IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.671/Mum./2022

(Assessment Year : 2018–19)

Atos Information Technology
(Singapore) Pte Ltd.
C/o Atos India Pvt. Ltd., 7th 8th 9th Floor
Building no.3, Gigplex Estate Pvt. Ltd. ……. Appellant
Plot no.IT 5 Airoli Knowledge Park
TTC Industrial Area, Thane 400 402
PAN – AAHCA8215F

v/s

Dy. Commissioner of Income Tax
International Taxation, Circle–1(1)(2) .....Respondent
Mumbai

Assessee by : Shri Dinesh Bafna a/w
Shri Yogesh Malpani
Revenue by : Ms. Surabhi Sharma

Date of Hearing – 20/03/2023	Date of Order – 31/03/2023

O R D E R

PER BENCH

The present appeal has been filed by the assessee challenging the impugned final assessment order dated 17/02/2022, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (*"the Act"*), pursuant to the directions dated 27/01/2022, issued by the learned Dispute Resolution Panel–1, Mumbai–2, [*"learned DRP"*], under section 144C(5) of the Act, for the assessment year 2018–19.

2. In its appeal, the assessee has raised the following grounds:–

"1. On the facts and in the circumstances of the case and in law, the Learned AO erred in alternately holding the sum of Rs. 10,76,69,690 as 'Royalty' in view of Section 9(1)(vi) of Income-tax Act, 1961 (the Act) and Article 12 of the Double Taxation Avoidance Agreement entered into between India and Singapore ('the DTAA').

The Appellant humbly prays that the Learned AO be directed to not treat the aforesaid receipts as 'Royalty' under Section 9(1)(vi) of the Act read with Article 12 of the DTAA.

2. On the facts and in the circumstances of the case and in law, the Learned Deputy Commissioner of of Income-tax (International Taxation) 1(1)(2), Mumbai ("the Learned AO') and the Dispute Resolution Panel ('the DRP') erred in holding the sum of Rs. 10,76,69,690 as 'Fees for technical services' under Section 9(1)(vii) of the Act read with Article 12 of the DTAA.

The Appellant humbly prays that the Learned AO be directed to not treat the aforesaid receipts as 'Fees for technical services' under Section 9(1)(vii) of the Act read with Article 12 of the DTAA.

3. On the facts and in the circumstances of the case and in law, the Learned AO erred in holding that the amounts received by the Appellant will also fall within the definition of Fees for technical services' as per Article 12(4)(a) of DTAA.

The Appellant humbly prays that the Learned AO be directed to not treat the aforesaid receipts as 'Fees for technical services' under Article 12(4)(a) of the DTAA.

4. On the facts and in the circumstances of the case and in law, the Learned AO and the DRP erred in not considering that the sum of Rs. 10,76,69,690 is in the nature of "Business Profits" under Article 7 of the DTAA, not taxable in India as the Appellant did not have a Permanent Establishment in India under Article 5 of the DTAA.

The Appellant humbly prays that the Learned AO be directed to not treat the aforesaid receipts as 'Business Profits' under Article 7 of the DTAA and not tax in absence of Permanent Establishment in India.

5. On the facts and in the circumstances of the case and in law, while calculating the tax liability of the Appellant, the Learned AO has erred in allowing short credit of Tax deducted at source by its customers of Rs. 63,14,556.

The Appellant prays that Ld. AO be directed to kindly allow the credit of tax deducted at source.

6. On the facts and in the circumstances of the case and in law, the Ld. AO has erred in levying charging consequential interest under section 234B of the Act.

The Appellant prays that Ld. AO be directed to kindly delete the consequential interest under section 234B of the Act.

7. On the facts and in the circumstances of the case and in law, the Learned AO has erred in proposing to initiate penalty proceedings under section 270A of the Act without appreciating that none of the provisions of section 270A of the Act gets attracted in the facts of the Appellant's case.

The Appellant humbly prays to Your Honours to kindly direct the Learned AO to drop/ abate the penalty proceedings and oblige.

That Appellant craves leave to add, to amend, to substitute, to withdraw, to modify, to alter and/or re-instate the foregoing grounds of the appeal at or before the time of hearing."

3. The brief facts of the case as emanating from the record are: The assessee is a company incorporated in Singapore and is engaged in providing support services to its group companies in India namely, Atos India Private Ltd. ("*Atos India*"). During the year, the assessee received consideration to the tune of Rs. 6,33,96,361, for project support services such as Midrange support services, Database support services, Service delivery management, and support services in relation to the Standard Chartered Bank Project from Atos India. The assessee also received consideration to the tune of Rs. 4,42,73,329, for regional support services such as strategy operations, Sales / Markets / Support Service Lines services, Finance, Legal, HR, Marketing, and Communication services, which assisted Atos India in carrying out their day-to-day operations in pursuant to the Regional Service Agreement. For the year under consideration, the assessee filed its return of income on 30/11/2018, declaring a total income of Rs. 1,97,630. In the return of income, the above receipts from India were not offered to tax, even though TDS was deducted at source on the above payments. During the assessment proceedings, the assessee was asked to show cause as to why the aforesaid receipts should not

be taxed in India. In response thereto, the assessee submitted that the payments made by Atos India to the assessee for the above services do not constitute either '*Royalty*' or '*Fees for Technical Services*'. The assessee further submitted that the receipts are in the nature of 'business profits' and is taxable in terms of provisions of Article 7 of the India Singapore Double Taxation Avoidance Agreement ("*DTAA*"). However, since the assessee did not have a Permanent Establishment in India in terms of Article 5 of the DTAA, the amount received from Atos India is not taxable in India.

4. The Assessing Officer ("*AO*") vide draft assessment order dated 16/04/2021, passed under section 143(3) r/w 144C of the Act did not agree with the submissions of the assessee and held that the consideration received by the assessee from the Indian entity is nothing but Royalty within the definition as per Article 12(3) of the India Singapore DTAA. The AO further held that the receipts also get covered within the ambit of '*Royalty'* under the provisions of section 9(1)(vi) of the Act. Without prejudice, the AO also held that the payments are also in the nature of '*Fees for Technical Services'* under the provisions of the Act and India Singapore DTAA. Accordingly, the AO made an addition of Rs. 10,76,09,690, on account of payment received from Atos India in respect of project-related services and regional support services.

5. The assessee filed detailed objections before the learned DRP against the addition made by the AO. Vide directions dated 27/01/2022, issued under section 144C(5) of the Act, the learned DRP by following its directions rendered in assessee's own case for the assessment year 2014-15 rejected the objections filed by the assessee, after noting that the facts for the year under

consideration are similar to the facts for the assessment year 2014-15. Further, the learned DRP though noted that an identical issue in assessee's own case has been decided in its favour by the coordinate bench of the Tribunal for the assessment years 2014-15 and 2015-16, rejected the objections filed by the assessee in order to keep the issue alive. In conformity with the directions issued by the learned DRP, the AO passed the impugned final assessment order treating the receipts from Atos India as Royalty and/or Fees for Technical Services under the provisions of the India Singapore DTAA as well as the Act. Being aggrieved, the assessee is in appeal before us.

6. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that the issue of taxability of receipts from Atos India in respect of project-related services pertaining to Standard Chartered Bank Project as Royalty and/or Fees for Technical Services was decided in favour of the assessee by the coordinate bench of the Tribunal in assessee's own case for assessment years 2014-15 and 2015-16. As regards the receipt from Atos India in respect of support services pursuant to the Regional Service Agreement, the learned AR by referring to various judicial pronouncements submitted that these receipts are also not taxable in the hands of the assessee.

7. On the other hand, the learned Departmental Representative ("*learned DR*") by vehemently relying upon the orders passed by the lower authorities submitted that the decision of the coordinate bench of the Tribunal in assessee's own case for the assessment years 2014-15 and 2015-16 was not found to be acceptable by the Department, however, no further appeal could

be filed as the tax effect involved was below the prescribed limit. As regards the taxability of receipts from Atos India for the support services pursuant to the Regional Service Agreement is concerned, the learned DR filed detailed written submissions supporting the findings of the AO/learned DRP in concluding the same to be in the nature of Royalty/Fees for Technical Services under the Act as well as the India Singapore DTAA.

8. We have considered the rival submissions and perused the material available on record. We find the coordinate bench of the Tribunal in assessee's own case in Atos Information Technology Singapore Pte. Ltd. vs DCIT, in ITAs No.7144/Mum./2017 and 5744/Mum./2018, vide order dated 30/03/2021, for the assessment years 2014-15 and 2015-16 held that payment received by the assessee from various projects related services, including Standard Chartered Bank Project, would not qualify as Royalty/Fees for Technical Services. The relevant findings of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:-

> *"18. Keeping the aforesaid factual position in perspective, we have to examine, whether each kind of payments received by the assessee qualifies either as royalty or FTS under the relevant provisions of India-Singapore DTAA. As far as the project related services rendered by the assessee, there is unanimity between the parties that they relate to data center and mailbox hosting services. What is meant by mailbox hosting services? It is a service where both incoming and outgoing emails are managed by a separate shared or dedicated server. All email messages and associated files of the client are stored on a server. Similarly, datacenter service encompasses all services and facility related components and activities that support the implementation, maintenance, operation and enhancement of a datacenter, which is an environment that provides processing, storage, networking, management and distribution of data within a enterprise.*
>
> *19. As per the scope of work under the agreement, insofar as project related services pertaining to Nokia Siemens' project, the assessee is required to provide storage services for email and datacenter hosting. Similarly, for project related services to Standard Chartered Bank, the scope of services includes the*

employees of the assessee in remotely maintaining and monitoring the server and computer equipment and in case of any breakdown in the server, to take immediate remedial measure for its smooth and continuous functioning. Further, the assessee is required to remotely manage databases and carry out overall monitoring activities. Further, the assessee has to ensure timely delivery and problem resolution to the customers of Atos India. As far as services relating to other projects are concerned, the assessee is required to provide server hosting services and carry out support services of the said server.

20. The departmental authorities have held, while providing the services the assessee has allowed the use or right to use of any industrial, commercial or scientific experience as well as allowed use or right to use of industrial, commercial or scientific equipment. According to the departmental authorities, the assessee has rented out the servers to Atos India which amounts to allowing use or right to use of an industrial, commercial, scientific equipment.

18. Keeping in view the aforesaid factual position, we have to examine whether the payments received by the assessee come within the ambit of "royalty and FTS", as per Articles 12(3) and 12(4) of India-Singapore DTAA. The term 'royalty' has been defined under Article 12(3) of the tax treaty and reads as under:-

> *"3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use :*
>
> *(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information?*
>
> *(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise / from activities described in paragraph 4(A) or4(f) of Article 8."*

21. A reading of the Article 12(3) makes it clear that it provides for three basic situations to consider a payment to be in the nature of royalty. Firstly, the payment must be for the use or right to use concerning industrial, commercial or scientific experience. Secondly, it must be for use or right to use any copyright of a literary, artistic or scientific work including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process. Thirdly, it must be for use or right to use any industrial, commercial or scientific equipment. It has to be examined, whether any of the aforesaid conditions either on stand-alone basis or cumulatively apply to the payments received by the assessee while rendering services to Atos India.

22. As could be seen from the facts on record, while rendering such services, none of the employees of the assessee have visited India. Not only the servers and other hardware are located outside India but the employees of the assessee have rendered such services remotely, while located in Singapore.

23. As discussed earlier, the assessee is simply providing mailbox hosting services and data centre services through servers maintained by it. The assessee is required to ensure proper functioning of the server with related software while providing such services. There is no material on record to suggest that while rendering such services, the assessee has allowed Atos India or any other party use of commercial or scientific experience. Further, there is no material to show that the assessee has allowed use or right to use of any copyright of literary, artistic or scientific work including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process. Further, though, the learned DRP has observed that the assessee has allowed use or right to use of any industrial, commercial or scientific equipment by renting out the server; however, that finding is not based on any cogent evidence brought on record. The agreement entered by the assessee for project related services does not show that the assessee is renting out either the servers or any other equipment to Atos India while providing services. In this regard, we may refer to the agreement entered with Atos India for the Standard Chartered Bank project. As per clause 5.1 of the said agreement, it has been made clear that the ownership of the intellectual property rights would all along remain with the assessee and no part of it would be transferred to Atos India. Rather, as per clause 5.2 of the agreement, the assessee, if necessary, can use Atos India's intellectual property including any software for providing services. There is nothing on record to suggest that the assessee has either rented out its servers or allowed access to the servers to Atos India or any other party independently and in exclusion of the assessee.

23. Further, while rendering the managed services, the assessee has not allowed the recipient to use or right to use of any copyright of literary, artistic or scientific work including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process. The payment received is also not for use of information concerning industrial, commercial or scientific experience. In our considered opinion, the services rendered by the assessee are purely IT infrastructure management and mailbox hosting services and for rendering which the assessee has neither allowed use or right to use of any copyright of literary, artistic or scientific work, etc. or use of information concerning industrial, commercial or scientific experience or has allowed use or right to use any industrial, commercial or scientific equipment.

24. In case of DCIT vs Suvvis Communication Corporation (supra), the co-ordinate bench has held, the true test for finding out whether the consideration is for rendition of services, though, involving the use of scientific equipment or the consideration is for use of equipment simpliciter. In the facts of the present case, there cannot be two opinions about the fact that, though, in course of rendition of services there may be involvement of or use of scientific equipments, but, the consideration received is not for use of equipment simpliciter, but for rendering services.

22. In case of Edenred Pte Ltd vs DCIT (supra), the co-ordinate bench, while considering a somewhat similar issue has held as under:-

> *"We find that (i) under the said IDC agreement, the appellant, essentially provides IT infrastructure management and mail box/website hosting services to*

its India group companies; these IDC services are performed by the appellant's personnel in Singapore ; the Indian group companies directly remit IDC service payments towards the appellant's bank account in Singapore, (ii) IDC is an ISO 27001 certified data centre owned by Edenred Pte. and located in Singapore ; IDC services are provided using the IDC and IT/security team in Singapore, (iii) the services under the IDC agreement comprise of administration and supervision of central infrastructure ; mailbox hosting services and website hosting services, (iv) IDC services ensure 100% uptime for critical external facing applications which need highly secured web environment and dedicated team of security experts to ensure 100% uptime Edenred Pte Ltd. 11 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 of security systems (firewall, antivirus, access controls) which are also hosted on server in Singapore.

We further observe that examples of websites/applications/softwares hosted by Indian group companies on the data centre in Singapore are web ordering application, corporate website, websites created for customers of Edenred India entities while making a loyalty program for them.

A perusal of the documents filed before the AO and DRP clearly indicate that (i) appellant has an infrastructure data centre, not information centre at Singapore, (ii) the Indian group companies neither access nor use CPU of the appellant, (iii) no CDN system is provided under the IDC agreement, no such use/access is allowed, (iv) the appellant does not maintain any such central data (v) IDC is not capable of information analytics, data management, (vi) appellant only provides IDC service by using its hardware/security devices/personnel ; all that the Indian group companies received are standard IDC services and not use of any software, (vii) bandwith and networking infrastructure is used by the appellant to render IDC services ; Indian companies only get the output of usages of such bandwith and network and not its use, (viii) consideration is for IDC services and not any specific program and (ix) no embedded/secret software is developed by the appellant.

Against the above factual backdrop, let us discuss below the case laws relied on both sides.

6.1 We begin with the case laws relied on by the Ld. counsel. A plethora of precedents on the subject in which we are presently concerned compels us, in order to avoid prolixity, to refer only a few decisions below.

Edenred Pte Ltd. 12 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 In the case of Bharati Axa General Insurance Co. Ltd. (supra), the appellant, an Indian company carrying on business of general insurance entered into a service agreement with a Singapore company AXA ARC for receiving assistance such as business support, market information, technology support services and strategy support etc. from the latter. The AAR held that

(i) though the services rendered by AXA ARC may well be brought within the scope of the definition of FTS under the IT Act as they answer the description of consultancy services or some of them may be categorized as technical services but the qualifying words "make available technical knowledge, experience, skill, know-how, which enables the recipient of services to apply the technology contained therein" in Article 12.4 of the DTAA make material difference, (ii) all technical or consultancy services cannot be brought within the scope of this definition unless they make available technical knowledge, knowhow etc. which in turn facilitates the person acquiring the services to apply the technology embedded therein, (iii) services provided by AXA ARC to the applicant do not fulfill the requirements of the definition of FTS in the DTAA, (iv) even assuming that they are technical or consultancy services, it cannot be said that the

applicant receiving the services is enabled to apply the technology contained therein, (v) also there is nothing in the IT support services that answers the description of technical services as defined in the DTAA, (vi) therefore, the fees paid to AXA ARC by the applicant does not amount to fees for technical services within the meaning of the DTAA, (vii) as regards the payments made for providing access to software applications and to the server hardware system hosted in Singapore for internal purposes and for availing of related support services under the terms of the service agreement, same cannot be brought within the scope of the definition of Edenred Pte Ltd. 13 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 'royalty' in Article 12.3, (viii) there is no transfer of any copyright in the computer software provided by AXA ARC and it cannot be said that the applicant has been conferred any right of usages of the equipment located abroad, more so, when the server is not dedicated to the applicant.

Similarly, in the case of Standard Chartered Bank (supra), the assessee- bank entered into an agreement with a Singapore company SPL, for the provision of data processing support for its business in India and that data processing is down outside India. Application software by which data is transmitted to hardware at Singapore and processed by SPL at Singapore is owned by the assessee. Thus what is used by the appellant is the computer hardware owned by SPL. The Tribunal held that (i) payment in question can be said to be a payment for a facility which is available to any person willing to use the facility, (ii) system software which is embedded in the computer hardware by which the computer hardware functions is not owned by SPL and SPL only has a license to use the system software ; (iii) consideration received by SPL is for using the computer hardware which does not involve use or right to use a process, (iv) there is nothing on record to establish that the hardware could be accessed and put to use by the assessee by means of positive acts, (v) therefore, it cannot be said that the payment by the assessee to SPL is royalty within the meaning of Article 12 of the treaty.

In ExxonMobil Company India (P.) Ltd. (supra), the assessee had paid certain amount to 'EMCAP', Singapore towards global support fees. The AO opined that payment made by the assessee was in the nature of FTS as defined in Explanation 2 to section 9(1)(vii) of the Act. The Tribunal observed that as per terms of agreement, EMCAP had to provide management consulting, Edenred Pte Ltd. 14 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 functional advice, administrative, technical, professional and other supporting services to the assessee; however, there was nothing in agreement to conclude that in course of such provision of service, EMCAP had made available any technical knowledge, experience, skill, knowhow or process which enabled assessee to apply technology contained therein on its own. Therefore, the Tribunal held that payment made by the assessee could not be considered as FTS as defined under Article 12(4)(b) of the India-Singapore DTAA.

In M/s Reliance Jio Infocomm Ltd. (supra) for AY 2016-17, the Tribunal observes that though the India-Singapore Tax Treaty is amended by Notification No. SO 935(E) dated 23.03.2017, however, the definition of 'royalty' therein has not been tinkered with and remains as such.

6.2 Now we turn to the case laws relied on by the Ld. DR. In the case of Cargo Community Network (P.) Ltd. (supra), the assessee, a non-resident company has its registered office at Singapore. It is engaged in the business of providing access to an internet based air cargo portal known as Ezycargo at Singapore. The applicant received payments from an Indian subscribers for providing password to access and use the portal hosted from Singapore. The AAR held that payments made for concurrent access to utilize the sophisticated services offered by the portal would be covered by the expression royalty.

We find that subsequently, after considering the decision in Cargo Community Network (P.) Ltd. (supra), Mumbai ITAT in the case of Standard Chartered Bank 11 ITR 721 and Yahoo India Pvt. 140 TTJ 195 held that no part Edenred Pte Ltd. 15 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 of the payment could be said to be for use of specialized software on which data is processed as no right or privilege was granted to the company to independently use the computer.

In the case IMT Labs (India) (P.) Ltd. (supra), the assessee, an Indian company, entered into an agreement with a non-resident American company for securing license of a particular software, which the applicant is entitled to use. The applicant has to pay license fee for usage of software to the American company. The AAR held that 'Smarterchild' application software on the American company's server platform is scientific equipment licensed to be used for commercial purposes and therefore, payments made for producing and hosting 'Interactive Agent' applications would be covered by the expression 'royalties' as used in Article 12.

However, we find that in the instant case, appellant only provides service by using its hardware/security devices/personnel and not use of any software and therefore the above case is distinguishable from the present appeal.

In ThoughtBuzz (P.) Ltd. (supra), the applicant, a Singapore company was engaged in providing social media monitoring service for a company, brand or product. It was a platform for users to hear and engage with their customers, brand ambassadors etc. across the internet. The applicant offered service on charging a subscription. The clients, who subscribe, can login to its website to do a search on what is being spoken about various brands and so on. The AAR held that the amount received from offering the particular Edenred Pte Ltd. 16 ITA Nos. 1718/M/2014 254/M/2015& 507/M/2016 subscription based service is taxable in India as 'royalty' in terms of paragraph 2 of Article 12 of the DTAC between India & Singapore.

However, we find that in the instant case, the appellant is only providing IDC service which includes administration and supervision of central infrastructure, mailbox hosting services and website hosting services and therefore, the ratio laid down in the above ruling is not applicable to the facts of the appellant's case.

6.3 From the enunciation of law in Bharati Axa General Insurance Co. Ltd; ExxonMobil Company India (P.) Ltd; Standard Chartered Bank v. DDIT; DCIT v. M/s Reliance Jio Infocomm Ltd narrated at para 6.1 hereinbefore, it is quite luculent that revenues under the IDC agreement ought not to be taxed in the hands of the appellant as royalty under the Act and/or India-Singapore DTAA. Therefore, we delete the addition of Rs.95,62,479/- made by the AO towards IDC charges and allow the 2nd ground of appeal."

25. The observations of the co-ordinate bench in the aforesaid decision would squarely apply to the facts of the present case. Therefore, we are of the considered opinion that the payment received by the assessee for rendering services relating to various projects would not qualify as royalty under Article 12(3) of the India-Singapore DTAA. Once it is held so, it becomes immaterial whether the payment qualifies as royalty under the domestic law as the treaty provisions being more beneficial to the assessee would override the provisions of domestic law as per section 90(2) of the Act.

26. Having held so, now let us examine whether the payment received can be treated as FTS. Before we proceed to decide the issue, it is necessary to look at the definition of FEES FOR TECHNICAL SERVICES as per Article 12(4) of the India-Singapore DTAA, 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 ; or*
>
> *(c) consist of the'development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.*
>
> *For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person"*

27. On a careful reading of Article 12(4) of the tax treaty, it becomes very much clear that Article 12(4)(a) and 12(4)(c) are not applicable to the present case. Insofar as Article 12(4)(b) is concerned, it clearly denotes that a payment can be treated as FTS, if it makes available technical knowledge, experience, skill, know-how or process which enables the person acquiring the services to apply the technology contained therein. Therefore, the most crucial factor which requires examination is, while rendering services, whether the assessee has made available any technical knowledge, experience, skill, know-how or process in terms of section 12(4)(b). In our view, the material on record would not persuade one to conclude so. The true meaning of the aforesaid provision is, not only the payment is received for providing technical or managerial services, but, while doing so the service provider also makes available any technical knowledge, experience, skill, know-how or process, etc. to the recipient of services, which enables the person acquiring such services to apply the technology contained therein independent of the service provider. In other words, the service recipient must be in a position to apply the technical knowledge, experience, skill, know-how, etc. without requiring the permission or presence of the service provider.

28. In the facts of the present case, there is nothing on record to suggest that Atos India can use any technical knowledge, experience, skill, know-how or process, etc. independently on its own without requiring the involvement of the assessee. Therefore, in our considered opinion, the tests and conditions of Article 12(4)(b) are not satisfied. That being the case, the payment received by the assessee from various projects related services would not qualify as FTS either. That being the case, the payment received by the assessee has to be treated as business profits; hence, would not be taxable in absence of a permanent establishment in India.

29. At this stage we must deal with the submission of learned Departmental Representative that as per Article 12(2) of the India-Singapore DTAA the amount received can be taxed in India in accordance with the domestic law. On a careful reading of Article 12 of India–Singapore DTAA as whole, it is found, Article 12(1) provides for taxation of royalty and FTS in the country of residence of the recipient. Definitions of royalty and FTS have been given under Article 12(3) and 12(4) of the tax treaty. Of course, Article 12(2) provides for taxation of royalty and FTS in the source country. However, in our considered view, Article 12(2) has to be read in conjunction with Article 12(1), 12(3) and (4) of the tax treaty and not on standalone basis. In our view, Article 12(2) will get triggered only if the amount received qualifies as royalty and FTS under the treaty provisions. Since, in the facts of the present case we have held that the payment received towards various project related services does not qualify as royalty and FTS under the treaty provisions, the applicability of Article 12(2) of the tax treaty would not arise."

9. The learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case and no change in facts and law was alleged in the relevant assessment year. The issue arising in the present appeal is recurring in nature and has been decided by the coordinate bench of the Tribunal in the preceding assessment years. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we uphold the plea of the assessee and direct the AO to delete the impugned addition on account of receipts from Atos India towards project-related services pertaining to Standard Chartered Bank Project.

10. As regards the taxability of receipts from Atos India for the support services pursuant to the Regional Service Agreement, we find that the AO only referred to the Regional Support Agreement dated 02/02/2017 entered by the assessee with Atos India, however, neither analysed the various services rendered by the assessee under the aforesaid agreement nor analysed the terms of the agreement to come to the conclusion that the receipts are in the

nature of Royalty and/or Fees for Technical Services under the Act and the DTAA. We find that the learned DRP also did not analyse any of the above aspects and rejected the objections filed by the assessee by merely placing reliance upon its directions rendered in assessee's own case for the assessment year 2014-15, wherein this issue was not involved. Since the factual aspect pertaining to the taxability of receipt under the Regional Service Agreement has not been properly examined by any of the lower authorities vis-à-vis the terms of the agreement and services rendered therein, we deem it appropriate to remand this issue to the file of AO for *de novo* adjudication. Needless to mention that no order shall be passed without affording reasonable opportunity of being heard to the assessee. As a result, grounds No. 1-4 raised in assessee's appeal are allowed for statistical purposes.

11. Ground no.5, raised in assessee's appeal is pertaining to short grant of credit of TDS. This issue is restored to the file of the AO with the direction to grant TDS credit, in accordance with the law, after conducting the necessary verification. As a result, ground no.5 raised in assessee's appeal is allowed for statistical purposes.

12. Ground no.6, raised in assessee's appeal, is pertaining to the levy of interest under section 234B of the Act, which is consequential in nature. Therefore, ground no.6 is allowed for statistical purposes.

13. Ground no.7 is pertaining to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

14. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 31/03/2023

Sd/-
G.S. PANNU
PRESIDENT

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 31/03/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai

Sd//
(B.R. BASKARAN)
ACCOUNTANT MEMBER
NOMINATED