INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.526/Del/2020
(Assessment Year: 2016-17)

Avaya International Sales Ltd, C/o. Mr. Rohit Verma Ernst & Young LLP, 1st Floor, Tower B, DLF Centre Court Building, Sector-42, Gold Course, Gurgaon-122002 (Assessee) **PAN: AAKCA7138A**	Vs.	ACIT, Circle-International Taxation 1(1)(1), New Delhi (Respondent)

ITA No.714/Del/2020
(Assessment Year: 2016-17)

DCIT, Circle-1(1)(1), International Taxation, New Delhi (Assessee) **PAN: AAKCA7138A**	Vs.	Avaya International Sales Ltd, C/o. Mr. Rohit Verma Ernst & Young LLP, 1st Floor, Tower B, DLF Centre Court Building, Sector-42, Gold Course, Gurgaon-122002 (Respondent)

Assessee by :	Dr. Shashwat Bajpai, Adv Ms. Ananya Kapoor, Adv
Revenue by:	Shri Sukesh Kumar Jain, CIT-DR
Date of Hearing	16/02/2023
Date of pronouncement	07/03/2023

O R D E R

PER ANUBHAV SHARMA, J. M.:

1. The present appeals have been preferred by the Assessee and the revenue against the order dated 30.11.2019 of Ld. CIT(A)-42, New Delhi (hereinafter referred as Ld. First Appellate Authority) arising out of an appeal before it against the assessment order dated 25.02.2019 passed

u/s 143(3) read with Section 144C of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the AO, ACIT, Circle-1(1)(1), International Taxation, New Delhi (hereinafter referred as the Ld. AO).

2. Brief facts of the case is that the assessee Avaya International Sales Limited (Avaya Ireland' or 'the Assessee') is a company incorporated in Ireland and a tax resident of Ireland. The assessee is engaged in the business of developing, marketing, licensing and providing enterprise communication networks related hardware, software and services to the customers located in different geographies in the world, including India. During the year under consideration, the assessee has earned income from sale of hardware, software and rendering of standard automated services to Indian customers. The assessee filed the original return of income under section 139(4) of the Act for Assessment Year 2016-17 on March 30, 2018 reporting Nil income and claiming a refund of Rs. 6,02,56,590 (for tax deducted at source) in the return of income. The return of income was selected for scrutiny by the Assistant Commissioner of Income Tax, Circle 1(1)(1), International Taxation ('the Ld. AO') and a notice dated 30 August 2018 under section 143(2) of the Act was issued to the assessee. Further, a notice dated 9 October 2018 under 142(1) of the Act along with detailed questionnaire was issued to the assessee. The assessee filed the requisite documents and information as sought by the Ld. AO in connection with the assessment proceedings.

3. During the course of assessment proceedings, the Ld. AO had required the assessee to submit reason as to why income from sale of software should not be taxable. In this regard, the Assessee had filed detailed submissions wherein it was submitted that receipt from sale of software do not qualify as transfer of 'copyright' and hence, is out of the ambit of 'royalty' as per Article 12(3) of the India-Ireland Double Taxation Avoidance Agreement (DTAA') and hence, is not taxable in India.

4. Further during the course of assessment proceedings, the Ld. AO had required the Assessee to submit reason as to why income from rendering

sale of standard automated services should not be taxable as fees for technical services ('FTS'). In this regard, the Assessee had filed detailed submissions wherein it was submitted that the services provided by the Assessee are purely standard automated in nature and the same did not involve any human intervention. Accordingly, the same should not qualify as FTS as per Article 12 of the India- Ireland DTAA and hence, not taxable in India.

5. The Ld. AO treated the software sales as royalty and provision of business support activities as technical services taxable as FTS. The ld CIT(A) had deleted the addition of treating the software sales for the purpose of royalty by following relevant para 6.29 while sustained the additions of technical support as FTS as under:-

> *"6.29 On the basis of the above observations, I find that the payment made by the customers of the appellant cannot be characterized as royalty either under the Income Tax Act or under the DTAA. The basis for conclusion as borrowed from judicial decision in this case summed up as under:*
>
> - *The customer has not been given any of the seven rights under S. 14 (a) (i) to (vii) of the Copyright Act, 1957 and, therefore what is transferred is not a copyright but actually a copyrighted article*
> - *The customer cannot commercially exploit the software and therefore a copyright is not transferred.*
> - *The software provided under the contract is goods and therefore no royalty can be said to be paid it. "*

6. The assessee has raised the following grounds of appeal:-

> ***"1. Ground 1: Non-taxability of fee for support/ maintenance services***
>
> *1.1 That on the fact of the case and in law, the learned Commissioner of Income-tax (Appeals) [hereinafter referred to as "learned CIT(A)"] has erred in holding that the payments received by the Appellant towards support/ maintenance services are taxable in the hands of the Appellant in India.*
>
> *1.2 That on the fact of the case and in law, the learned CIT(A) has failed to appreciate that payments received by the Appellant towards support/ maintenance services (being standard automated services) do not qualify as Fees for Technical Services ("FTS") neither under section 9(1)(vi) of the Income-tax Act, 1961 nor under Article 12 of*

India-Ireland Double Taxation Avoidance Agreement ("DTAA") and thus, is not chargeable to tax in the hands of the Appellant in India.

1.3 Without prejudice to the above and on the fact of the case and in law, the learned CIT(A) has erred in not adjudicating on the quantum of support/ maintenance services provided by the Appellant for the subject AY.

*2. **Ground 2: Initiation of penalty proceedings under section 271(1)(c), 271BA and 271F of the Act***

2.1 That on the facts and circumstances of the case and in law, the learned CIT(A) has erred in dismissing grounds of appeal of the Appellant against the initiation of penalty proceedings under section 271(1)(c), 271BA and 271F of the Act.

2.2 That on the facts and circumstances of the case and in law, the learned CIT(A) has failed to appreciate that penalty proceedings initiated by the learned AO under section 271(1)(c), 271BA and 271F of the Act against the Appellant are bad in law and hence, the learned CIT(A) has erred in not directing the learned AO to drop these penalty proceedings."

7. The revenue has raised the following grounds of appeal:-

"Ground No 1

On the facts and in the circumstances of the case and in law, the Assistant Commissioner of Income Tax, Circle 1(1)(1). International Taxation (the Ld. AO) erred in determining assessed income as INR 61,87.44.770 as against the nil income as reported by the Appellant in its return of income.

Your Appellant prays that the addition made by the Ld.AO in this regard be deleted.

Ground No 2

On the facts and circumstances of the case, and in law, Ld. AO has erred in characterising the receipts from sale of software as 'Royalty' within the meaning of Article 12 of the Double taxation Avoidance Agreement (DTAA') between India and Ireland.

It is prayed that the income from sale of software do not qualify as 'royalty' as per India-Ireland DTAA.

Ground No 3

On the facts and circumstances of the case, and in law, Ld. AO has erred in characterising the receipts to the tune of INR 30,04,84,790 as income from sale of software and hence, taxable as 'Royalty' at the rate of 10% as per Article 12 of the India-Ireland DTAA.

It is prayed that the addition made by the Ld. AO be deleted.

Ground No 4

On the facts and circumstances of the case, and in law, Ld. AO has erred in characterising the invoice raised on Redington India Limited for US$

2,77.739.39 (INR 1,77,75,194) as income from sale of software and hence, taxable as 'Royalty' at the rate of 10% as per Article 12 of the India-Ireland DTAA.

It is prayed that the addition made by the Ld. AO be deleted.

Ground No 5

On the facts and circumstances of the case, and in law, Ld. AO has erred in characterising the receipts from rendering of standard automated services as 'fees for technical services within the meaning of Article 12 of the India-Ireland DTAA.

It is prayed that the income from rendering of standard automated services does not qualify as 'fees for technical services' as per India-Ireland DTAA.

Ground No 6

On the facts and circumstances of the case, and in law, Ld. AO has erred in characterising the receipts to the tune of INR 30,04,84.790 as income from provision of services taxable as 'fees for technical services' at the rate of 10% as per Article 12 of the India-Ireland DTAA.

It is prayed that the addition made by the Ld. AO be deleted.

Ground No 7

On facts and circumstances of the case, and in law, Ld. AO erred in levying interest under section 234A of the Income-tax Act, 1961.

It is prayed that the interest under section 234A of the Act be deleted.

Ground No 8

On facts and circumstances of the case, and in law, Ld. AO erred in levying interest under section 234B of the Income-tax Act, 1961.

It is prayed that the interest under section 234B of the Act be deleted.

Ground No 9

On the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act on the additions made in the final assessment order.

Your Appellant prays that the penalty proceedings be dropped.

Ground No 10

On the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 271F of the Act for delay in filing of return of income.

Your Appellant prays that the penalty proceedings be dropped.

Ground No 11

On the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 271BA of the Act for non-filing of report from an accountant as required under section 92E of the Act.

Your Appellant prays that the penalty proceedings be dropped. All the grounds of appeals stated above are without prejudice to each other."

8. In regard to appeal of the revenue in ITA No. 714/Del/2020 it can be observed that the ld CIT(A) in para No. 6.29 and 6.30 had made relevant finding, however, the disputed question of fact and law in regard to issue involved stand now settled by the judgment of Hon'ble Supreme Court in case of **Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT and Another (2022) 3SCC 321**, wherein, the Hon'ble Apex Court categorized the batch of appeals before it into following four categories of software payments:

Category 1 – Sale of software directly to an end user by a non-resident

Category 2 – Sale of Software by a non-resident to Indian distributors for resale to end customers in India

Category 3 – Sale of software by a non-resident to a foreign distributor for resale to end customers in India

Category 4 – Software bundled with hardware and sold by foreign suppliers to Indian distributors or end users.

And held as under:-

"169. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment."

8.1 The ld DR could not submit anything on fact or law to support the findings of the ld CIT(A) consequent to the judgment of the Hon'ble Supreme Court in **Engineering Analysis Centre of Excellence Pvt Ltd (supra)**.

8.2 In the light of the aforesaid, Bench is of the considered opinion that the issue involved in this regard is now further covered in favour of the assessee by the decision of the Hon'ble Supreme Court. Thus, the grounds in appeal of the revenue have no substance.

9. In regard to appeal of the assessee ITA No. 526/Del/2020 the sum and substance of the argument on behalf of the assessee was that there is no dispute to the fact that the disputed standard automated services were in the nature of technical services and only submission was that these technical services were without human intervention. The ld AR submitted that the question of human intervention is a question of facts and need to be examined by the Tax Authorities below but the same was not examined.

10. In this context it is relevant to observe that the assessee had raised a ground in the alternative which the ld CIT(A) adjudicated in para 10.1 and 10.2 in his order as follows:-

> "*10.1 The appellant had filed detailed written submission which is summarized as under:*
>
> > *Ground No 12 Without prejudice to any other grounds of appeal filed by the Appellant, on the facts and in the circumstances of the case and in law, the Ld. AO, has inadvertently considered the amount of provision of standard automated services as INR 30,04,84,790 instead of USD 9,714(INR 6,19,380).*
> >
> > *1. Our submission*
> >
> > - *Without prejudice to our arguments in Ground 5 and Ground 6 of the submission, the Appellant submits that the Ld. AO has inadvertently considered the amount from provision of standard automated services as INR 30,04,84,790.*
> > - *As mentioned in the bifurcation of total amount of receipts appearing in Form 26AS in para 2 of the submission above.. the Appellant submits that the receipts from provision of standard automated services is INR 6,19,380.*
> > - *In this regard, alisting of invoices along with sample copies of invoices pertaining to provision of standard automated services is*

enclosed herewith for your Honour's reference (Page no to of the Paperbook).)

1. Prayer

- *In light of the above, on a without prejudice basis, the Appellant humbly requests your Honour to consider the amount in connection to provision of standard automated services as INR 6,19,380*

Findings:

10.2 The appellant pointed out that the receipts from provision of standard automated services is Rs. 6,19,380/- as against the receipt of Rs. 30,04,84,790/- as taken by the AO. The AO is directed to verify the facts stated by the appellant and modify the consideration from provision of services at Rs 6,19,380/- after due verification. The ground of appeal is statistically allowed."

11. As with regard to the alleged non examination of the issue in context of human intervention the ld DR submitted that the ld CIT(A) has taken into consideration those aspects and the reference made to the observation of ld CIT(A) in para 7.5 as follows:-

"7.5 The AO observed in the assessment order that it is ample clear from the perusal of agreement entered into by the assessee with the Indian clients that for providing the technical services, human intervention is there in the form of service desk, support staff, Avaya accredited technician, Not only off site service but on site service was provided to the Indian clients as per the agreement. As per the Service Agreement following services through technical staff were to be provided to the Indian clients during the period of agreement.

2.1.2 Remote Tier III/Tier IV technical support service

Under this service Avaya will provide the following technical support services directly to Partner's end user's own support staff

- *Assistance in isolating and recommending corrective action to resolve an escalated problem and to dial into the partner's and user's Avaya Product e.g. communication manager, to attempt to resolve the problem remotely on the product.*
- *Case management and tracking of all service escalations*
- *24x7 remote support for major severity situations*
- *Business day remote support for all other situations*
- *Tier 3 (backbone) technical product support for Avaya products*
- *Dispatch of Avaya accredited technicians with/without spare parts to supported sites and carry out on site hardware replacement and any further diagnostics activity."*

12. The ld DR relied on the judgment **of Hon'ble Supreme Court in case of CIT Vs. M/s. Bharti Cellular 193 Taxman 97(SC)** which is also been relied upon by the ld AR. The sum and substance of the judgment of the Hon'ble Supreme Court in **M/s. Bharti Cellular (supra)** is that question of human intervention needs to be examined by the expert and relevant finding of the Hon'ble Supreme Court are in para 7 to 11 which are reproduced below for convenience:-

> *"7. Aggrieved by the AO's order, DTL filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)] being Appeal No. 34/09-10 for the AY 2004-05. In the order dated 8th December 2010, dismissing the appeal, the CIT(A) agreed with the contention of DTL that Section 194C of the Act would apply since electricity was 'goods' as defined under Section 2 of the Sales of Goods Act and in terms of the contract, PGCIL was in fact transporting such goods to DTL. The CIT (A), however, held that "in the absence of sufficient legal precedent on the subject, I am unable to reject the view taken by Ld. Assessing Officer". The CIT (A), therefore, confirmed the said order of the AO. Some relief was granted as far as the calculation of interest payable.*
>
> *The order of the ITAT*
>
> *8. DTL then carried the matter further in appeal to the Income Tax Appellate Tribunal (TTAT) by filing ITA No. 755(Del) 2011 (for AY 2004-05). The ITAT agreed with the DTL that what had been availed by it from PGCIL was not a technical service. It was held that DTL was not liable to be saddled with higher liability of TDS. The appeal was accordingly allowed.*
>
> *9. The ITAT based its opinion on the decision of this Court in CITV. Bharti Cellular Ltd. [2009] 319 ITR 139/[2008] 175 Taxman 573 (Delhi) and of the Madras High Court in Skycell Communications Ltd. v. Dy. CIT [2001] 251 ITR 53/119 Taxman 496. The ITAT noted that both the decisions laid emphasis on the involvement of a 'human element' for rendering technical services and imparting of technical knowledge. The ITAT held that none of those conditions were satisfied in the present case. While there might be supervision of transmission work by the technical personnel of the payee "there is no human intervention in so far as the assessee is concerned regarding the transmission". It was further held that even if technical knowledge could be upgraded without "presence of human beings by way of handing over drawings and designs or a technical service can be rendered by robot (machines) without intervention of human element, the classification of the services rendered by the assessee as technical service is not free from doubt".*
>
> *10. When the case was heard on 16th July 2015, Mr. A.B. Dial, learned Senior counsel for DTL, drew the attention of this Court to the decision dated 8th May 2015 of the Division Bench of the Bombay High Court in CIT(TDS) v. Maharashtra State Electricity Distribution Co.Ltd. [2015] 375 ITR 23/232 Taxman 373/58 taxmann.com 339 (Bom.) which held that wheeling charges would not amount to payment of fees for technical*

services. Mr. Kamal Sawhney, learned Senior Standing counsel for the Revenue then sought time to examine the said decision and make submissions.

Submissions on behalf of the Revenue

11. The submissions of Mr. Sawhney were heard by this Court on the 30th July, 2015. The principal submission of Mr. Sawhney was with reference to Section 194] of the Act and the Central Electricity Authority (Grid Standards) Regulations, 2010. The submissions of Mr. Sawhney was basically twofold. In the first place, he submitted that whether the fees paid in the context of rendering of services amounted to fees for technical service could be answered only by examining the very nature of service being performed, and in that context the working of the industry, in this case, the power generation and transmission industry. According to him, a detailed analysis would have to be undertaken by examining experts and since that was not performed by the ITAT or perhaps even the AO, the case would have to be remanded for a fresh determination."

13. The bench is of considered opinion that although reference has been made by the Tax Authorities below to have taken into consideration the aspect of questioning technical services on the basis of human intervention however, there seems to have been lack of examination of the issue by taking into account the relevant evidence and opinion of expert. Conclusion are more on basis of general perception of the nature of service. Thus, the bench is of considered opinion that this issue requires restoration to the files of the ld AO to decide the issue afresh after taking into consideration the judgment of the Hon'ble Supreme Court in CIT Vs. Bharti Cellular (supra). In the light of the aforesaid the grounds in appeal of the assessee are allowed for statistical purposes.

14. In the result, **the appeal of the assessee is allowed for statistical purposes and the appeal of the revenue is dismissed.**

Order pronounced in the open court on 07/03/2023.

-Sd/-	-Sd/-
(N. K. BILLAIYA)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 07/02/2023
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi