

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI YOGESH KUMAR, JUDICIAL MEMBER

ITA No. 995/DEL/2022 [A.Y 2018-19]
ITA No. 997/DEL/2022 [A.Y 2019-20]

M/s Bio Rad Laboratories
[Singapore] Pvt Ltd
Emaar Digital Greens, 9th Floor
Tower -A, Sector 61, Golf Course
Extension, Gurgaon, Haryana

Vs. The A.C.I.T
Circle 1(1)(2)
International Taxation
New Delhi

PAN: AAFCB 552L
(Applicant)

(Respondent)

Assessee By : Shri K.M. Gupta, Adv.
Ms. Shruti Khimta, AR

Department By : Shri Gangadhar Panda, CIT-DR

Date of Hearing : 19.12.2022
Date of Pronouncement : 30.12.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

These two separate appeals by the assessee are preferred against two separate orders dated 30.03.2022 framed u/s 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to Assessment Years 2018-19 and 2019-20.

2. The common grievance involved in both the appeals were heard together and are disposed of by this common order for the sake of convenience and since the underlying facts in issues are identical, all these appeals are being disposed off by this common order for the sake of convenience and brevity.

3. The common grievance in both the appeals is that the receipts, according to the Assessing Officer, on account of provision of information technology and other administrative services to its affiliate in India are in the nature of Fees for Technical Services [FTS] under the India Singapore Double Taxation Avoidance Agreement [DTAA].

4. Briefly stated, the facts of the case are that the assessee is incorporated under the laws of Singapore and is engaged in the trading of scientific goods, instruments, apparatus, reagents, kits of life science group. The assessee also provides business support services to its group companies. Being a tax resident of Singapore, the assessee is entitled to the beneficial provisions of the DTAA. The assessee does not have any presence in India either in form of an office, a branch or a factory, a warehouse or any other fixed place of business.

5. During the year under consideration the assessee has cross charged to its affiliate in India for rendition of information technology and other administrative services. Such services were rendered pursuant to the General Services and Cost Allocation Agreement entered into between the members of the Bio-Rad Group.

6. In both the years under consideration, the Assessing Officer concluded by holding that the services in the nature of managerial services provided by the assessee to its Indian AE and such technical knowledge, experience, skill, know-how etc. were made available by the assessee to the Indian affiliate and, therefore, they are in the nature of FTS being taxable @ 10% under the provisions of the DTAA.

7. Objections were raised before the DRP but were of no avail and in line with the DRP directions.

8. Before us, the ld. counsel for the assessee vehemently stated that the assessee had rendered information technology and certain other administrative services to its Indian affiliate pursuant to the Service Agreement. The ld. counsel for the assessee submitted that the Bio-Rad Group operates globally and has a number of

manufacturing and trading companies in various countries and in order to provide certain general administrative services to the group and its affiliates, it has set up two tier service level companies (a) a company that services the requirements of entire group companies all over the world and (b) a company that services the requirements of specific continent i.e. Asia-Pacific region. It was explained that the assessee is a service provider of the Asia-Pacific region provides general administrative services to the group companies situated therein.

9. Referring to various clauses of the agreement, the ld. counsel for the assessee referred to Article 12 of the DTAA and stated that the term 'make available' has not been defined either in the Act or in the India-Singapore DTAA but has been explained by various courts across jurisdictions in India.

10. Specific mention was made to the decision of the Hon'ble Karnataka High Court in the case of De Beers India Minerals (P.) Ltd. [2012] 346 ITR 467 and the decision of the Hon'ble Jurisdictional High Court in the case of DIT Vs. Guy Carpenter & Co. Ltd 346 TR 504.

11. It is the say of the ld. counsel for the assessee that from the nature of services, it is evident that the assessee has not made available any technical knowledge, skill, etc., rather, the services are given on a continuous year-on-year basis. Therefore, the impugned income can neither be brought to tax under the Treaty nor under the provisions of the Act.

12. Per contra, the ld. DR strongly supported the assessment order and read the operative part of the assessment order and operative directions of the DRP relying upon the very same judgments which have been referred to by the Assessing Officer in his assessment order.

13. We have given thoughtful consideration to the orders of the authorities below and have carefully considered the judicial decisions relied upon by both the representatives. We have also considered the relevant documentary evidences brought on record in light of Rule 18(6) of ITAT Rules.

14. General Services and Cost Allocation Agreement is effective from 01.01.2010 by which it was, inter alia, agreed that the service providers are willing to use their personnel, expertise and faculties to

provide such services on the terms and conditions set forth herein and the parties acknowledge that the costs and expenses incurred with respect to the services benefit certain or all the members of the Bio-Rad Group in their efforts to conduct the business and to promote, sell or support the products.

15. The description of the services are as under:

“Pursuant to Article 2.1 of this Agreement, Service Provider, to the extent of its capabilities, may perform any of the following Services for a Benefiting Party or Benefiting Parties:

- 1. Information Technology Services. Services including the provision of networks, helpdesk, information technology education; data center operations; assessment of computer and other automated data processing system requirements, their acquisition, and the proper functioning of such systems; and other information technology services.*
- 1. 2. Sales and Marketing Services. Services related to sales of products, customer technical support, warranty, and non-warranty services, including but not limited to assistance with the development of local business plans, sales promotion planning, providing sales promotion materials, package design, advice concerning advertising production costs, and advertising research.*
- 3. Finance and Accounting Services. Assistance with Finance and Accounting, including the provision of business management systems; assistance in creating procedures and policies for*

accounting purposes; assistance in budgeting, financial forecasting and planning, general accounting, cost control and other similar related finance services.

4. Human Resources. Assistance with personnel recruitment; performance management and improvement systems; organization development; -employee relations; company-wide committee facilitation; company employee and community communication; employee benefit plan obligations; compensation and benefits administration (including stock plans); employee safety, welfare, wellness and health; expatriate support; employee orientation, development, and training; organizational and space planning; policy development and documentation; charitable giving, and employee services and counseling.

5. Regulatory and Quality Assurance Services. Services provided in connection with legal and government relations, including the preparation of applications for permits and Other authorization forms; filings and reports with governmental agencies; quality assurance; and other services as may be required for the conduct of business activities.

6. Legal Services. Services provided in connection with corporate governance issues; protection of corporate assets, including patents and intangible property; product liability claims, compliance with employment laws and regulatory requirements; contracts; and other legal services unrelated to business acquisitions or divestitures.

7. Education and Training Services. Services for a Party's customers and employees, including the provision of trainers to hold training classes at Party's or customer's site

and attendance at trainings held at JService Provider's site.

8. Treasury Services. Treasury Services may include management of the following: cash and its equivalents, investments, stock plans, hedging, foreign currency exchange risks, and other treasury-related executive and administrative services.

2. 9. Materials Management, Procurement, and Logistics Services. Services in connection with inventory, product, and component handling; transport; inventory; warehousing; packaging; materials; and other related services.

10. General, Administrative and Other Services. Other Sendees shall include any services not otherwise specified in this Agreement."

16. Article 12 of the DTAA provides for royalties and fees for technical services and relevant Article is 12(4)(b) which reads as under:

"4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment

of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available technical knowledge, experience, skill know-how or processes, which enables the person acquiring the services to apply the technology contained therein;”

17. A perusal of the aforementioned provision shows that in order to qualify as FTS, the services rendered ought to satisfy the ‘make available’ test. Therefore, in our considered opinion, in order to bring the alleged managerial services within the ambit of FTS under the India-Singapore DTAA, the services would have to satisfy the ‘make available’ test and such services should enable the person acquiring the services to apply the technology contained therein.

18. As mentioned elsewhere, the agreement is effective from 01.01.2010 and we are in Assessment Years 2018-19 and 2019-20. In our considered opinion, if the assessee had enabled the service recipient to apply the technology on its own, then why would the service recipient require such service year after year every year since 2010?

19. This undisputed fact in itself demolishes the action of the Assessing Officer/DRP. Facts on record show that the recipient of the services is not enabled to provide the same service without recourse to the service provider, i.e, the assessee.

20. In our humble opinion, mere incidental advantage to the recipient of services is not enough. The real test is the transfer of technology and on the given facts of the case, there is no transfer of technology and what has been appreciated by the Assessing Officer/ld. CIT(A) is the incidental benefit to the assessee which has been considered to be of enduring advantage.

21. In our understanding, in order to invoke make available clauses, 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.

22. The Hon'ble Delhi High Court in the case of Guy Carpenter 346 ITR 504 [supra] on similar circumstances held as under:

“9. A plain reading of [Article 13\(4\)\(c\)](#) of the DTAA indicates that 'fees for technical services' would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which, inter alia, "makes available" technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. According to the Tribunal this "make available" condition has not been satisfied inasmuch as no technical knowledge, experience, skill, know-how, processes, have been made available by the assessee to the insurance companies operating in India. It also does not consist of the development and transfer of any technical plan or technical design.

10. The Tribunal examined the evidence available on record in order to return a finding on the issue as to whether the payments received by the assessee from the insurance companies operating in India would fall within the expression 'fees for technical services' as appearing in [article 13\(4\)\(c\)](#) of the DTAA read with [section 9\(1\)\(vii\)](#) of the said Act.

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11. The Tribunal also noted the process by which the transaction takes place. It has been pointed out that the originating insurer in India would contact J.B. Bodal M.B. Boda for placing identified risks/ class of risks with international reinsurers. J.B. Boda, in turn, would contact one or more international firm(s) of reinsurance broker(s) like the assessee for competitive proposals from the international reinsurer. Then, the

international reinsurance brokers like the assessee would contact other primary brokers and various syndicates in the Lloyds market for competitive proposals. Based on the various offers or proposals given by the international reinsurance brokers, like the assessee, to J.B. Boda, the latter would present various options to the originating insurer in India, which would take a final decision in the matter. Based on the decision of the originating insurer in India, the policy terms would then be agreed upon and the risk would be placed with the international reinsurer. It was also pointed out that as per the normal industry practice, the reinsurance premium net of brokerage of 10% as per the policy contract is remitted to the assessee, i.e., reinsurance brokers, for onward transmission to international reinsurers. The intermediation fee which is another word for brokerage is paid separately by the originating insurance in India to J.B. Boda, the international reinsurance brokers like the assessee and other intermediaries, based on a mutually agreed ratio which accounts for their relative contribution in the reinsurance process.

12. Based on this manner of transacting, the Tribunal came to a conclusion that the payment received by the assessee could not be regarded as 'fees for technical services'. Further, more, the Tribunal also held that such receipts would not amount to fees for technical services as the "make available" clause contained in [article 13\(4\)\(c\)](#) had not been satisfied in the facts and circumstances of the present case.

13. In our view, the Tribunal has arrived at these conclusions purely on assessing the factual matrix of the case at hand. The findings are in the nature of factual findings and, therefore, according to us, no substantial question of law arises for our consideration, particularly, because the learned counsel for the Revenue was unable to point out any perversity in the recording of such findings."

23. Similarly, the Hon'ble High Court of Karnataka in the case of De Beers India Minerals [P] Limited 346 ITR 467 has, inter alia, held as under;

“Therefore the clause in Singapore agreement which explicitly makes clear the meaning of the word make available, the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know how or processes. To attract the tax liability, that technical knowledge, experience, skill, know-how or process which is used by service provider to render technical service should also be made available :it is open to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know-how or processes so as to render such technical services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use may not use the technology. It has no bearing on the taxability aspect is concerned. When the technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilizes for rendering technical services. The crux of the

matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know-how or process to the recipient of the technical service, in view of the clauses in the DTAA, the liability to tax is not attracted. [Para 14]

From the aforesaid discussion it is clear that test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available. [Para 18]

It is in this background one has to look at the facts of this case, in order to find out whether the service provider has made available the technical knowledge to the assessee so as to foist the liability of payment of tax. [Para 21]

What is the meaning of 'make available'. 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, skills, 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. 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 « edge, 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.”

24. In light of the aforementioned judicial decisions, we are of the considered view that the service recipient of the assessee is unable to make use of the said technology only by itself in its business or for its own benefit without recourse to the assessee year after year.

25. The Revenue has relied upon the decision in the case of Shell India Markets (P.) Ltd.(342 ITR 223. This decision was also used in the case of Linklaters LLP vs Deputy Commissioner of Income-tax [2017] 79 taxmann.com 12 and while deciding the appeal of Linklaters LLP(supra), the co-ordinate bench at Mumbai has observed

as under:

“14 Similarly reliance placed by AO on another judgement of AAR in the case of Perfetti Ben case (supra) is misconceived since this ruling has been set aside by Hon'ble Delhi High Court in the judgement reported at 52 Taxmann.com 161. Similarly, reliance on the judgement of Shell India Markets (P.) Ltd., In re [2012] 342 ITR 223/205 Taxman288/l8 taxmann.com 46 (AAR - New Delhi) is also of no use since in this case also earlier ruling in the case of Perfetti was followed which has been set aside by Hon'ble Delhi High Court. Thus, impliedly, the said judgment gets overruled by the judgement of Hon'ble Delhi High Court. Similarly, decision in Dy. DIT (IT) v. Tata Iron & Steel Co Ltd. [2009] 34 SOT 83 (Mum.) was in context of provisions of section 9(i)(vii) of the Act and does not deal with the provisions of DTAA. Further it was given on altogether different facts.”

26. Further, the Assessing Officer has also relied upon the decision in the case of CBDT vs Oberoi (India) (P) Ltd. 97 Taxmann 453 (SC) wherein services were provided to a non-resident and the decision is in connection with not granting approval u/s 80-O of the Act and is inapplicable to the facts of the case.

27. Further, we find that the Assessing Officer has referred to various decision which are based upon the decision of the Authority for Advance Rulings in the case of Perfetti Van Melle Holding B.V. which

has subsequently been reversed by the Hon'ble High Court of Delhi in 52 Taxmann.com and hence is no longer a good law.

28. Considering the facts of the case in totality, in light of the judicial decisions discussed hereinabove, we are of the considered view that the receipts of the assessee on account of provision of information technology and other administrative services to its affiliate in India are not in the nature of Fees for Technical Services under the India Singapore Double Taxation Avoidance Agreement and we, accordingly, direct the Assessing Officer to delete the same.

29. In the result, the appeals of the assessee in ITA Nos. 995 & 997/DEL/2022 are allowed.

The order is pronounced in the open court on 30.12.2022.

Sd/-

**[YOGESH KUMAR]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 30th December , 2022.

VL/

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3. CIT
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5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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