IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C" : PUNE

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

I.T.A.No.148/PUN./2023
Assessment Year 2020-2021

BMC Software Asia Pacific Pte Ltd., 600, Singapore, 20-01/10 Parview Square, Foreign, Singapore. PAN AAECB0642A	vs.	The ACIT (International Tax), Circle-1, Room No.314, 3rd Floor, B.O. Bhavan, Plot No.1, Sector No.17, Pune Satara Road, Parvati, Pune – 411 009. Maharashtra.
(Appellant)		(Respondent)

For Assessee :	Mr. Farrokh V Irani
For Revenue :	Shri Ganesh Bare, CIT

Date of Hearing :	26.06.2023
Date of Pronouncement :	27.06.2023

ORDER

PER SATBEER SINGH GODARA, J.M. :

This assessee's appeal for assessment year 2020-2021 arises against the ACIT (IT) Circle-1, Pune's assessment having DIN & Order No.ITBA/AST/S/143(3)/2022-23/1047954768(1), dated 12.12.2022, framed in consequence to the CIT [DRP-3], Mumbai-1, Mumbai's directions in DIN & Order No.ITBA/DRP/F/144C(5)/2022-231047508342(1), dated 18.11.2022, in proceedings u/sec.144C(5) r.w.s.144C(13) of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties at length. Case file perused.

2. The assessee pleads the following substantive grounds in the instant appeal :

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

I. Erred in considering the receipts on account of support and maintenance services to its customers in India as liable to tax in India :

The learned AO has erred on facts and in circumstances or the case and in law in considering the receipts of INR 54,93,70,516 from support and maintenance services rendered in relation to sale as fees for technical services under the India-Singapore DTAA as well as under the Act and liable to tax in India.

II. Invalidity of Assessment Proceedings :

The learned AO has erred in conducting assessment proceedings for the assessment year 2020-21 and passing a final assessment order under section 143(3) read with section 144C of the Act without issuing a valid notice under section 143(2) the Act. The assessment proceedings were initiated by issuance of notice under section 143(2) by National

Faceless Assessment Centre ('NaFAC'), without having authority to issue the said notice.

III. Other grounds of appeal :

1. Initiation of penalty proceedings under section 274 read with section 270A of the Act.

The learned AO has erred on the facts and in circumstances of the case and in law in proposing to initiate penalty proceedings against the Appellant under section 2.74 r.w.s 270A of the Act considering the receipts of INR 54,93,70,516 from support and maintenance services rendered in relation to sale as liable to tax in India.

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."

3. Learned counsel next submitted that the very issue(s) had arisen between the parties in the preceding assessment year 2019-2020 as well wherein this tribunal's coordinate bench's order in ITA.No.680/PUN./2022 dated 25.01.2023 has allowed the taxpayer's appeal vide following detailed discussion :

"3. It next transpires during the course of hearing with the able assistance coming from both the sides that the DRP's direction herein have followed its earlier deduction in assessment year 2018-19 for affirming the Assessing Officer's draft assessment dated 27.09.2021 proposing the impugned ALP adjustment. We make it clear that the learned DRP's detailed discussion to this effect in paragraphs 4.2 to 4.2.4 in internal pages 11 to 18 of the corresponding year. And also that the assessee has already succeeded on the very issue in its appeal ITA.No.97/PUN./2022 for assessment year 2018-19 as per learned coordinate bench's order dated 15.07.2022 reading as under :

"2. The only effective ground raised in this appeal is against treating receipt of Rs.42,42,96,498/- from Support and Maintenance Services rendered in relation to software sold as chargeable to tax as Fees for Technical Services (in short 'FTS') under the Act and also India-Singapore Double Taxation Avoidance Agreement (DTAA).

3. Succinctly, the facts of the case are that the assessee is a tax resident of Singapore engaged in selling Software products to end-users and customers. Return was filed declaring total income at Nil. During the draft proceedings, the Assessing Officer (AO) noted that the assessee earned income of Rs.109,01,25,420/- from

sale of Software licenses and support services in relation thereto, which was not offered for taxation on the ground that the first item was towards sale of software licenses and not the transfer of copyright; and the second was for Support services which did not make available any technical know-how to the customers. The AO observed that the Dispute Resolution Panel (DRP) in earlier assessment years has confirmed the action of the AO in treating such amount as Royalty. The assessee gave its bifurcation as, Rs.67.94 crore from sale of software license and Rs.41.06 crore from rendition of Support and Maintenance of the software licensed (hereinafter also called 'IT Support services'). The AO held that the first component was chargeable as Royalty under the Act as well as Article 12(3)(a) and the second was taxable as `fees for technical services' under the Act and also Article 12(4)(a) of the DTAA. The assessee's contention that the second item was in the nature of provision of services involving technical knowledge without making available such technical knowledge to the customers and hence not hit by Article 12(4)(b) of the DTAA, did not find favour with the AO. Following his view taken for earlier years, the AO notified the draft order including the entire amount from both the streams as chargeable to tax. The assessee raised objections before the DRP by contending that the Tribunal has

deleted similar taxability in its own case for the A.Ys. 2010-11, 2016-17 and 2017-18. The DRP held that income from sale of software licenses was not chargeable to tax in the light of the judgment of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 472 (SC). As regards the income from IT support services, the DRP distinguished the earlier orders of the Tribunal by noting that the Tribunal dealt with both the items of revenue as Royalty without separately noting that the second item was in the nature of fees for technical services. A remand report was called for from the AO, who held that the IT Support service charges were covered by clauses (a) and (b) of para 4 of Article 12 of the DTAA, as against his stand in the draft order to the effect that these were governed by Article 12(4)(a) of the DTAA. The DRP held that the IT Support charges were chargeable as Fees for technical services under the DTAA. Giving effect to the directions of the DRP, the AO passed the impugned order including IT Support service charges of Rs.42.42 crore in the total income. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

4. We have heard both the sides and gone through the relevant material on record. It is overt from the factual panorama that income from sale of software has been immuned from the tax-net

primarily on the ground that no copyright was provided by the assessee to its customers. The issue under consideration is qua the income from IT Support services. At the outset, it has been fairly admitted on behalf of the assessee that the amount under consideration is chargeable to tax under the Act, but the protection is sought under the DTAA. The stand of the assessee has been that the said amount is in lieu of providing technical knowledge and experience etc. and since such services were not made available to the customers, it was not chargeable to tax in terms of Article 12(4)(b) of the DTAA. Au contraire, the AO rejected this philosophy by holding such amount to be in relation to software sold, thereby, falling under Article 12(4)(a) of the DTAA as fees for technical services. During the course of the remand proceedings, the AO canvassed a view that the receipt was also for making available technical knowledge etc. to the software buyers and hence covered under Article 12(4)(b) of the DTAA as well. Thus, it is evident that the AO has considered the receipt from IT Support services both under clauses (a) and (b) of Article 12(4) of the DTAA.

5. In order to appreciate the rival contentions, it would be apposite to consider the mandate of the relevant parts of Article 12 of the DTAA, which runs as under:

`Article 12

ROYALTIES AND FEES FOR TECHNICAL SERVICES

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. ….

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(b) or 4(c) of Article 8.

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.

……..'

6. A cursory look at the above Article transpires that it deals both with royalties and fees for technical services. The terms `Royalties' has been defined in para 3 having two clauses. Though the word `or' has not been used between the clauses (a) and (b), still the term 'royalties' means consideration received either for the use or right to use of (a) any copyright of a literary, artistic or scientific work etc. or (b) any industrial, commercial or scientific equipment. Both the clauses are independent of each other. A consideration becomes `royalties' on satisfaction of the requisite conditions of either of the clauses. The conditions of both the clauses do not require cumulative satisfaction so as to rope in such consideration within the ambit of `royalties'. Simply put, if consideration is received for allowing use or right to use copyright in literary, artistic or scientific work etc., it becomes `royalties'. There is no requirement that such use or right to use of the software etc. must necessarily be coupled with the use of any industrial, commercial or scientific equipment, so as to constitute `royalties'.

7. Similar is the position regarding para 4 of Article 12, which has three clauses. The word `or' has been expressly deployed at the end of the clauses (a) and (b) so as to make it clear that consideration for the services referred to in either of the three clauses constitutes fees for technical services. In other words, if the consideration is received for rendering the services in the nature given in clause (a), the amount will become FTS without examining if the conditions of clauses (b) or (c) are satisfied. Similarly, if some consideration is received for the services which "make available" technical knowledge etc. under clause (b), it automatically becomes FTS without any further need to examine if the prescription of clauses (a) and (c) is satisfied. It follows that paras 3 and 4 of the Article 12 deal with distinct situations, mutually exclusive to each other, so as to constitute royalties or fees for technical services, as the case may be, in the given circumstances.

8. Adverting to the facts of the extant case, it is patent that the AO categorized Receipt on account of software licenses under clause (a) of para 3 of the Article 12 in the draft order and finalized its taxability. It is a different matter that the DRP held such amount not falling under para 3(a) of the Article and hence not taxable. Similarly, the AO treated the Receipt on account of IT

Support services in the draft proceedings as falling under para 4(a) of Article 12. It was during the course of remand proceedings that the AO made out a case that the receipt is also governed by clause (b) of Article 12(4). As such, we will proceed in seriatim to examine if the income from IT Support services falls within clauses (a) or (b) of para 4 of Article 12 of the DTAA.

I. Do IT Support charges fall under Article 12(4)(a)?

9.1. The assessee sold software licenses for which it earned income of Rs.67.94 crore. The AO treated such amount as chargeable to tax as royalty under the Act and also Article 12(3)(a) of the DTAA. The assessee earned income from IT support service anent to the software sold, which was treated by the AO as falling under Article 12(4)(a), because such clause provides that fees for technical services means payment in consideration of services of managerial, technical or consultancy nature etc., if such services are ancillary and subsidiary to the application or enjoyment of the right, property or information for which the payment described in para 3 is received. The DRP held that income from sale of software does not fall under Article 12(3)(a) and hence not chargeable to tax. Now the moot question is whether IT Support service charges in relation to the software sold will still constitute FTS under para 4(a) of Article 12 of the DTAA?

9.2. The writ of Article 12(3)(a) extends to treating consideration for use or right to use any copyright of literary, artistic, scientific work etc. as `Royalties'. Para 4(a) provides that the FTS means any consideration for services which are ancillary and subsidiary to the application or enjoyment of right, etc. for which payment described in para 3 is received. Thus, it is evident, in order an income to fall under para 4(a), it is necessary that there should be some amount falling in para 3(a) and the income as per para 4(a) should be for services ancillary to the enjoyment of the right property etc., `for which a payment described in paragraph 3 is received'. If there is no amount falling in para 3(a) which can be described as 'Royalties' for use or right to use any copyright etc., consideration for any services ancillary and subsidiary to the application or enjoyment of such right etc. cannot also, as a fortiori fall in para 4(a). It is for the raison d'etre that existence of any consideration under Article 12(3)(a) is sine qua non for bringing any amount in relation to services under para 4(a) of Article 12. There can be two situations of income arising from licensing of software and also from support and maintenance services for such software. First, where the amount received by the assessee from licensing of software satisfies the condition of `royalty' as right to copy is also assigned to the licensee; and

second, where copyright is not assigned. In the first situation, income from licensing of software would descend in para 3(a) of Article 12 and accordingly the amount of support and maintenance charges will be governed by para 4(a) of Article 12. In the second scenario, income from licensing of software would not satisfy the condition of `royalty' and hence will not drop into para 3(a) of Article 12 with sequitur that the question of application of para 4(a) to support and maintenance charges will not arise. Since there is no amount taxable as royalties under Article 12(3)(a) in this case, the IT Support service charges, as a natural corollary, cannot be brought within the purview of Article 12(4)(a) of the DTAA.

II. Do IT Support charges fall under Article 12(4)(b)?

10.1. Having found that Support and maintenance charges do not fall under para 4(a), we now proceed to examine, if these can be covered under clause (b), as has been held by the AO in alternate. Para 4(b) of Article 12 stipulates that consideration for services of technical nature etc. becomes FTS if such services "make available" technical knowledge, experience, skill, knowhow or process etc. that enables the person acquiring the services to apply the technology contained therein.

10.2. We revert to the factual panorama prevailing in this case to find out if the mandate of para 4(b) is satisfied? The AO, in the remand report, has discussed the nature of IT Support services. A copy of the remand report is available at page 493 of the paper book. Relevant extracts therefrom have been reproduced by the DRP in its direction as well. The AO has discussed the nature of services rendered to Bharati Airtel Ltd., Gurgaon. Para 4.3 of the remand report provides that the: "Customer has requested BMC to provide the following services, as time permits, to assist the Customer with the following activities :

On the existing 8.1 system-

- *Performing a sizing review for new integrations and new lines of businesses being added to the platform and provide recommendations on the existing Remedy 8.1 system to achieve high availability of up to 99.99%*
- *Assisting Customer Operations team to perform Remedy operations management tasks to provide consistent user experience and stability.*
- *Be a member of the Customer team providing level 3 support.*

On the new 9.1 system

- *Performing configuration and enhancements on the Remedy platform.*
- *Best practices technical advisory, configuration, documentations, integration of Remedy with other systems based on Customer use cases and requirements.*

- *Assisting Customer Operations team to perform Remedy operations management incident management, bug fixing, patch updates and deployment of major software releases.*
- *Be a member of the Customer team providing level 3 support.*
- *Review application performance and health check (including sizing and provide recommendations on changes,*
- *Quarterly review of activities undertaken and to be provided in following quarter including -*
    - *Historical performance and availability review*
    - *Recommendations to improve performance and availability that could be implemented in the next quarter*
    - *Review of support cases and incidents raised within BMC*
    - *Additional use cases Customer would like to deploy and Customer roadmap update*
    - *BMC roadmap and Customer innovation agenda update*

    BMC will provide the following to assist the customer:-

    - *Provide two (2) resources for 24 continuous months (inclusive of public holidays and annual leave) during Business Hours.*
    - *Services will be delivered onsite in Customer's location in Manesar, Gurgaon.*
    - *BMC resources will assist with operations onsite during on Business Days, some remote assistance may be*

required to support major or critical incidents outside of business hours.

- *In case of a critical incident that disrupts the High Availability of the system, BMC will -*
    - *Invoke our Severity 1 alert notification and place the Customer incident on Follow The Sun priority.*
    - *Convene a specialist team consisting operations BMC technical support analysis customer operations teams to further review.*
    - *Work with Customer operations BMC technical support analysts and Product teams if required to isolate the issue.*
    - *Work with BMC support teams to identify a Root Cause Analysis.*
    - *Work with customer remediation teams to schedule remediation work and add the remediation to the ongoing best practices and customer operations guides.*
    - *Add the incident to the list for Quarterly review.*

10.3. From the above description of services, it is graphically apparent that the assessee has been called upon to perform sizing review for new integrations and new lines of businesses; assisting Customer Operations team to perform Remedy operations; reviewing application performance and health check; quarterly

review of activities undertaken. Further, the assessee was asked to deploy two persons for rendering on-site services.

10.4. Then the AO has discussed terms of Agreement with Wipro Ltd., Bangalore. The assessee's responsibilities have been mentioned as under:

> *BMC Remedy on Demand – Activation or BMC Remedy on Demand Public Sector – Activation :*
>
> *This Service will activate the BMC remedy on Demand solution as part of the BMC Remedy on Demand subscription service, and enable the customers to leverage the features of the BMC Remedy on Demand solution. The process includes activities that provide system access and basic configuration to enable the service. The process is administered remotely and when completed an email with credentials and general information on accessing and using the service will be sent to the Customer contact.*
>
> *Scope of Service Included :*
>
> - *Provision Environments – provision three (3) BMC Remedy on Demand environments.*

10.5. Next is the Agreement with Cap Gemini, which states that the `Services' shall mean facilities management, service bureau, outsourcing, application management and development, or any other information processing or related services.

10.6. On an overview of the nature of foregoing services rendered by the assessee to its customers, it is absolutely clear that these are in the realm of attending to the Customers requirements by performing sizing review for new integrations and new lines of businesses and also providing level 3 support along with reviewing applications performance and health checks etc. These services definitely require technical knowledge for their rendition. The question is whether such services make available any technical knowledge, experience, or skill etc. to the customers within the scope of para 4(b) of Article 12 of the DTAA? The expression `make available' has come up for consideration before several judicial forums. The Hon'ble Karnataka High Court in CIT Vs. De Beers India Minerals Pvt. Ltd. (2012) 346 ITR 467 (Kar.) has held that the condition of the expression make available gets satisfied if the payer of the services is able to utilize the acquired knowledge or knowhow at his own in future without the aid of the service provider. The Authority for Advance Ruling in Production resources group, in Re (2018) 401 ITR 56 AAR has also held that "make available" connotes something which results in transmitting the technical knowledge so that the recipient could derive an enduring benefit and utilize the same in future on his own without the aid and assistance of the provider. On going

through the above interpretation, it becomes palpable that in order to `make available' technical services, it is essential that the recipient of the services must acquire such technical know-how etc. which he can himself use in future without any assistance of the provider. It cannot be any act or service which is availed that simultaneously gets consumed without leaving any knowhow in the hands of the service-receiver. At this stage, it is pertinent to note that the DTAA has not left the meaning of the expression `make available' open for any interpretation. The afore referred judicially settled meaning of the term `make available' has been incorporated in para 4(b) of Article 12 of the DTAA itself, which opens with making available technical knowledge etc. and culminates with: "which enables the person acquiring the services to apply the technology contained therein". On going through the nature of services discussed supra, it is unequivocal that albeit the assessee provided the services laced with technical knowhow, but did not provide any technical knowledge, experience or skill etc. to the recipients for their own application in future without assistance of the assessee. The services provided by the assessee were consumed with their provision. In the hue of the command of Article 12(4)(b), it is palpable that the assessee, with the provision of IT Support services, did not "make available" any technical

knowledge, experience or skill etc. to its customers to apply in future. Ex consequenti, receipt for IT Support services does not become FTS under this provision as well.

11. Once it is held that the amount received by the assessee for providing the IT Support services does not fall under para 4(a) and also misses the prescription of para 4(b), the same ceases to be FTS. The same way in which income from sale of software license in the present case broadly falls under para 3(a) of Article 12 but has been held by the DRP to not satisfy the condition of taxability, income from Support and Maintenance charges of the licensed software also largely fall under para 4(a & b) but fail to magnetize taxability within its purview.

12. The DRP has arrived at the conclusion of taxability of IT Support service charges as FTS by distinguishing the earlier years' tribunal orders. It held that the Tribunal did not separately examine the nature of Support services charges de hors receipts on account of software licenses and proceeded to treat both as software royalty. Firstly, the DRP in the earlier orders did not draw any such distinction and held the entire amount as chargeable to tax as royalty in the light of the decision in Samsung (supra). When the matter came up before the Tribunal, the decision in Engineering Analysis (SC)(supra) had been delivered by then,

based on which the decision of the AO, treating the composite amount as royalty, was reversed. When neither the AO nor the DRP had treated the two streams of income as separate from each other, having different connotation in terms of the DTAA, there could have been no question of the Tribunal setting up a new case. Be that as it may, we have eloquently discussed the issue above and reached the conclusion that the income from IT Support services, even if viewed independent of software license income, is not chargeable to tax. The impugned order is, ergo, overturned and the addition of Rs.42.42 crore and odd is directed to be deleted."

4. The CIT-DR could hardly indicate any distinction on facts or law, as the case may be, so far as the instant sole issue of support and maintenance services addition is concerned. We thus accept the assessee's instant first and foremost substantive grounds in very terms.

5. Mr. Irani at this stage further invited our attention to the assessee's second substantive grounds challenging validity of the impugned assessment proceedings itself. He vehemently argued the same for some time but submitted thereafter that once we have accepted the assessee's foregoing first substantive grievance, this issue may be kept open subject to all just exceptions. We order accordingly."

4. Learned CIT-DR vehemently opposed the assessee's stand. He submitted that each and every year appeal involves it's own facts and issues and therefore, we must adjudicate the instant twin substantive issues afresh after considering the lower authorities respective detailed reasoning(s). We hardly see any merit in the Revenue's instant arguments once it has come on record as per the DRP's detailed discussion in paragraphs 5 to 6 [at pages 24 to 30] settling the matter at rest whilst concluding that both these assessment years 2019-2020 and 2020-2021 involve identical set of facts only. We thus adopt judicial consistency to accept the assessee's first and foremost substantive ground raised on merits.

5. Faced with the situation, learned counsel once again made the same concession as that in preceding assessment year not pressing for the assessee's second substantive ground in very terms. Ordered accordingly.

6. This assessee's appeal is partly allowed in above terms.

Order pronounced in the open court on 27.06.2023.

Sd/-	Sd/-
[DR. DIPAK P. RIPOTE]	[SATBEER SINGH GODARA]
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Pune, Dated 27th June, 2023

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	The CIT (DRP-3), Mumbai-1, Room No.1616, 16th Floor, Air India Building, Nariman Point, Mumbai – 400 021 Maharashtra.
4.	The CIT, ITTP, Pune
5.	D.R. ITAT, Pune "C" Bench, Pune
6.	Guard File.

//By Order//

Assistant Registrar, ITAT, Pune Benches,
Pune.