

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

**BEFORE SHRI G.S. PANNU, PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

**ITA No. 7736/Del/2019
Assessment Year: 2016-17**

Financiere CVT (Now GE Energy Power Conversion group), 6 th Floor, Building 7A, DLF Cyber City, Phase-3, Gurgaon. PAN: AABCF6233C) (Appellant)	Versus	ACIT, Circle 1(3)(1), International Taxation, New Delhi. (Respondent)
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Assessee by:	Sh. Ravi Sharma, Advocate & Sh. Rishabh Malhotra, AR
Revenue by:	Sh. S.N. Pandey, Sr. DR

Date of hearing : 06.04.2023
Date of pronouncement : 16.06.2023

ORDER

PER SAKTIJIT DEY, J.M.:

Captioned appeal by the assessee arises out of order dated 12.07.2019 of learned Commissioner of Income-tax (Appeals)-42, New Delhi pertaining to assessment year 2016-17.

2. Though, the assessee has raised multiple grounds, however, the only issue arising for consideration is whether the amount of

Rs.5,78,85,456/- received by the assessee towards services rendered to GE Power Conversion (India) Pvt. Ltd. and Converteam EDC Pvt. Ltd. is in the nature of fees for technical services(FTS).

3. Briefly, the facts relevant to this issue are, the assessee is a non-resident corporate entity and a tax resident of Republic of France. As stated by the Assessing Officer, the assessee is engaged in the business of electrification. For the assessment year under dispute, the assessee filed its return of income declaring nil income. In course of assessment proceedings, the Assessing Officer noticed that in the year under consideration, the assessee had receipts of Rs.5,78,85,456/- from rendition of certain services to its Indian subsidiary. However, the assessee has not offered them to tax claiming that they are not taxable in India. After calling for and examining necessary details, the Assessing Officer found that the assessee has provided certain services to the Indian subsidiary.

4. After examining the nature of services provided to Indian subsidiary, the Assessing Officer was of the view that the receipts are in the nature of FTS. Therefore, he issued a show cause notice to the

assessee to explain as to why it should not be treated as FTS and taxable in India as per India-France Double Taxation Avoidance Agreement (DTAA). In response to show cause notice, the assessee submitted that the services rendered by the assessee are in the nature of managerial services. It was submitted, though, the term 'FTS' in Article 13(4) of India-France DTAA has wider scope and encompasses services in the nature of managerial, technical or consultancy, however, protocol to India-France DTAA provides that after 01.09.1989, if India signs any DTAA with a third State, which is a member of OECD and in terms of that treaty India limits its taxation at source to a rate lower or scope more restricted than the rate or scope provided in India-France DTAA, then such restricted rate or scope provided in the treaty with third State will apply to India-France DTAA. Thus taking shelter under such Most Favoured Nation (MFN) clause provided in the protocol, the assessee submitted that as per India-United Kingdom(UK) DTAA, the term 'FTS' under Article 13(4) is more restricted in its scope, as it only includes technical or consultancy services and further imposes 'make available' condition. Thus, the assessee submitted, since the assessee has provided managerial services, the fee received does not fall within the definition of FTS as provided under

Article 13(4) of India-UK DTAA. Without prejudice, the assessee submitted, even assuming that the services are in the nature of technical or consultancy, however, since, while rendering such services, the assessee has not made available the technical knowledge, knowhow, skill etc. to the recipient of such services, the receipts cannot be treated as FTS.

5. The Assessing Officer, however, did not find merits in any of the submissions of the assessee. Firstly, he held that the services rendered by the assessee are in nature of technical or consultancy services. Secondly, he observed that the protocol by itself would not facilitate importing of the definition of FTS in another treaty to India-France treaty, unless, the government issues notification incorporating such definition in India-France DTAA. Thus, he held that the definition of FTS as given in India-France DTAA will apply to the receipts. Without prejudice, he observed, even, applying the provisions of Article 13(4) of the India-UK DTAA, the 'make available' condition is satisfied, as the nature of services provided demonstrate that the assessee has made available technical knowledge, knowhow, skill etc. while rendering the services to the Indian subsidiary. Thus, he concluded that the amount received by the assessee is in the

nature of FTS, both under the domestic law and India-France treaty, hence, taxable in India.

6. Contesting the addition made treating the receipts as FTS, the assessee filed appeal before learned Commissioner (Appeals). After considering the submissions of the assessee, learned Commissioner (Appeals) accepted assessee's claim that even without specific notification issued by the Government as per protocol to India-France DTAA, the assessee would be entitled to the benefit of MFN status. Hence, more restricted meaning of FTS as per India-UK DTAA would apply to the receipts of the assessee. However, learned Commissioner (Appeals) held that the amount received by the assessee is for the services of the nature of technical or consultancy, hence, would be covered under Article 13(4) of India-UK DTAA. Further, he held that while rendering such technical or consultancy services, the assessee has made available technical knowledge, knowhow, experience, skill etc. to the recipient of such services. Accordingly, he upheld the taxability of the receipts in the hands of the assessee.

7. Before us, learned counsel for the assessee, more or less, reiterated the stand taken before the departmental authorities and submitted that

the nature of services rendered by the assessee are purely management support services including payroll support , staffing and recruitment support, training and employee development support, benefit support. Drawing our attention to the correspondences with the Indian subsidiary through email, learned counsel emphasised that the nature of services rendered are neither technical nor consultancy. He submitted, even, assuming that there is some element of technical or consultancy services, however, the 'make available' condition as per Article 13(4)(c) of India-UK DTAA is not satisfied. He submitted, the departmental authorities have not brought any material on record to demonstrate that while rendering such services, the assessee has made available any technical knowledge, experience, knowhow, skill etc. to the recipient of services so as to enable the recipient to utilize the technical knowledge, skill, knowhow etc. independently in future. Thus, he submitted, the amount received does not qualify as FTS under Article 13(4) of India-UK DTAA. In support of such contention, learned counsel relied upon the following decisions :

- (i). DIT v. Guy Carpenter & Co. Ltd. (2012) 346 ITR 504 (Delhi)
- (ii). Dee Beers India Minerals (P) Ltd. (2012), 346 ITR 467 (Kar.)
- (iii). Steria (India) Ltd. v. CIT (2016) 386 ITR 30 (Del).
- (iv). Measurement Technology Ltd. United Kingdom (2015) 376 ITR 461(AAR)

- (v). Invensys Systems Inv. Vs. DCIT (2009) 317 ITR 438 (AAR)
- (vi). DCIT vs. Boston Consulting Group (2005) 94 ITD-31.
- (vii). DCIT v. Sun Pharmaceutical Laboratories Ltd. (2018) 96 taxmann.com 105.

8. Finally, he submitted, in assessee's own case for assessment year 2015-16, learned first appellate authority himself has concluded that identical nature of receipts from same Indian subsidiary is not in the nature of FTS under the treaty provision. He submitted, the said decision of the first appellate authority was upheld by the Tribunal while deciding the appeal in order dated 23.09.2022.

9. Strongly relying upon the observations of the Assessing Officer and learned first appellate authority, learned Departmental Representative submitted, the assessee has rendered wide spectrum of services to its Indian subsidiary covering 15 different services. Drawing our attention to the nature of various services rendered, learned Departmental Representative submitted, many of the services rendered are in the nature of technical or consultancy services. Further, he submitted, since, the assessee is providing training to the employees of the service recipient, the 'make available' condition under India-UK DTAA is also satisfied. Thus, he

submitted, the receipts have been rightly treated as FTS and brought to tax in India.

10. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. At the outset, we must observe that though, the Assessing Officer has held that the benefit of MFN status in terms of protocol to India-France DTAA would not be available to the assessee in absence of a specific notification issued by the Government of India, however, learned first appellate authority has reversed the aforesaid decision of the Assessing Officer and has accepted assessee's contention that in terms with protocol to India-France DTAA, the assessee can avail the benefit of MFN status. Hence, more restricted scope and meaning of FTS as provided under Article 13(4) of India-UK DTAA would apply to determine the nature of receipts. Admittedly, against aforesaid decision of learned first appellate authority, the Revenue is not in appeal. Therefore, we have to proceed on the footing that the taxability of the amount received by the assessee from Indian subsidiary- whether FTS or not, has to be determined with reference to Article 13(4) of India-UK DTAA.

11. On a reading of Article 13(4) of India-UK treaty as a whole, it is understood that the receipts from rendition of services of technical or consultancy nature qualifies as FTS. However, clause (c) to Article 13(4) of India-UK DTAA carves out an exception by providing that the receipts cannot be treated as FTS unless, while rendering services, the technical knowledge, experience, skill, knowhow etc. is made available to the service recipient. The expression 'make available' has been judicially interpreted to mean that it will enable the recipient of such services to independently apply such technical knowledge, knowhow, skill etc., acquired from service provider, in future, without the aid and assistance of the service provider. Keeping in view the aforesaid legal position, if we examine the facts on record, it is to be seen that the assessee provided the following category of services :

- (i). **Payroll support, staffing and recruiting support, training and employee development support, benefits support** - These services broadly fall under human resources function.
- (ii). **Accounts receivable and accounts payable support** - these include compiling, analysing and recording credit data and other financial information, compiling billings, keeping records of collection activities and status of accounts, compiling information and records to draw up purchase orders for procurement of materials, making payment to vendors, keeping records of payments etc.

- (iii). **General administrative support, routine corporate and public relations support and meeting coordination and travel planning support** – These services comprise of routine clerical activities like drafting correspondences, organizing and maintaining electronic files, mailroom services, assistance in ensuring travel arrangements of staff, , coordinating with the staff for setting up group conventions, negotiating travel fares and hotel charges, preparation of routine public relations programme and corporate communication policy etc.
- (iv). **Accounting, auditing and statistical assistance support:** These services cover functions like gather of information for preparation of financial statements, performing calculations and verifying the accuracy of figures, consolidation of legal entity results for each country, preparation of group-wide accounting manual to be followed by every affiliate, compilation of data for statistical studies etc.
- (v). **Tax support** : These services encompass support in relation to various applicable taxes, which includes assistance in preparation of return forms, gathering information with respect to tax payments, processing of tax payments, negotiating advance pricing agreements etc.
- (vi). **Health, safety, environmental & regulatory affairs support and legal support:** These services include preparation of internal healthy, safety and environment stands, overviewing compliances with various regulatory requirements, preparation of documentation as mandated by law etc., general legal services like reviewing contracts and agreements, providing inputs, coordinating with legal counsel maintaining records etc.
- (vii). **Budgeting and Treasury activities support:** These services include compiling data to prepare budgets and other accounting reports for management, verifying information for completeness, accuracy and conformance with internal procedures and regulations, providing staff and facilities to hedge currency exposures, coordinating investment activities in connection with short term cash management etc.
- (viii). **Routine information and Technology (IT) support** : These services include supporting computer systems, including those

used in connection with operations, accounting, manufacturing, customer service, human resources, payroll and email, formulating guidelines with respect to the use of IT systems, maintenance and repairs of IT systems etc.

12. Thus, on scanning through various services rendered by the assessee to the Indian subsidiary, it appears that most of the services rendered are routine management support services. However, some of the services like implementation of ERP patches, identify indirect tax issue that could arise on sourcing from India for a global project, guidance sought by Indian subsidiary on the terms and conditions to be proposed to one of its customer and preparation of global guidelines for use of power conversion entities, advice regarding increase the use of software in regular activities to increase the productivity, assistance given in opening the supplier code in their SAP etc., may fall within the ambit of either technical or consultancy services. However, such services have to be specifically identified keeping in view the definition of FTS under Article 13(4) of India-UK DTAA. In the facts of the present case, the departmental authorities have not carried out that exercise before concluding that the entire variety of services

rendered by the assessee comes within the sweep of technical or consultancy services. This, in our view, is unsustainable.

13. Even, assuming that out of the variety of services rendered by the assessee, some may or may not fall within the ambit of technical or consultancy services, still the 'make available' condition under Article 13(4) (c) of the India-UK treaty has to be satisfied. Though, the departmental authorities have alleged that the make available condition stands satisfied, however, no material has been brought on record to support such finding. As discussed earlier, the burden is entirely on the Revenue to prove that rendition of services by the assessee has made available technical knowledge, knowhow, skill etc. to the service recipient so as to enable the service recipient to utilize such technical knowledge, knowhow, skill etc. independently in future without the aid and assistance of the assessee. Thus, in our view, the Revenue having failed to demonstrate the aforesaid aspect through cogent evidence, it has to be held that the make available condition under Article 13(4)(c) of India-UK treaty is not fulfilled. While coming to such view, we have drawn support from the ratio laid down in the decisions cited before us by learned

counsel for the assessee. Pertinently, in assessee's own case in assessment year 2015-16 (Convertteam Group and Financiere CVT got merged and renamed as GE Energy Power Conversion Group), the Tribunal in ITA No. 8112/Del/2019 dated 23.09.2022, while considering identical nature of receipts from the very same Indian subsidiary, has confirmed the order of the first appellate authority holding that the receipts are not in the nature of FTS under Article 13(4) of India-UK DTAA. For ease of reference, following observations of the coordinate Bench are reproduced here under:

"19. It would be pertinent to refer to Article -13 of the India UK Tax Treaty which is as under :-

"For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term fees for technical services means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph -3(a) of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design."

20. A perusal of the above Article show that the term FTS has a more restrictive scope in so far as the absence of the term "managerial" and further existence of the "make available" condition are embedded therein.

21. In our understanding under the India UK tax treaty for a payment to qualify as FTS both the following conditions need to be cumulative satisfied :

(i) The services need to be “technical” or “consultancy” in nature.

(ii) The services need to make available technical knowledge, experience, skill, know-how or processes, which enables the persons acquiring the services to apply the technology contained therein.

22. Considering the factual matrix of the case in hand in the light of the judicial decisions discussed here in above we do not find any error or infirmity in the findings of the CIT(A) which need interference.”

14. Thus, considering totality of facts and circumstances of the case, we hold that the amount received by the assessee from Indian subsidiary towards rendition of various services do not qualify as FTS under Article 13(4) to India-UK DTAA read with India-France DTAA. Thus, we delete the addition of Rs.5,78,85,456/-.

15. For the aforesaid reasons, we hold that reimbursement of expenses amounting to Rs.65,49,653/- will also not qualify as FTS. Grounds are allowed.

16. In the result, appeal is allowed.

Order pronounced in the open court on 16 /06/2023.

Sd/-

(G.S. PANNU)
PRESIDENT

*aks/-

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

Copy forwarded to:

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2. Respondent
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Assistant Registrar
ITAT New Delhi