bhosari, Pune-411 026
PAN: AABCF 6351 K — Appellant

Vs.

The Asstt. C.I.T. (International Taxation)
Circle 1, Pune. — Respondent

Appellant by : Shri Siddesh Chaugule, CA
Respondent by : Shri Keyur Patel – CIT DR

Date of Hearing : 27-10-2022
Date of Pronouncement : 01-11-2022

ORDER

PER PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

This appeal preferred by the assessee emanates from findings of the Ld. Disputes Resolution Panel-3, Mumbai-2, dated 25-04-2022 for A.Y. 2019-20, u/s 144C(5) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") as per the following grounds of appeal.

"Based on the facts and circumstances of the case, the Appellant respectfully craves leave to prefer an appeal under Section 253 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'), against the order dated 09 May 2022 (serviced on 09 May 2022) issued by the Learned Assistant Commissioner of Income Tax (IT) Circle 1, Pune (hereinafter referred to as 'Ld. AO'), under Section 143(3) read with Section 144C(13) of the Act, pursuant to directions issued by the Hon'ble Dispute Resolution Panel-3, Mumbai (hereinafter referred to as 'Hon'ble DRP'), dated 25 April 2022.

The following grounds of appeal are independent of and without prejudice to one another.

1. Income from providing Information Technology (IT") Support Services and Management Services considered taxable as Fees from Technical Services ('FTS')

1.1 The Hon'ble DRP I Ld. AO has erred on facts & in law in treating the receipts from IT Support services and Management Services taxable as FTS" as per the provisions of Section 9(1)(vii) of the Act and as well as Double Taxation Avoidance Agreement ('DTAA') between India and France especially not considering the 'make available' clause in light of beneficial provisions of India-France tax DT AA read with India- UK DTAA.

2. Income from providing IT Support Services and Management Services considered taxable as Royalty

2.1 The Hon'ble DRP / Ld. AO has erred on facts and in law in treating the receipts from IT Support services and Management Services taxable as 'Royalty' as per the provisions of Section 9(1)(vi) of the Act and the provisions of DTAA between India and France.

3. Penalty proceedings are bad in law.

3.1 On the facts and in the circumstances of the case, the Ld. AO has erred on facts & law in initiating penalty proceedings under section 270A of the Act on the premise that there is under-reporting of income by the Appellant, without appreciating the fact that the additions made by the Ld. AO is not in accordance with the law.

3.2 The Ld. AO has erred on facts & law in initiation of penalty proceedings without taking into consideration that the provisions of section 270A of the Act cannot be invoked when there is a mere difference of opinion regarding taxability of income I non-acceptance of legal claim.

The appellant craves leave to add, alter, vary, omit substitute or amend the above grounds of appeal at any time before or at, the time of hearing of the appeal, so as to enable the Hon'ble ITAT to decide this appeal according to law."

2. That, the issue for adjudication is whether the receipts on account of I.T. support services and management services are taxable as royalty. It has been contended by the assessee that the I.T. support services and management services is not taxable under royalty. The ld. A.O in the draft assessment order observed in the following paragraphs which are extracted as follows, that the receipts of I.T. support services and management services were taxable as royalty.

"4.1.4 From the above discussion, it can be seen that the assessee itself is not performing the functions/services related to General Management, Communication, Sales and Marketing, Program Management, Information System, Human Resources, Production Purchasing, Manufacturing, Quality, etc., and it is only providing assistance, by way of consultancy services, to the AE for performing· the various actual functions mentioned above. In other words, it is the personnel of the AE who have actually performed the functions with the assistance provided by the assessee company. As stated above, in the preamble to the Services Agreement, it has been stated that assessee has assembled ***a good knowledge and a great experience in the provision of services*** *in the above areas. From the discussion in the preceding paragraph,* ***it would be seen that the assessee company had, as per the Services Agreement, shared the information concerning commercial/industrial experience which it had 'assembled' and using such information, the personnel of the AE had actually performed these functions. Accordingly, it is inferred that that the payments received by the assessee from its AE in terms of the Services Agreement are covered by the definition of "Royalty"*** *under Article 13(3) of the India-France DT AA.*

4.1.5 *The Global Information Support Services provided by the assessee to its AE in India include IT Support services, the description of which has been given in paragraphs 1.8 and 1.9 of the Services Agreement, which have been reproduced hereinabove. In para 1.8, it has been stated that the service provider (the assessee) coordinates the Information System actions and/or the execution of specific projects which are borne at a central level. In para 1.9, it has been stated that the service provided assists the company (the AE) in the computerisation of systems office*

automation and utilisation of personal computers adapted to the company and the Faurecia Automotive Holding. It helps the company to choose the equipment (software, hardware, networks). It also ***assists the company in the implementation of systems.*** *The company might request help from the service.*

X x x x x

4.2.1 Without prejudice to the above that the nature of receipts of the assessee falls within the ambit of "Royalty" its taxability under the 'FTS' is being discussed as under:

Assessee's submission have been gone through; however, the same is not acceptable. Assessee in its submission has argued that the service are not in nature of "Fees for Technical Services"(FTS) relying upon protocol of India-France DTAA and sought to import beneficial provisions of definition of Royalty & Fees for Technical Services as per India-UK DTAA. Assessee contended that since services rendered to the Indian AE does not make available to the Indian Entity, therefore, it does not fall under the purview of the FTS as per India-UK DTAA.

4.2.2 ***4.22*** *The definition of 'Fees for Technical Services', as per Article 13(4) of the IndiaFrance DTAA, is as under:*

> ***"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, in consideration for services of a managerial, technical or consultancy nature."***

4.2.3 ***4.2.3*** *From the above, it is clear that the consideration received on ale of* ***'managerial'*** *services would also covered by the definition of 'Fees for Technical Services' under Article 13(4) of the India-France DTAA, as the definition includes the term "managerial". From the description of services as given in the Services Agreement between the assessee and its AE (Exhibit I) and, the extracts of the same reproduced in the later part of this assessment order, it is crystal clear that the services provided by the assessee are* ***managerial, technical and consultancy,*** *in nature.*

X x x x x x

4.2.5 4.2.5 In view of the above, the consideration received by the assessee from its AE towards Management charges and IT support services are covered by the definition of 'FTS' under Article 13(4) of the India-France DTAA and is, accordingly, liable to be taxed in the hands of the assessee.

X x x x x

4.3..16 Thus, as of now, the Department's stand is that separate notification i9s required to be issued to give effect to the MFN clause. As stated above, the issue involved is pending for decision by the Hon'ble Supreme Court, and the issue involved is yet to attain finality by way of confirmation by the Hoh'ble Supreme Court.

4.3.17 In the light of the discussion in the preceding paragraphs, it is clear that the respective definition of 'Fees for technical services' INDIA-UK-DTTA cannot be imported to the INDIA-FRANCE-DTTA . In view of the above discussion, provisions of Income-tax Act, INDIA-FRANCE-DTTA and the absence of crucial details evidences from the assessee, receipts of Rs. 48,32,25,471/- will be chargeable to tax as 'Fees for Te3chnical Services' under Article 13 of the INDIA-FRANCE-DTAA"

3. The ld. D.R.P has discussed this issue at para 5.1 onwards of their findings. That, on their analyses and discussion which is on record, the ld. D.R.P has upheld the findings of the ld. A.O to bring the I.T. support services and

management services fees to be taxed in the hands of the assessee as FTS/Royalty.

4. At the time of hearing, the ld. A.R of the assessee submitted that this issue has been consistently held in favour of the assessee by Pune Tribunal starting from A.Y. 2011-12 in ITA No. 784/PUNB/2015 in assessee's own case, order dated 08-07-2019, which was followed also and relief provided to the assessee by Pune Tribunal in ITA No.253/PUN/2021 in A.Y. 2017-18, order dated 09-06-2022.

5. Per contra, the ld. CIT DR supported findings of the subordinate authorities and also placed reliance on the decision of Delhi Tribunal in the case of J.C. Bamford Excavators Ltd. (2019) 101 taxmann.com 492 (Delhi-Trib). In support of the findings of the ld. DRP, the ld. CIT DR submitted that the addition should be sustained. The ld. CIT DR further stated that on the issue which has been held in favour of the assessee, the Revenue has preferred an appeal before Hon'ble Jurisdictional High Court and it is pending for admission.

6. We have heard the rival contentions, analysed the facts and circumstances in this case and considered the judicial pronouncements placed on record. We find that in assessee's own case the co-ordinate Bench of Pune Tribunal in ITA No. 253/PUN/2021 for A.Y. 2017-18, order dated 09-06—2022 has held as follows:

> *"2. That on perusal of the grounds of appeal and as submitted by the ld. Counsel for the assessee, Grounds No. 1 & 2 pertains to whether income from Information Technology Support Services and income from Management Services would amount to royalty or Fees for Technical Services (FTS). According to the ld. A.R, these incomes are neither royalty nor FTS. The ld. D.R.P has observed this issue at page 59 para 2.3.21 onwards of their order and at page 67 in para 2.3.32.4 has given findings that such income constitutes royalty and similarly held at page 64 para 2.3.31.4 that they are also FTS. The ld. A.R at the time of hearing submitted that in assessee's own case similar issues were addressed and answered in favour of the assessee by Pune Tribunal's decision in ITA No. 784/PUN/2015 for A.Y. 2011-12, order dated 08-07-2019, wherein it was observed and held as follows:*
>
> > *7. Briefly stated, the facts of this additional ground are that the assessee received a sum of Rs.2,66,72,222/- from Faurecia India towards provision*

of Global Information Support services. The same was not offered to tax. On being called upon to explain as to why this amount was not declared as income, the assessee submitted that it provided assistance to run operations, giving technical support and providing studies for adaptation of Information System to meet users' needs, which did not make available any technical knowledge, experience, skill or knowhow etc. to Faurecia India and hence, the same did not fall within the meaning of "Fees for technical services" under Article 13 of the DTAA with France read with para 7 of the Protocol. The assessee made further detailed submissions which have been incorporated in the impugned order. The AO analyzed the nature of services rendered by the assessee to Faurecia India. Considering retrospectively inserted Explanation below section 9(2) of the Act and clause (iv) of Explanation 2 to section 9(1)(vi), the AO opined that the amount received by the assessee was in the nature of Royalty. He further held that the amount received by the assessee was also `Fees for technical services' as per Explanation 2 to section 9(1)(vii) of the Act. The DRP did not interfere with the impugned order which has brought the assessee before the Tribunal.

8. Having heard the rival submissions and perused the relevant material on record, we consider it expedient to, first, discuss the nature of services rendered by the assessee to Faurecia India in terms of Services Agreement dated 3.1.2011, pursuant to which the services were rendered to the Indian entity. A copy of such Agreement has been placed at page176 onwards of the paper book. Article 3 of the Services agreement states that the assessee agrees to supply the Indian entity services in one or several of the following areas :

"1.1 General Management
1.2 Communication
1.3 Sales and Marketing
1.4 Program Management
1.5 Accounting, Controlling and Tax
1.6 Treasury
1.7 Legal, Insurance, Real Estate
1.8 General Management of Information System Organisation
1.9 Information System
1.10 Human Resources
1.11 General Management of Purchasing Organisation
1.12 Production Purchasing
1.13 Non Production Purchasing
1.14 Manufacturing
1.15 Quality"

9. Further elaboration of the services has been made in Exhibit1 to the Agreement. First is `General Management'. It has been mentioned under this that: "This service aims to provide assistance to the Company (i.e. the Indian entity) with the definition of strategic plans for Faurecia Interior Systems (opening of new markets, long range development of products etc.). It also assists the Company in the development of existing and new markets in other regions. It promotes the Company's interests towards worldwide car manufacturers. It helps the Company to identify and negotiate the acquisition of businesses that reinforce the Company's existing businesses and/or enable it to enter new markets.' It can be seen that the assessee is looking after several fields of Faurecia India's business, which even extend to negotiations and acquisition of new businesses as well. Under the head of `Sales and Marketing' services:, `the service provider assists the Company in monitoring the market for Faurecia Interior Systems. It helps the Company to produce brochures on surveys, market share, sales techniques etc. for the use of the Company…… It also provides the Company with assistance in the field of the sale of Interior Systems…. The service provider consults on behalf of the Company the car manufacturers and/or their subcontractors and it advises the Company on the pricing strategy regarding the car manufacturers' purchases'. It can be seen from the Sales and marketing services that the assessee is in full control of the marketing activity of Faurecia India. Not only this, it is also

laying foundation for the future marketing plans of Faurecia Interior Systems. The assessee is also providing `Accounting, Controlling and Tax' services. It has been mentioned that: "The service provider assists the Company in the organization of accounting systems and in the implementation of procedures in compliance with the FCP standards. This assistance includes up-to-date costing accounting, inventories management systems, forecasting procedures etc….. This service also includes assistance for all tax matters related to the Company's business whether in the ordinary course of business, domestic, foreign ventures, or in specific projects such as investments, acquisitions or reorganizations, etc.' Narration of the above service indicates that the assessee is in full charge of the accounting, controlling and tax matters of Faurecia India, which also emerges from clause 1.7 of the Exhibit, which states that: "This department assists the Company with all legal matters (e.g. company law, commercial law, civil law or anti-trust law).' Then the next service is `Human resources' under which the assessee provides: "assistance to the Company in the staff management. It assists the Company in personnel evaluation, job descriptions, salary packages and pension schemes tailored for Faurecia Interior Systems. It also assists in the monitoring of the career management and succession planning within the Company and the Faurecia Group'. Under the head `General Management of Purchasing Organisation', it has been mentioned that: "The service provider coordinates the purchasing actions and/or the execution of specific projects, which are borne at a central level". It has further been set out under the heading `Production Purchasing' that: "The service provider helps the Company with the production purchasing activities, especially those regarding chemicals, plastic parts, stamping, mechatronics, tools and equipments. It advises the Company on general management and strategy defined at Business Group level, which means supplier development, quality, tools and methods'. The assessee also provided non-productive purchasing services in addition to the manufacturing services. The Agreement states that: "the service provider helps the Company to reach the high level of performance and competitiveness at a worldwide level. …….. It assists the Company in the fields of efficiency in production…… The service provider helps the Company to go through the three steps of production,…….. production preparation; production control; and production execution". Under the head `Quality services', it can be seen that: "The service provider helps the Company to improve quality of Faurecia Interior Systems…. by specially designing Global actions and by standardizing methodological tools and by preparing communications on HSE topics'.

10. A perusal of the services referred to in the Exhibit to the Agreement reveals that these cater to various facets of business operations, such as, Management, Marketing, Accounting and finance, Human resources, Purchasing, Manufacturing and Quality, which fall in the overall realm of Managerial services.

11. In addition to the above, the assessee has also rendered IT support services that have been set out in paras 1.8 and 1.9 of the Services Agreement. Para 1.8 with the caption `General Management of Information System Organisation' states that: `The service provider (i.e. the assessee) coordinates the Information System actions and/or the execution of specific projects, which are borne at a central level'. Para 1.9 with the heading `Information System' states that the service provider assists the Company in the computerization of systems, office automation and utilisation of personal computers adapted to the Company and the Faurecia Interior Systems. It helps the Company to choose the equipment (software, hardware, networks). It also assists the Company in the implementation of systems. The Company might request help from the service provider to design tailored programs. This service neither includes the licensing, nor the sale of software, nor computer programs. The services provided by the service provider fall into three categories: Operations, Technical support and Studies.' Then there is a detailed amplification of such services under the above three heads, as submitted before the AO, which is as under :-

"a. Operations – FAH helps the Indian entity to run the IT operations, which includes the organization, management of the IT Infrastructure and of the applications available on IT Infrastructure, upgrade of current applications from project phase to delivery production.

b. Technical Support – FAH provides local IT support to users on site to order, change or upgrade PC or local applications and infrastructure issues, core competence centres for dedicated applications and

c. Studies – This includes studies undertaken to adapt information system to meet user's need in respect of the regulations and Faurecia core procedures on the following areas, legal evolutions new organizations, now parameters, final customer's needs, Faurecia group's needs and IT (applications, infrastructure).

12. The above discussed services provided by the assessee to Faurecia India are largely in the nature of technical services.

13. Though the assessee contended before the AO that it rendered only IT Support services, however, on perusal of sample invoices submitted by the assessee before the Tribunal, it turns out that it rendered not only IT Support services but also managerial services. For example, a copy of Invoice no. 1800000289 for the services rendered during the period 9.11.2011 to 20.11.2011 gives the description of services as `BG Fees , Group Fees, IT Fees, Division Fees and Purchase Fees'. Though this invoice relates to the next year, the ld. AR admitted that the nature of services rendered by the assessee during the year under consideration were on the same lines as depicted in the above referred invoice. It, therefore, emerges that the assessee rendered to the Indian entity not only IT support services, which outnumber others, but also some part consists of managerial services.

14. The AO has characterized receipt of fees for the above services both as "Royalty" as well as "Fees for technical services" under the Act as well as the DTAA.

15.1. We will first examine if the receipt can be considered as "Royalty"? Section 9(1)(vi) of the Act deals with income by way of Royalty payable, inter alia, by a resident. The term `Royalty' has been defined in Explanation 2 which has six clauses. The case of the AO is that the assessee received Royalty in terms of clause (iv) of Explanation to section 9(1) of the Act, which provides that any consideration for "(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill' shall be considered as Royalty. On going through the prescription of clause (iv), it becomes pertinent to note that before the words "technical, industrial, commercial or scientific knowledge, experience or skill", the legislature has used the expression "imparting of any information concerning". The word "imparting" assumes significance in this context. This word does not connote rendering some services involving technical, industrial, commercial or scientific knowledge etc. Rather, it refers to imparting of information regarding some technical, industrial, commercial or scientific "knowledge, experience or skill". When we read the word `imparting' in the beginning of the provision in conjunction with "knowledge, experience, or skill" at the end of the provision, it becomes crystal clear that the same refers to providing some technical, industrial or commercial knowhow etc. to be used by the recipient and not consuming it as such as a service received.

15.2. At this stage, it is imperative to appreciate that we are dealing with the definition of the term `Royalty', which is primarily a consideration for use of intellectual properties, such as, patent, model or invention etc. or technical, industrial or scientific knowledge or specified types of industrial or commercial equipments etc. Placement of clause (iv) in the Explanation 2, which is a part of income by way of `Royalty', itself implies that the consideration referred to herein is for use of some right, property or information concerning technical, industrial or commercial knowledge etc.

and not a mere rendering of services involving some technical expertise etc.. In Warley Parson Services Pty. Ltd. in Re (2009) 313 ITR 74 AAR, the Authority has held that mere rendering of technical services is not sufficient to attract that clause but the expert knowledge, skills etc. behind the service should be imparted to the other contracting party, that is to say, there has to be a transfer of technical know-how. In view of the foregoing discussion, it becomes evident that the IT support services rendered by the assessee, which are otherwise technical in nature, do not involve any imparting of information concerning technical, industrial, or commercial knowledge to Faurecia, India. The same being a mere rendering of services, cannot be brought within the scope of section 9(1)(vi) of the Act. In view of our decision about the receipt not falling within the ambit of section 9(1)(vi) of the Act, there is no need to examine the relevant provision under the DTAA. We, therefore, hold that the amount received by the assessee is not in the nature of Royalty.

16. Next we proceed to examine if the payment received by the assessee can be considered as `Fees for technical services'? Section 9(1)(vii) deals with income by way of `Fees for technical services' payable, inter alia, by a resident. Definition of the expression `Fees for technical services' has been extracted in an earlier part of this order. On going through such provision, to the extent it is relevant for our purpose, it deciphers that fees for technical services means any consideration for rendering managerial, technical or consultancy services excluding any consideration for construction, assembly, mining etc. It is nobody's claim that the case is covered under the exception. We have hereinabove discussed the nature of services rendered by the assessee to the Indian entity and held these to be technical as well as managerial services. That being the position, the transaction is caught within the scope of `fees for technical services' u/s.9(1)(vii) of the Act.

17. Section 90(1) of the Act provides that the Central Government may enter into an agreement with the Government of any other country for the granting of relief of tax in respect of income on which tax has been paid in two different tax jurisdictions. Subsection (2) of section 90 unequivocally provides that where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax or for 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'. Crux of sub-section (2) is that where a DTAA has been entered into with another country, then the provisions of the Act shall apply only if they are more beneficial to the assessee. In simple words, if there is a conflict between the provisions under the Act and the DTAA, the assessee will be subjected to the more beneficial provision out of the two. If the provision of the Act on a particular issue is more beneficial to the assessee vis-a-vis that in the DTAA, then such provision of the Act shall apply and vice versa. The Hon'ble Supreme Court in the case of CIT v. P.V.A.L. Kulandagan Chettiar (2004) 267 ITR 654 (SC) has held that the provisions of sections 4 and 5 are subject to the contrary provision, if any, in DTAA. Such provisions of a DTAA shall prevail over the Act and work as an exception to or modification of sections 4 and 5. Similar view has been taken by the Hon'ble jurisdictional High Court in CIT v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom.). In the light of the above discussion, it becomes vivid that if the provisions of the Treaty are more beneficial to the assessee vis-a-vis its counterpart in the Act, then the assessee shall be entitled to be ruled by the provisions of the Treaty.

18.1. Having seen that the payment falls within the definition of `Fees for technical services' under the Act, let us examine the position under the Double Taxation Avoidance Agreement between India and France. Article 13 of the DTAA deals with Royalties and Fees for technical services. Para 4 of Article 13 defines the term "Fees for technical services" as under : - `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, in consideration for services of a managerial, technical or consultancy nature.'

18.2. On going through the mandate of para 4 of Article 13 defining the term `Fees for technical services', it becomes plain that the same refers to a consideration for services of managerial, technical or consultancy nature. It turns out that definition of the expression `Fees for technical services' under Article 13 of the DTAA is by and large similar to that given in section 9(1)(vii) of the Act to this extent, which does not directly support the case of the assessee.

18.3. At this stage, it would be relevant to refer to the Protocol, which for all practical purposes, is considered as a part and parcel of the DTAA. Relevant part of para 7 of the Protocol dated 29-09-2012 between India and France, reads as under:-

> *`In respect of Articles 11 (Dividends), 12 (Interest) and 13 (Royalties, fees for technical services and payments for the use of equipment), if under any Convention, Agreement or Protocol signed after 1st Sept., 1989, between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later.'*

18.4. A careful circumspection of para 7 of the Protocol indicates that the same contains a Most Favoured Nation (MFN) clause, as per which, if India enters into a DTAA after 01-09-1989 with a third state which is a member of the OECD and the rate of taxation or scope of fees for technical services etc. under such other DTAA with a third state is narrower than para 4 of Article 13 of the DTAA with France, then such lower rate or restricted scope shall apply under the DTAA with France. Net effect of the MFN clause in the present context is that if India has entered into a DTAA with a third state which is a member of the OECD and the scope of the term "Fees for technical services" under such DTAA with a third state is limited vis-à-vis its scope given in the DTAA with France, then such limited scope as per the DTAA with the third state shall stand substituted in place of para 4 of Article 13 of DTAA with France.

18.5. In this connection, it is seen that India entered into a DTAA with the UK, which is a member of the OECD. Article 13 of such DTAA with the UK defines the term "Fees for technical services" under para 4 of Article 13, as under: -

> *`For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which :*
>
> *(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this Article is received; or*
>
> *(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this article is received; or*
>
> *(c) make available technical knowledge, experience, skill, knowhow or processes, or consist of the development and transfer of a technical plan or technical design.'*

18.6. On going through Article 13(4) of DTAA with the UK, it can be seen that the term "Fees for technical services" has three constituents. Clauses (a) and (b) deal with payment for services which are ancillary and subsidiary to the enjoyment of right, property or information for which payment has been described under paras 3 (a) and (b) of this Article. Para 3 of Article 13 defines `Royalties' to mean payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work etc. or any industrial, commercial or scientific equipment etc. Thus, it is seen that clauses (a) and (b) of para 4 of the DTAA with the UK are not relevant for our purpose. Then there is clause (c) of para 4 which states that the term "fees for technical services" means payment of any kind for rendering any technical or consultancy services which "make available" technical knowledge, experience, skill, knowhow or processes or consists of the development and transfer of a technical plan or technical design. This clause bears usefulness in so far as interpretation of Article 13(4) of the DTAA with France is concerned. In view of the MFN clause in the Protocol, Article 13(4) of the DTAA with the UK shall overshadow Article 13(4) of the DTAA with France and limit the scope of the DTAA with France to the extent provided in the DTAA with the UK. Following two things emerge on going through the ambit of "Fees for technical services" under Article 13(4)(c) of the DTAA with the UK. First is that unlike Article 13(4) of DTAA with France defining "Fees for technical services" as "consideration for services of managerial, technical or consultancy nature", Article 13(4) of the UK DTAA defines "Fees for technical services" as payment for rendering of only `technical or consultancy services'. The term `managerial' is missing in so far as the scope of "Fees for technical services" under the DTAA with the UK is concerned. The second departure in the DTAA with the UK from the DTAA with France is that the `scope' of technical or consultancy services in the DTAA with the UK has been restricted to `make available' any technical knowledge, experience, skill, knowhow or processes etc. In fact, the reason for omission of the word `managerial' from the definition of the expression `fees for technical services' in the DTAA with the UK is comprehensible. It is so because the clause refers to making available the services. Unlike technical or consultancy services, managerial services cannot be made available for use in future. This appears to be the raison d'etre for exclusion of the term `managerial' services from the definition. Thus, a reading of Article 13(4)(c) of the DTAA with the UK, when read in place of Article 13(4) of the DTAA with France, deciphers that "Fees for technical services" shall mean any payment for rendering of any technical or consultancy services which `make available' technical knowledge, experience or skill etc. to the recipient.

18.7. We have adverted to the nature of services rendered by the assessee to Faurecia India and found them to be Managerial and also Technical in nature. In so far as the Managerial services are concerned, the consideration for them goes out of the purview of `Fees for technical services', as the term "managerial" is absent in Article 13(4) of the DTAA with UK. Case of the AO rests on treating consideration for such services as `Royalty' or `Fees for technical services' only. Resultantly, payment for the Managerial services cannot be brought within the scope of the term `Fees for technical services' under Article 13 of the DTAA with France as read in conjunction with the DTAA with the UK.

18.8. As far as the remaining Technical services rendered by the assessee to Faurecia India are concerned, it is seen that these are of coordinating the Information system and assisting Faurecia India in computerisation of systems, office automation and utilisation of personal computers which fall into the aforesaid three categories namely, Operations, Technical support and Studies. On going through the nature of such services, it is manifested that these do not result in making available any technical knowhow etc. to the Faurecia India.

18.9. The term "make available" has come up for consideration before the Hon'ble Karnataka High Court in CIT Vs. De Beers India Minerals Pvt. Ltd. (2012) 346 ITR 467 (Kar.) in which it has been held that this term means that the payer of the services should be able to utilise the acquired

knowledge or knowhow at his own in future without the aid of service 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 utilise the same in future on his own without the aid and assistance of the provider. On going through the above interpretation, it becomes palpable that in order to `make available' technical services, it is sine qua non that the payer of the services must acquire such technical know-how etc. which he can himself use in future without any assistance of the provider and the same is not any such act or service which vanishes or disappears on its provision by the payee itself.

18.10. When we advert to the nature of the Technical services rendered by the assessee, it gets axiomatic that no technical knowledge was made available by the assessee to Faurecia India for its use thereafter. Rather, it is a case of providing a service involving technical knowledge, which got consumed with its provision itself. Since such services simply involve use of technical knowledge and do not result into handing over some technical knowhow to Faurecia India, the same, in our considered opinion, cannot be termed as "Fees for technical services" under the DTAA.

18.11. Thus, it is overt that the total amount received by the assessee for rendition of services to Faurecia India, which is a mixed bag of Managerial and Technical services, does not eventually make available any technical knowledge, experience, skill, know-how etc. to the India entity and hence the same cannot in our considered opinion be considered as `Fees for technical services' under Article 13(4) of the DTAA with France when read with the Protocol and Article 13(4) of DTAA with the UK.

19. Reliance of the ld. AO on the Explanation below section 9(2) of the Act is of no consequence. This Explanation simply states that income of a non-resident shall be deemed to accrue or arise in India, inter alia, under clauses (vi) or (vii) of sub-section (1) of section 9 and shall be included in the total income of the non-resident, whether or not — (i) the non-resident has a residence or place of business or business connection in India; or (ii) the non-resident has rendered services in India. In the instant appeal, the issue is whether the services rendered by the assessee fall within ITA the definition of `Royalties' or `Fees for technical services' u/s 9(1)(vi) or (vii) of the Act. We have held that section 9(1)(vi) is not attracted. Albeit section 9(1)(vii) is attracted, but the amount ceases to be `Fees for technical services' in the light of the DTAA. Thus, there is no quarrel on whether or not the assessee has a place of business or business connection in India or it has rendered services in or outside India. The position would have been otherwise if the assessee had been covered u/s 9(1)(vi) or (vii) and not getting immunity under the DTAA and then claiming that no income on this score should be included in its total income as either it had no place of business in India etc. or the services were not rendered in India. As such, the reliance of the ld. AO on the Explanation below section 9(2) of the Act, for fortifying his point of view that the amount in question be charged to tax, is pointless.

20. As the extant payment received by the assessee can neither be construed as `Royalty' u/s 9(1)(vi) of the Act nor as `Fees for technical services' under the DTAA, the same cannot be included in the total income of the assessee. Ex consequenti, we overturn the impugned order on this score and order the deletion of the addition.

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

3. Respectfully following the aforestated decision, we are of the considered view that the extant payment received by the assessee can neither be considered as royalty u/s 9(1)(vi) of the Act nor as fees for technical services and therefore, the same cannot be included in the total income of the assessee. Grounds No. 1 and 2 of the assessee's appeal are allowed."

7. We also find that the decision relied on by the ld. CIT DR (supra) is on the issue of alleged service PE which is not the issue in the present case. Hence, reference to this case is not applicable in the present facts situation. We therefore, find that in assessee's own case, Pune Tribunal has given relief to the assessee on this very issue in A.Y. 2011-12 (supra) as well as in A.Y. 2017-18. The ld. CIT DR could not produce any materials/evidences on record to suggest any deviance from the facts situation. Therefore, following our order in assessee's own case (supra) on the same parity of reasoning these grounds of the assessee are allowed.

8. The other grounds pertain to penalty which, as submitted by the ld. A.R should be consequential only.

9. In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on this 01st November 2022

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

Pune; Dated, the 01st day of November 2022
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The DRP Panel 3, Bombay
4. D.R. ITAT 'C' Bench
5. Guard File

BY ORDER,

Sr. Private Secretary
ITAT, Pune.

/// TRUE COPY ///

1	Draft dictated on	31-10-2022	Sr.PS/PS
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9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		