

आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, PUNE

BEFORE SHRI S.S.GODARA, JM
AND SHRI G.D. PADMAHSHALI, AM

आयकर अपील सं. / ITA No.258/PUN/2021
निर्धारण वर्ष / Assessment Year : 2017-18

ITO (IT), Ward -4, Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. Sungard Availability Services LLP.,
680, East Swedesford Road Wayne,
Philadephia, Pennsylvania,
United States,
PIN – 999999

PAN : ABTFS0527J

.....प्रत्यर्थी / Respondent

Assessee by : Shri Ajit Kumar Jain &
Shri Siddhesh Chaugule
Revenue by : Shri B.Y.Chavan

सुनवाई की तारीख / Date of Hearing : 30.08.2022
घोषणा की तारीख / Date of Pronouncement : 28.11.2022

आदेश / ORDER

PER S. S. GODARA, JM :

1. This assessee's appeal for AY 2017-18 arises against the CIT(A)-Pune-13's DIN & Order no. ITBA/APL/S/250/2021-22/1032144004(1), dated 01.04.2021 in proceedings u/s 143(3) of the Income Tax Act, 1961; in short "the Act".

Heard both the parties. Case file perused.

2. The Revenue raises the following substantive grounds in the instant appeal :-

- “1. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in treating the amount of Rs.68,72,39,090/- as non taxable in India, on the ground that the services were rendered outside India, without appreciating the fact that the assessee had failed to fulfil all conditions as laid down in clause (b) of section 9(l)(vi) of the I T Act.
2. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in treating the FIS received by the assessee from Infosys Ltd, being not accrued or arose in India, without appreciating the fact that, the assessee had fulfilled all the conditions as enumerated in clause (b) of Article 12(4) of India-USA DTAA.
3. The appellant craves leave to add to, alter, amend, modify or withdraw all or any of the above ground(s) of appeal either at the time of the hearing or before the-hearing of this appeal.”

3. Both the learned representatives next invited our attention to the CIT(A)'s detailed discussion reversing the Assessing Officer's action holding the sum of Rs.68,72,13,090/- as taxable in assessee's hand as follows.

“3.3 I have carefully considered the submission of the appellant in light of the facts of the case. Infosys Limited (Infosys), an Indian resident company had entered into an agreement to render software

support services to McDonalds Corporation, A USA based entity. In order to render such services, Infosys had entered into subcontracting agreement with the appellant, SunGard Availability Services LP, a limited partnership, tax resident in USA. The appellant provides the following services to Infosys under the sub-contracting agreement: Cloud Infrastructure-Managed private cloud, Colocation and network services, Mainframe services, Disaster/Data recovery services. Perusal of the appellants submission brings out the following:

- *Income accrues or arises to a person at a place where the services are rendered. The place of “accrual” of income has judicially been interpreted to mean the place where the income generating activity takes place, irrespective of the sites of the payer.*
- *The Appellant renders services to Infosys, at or from its facilities located in USA;*
- *Necessary infrastructure/ equipment/ hardware/ software used for provision of the services by the Appellant under the sub-contracting agreement are installed at facilities owned by Appellant, all of which are located in USA;*
- *The Appellant stores and processes all of McDonald’s data only at its specified facilities located in USA.*
- *The Appellant also provides Colocation services i.e. that allow Infosys to store their own equipment/hardware which is utilized by Infosys for provision of services to its customer i.e McDonalds. These services by its very nature can only be provided/utilized/availed only where Colocation facilities/infrastructure is situated (which is in Philadelphia 1500 Spring Garden, 19130)*

- *Thus Infosys is availing and utilizing the services of the Appellant in USA, to earn income from its customer i.e. McDonald's located in USA (i.e. from a source outside India).*
- *Infosys has availed the services from the Appellant for in turn rendering services to its customer outside India and hence the source of income lies outside India. In view of the same, Appellant's case falls within the ambit of exception provided under clause (b) to Section 9(1)(vii) of the Act and income earned by the Appellant can not be deemed to accrue or arise in India.*
- *As per Clause (b) of Article 12(4) of India -USA DTAA, the amount received by the Appellant from rendering of services shall be taxable in India as "FIS" only if the,*
 - Services are in the nature of "Technical" or "Consultancy";*
 - and*
 - Services make available technical knowledge, experience, skill knowhow or processes; or*
 - Services consist of the development or transfer of a technical plan or design.*
- *The contract is one for pure provision of services, with no technology or know-how being transferred to Infosys. This is evident from the Work order related to Cloud services (refer page no. 250-258 of factual paper book) and Work order related to Colocation services (refer page no. 264).*
- *Considering the nature of services provided such as collocation service mainframe services, data recovery services etc. in which infrastructure and backup / recovery services are provided, it is*

only a facility which is being given by the Appellant to Infosys / McDonald and not a transfer of technology/ service which can be used by Infosys independently in future on its ow without recourse to the Company.”

4. We have given our thoughtful consideration to vehement rival contentions. Mr. Chavan has filed a detailed note interalia re-iterating the assessment findings that the assessee had indeed provided fee for technical services “FTS” to M/s. Wipro Ltd. and therefore, the Assessing Officer had rightly invoked deeming fiction of income u/s. 9(1)(vii) read with Sec. 9(2) Explanation that mere absence of payee/assessee’s permanent establishment “PE” in India would not be fatal to the Revenue’s cause. He also quoted this tribunal’s co-ordinate bench order in Groupo Antolin Irausa SA V/s. DDIT ITA NO. 1442/PN/2017 that assessee’s services rendered to M/s. Wipro Ltd. in USA give rise to its taxability in India only.

5. We find no merit in Revenue’s instant arguments. This is for the precise reason that the assessee herein ; M/s. Sungard Availability Services LLP (a USA based entity) had entered into a service agreement with the payer M/s. Wipro Ltd.(Indian Company) providing the impugned services through the latter’s group company in USA to M/s. McDonald’s Corporation(USA) in USA only. Page 557 onwards in assessee’s paperbook contain it’s explanation before the Assessing Officer at 11/12/2019 regarding the four folded services i.e. Cloud Infrastructure Managed Private Cloud, Colocation, Mainframe and Data Recovery services.

6. Mr. Chavan could hardly dispute that the even if we agree to Revenue's arguments under section 9(1)(vii) r.w.s. 9 (2) Explanation that the above services give rise to application of Sec.9's applicability (supra), the assessee is found very well entitled for the benefit of India USA double taxation avoidance agreement "DTAA" u/s 90(2) of the act wherein Article 12 (4) (b) stipulates taxability of the income arising therefrom only if the services concerned "make available technical knowledge" to the recipient/payer. Mr. Chavan could not refer to any material in the case file satisfying the forgoing "make available" condition in assessee's services. This tribunals recent coordinate bench decision in M/s. Faurecia Automotive Holding V/s. DCIT ITA No. 784/PN/ 2015 dated 08.07.2019 holds in light of CIT V/s. De Beers India Minerals Pvt. Ltd. (2012) 346 ITR 467 (Kar.) that such " make available" condition stipulates that the payer concerned is independently able to make use of the technical know-how etc. coming from the service provider's side . We thus affirm the CIT(A)'s findings reversing the Assessing Officer's action holding the amount in issue of Rs. 68,72,39,090/- as taxable in India. The Revenue's instant sole substantive grievance fails accordingly.

7. This Revenue's appeal is dismissed in above terms.

Order pronounced in the Open Court on this 28th day of November, 2022.

Sd/-

Sd/-

(G.D. PADMAHSHALI)

(S.S. GODARA)

लेखा सदस्य/ **ACCOUNTANT MEMBER**

न्यायिक सदस्य/**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 28th November, 2022.

Ashwini

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-13 Pune.
4. The CIT (IT &TP), Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “सी” बेंच,
पुणे / DR, ITAT, “C” Bench, Pune.
6. गार्ड फ़ाइल / Guard File. आदेशानुसार / BY ORDER,
// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

ITA No.258/PUN/2021
A.Y. : 2017-18
M/s. Sungard Availability Services LLP.,

S.No.	Details	Date	Initials
1	Draft dictated on	26.09.2022	
2	Draft placed before author	27.09.2022	
3	Draft proposed & placed before the Second Member		
4	Draft discussed/approved by Second Member		
5	Approved Draft comes to the Sr. PS/PS		
6	Kept for pronouncement on		
7	Date of uploading of Order		
8	File sent to Bench Clerk		
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		