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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No. 556/Mum/2022
(A.Y.2018-19)

Dieffenbacher GmbH Maschinen Und Anlagenbau, Heilbronner Strasse, 20 Eppingen, Germany 411006	Vs.	The ACIT, INT Tax Circle-2(1)(2), Room No. 1612, 16th Floor, Air India Building, Nariman Point, Mumbai - 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AADCD9456H		
Appellant	..	Respondent

Appellant by :	Nikhil Tiwari
Respondent by :	Soumendu Kumar Dash

Date of Hearing	24.01.2023
Date of Pronouncement	16.03.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assesse is directed against the order passed by the ACIT, Int. Tax u/s 143(3) r.w.s 144C(13) of the Act in pursuance of the directions issued by the DRP (1)-2, Mumbai dated 24.01.2022 for A.Y. 2018-19. The assesse has raised the following grounds before us:

"On the facts and in the circumstances of the case and in law, the Hon'ble DRP and consequentially the learned AO have:

1. Erred in addition on account of non-deduction of TDS as mentioned below:

The Learned AO has erred in disallowing the expenditure of INR 17,13,981 incurred by the Appellant towards supervision installation and commissioning services provided by its vendor Compagnie Belge De Ventilateurs S.A. (CBV) (sub-contractor from Belgium) under section 40(a)(ia) of the Act on account of not

deducting taxes at source, treating the same as fees for technical services under Article 12 of India-Belgium Double Taxation Avoidance Agreement (DTAA).

2. Erred in levying penalty on the above erroneous addition:

The learned AO has erred levying penalty on the above erroneous addition as under reporting of income under section 270A(2) of the Act.

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 Honourable Income-tax Appellate Tribunal to decide this appeal according to law."

2. The fact in brief is that the assesse company Dieffenbacher GmbH Maschinen Und Anlagenbau, 20 was incorporated in the tax/resident of Germany and filed its return of income on 30.11.2018 declaring total income of Rs.56,01,540/-. The case was selected for scrutiny and notice u/s 143(2) of the Act was issued on 22.09.2019. The assesse company has entered into a contract with Greenply Industries Ltd. (Greenply)to render training, supervision and consultancy in connection with installation services to set up HDF/MDF board production line machinery at Greenply's premises in India. The assesse company has a permanent establishment/PE in India as assesse it has performed services in India for the period exceeding 90 days during the F.Y. 2017-18. Accordingly, as per Article 5 of India-German DTAA income attributable to service PE in India was offered to tax as business income.

3. During the course of assessment the A.O noticed that there was payment of Rs.17,13,981/- in the nature of installation and supervision for the fan. The payment has been made to Compagnie Belge De Ventilateurs S.A. (CBV) (sub-contractor, Belgium) without deducting of TDS. The A.O was of the view that since the payment was in the nature of fees for technical service and services were provided in India,

therefore, the TDS required to be deducted. On query, assessee explained that services were availed due to expertise of CBV in commissioning and installation of dryer fans. As per DTAA between India-Belgium, the scope of tax, FTS was limited, therefore, no TDS was deducted and CBV had requested for non-deduction of tax. It was further submitted that services were not make available in India as the activities/services performed by CBV did not impart or transfer any knowledge, knowhow, skill to the recipient of services.

However, AO has not accepted the submission of the assessee. The A.O stated that assessee got specialised services in commissioning and installation of plant in India and the technical knowledge/knowhow was made available to the Indian client. The A.O further stated that assesse has received managerial technical and consultancy services mainly from CBV, spanning the entire gamut of commissioning and installation of plant etc. and enriching it with the knowledge of enduring nature. The A.O stated that the impugned receipt of Rs.17,13,981/- certainly falls in the category which qualifies to be FTS under the Act and also under article 12(4) of India –Belgium read with India-Portugal DTAA. Therefore, payment of aforesaid remittances was held to be liable for TDS @ 10% + surcharge + EC. The A.O held that technical knowledge was clearly in the nature of FTS falls in the definition of provisions of Sec.9(1)(vii) of the Act as the fees has been paid for rendering of technical/consultancy services. The draft assessment order u/s 144C(1) r.w.s 143(3) was passed by the assessing officer on 21.04.2021.

4. In response the assesse filed its objections before the DRP-I, Mumbai on 31.05.2021. The DRP vide order dated 24.01.2022 has upheld the order of the assessing officer and dismissed the objections filed by the assessee.

5. Accordingly, the A.O passed final assessment order u/s 143(3) r.w.s 144C(13) of the Act on 27.01.2022 treating the remittance of Rs.17,13,981/- as fees for technical services.

6. During the course of appellate proceedings before us the ld. Counsel contended that activity/services performed by CBV did not impart or transfer any technical knowledge/knowhow skills to the services recipient. He further submitted that providing all these services did not enable the service recipient to undertake the said services in its own capacity in future. The ld. Counsel further submitted that CBV is a tax recipient of Belgium and is eligible for access the India-Belgium Tax Treaty. As per protocol of the India-Belgium Tax Treaty, India would limit its taxation on royalties or fees for technical services if under any scope convention or agreement between India and a third state being a member of the OECD, India limits its taxation or royalties or fee for technical services to a lower or a scope more restricted than the rate or scope provided in the present agreement in the said item of income. In this regard there is a tax treaty between India Portugal (being OECD opportunity company) as a restricted scope of taxation for fees for included services (entered on 11.09.1998). The ld. Counsel submitted that the 'make available' clause which is mandatory to tax any income characterised as FTS in case of a tax recipient of Portugal was also be required to be applied in the case of the assessee. The

ld. A.R has also filed paper book comprising various judicial pronouncements and particularly referred the case of Walters Kluwer Financial Services Belgium NV Vs. DCIT, Circle 3(1)(1) vide ITA No. 8267/Del/2019 dated 28.12.2022

On the other hand, the ld. D.R supported the order of lower authorities and referred CBDT Circular No. F. No.503/1/2021 FT & TR-1 dated 03.02.2022 and submitted that notification u/s 90 of the Income Tax is required for implementation of the terms of the DTAA.

However, in the rejoinder the ld. A.R submitted that no separate notification is required for invoking the MFN clause to impart the more restrictive scope present in the treaty with any member of the OECD and he also referred the following judicial pronouncements:

(i) *Steria (India) Ltd. Vs. CIT [2016] 386 ITR 390 (Delhi HC)*
(ii) *GRI Renewable Industries S.L. Vs. ACIT (ITA No.202/Pun/2021 dated 15 February 2022) (Pune ITAT)*
(iii) *SCA Hygiene Products AB Vs. DCIT (2021) 187 ITD 419 (Mumbai ITAT)*

7. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above the assessee submitted before the A.O & DRP copies of invoices of CBV with description of service placed at page no. 27 to 31 of the paper book and after referring the various details submitted that there was no transfer of technical knowledge. knowhow, experience skill or process from the services provided by CBV. It was also submitted that because of applicability of MFN clause Fees for Technical Services (FTS) mentioned in the Double Taxation Agreement between India and Belgium no tax at source to be deducted after taking into consideration the

DTAA between India & Portugal. However, the DRP has not agreed with the submission of the assessee and stated that since the legal requirement of notification has not been complied with as contained in Sec. 90 of the IT. Act, therefore, restrictive definition of FTS as in the India-Portugal DTAA cannot be extended into the India-Belgium DTAA.

Regarding the decision of DRP that MFN is not applicable in the case of the assessee by referring the CBDT Circular as cited above, we noticed that in the case of GRI Renewable Industries S.L. Vs ACIT vide ITA No. 202/Pun/2021 the coordinate bench of Pune Tribunal held that CBDT Circular dated 03.02.2022 cannot be invoked for the assessment year which is much prior to the CBDT Circular of the year 2022 the finding of the Tribunal is as under:

> *"13. Notwithstanding the above, it can be seen that the CBDT has panned out a fresh requirement of separate notification to be issued for India importing the benefits of the DTAA from second State to the DTAA with the first State by virtue of its Circular, relying on such requirement as supposedly. contained in section 90(1) of the Act. In our considered opinion-the-requirement contained in the CBDT circular No 03/2022 cannot primarily be applied to the period anterior to the date of its issuance as it is in the nature of an additional detrimental stipulation mandated for taking benefit conferred by the DTAA. It is a settled legal position that a piece of legislation which imposes a new obligation or attaches a new disability is considered prospective unless the legislative intent is clearly to give it a retrospective effect. We are confronted with a circular, much less an amendment to the enactment, which attaches a new disability of a separate notification for importing the benefits of an Agreement with the second State into the treaty with first State Obviously, such a Circular cannot operate retrospectively to the transactions taking place in any period anterior to its issuance. In view of the foregoing discussion, we are satisfied that the requirement of a separate notification for implementing the MFN clause, as per the recent CBDT circular dt 03-02-2022 cannot be invoked for the year under consideration, which is much prior to the CBDT circular of the year 2022."*

Further, we have noticed that coordinate bench of the ITAT in the case of M/s Essity Hygiene & Health Vs. DCIT (ITA No.778/Mum/2021) dated 10.06.2022 (Mum Trib) wherein after following the decision of ITAT Pune as referred supra it

is held that there is no requirement of separate notification for importing the beneficial treatment from the agreement. Therefore, respectfully following the aforesaid decisions of the coordinate benches of the Tribunal, we are of the considered view that CBDT Circular No. 3/2022 dated 03.02.2022 is not applicable to the present appeal, therefore, assessee is entitled to claim the benefit of the restricted definition under India-Portugal DTAA. Since, the assessee have been found not to have made available any technical knowledge experience or skill or knowhow, therefore, the impugned services received by the assessee cannot be taxed under the provision. Accordingly, appeal of the assessee is allowed.

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

Order pronounced in the open court on 16.03.2023

Sd/- Sd/-

(Vikas Awasthy) (Amarjit Singh)
Judicial Member Accountant Member

Place: Mumbai
Date 16.03.2023
Rohit: PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.