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

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.1092/Del/2020
Assessment Year: 2014-15
With
ITA No.366/Del/2021
Assessment Year: 2015-16

Netafim Ltd., C/o- Netafim Irrigation India Pvt. Ltd., Plot No.268-270, 271B GIDC, Manjusar, Savli, Vadodara	**Vs.**	Deputy Commissioner of Income-tax, International Taxation, Circle 2(2)(2), New Delhi
PAN :AADCN4087C		
(Appellant)		**(Respondent)**

Appellant by	Sh. Salil Kapoor, Advocate Sh. Ananya Kapoor, Advocate Sh. Vibhu Jain, Advocate
Respondent by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	18.05.2023
Date of pronouncement	31.05.2023

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeals by the assessee arise out of two separate orders of learned Commissioner of Income Tax (Appeals)-43, New Delhi, pertaining to assessment years 2014-15 and 2015-16.

2. The only common issue arising for consideration in the present appeals is, whether the amounts received by the assessee

from its Indian subsidiary towards IT and SAP charges can be treated as Fees for Technical Services (FTS) under India – Israel Double Taxation Avoidance Agreement (DTAA) read with India – Portugal DTAA.

3. Briefly the facts relating to this issue are, the assessee is a non-resident corporate entity incorporated in Israel and a tax resident of Israel. Being a tax resident of Israel, the assessee opted to be governed by India – Israel, as, it is more beneficial to the assessee. Be that as it may, in the assessment years under dispute, the assessee filed its return of income offering to tax the royalty income received from Indian subsidiary towards transfer of technical know-how, skill etc. In course of assessment proceeding, the Assessing Officer noticed that, in addition to the royalty income, the assessee has also received certain fees/charges towards provision of IT support and SAP services under IT and SAP service agreement entered with the Indian subsidiary. However, the receipts from the Indian subsidiary under the IT and SAP service agreement have not been offered to tax by the assessee. When the Assessing Officer called upon the assessee to explain, why the amounts received under the IT and SAP service agreement should not be treated as FTS in terms of

Article 13 of India – Israel DTAA, the assessee furnished a detailed submission stating that, though, the scope of FTS under Article 13 of India – Israel DTAA is much wider, however, as per the Protocol to Indian – Israel DTAA, if under any convention/ agreement between India and any third State, which came into force after 01.01.1995, India limits its taxation at source or royalties or FTS to a rate lower or a scope more restricted than the rate or scope provided in India – Israel DTAA, the same restricted rate or scope as provided in the other treaty shall also be applicable. Taking shelter under the Most Favoured Nation (MFN) clause in the Protocol to India – Israel DTAA, the assessee submitted that as per India – Portugal DTAA, the scope of FTS is more restricted compared to India – Israel DTAA as the definition of FTS under India – Portugal DTAA speaks of fulfillment of 'make available' condition.

4. It was submitted by the assessee that since while rendering services under IT and SAP service agreement, the assessee had not made available any technical knowledge, know-how, skill etc, the receipts cannot be treated as FTS. The Assessing Officer, however, did not accept the submission of the assessee. He observed, the MFN clause under the Protocol to India – Israel

DTAA will not be available to the assessee unless and until the Government of India issues a notification specifically stating that more restricted definition/scope of India – Portugal would be applicable to India – Israel DTAA. The Assessing Officer observed, in absence of such notification, the 'make available' condition under India – Portugal DTAA cannot be automatically imported to India – Israel DTAA. Thus, ultimately, he held, since, Article 13 of India – Israel DTAA does not contain any make available condition and the services for which the amounts were received, fall within the ambit of Article 13(3) of India – Israel DTAA, the receipts would be taxable in India. Accordingly, he brought to tax the receipts under the IT and SAP Service Agreement by treating it as FTS in terms with Article 13 of the treaty. The assessee contested the aforesaid addition before learned Commissioner (Appeals). After taking note of the submissions of assessee and the ratio laid down in certain judicial precedents, learned Commissioner (Appeals) agreed with the assessee that the MFN clause under the Protocol to India – Israel DTAA would apply even in absence of specific notification issued by the Government of India. Thus, he held that more restricted scope of FTS under Article 12(4) of India – Portugal DTAA would be applicable to the assessee.

5. Having held so, learned Commissioner (Appeals) held that assessee's receipts under IT and SAP Service Agreement would fall under Article 12(4)(a) of India – Portugal DTAA as such fees were received with regard to services which are ancillary and subsidiary to the Technical Collaboration Agreement resulting in payment of royalty. In other words, learned Commissioner (Appeals) held that the fees received under IT and SAP Service Agreement is as a result of the royalty income. Thus, he held that since the receipts would fall under Article 12(4)(a) of India – Portugal DTAA, the 'make available' condition under Article 12(4)(b) of the said treaty would not apply. While coming to the conclusion that the receipts from IT and SAP Service Agreement is ancillary and subsidiary to royalty income, learned Commissioner (Appeals) observed that the IT and SAP Service Agreement was entered into due to the fact that a Technical Collaboration Agreement was initially signed. He observed, in case, the Technical Collaboration Agreement would not have been signed, the IT and SAP support would not be required. He observed, the SAP support is an additional support, which is offered in any manufacturing concern. Hence, it is ancillary and subsidiary to the main agreement as it is essential for the operation of the

Indian subsidiary. In the aforesaid premises, he upheld the decision of the Assessing Officer in treating the receipts under IT and SAP Service Agreement as FTS, though, for a different reason.

6. Before us, learned counsel appearing for the assessee submitted, there is no linkage between the IT and SAP Service Agreement and the Technical Collaboration Agreement. He submitted, the Technical Collaboration Agreement is purely for the drip irrigation system implemented by the Indian subsidiary. Whereas, he submitted, the IT and SAP Service Agreement is purely for providing day-to-day IT support required for maintaining IT infrastructure. Further, he submitted, the first appellate authority was factually incorrect while observing that the IT and SAP Service Agreement was entered into only because the Technical Collaboration Agreement was signed. On the contrary, he submitted, IT and SAP Service Agreement existed prior to the Technical Collaboration Agreement, which clearly demonstrates that two agreements have no connection with each other. He submitted, before invoking Article 12(4)(a) of India – Portugal DTAA, the first appellate authority has never disclosed his mind to the assessee, nor sought any explanation from the assessee on the applicability of Article 12(4)(a) of India – Portugal

treaty. Thus, he submitted, the receipts under IT and SAP Service Agreement cannot come within the ambit of Article 12(4)(a) of India – Portugal DTAA. However, in absence of fulfillment of 'make available' condition, such receipts cannot be made taxable in India under Article 12(4)(b) of the treaty. Learned counsel for the assessee submitted, in assessee's own case in assessment years 2010-11 and 2011-12, the Tribunal vide order dated 20.02.2023 passed in ITA No.1427/Del/2015 and ITA No.975/Del/2016 has held that the receipts under IT and SAP Service Agreement cannot come within the ambit of FTS under Article 12(4)(b) of India – Portugal DTAA. Additionally, he relied upon the following decisions as well:

i. *US Technology Resources (P) Ltd. Vs. CIT [2018] 97 taxmann.com 642 (Kerala).*
ii. *Shangri-La International Hotel Management Pte. Vs. ACIT [2023] 148 taxmann.com 3 (Delhi – Trib.)*
iii. *Russel Reynolds Associates Inc. Vs. DCIT[2022] 137 taxmann.com 443 (Delhi – Trib.)*
iv. *SCA Hygiene Products AB Vs. DCIT [2021] 123 taxmann.com 152 (Mumbai – Trib.)*
v. *GRI Renewable Industries S.L. Vs. ACIT [2022] 140 taxmann.com 448 (Pune – Trib.)*
vi. *Cotecna Inspection SA Vs. ITO [2022] 136 taxmann.com 368 (Delhi)*
vii. *Steria (India) Limited Vs. CIT [2016] 72 taxmann.com 1 (Delhi)*
viii. *CIT Vs. De Beers India Minerals (P.) Limited [2012] 346 ITR 467 (Kar HC)*
ix. *DIT Vs. Guy Carpenter & Co. Ltd. [ITA No.202/2012 (Delhi HC)]*

x. *Outotec Oyj Vs. DDIT [2016] 76 taxmann.com 33 (Kolkata Trib.)*
xi. *Spencer Stuart International BV Vs. ACIT [2018] 94 taxmann.com 380 (Mumbai Trib.)*

7. Strongly relying upon the observations of learned first appellate authority, learned Departmental Representative submitted, the services rendered under IT and SAP Service Agreement are ancillary and subsidiary to the Technical Collaboration Agreement. He submitted, the fact that receipts are in the nature of FTS, has not been disputed by the assessee. He submitted, IT and SAP Service Agreement was entered into in 2009, however, the duration of the agreement was for one year. He submitted, subsequently, the agreement has been renewed from time to time. Drawing our attention to the scope of service under IT and SAP Service Agreement, he submitted that some of the services may be related to transfer of technical knowhow, knowledge etc., which resulted in royalty income. Thus, he submitted, the decision of the first appellate authority should be upheld.

8. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. At the outset, we must observe that the assessee, being a tax resident of

Israel, is governed under India – Israel DTAA. The scope and ambit of FTS under Article 13 of India – Israel DTAA is much wider. However, the Protocol to India – Israel DTAA provides that, in case, India enters into an agreement with any other third country after a specified date and the scope of FTS under the said treaty is more restricted, then the restricted scope provided under that treaty would apply to India – Israel DTAA. Though, the Assessing officer has rejected the application of more restricted definition of FTS under India – Portugal DTAA by holding that in absence of a specific notification of Government of India, such restricted definition of FTS cannot be imported to the India – Israel DTAA, however, learned Commissioner (Appeals) has diverged from the view taken by the Assessing Officer and has held that the benefit of MFN clause in the Protocol to India – Israel DTAA would be available to the assessee. Hence, the more restricted scope of FTS under India – Portugal DTAA would apply. Admittedly, against the aforesaid decision of learned Commissioner (Appeals), the Revenue has not filed any appeal.

9. That being the factual position, we have to proceed on the footing that the taxability of the disputed receipts would be governed by the definition of FTS as provided under Article 12(4)

of India – Portugal DTAA. It is a fact on record that learned first appellate authority has held that the receipts under IT and SAP Services Agreement, being ancillary and subsidiary to the royalty income, would be covered under Article 12(4)(a) of India – Portugal DTAA. Hence, the 'make available' condition under Article 12(4)(b) of the treaty would not be applicable. We have to examine the acceptability or otherwise of the aforesaid conclusion of learned Commissioner (Appeals). For this purpose, it is necessary to look into the respective agreements under which the assessee had received IT support service charges and royalty income. On perusal of material placed before us, it is observed, the assessee has entered into IT and SAP Service Agreement with the Indian subsidiary in writing on 11th November, 2010. However, the recitals of the said agreement make it clear that such services were being provided to the Indian subsidiary through oral agreement w.e.f. 1st April, 2009, which was formalized in writing on 11th November, 2010. Thus, for all practical purposes, the IT and SAP Services Agreement was effective from 1st April, 2009. Under this agreement, basically, the assessee provides the following services:

- Helpdesk, network, SAP basis and management

- SAP infrastructure support
- SAP license maintenance
- Application based support

10. As could be seen from the terms of the agreement as well as the nature of services provided therein, the assessee provides IT and SAP support services to its group concerns and subsidiaries by initially incurring the cost itself, thereafter cross charges the cost from its subsidiary. IT and SAP Service Agreement has been entered into basically to provide day to day IT support required for maintaining/running IT infrastructure. It is a fact on record that, though, the aforesaid agreement was initially for a specific period, however, subsequently, it has been renewed from time to time. Whereas, the Technical Collaboration Agreement was entered into between the assessee and the Indian subsidiary in writing from 7th November, 2012. Though, there was a verbal agreement existing from 1st April, 2011.

11. As could be seen from the Technical Collaboration Agreement, the assessee is engaged in the development, production, manufacture, extrusion, assembly and marketing of drip irrigation and micro irrigation products and system required for agricultural and other applications. The assessee is the legal

and beneficial owner of the technical know-how of the aforesaid products. Whereas, the Indian subsidiary is engaged in the business of aforesaid products in India for which it requires technical know-how, training and skill from assessee. As per the terms of the technical collaboration agreement, know-how shall mean, documentation, drawings, standards and specification relating to patents, inventions, designs for extrusion and assembly of the products, material specifications, product specifications and safety data sheets, operational and maintenance manual/instructions therefore, including, without limitations, any such data pertaining to the extraction processes in connection with the products. As per the Technical Collaboration Agreement, patent shall mean any patent (including utility model) or patent application in any jurisdiction which relates to the products or any improvement and which during the validity of the agreement may be owned by or licensed to the assessee. The product is defined to mean pressure compensated or non-pressure compensated driplines and other items specified in the agreement.

12. Thus, as could be seen from the scope and ambit of the Technical Collaborated Agreement, the royalty is paid to the

assessee by the Indian subsidiary for providing technical know-how, training and skill etc. relating to drip irrigation products/system.

13. Undisputedly, learned first appellate authority has invoked Article 12(4)(a) of India – Portugal DTAA to hold that the receipts under IT and SAP Service Agreement is in the nature of FTS. Before examining the acceptability of the aforesaid reasoning, it is necessary to look at Article 12(4) of India – Portugal DTAA, reproduced hereunder:

> *"Article 12(4)- For the purposes of this Article, "fees for included services" means payments of any kind, other than those mentioned in Articles 14 and 15 of this Convention, to any person in consideration of the rendering of any technical or consultancy services (including through the provisions of services of 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 or consist of the development and transfer of a technical plan or technical design which enables the person acquiring the services to apply the technology contained herein."*

14. Presently, we are concerned with Article 12(4)(a). A careful reading of Article 12(4)(a) of India – Portugal Tax Treaty makes it clear that to qualify as FTS therein, two conditions have to be satisfied. Firstly, the services giving rise to the fees must be ancillary and subsidiary, and secondly, it must be connected to

the application or enjoyment of right, property, or information which results in payment of royalty. On a detailed analysis of IT and SAP Service Agreement and Technical Collaboration Agreement earlier, we have noticed that the services rendered under IT and SAP support service agreement are completely different in nature and have no connection with the services rendered under the Technical Collaboration Agreement. While the services rendered under the IT and SAP Service Agreement is for day to day office functioning and maintenance of IT infrastructure, the services rendered under the Technical Collaboration Agreement is purely and strictly in connection with the drip irrigation system required for agricultural purposes. Therefore, in our considered opinion, the services rendered under IT and SAP Services Agreement cannot be ancillary and subsidiary to the services rendered under Technical Collaboration Agreement. Further, they do not relate to application or enjoyment of right to property or information resulting in payment of royalty.

15. At this stage, we must observe, learned first appellate authority, while coming to the conclusion that the services rendered under IT and SAP Services Agreement are ancillary and

subsidiary to royalty agreement, has completely misconceived the facts, as, he was under an impression that the Technical Collaboration Agreement existed prior to IT and SAP Service Agreement. Whereas, factually, it is not so. As discussed earlier, IT and SAP Service Agreement was existing between the parties from 1st April, 2009. Whereas, the Technical Collaboration Agreement came into effect from 1st April, 2011, after two years.

16. It appears, learned first appellate authority fell into such factual error because while invoking Article 12(4)(a) of India – Portugal DTAA, he did not afford any opportunity to the assessee to have his say. Had the first appellate authority given a proper opportunity of rebuttal to the assessee, the conclusion could have been different.

17. Be that as it may, after factually examining the nature of services rendered under the IT and SAP Service Agreement and the Technical Collaboration Agreement, we are convinced that the services rendered under IT and SAP Services Agreement are not ancillary and subsidiary to the services rendered under the Technical Collaboration Agreement. Moreso, when the IT and SAP Services Agreement was in existence much prior to the Technical Collaboration Agreement. For the aforestated reasons, we hold

that the receipts in dispute cannot be treated as FTS under Article 12(4)(a) of India – Portugal DTAA and made taxable at the hands of the assessee in India. Accordingly, the disputed additions in both the assessment years are deleted.

18. In the result, appeals are allowed.

Order pronounced in the open court on 31st May, 2023

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 31st May, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi