INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE

SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 1662/Del/2022
Asstt. Year: 2019-20

Spi Global US, Inc. C/o Spi Technologies India P. Ltd. Gothi Industrial Estate, R.S. No. 415 & 416, Vazhudavur, Kurumbapet Revenue Village, Pondicherry Puducherry-605009 PAN ABBCS1722J	Vs.	ACIT, Circle-3(1)(2), International Taxation, New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Ashik Shah, Advocate
Department by:	Shri Vizay Vasanta, CIT- DR
Date of Hearing:	25.04.2023
Date of pronouncement:	07.07.2023

O R D E R

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order dated 24.05.2022 of the Ld. Assessing Officer **("AO")** passed under section 143(3) r.w.s.144C(13) of the Income Tax Act, 1961 **(the "Act")** pertaining to Assessment Year **("AY")** 2019-20.

2. The assessee has raised the following grounds of appeal:-

1.1. "The Ld. AO and the DRP (hereinafter referred to as 'lower authorities') have erred in finalizing an order of assessment which is in violation of principles of natural justice and the provisions of the Act and is devoid of merits and are contrary to facts on record and applicable law and has been completed without adequate inquiries and as such is liable to be quashed.

1.2. The lower authorities have erroneously formed an opinion on the taxability of sub-contracting charges received by misapplying the provisions of the Act and India-US DTAA, without considering the information, arguments and evidence provided by the Appellant.

1.3. The Hon'ble DRP has erred in concluding that the sub-contracting charges paid by SPi India to the Appellant are chargeable to tax by treating the same as 'FIS' under Article 12(4) of the India-US DTAA, without appreciating that the condition of 'make available' of technical knowledge is a prerequisite for determining whether an income falls under Article 12(4) of the India-USA DTAA.

1.4. The Hon'ble DRP has erred in concluding that the sub-contracting services were made available to SPi India, without appreciating the meaning of the term 'make available' as defined in the Memorandum of Understanding to India-USA DTAA and various judicial precedents.

1.5. The lower authorities have failed to bring any material on record to prove that the sub-contracting services provided by SPi US have satisfied the conditions of make available in order to conclude that such services are taxable under FIS mentioned in Article 12(4) of the India-USA DTAA.

1.6. The Hon'ble DRP failed to appreciate that the DRP in earlier years in the case of Laserwords US, a group company allowed the same issue on similar facts, i.e., the DRP had concluded that receipt of sub-contracting charges is not taxable as 'Fees for Included Service's' under India-US Tax Treaty.

1.7. The lower authorities erred in concluding that the receipts from SPi India constitute FIS by misapplying the ruling of the Hon'ble Chennai ITAT in the case of a group company, M/s. Laserwords US Inc dated September 28, 2018 without appreciating that the issue before the Hon'ble ITAT was on allowance of Marketing fee and not sub-contracting fee."

3. Briefly stated the facts are that SPi Global US Inc., the assessee is a tax resident of USA and it assists its Associated Enterprise **("AE")** in India i.e. SPi Technologies India Private Ltd. **("SPi India")** in provision of e-publishing services. The said services include i) editorial services including page composition service, language polishing service, indexing service, correcting faulty grammar and punctuation etc. ii) enforcing a consistent style and tone in multi-author manuscript iii) ensuring smooth transition between sentences and paragraphs. During the relevant AY 2019-20, SPi India had sub-contracted a part of its e-publishing work in the nature of

editorial services to the assessee under an agreement with SPi India and the assessee received sub-contracted charges amounting to Rs. 5,27,15,350/- from SPi India pursuant to the provision of the said sub-contracted services. For the AY 2019-20 the assessee filed its return of income on 29.11.2019 declaring NIL taxable income and claimed refund of the taxes withheld by SPi India towards sub-contracting charges received by it. The assessee's case was selected for scrutiny and the statutory notices were issued to the assessee by the Ld. Assessing Officer **("AO")** wherein details regarding the sub-contracting charges were called for which were duly submitted by the assessee. The Ld. AO disregarded the submissions made by the assessee and proceeded to pass the draft assessment order on 30.09.2021 proposing to treat the sub-contracting charges as 'Other Income' as per Article 23 of the India-USA Double Taxation Avoidance Agreement **("India-USA DTAA")**. On filing objections before the Ld. Dispute Resolution Panel **("DRP")**, the Ld. DRP vide its order dated 06.05.2022 held that the sub-contracting charges constitutes 'Fees for Including Services' **("FIS")** within the meaning and scope of Article 12(4)(b) of the India-USA DTAA. Consequently, the Ld. AO passed the final assessment order dated 24.05.2022 under section 143(3) r.w.s 144C(13) of the Act determining the income of the assessee at Rs. 5,27,15,350/-.

4. Aggrieved, the assessee is in appeal before the Tribunal and all the grounds of appeal relate thereto. Ground No. 1.1 is general in nature. The main issue raised by the assessee in all other grounds of appeal relate to the taxability of sub-contracting charges received by the assessee under the provisions of India-USA DTAA which we proceed to deal with in the succeeding paragraphs.

5. The Ld. AR submitted that the assessee has merely assisted SPi India in the provision of certain services to its end clients and the payment for sub-contracting does not involve any transfer of technical knowledge, plan or design to SPi India so as to trigger the provisions of FIS under the India-USA DTAA. The Ld. AR further submitted that though the service rendered by the assessee involves technical expertise, the expertise is not transferred

by the assessee which can be independently applied by SPi India. The services rendered by the assessee are in the form of deliverables to be provided to the end clients or SPi India and do not make available any technical information/data to SPi India, which would enable SPi India to subsequently perform such functions on its own. The considerations received by the assessee are not towards a one-time service that equips the service recipient (SPi India) to perform such services which the assessee has performed.

5.1 The Ld. AR placed reliance on the following decisions wherein it has been held that technology could be considered as made available only if the recipient is enabled to apply the technology independently in future without recourse or assistance of the service provider:

i) Guy Carpenter & Co Ltd. High Court, Delhi 346 1TR 504
ii) De Beers India Minerals (P) Ltd. High Court, Karnataka 346 ITR 467
iii) US Technology Resources (P.) Ltd. High Court, Kerala 407 ITR 327
iv) Everest Global Inc. Tribunal, Delhi 194 ITD 729
v) Inter Continental Hotels Group (Asia Pacific) (Pte.) Ltd. Tribunal, Delhi 148 taxmann.com 27
vi) CPP Assistance Services (P.) Ltd Tribunal, Delhi 147 taxmann.com 484
vii) Mahindra and Mahindra Ltd Tribunal, Mumbai (Special Bench) 30 SOT 374

5.2 The Ld. AR further submitted that SPi India had sub-contracted similar e-publishing work to its another AE, namely, Laserwords US Inc. **("LW US")** and the said issue of e-publishing services was adjudicated by the Ld. DRP in the case of LW US on similar fact pattern for AY 2015-16 wherein it was held that consideration from rendition of sub-contracting services is not taxable in India in the hands of the assessee as per the provisions of India the USA DTAA since the 'make available' clause is not satisfied.

5.3 It was also submitted that the Ld. DRP erred in concluding that the receipts from SPi India constitutes FIS by misapplying the ruling of the Chennai Bench of the Tribunal in the case of LW US for AY 2015-16 in ITA No. IT(TP)A No. 74/Chny/2018 without appreciating that the issue before the Tribunal was with respect to marketing fee and not sub-contracting fee which is evident from the grounds of appeal before the Tribunal.

6. The Ld. DR, on the other hand, relied on the orders of the Ld. DRP/AO and filed written submission which is reproduced as under:-

> *"The assessee, M/s. SPi Global US Inc is a company incorporated under the laws of USA. It is a wholly owned subsidiary of SPi Global Content Holding Pvt. Ltd., Singapore. The Company is stated to be engaged in e-publishing work in the nature of editorial services including page composition, language polishing, indexing, correcting faulty grammar and punctuation etc.*
>
> *2. During the relevant assessment year, the assessee was sub-contracted a part of e-publishing work by SPi Technologies India Private Limited, ("SPi India"), an associate enterprise and pursuant to the services rendered, the assesee received an amount of Rs.5,27,15,350/-. While making these payments, the SPi India had deducted TDS at an effective rate of 16.78%.*
>
> *3. The assessee admitted that the services provided qualifies under the category of Fee for Included Services (FIS) but claimed that the same cannot be taxed since the services doesn't satisfy "make available" clause of article 12(4)(b) of India-USA treaty.*
>
> *4. During the course of assessment proceedings, the assessee did not submit the relevant contract under which the assessee had provided services to SPI India. In the absence of such a contract, the unexplained receipts of the assessee have been treated to be in the nature of Other Income by the AO.*

5. As seen from the order of DRP, during the DRP proceedings, the assessee had provided a document "Statement of Work" entered into between the assessee and the SPI India However the said document was unsigned and has no date of execution. (Page 38-39 of paper book dated April 17, 2023 filed by assessee)

6 The assessee couldn't produce any other documentary evidence before the DRP proceedings regarding the services provided. The assessee could produce certain invoices, the nature of services areas mentioned below:

a. Full service project coordination
b. Content assembly
c. Editorial services: proof reading
d. All text writing including evaluation and categorization

The assessee admitted that the above services are in nature of technical services but claimed that they are not taxable as FIS under Article 12(4)(b) of India-USA DTAA since the 'make-available' clause is not satisfied.

7. However the assessee had not furnished any agreement executed apart from undated Statement of Work furnished before the DRP. The assessee referred to the directions of DRP-2 issued in the case of it's associated enterprise M/s Laser woods US Inc with SPI India for AY.2015-16, where it was held that the consideration from rendition of sub-contracting services is not taxable in India as per India-USA DTAA.

8. In the absence of any contract submitted by the assessee, the DRP rightly held that the undated Statement of Work cannot be relied upon in any manner. The assessee had not discharged it's onus to show that under such arrangement, the technical knowledge contained therein were not made available to SPI India within the scope of Article 12(4) of the DTAA.

9. Further the DRP at para 2.2(h) on page 3 of it's order mentioned that the assessee stated as under:

"h) The consideration received by the assessee is not in the nature of one-time service that equips the service recipient to perform the services which the assessee had performed. ***Though the service recipient may independently posses the expertise to perform the services which the assessee has provided under the sub-contracting agreement, the consideration paid towards the services is not towards obtaining such expertise, but only towards using the deliverable of the assessee on an as-is where-is basis."***

As seen from the above, the assessee and SPI India were in the identical nature of business and the onus lies on the assessee to substantiate it's arguments that while providing the services, the technical knowledge contained therein were not made available to it's service recipient, SPI India.

10. Since the assessee couldn't substantiate it's arguments and had not discharged it's onus that no technology was made available to SPI India in rendering services, it is humbly prayed that the appeal of the assessee may be dismissed."

7. We have heard the Ld. Representative of the parties and perused the material on record. It is an admitted fact that the assessee is a tax resident of US and hence can opt to be governed by the provisions of India-USA DTAA if more beneficial to it in terms of section 90(2) of the Act.

7.1 The perusal of records reveal that the assessee executed a document titled 'statement of work' effective as at 1st January, 2018 with the assessee for the provision of services defined and at the prices agreed upon. This statement of work documents the contract deliverables to be provided by the assessee to SPi India (at page 38 and 39 of Paper Book). The overview of work as contained in the said statement of work is as under:-

"OVERVIEW OF WORK

Vendor will provide the e-publishing services for titles specified by SPI Technologies India Private Limited (Formerly Lambda Content India Private Limited) using specialized software. This will include updating content, graphics, art and providing page composition services including copy editing services, all corrections and creation of Table of Cases and Table of Statutes, culminating in a final deliverable of high resolution PDF files for print, and updated MS V Word files for future revision."

Further the clause on 'Term' states as under:-

"This Agreement shall be effective on the date hereof and shall remain in effect until terminated by the parties in writing."

7.2 The statement of work though not titled as an agreement clearly sets out the obligation of both the parties, overview of the work to be performed by the assessee and the effective date to be 1st January, 2018. In view of the above the contention of the lower authorities that the assessee has failed to produce an agreement between the parties for rendition of services does not hold good. The assessee has also submitted copies of invoices raised by the assessee on a sample basis before the lower authorities during the assessment proceedings which are placed at pages 40 – 43 of the Paper Book. Hence the contention of the Revenue that the assessee could not produce any other documentary evidence regarding the services provided also does not stand correct.

7.3 Article 12(4) of the India-USA DTAA defines FIS as under:-

"…12(4). The term "fees for included services" as used in this Article means payments of any kind to any person in consideration for rendering of any technical or consultancy services (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, or consist of the development and transfer of a technical plan or technical design."

7.4 In order to constitute FIS under Article 12(4) of the India-USA DTAA the services rendered must make available technical knowledge, experience, skill, know-how or processes to the person availing such services. The Memorandum of Understanding (MOU) to India-USA DTAA contains various instances explaining the meaning of the term 'make available'. The 'make available' clause is satisfied when the person acquiring the services is enabled to apply the technology independently in the future without the assistance of the service provider. The fact that the provision of the service may require technical/consultancy input by the person providing the service does not per se mean that technical knowledge, skills etc. are made available to the person availing the service. There has to be a transfer of the technical knowledge, experience, skill, know-how or processes or a technical plan or technical design from the service provider to the service recipient and the same should remain with the service recipient even after rendering of the services has come to an end.

7.5 The e-publishing work in the nature of editorial services comprising of page composition, language polishing, indexing, correcting faulty grammar and punctuation etc. sub-contracted to the assessee involves technical expertise, however, such expertise is not transferred by the assessee which can be independently applied by SPi India in future on its own without recourse to the assessee.

7.6 The impugned payment is not in relation to any services which make available any technical skill or know-how etc. to SPi India. In Outotec India P Ltd. Vs CIT (2015) 41 ITR (Trib) 449 (Delhi), Delhi Bench of the Tribunal pointed out that the expression "make available" in the context of 'fees for technical services' contemplates that the technical services should be of such a nature, that the payer comes to possess the technical knowledge so provided which enables it to utilize the same thenceforward. If the services

are consumed without leaving anything tangible with the payer for use in future, it will not be 'make available' of the technical services notwithstanding the fact that its benefit flowed directly to the payer. In Mahindra and Mahindra Ltd. vs. Dy. CIT (2009) 313 ITR (AT) 263 (Mumbai) (SB) it has been held that where the payer only obtained the benefit from the services, but did not get any technical knowledge experience or skill in its possession for future use, it cannot be said that technical know-how was made available.

7.7 It is also the grievance of the assessee that the Ld. DRP in earlier years in the case of LW US, a group company has allowed the same issue on similar facts in favour of the assessee concluding that receipt of sub-contracting charges is not taxable as FIS under India US Tax Treaty. During AY 2015-16 SPi India had sub-contracted similar e-publishing work to its AE, LW US and received consideration from SPi India for rendition of sub-contracting services. When the issue of taxability of sub-contracting charges received by the assessee arose before the Ld. DRP, the Ld. DRP held that sub-contracting charges are not taxable in India as per the India-USA DTAA as the make available clause is not satisfied. However, in the instant case in AY 2019-20 the Ld. DRP held that the sub-contracting charges are taxable as FIS since make available condition is satisfied. In holding so, the Ld. DRP failed to appreciate that the Ld. DRP in the case of LW US held that know how was made available only with respect to the issue of marketing fee and not sub-contracting fee. It is also contended by the assessee that the Ld. DRP misapplied the decision of the Chennai Bench of the Tribunal in the case of LW US for the AY 2015-16 to the present case as in the said decision the taxability of marketing fee were challenged and not sub-contracting charges which had already attained finality at DRP. We have perused the orders of the Ld. DRP and Chennai Bench of the Tribunal (supra) in the case of LW US for AY 2015-16 (at pages 92-109 of the Paper Book) and find that the contention of the assessee is correct.

7.8 In the light of the above factual matrix and the judicial precedents cited above, we are of the view that the sub-contracting charges received by the

assessee does not satisfy the make available condition as envisaged under Article 12(4) of the India-USA DTAA and hence are not chargeable to tax as FIS in India in the hands of the assessee. Accordingly, all the grounds of appeal are decided in favour of the assessee.

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

Order pronounced in the open court on 7th July, 2023.

sd/-	**sd/-**
(G.S. PANNU)	**(ASTHA CHANDRA)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 07/07/2023

Veena

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ASSISTANT REGISTRAR
ITAT, New Delhi

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Date on which the file goes to the Head Clerk	
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