IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI

BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND SHRI RAHUL CHAUDHARY, HON'BLE JUDICIAL MEMBER

ITA NO. 1006/MUM/2023 (A.Y: 2020-2021)

Buro Happold Limited C/o. Sudit K. Parekh & Co. LLP Urmi Estate – Tower A, 20th Floor 95, Ganpatrao Kadam Marg Lower Parel (W), Mumbai – 400013 **PAN: AABCB9239Q**	*v.*	ACIT (International Tax) Circle – 1(3)(2) Room No. 1810, 18th Floor Air India Building Nariman Point, Mumbai – 400 021
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Vijay Mehta**
Department Represented by	**:**	**Shri Anil Sant**
Date of Conclusion of Hearing	**:**	**10.07.2023**
Date of Pronouncement	**:**	**13.07.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (DRP-1), Mumbai-1 [hereinafter in short "Ld.DRP)"] dated 12.12.2022 for the A.Y. 2020-21 passed u/s. 144C(5) of Income-tax Act, 1961 (in short "Act").

2. Assessee has raised following grounds in its appeal: -

"1. Ground No. 1 - Taxability of amount received for Consulting and Engineering services as Fees for technical services (FTS)

1.1 On the facts and in the circumstances of the case and in law, the learned DRP (Dispute Resolution Panel") and DCIT have erred in considering income from consulting and engineering services amounting to INR 1,04,76,328/- as Fees for technical services (FTS) as per Article 13 of India-UK Double Taxation Avoidance Agreement (DTAA").

2. Ground No. II Taxability of amount received as management fees & common cost recharge as Royalty and Fees for technical services (FTS)

2.1 On the facts and in the circumstances of the case and in law, the learned DRP (Dispute Resolution Panel') and DCIT have erred in considering management fees & common cost recharge amounting to INR 8.85,47,006/- as Royalty and Fees for technical services (FTS) as per Article 13 of India-UK Double Taxation Avoidance Agreement (DTAA).

3. ***Ground No. III-Erroneous rate of tax applied while computing tax payable***

3.1 Without prejudice to the above grounds, on facts and circumstances of the case and in law, the learned DCIT has erroneously applied a tax rate of 15% as per India-UK DTAA instead of applying a beneficial rate of 10.608% under the Act while computing the amount of tax payable by the Appellant.

Ground No. IV-Erroneous levy of consequential interest under section 234B

4.1 On facts and circumstances of the case and in law, the learned DCIT has erred in levying consequential interest under Section 234B of the Act, amounting to Rs 16,10,425/-."

3. At the outset, Ld. Counsel for the assessee brought to our notice that the similar issues have been raised before the Coordinate Bench in

assessee's own case for the A.Y. 2012-13 in ITA.No. 1296/Mum/2017 and the Coordinate Bench has considered and adjudicated the issues in favour of the assessee and he brought to our notice Para No. 14 to 22 of the order. He submitted that there is no change in the objective and nature of transactions entered by the assessee during the current Assessment Year. Therefore, the decision rendered in A.Y. 2012-13 and A.Y. 2019-20 are applicable mutatis mutandis.

4. On the other hand, Ld. DR relied on the order of the lower authorities.

5. Considered the rival submissions and material placed on record, we observed that similar issues were considered and adjudicated by the Coordinate Bench in assessee's own case for the A.Y. 2012-13 and decided the issue in favour of the assessee. While holding so the Coordinate Bench held as under: -

> *"14. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon by both the parties. The core issue which needs to be addressed is, whether the amount received by the assessee towards supply of technical designs, drawings, plans, etc., under the consulting engineering services is to be treated as fees for technical services under the India-UK tax treaty. Once this issue is decided, the issue whether cost recharge is in the nature of fees for technical services will automatically get resolved since both the Assessing Officer and learned Commissioner (Appeals) have treated it as fees*

for technical services on the reasoning that such cost recharge is ancillary and incidental to consulting engineering services.

15. There is no dispute between the parties that the assessee being a tax resident of UK is governed under India-UK tax treaty and if the treaty provisions are more beneficial, they will apply to the assessee in terms with section 90(2) of the Act. From the assessment stage itself, the assessee has pleaded that since the supply of technical design/ drawings/plans by it to the Indian entity does not make available any technical knowledge, knowhow, process, etc., it cannot be treated as fees for technical services under Article-13(4)(c) India-UK tax treaty. Whereas, the Assessing Officer has rebutted such contention of the assessee on the reasoning that as per the second limb of Article-13(4)(c) of the India-UK tax treaty, amount received towards development and transfer of a technical plan or technical design, by itself, is in the nature of fees for technical services and there is no necessity of fulfilling the condition of "make available". The learned Commissioner (Appeals) while agreeing with the aforesaid reasoning of the Assessing Officer has further supplemented it by observing that through the provision of technical drawing and design and consultancy services provided through personnel at the site, the assessee has made available technical knowledge, experience, skill, knowhow or processes to the Indian entity, hence, the amount received is in the nature of fees for technical services.

16. For a better understanding of the dispute, it is necessary to look into the scope of work to be undertaken by the assessee under the relevant agreements. On a perusal of the sample copies of the agreements, it is noticed that the assessee was entrusted the work of providing consulting services for a twin city project by the Pune Municipality as well as other building projects in Mumbai. Further, on perusal of the sample copies of the agreement filed in the paper book, it is seen that the work of the assessee is basically to provide consultancy services relating to the projects and in that context to provide technical designs/drawings/plans. It is a fact on record that technical designs/drawings/plans supplied by the assessee under contract are project specific.

17. Keeping in view the aforesaid factual position, we need to examine the taxability of the amount received by the assessee under the India-UK tax treaty. As per Article-13 of the India-UK tax treaty, royalty and fees for technical services arising in a contracting State and paid to a resident of other contracting State may be taxed in that other State. However, such royalty and fees for technical services can also be taxed in the contracting State in which they arise subject to certain restrictions and conditions as enumerated in Article-13(2) of the India-UK tax treaty. Since, in the present appeal

the departmental authorities have treated the amount received by the assessee as fees for technical services, we have to look to the meaning of fees for technical services under India-UK tax treaty. Article13(4) of the India-U.K. tax treaty defines fees for technical services as under:-

> *"4. 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."*

18. Since, the conditions of Article-13(5) of the India-UK tax treaty are not applicable in the present case, it is not relevant for our purpose. Undisputedly, both the departmental authorities and the assessee are in agreement that if, at all, the amount received by the assessee is treated as fees for technical services, it will come within Article-13(4)(c) of the India-UK tax treaty. Therefore, the following two issues arise for our consideration viz.,

> *(i) Whether development and transfer of a technical plan or technical design simplicitor without making available technical knowledge, experience, skill, knowhow or processes, etc., would be in the nature of fees for technical services; and*
>
> *(ii) In the event, it is held that development and transfer of a technical plan or a technical design also requires making available technical knowledge, experience, skill, knowhow or processes, etc., whether in the present case such condition is satisfied."*

19. Undisputedly, in the present case, the amount received by the assessee, which has been treated as fees for technical services is towards supply of technical drawings/designs/plans. On a careful reading of Article-13(4)(c) of the India-UK tax treaty it becomes clear that the words "or consists of the development and transfer of a technical plan or technical design", appearing in the second limb has to be read in conjunction with "make available technical knowledge, experience, skill, knowhow or processes". The reasoning of the Assessing Officer that the second limb of Article-13(4)(c) of the India-UK tax treaty has to be read independently, in our view, cannot be the correct interpretation of the said Article. As per the rule of ejusdem generis, the words "or consists of the development and transfer of a technical plan or technical design" will take colour from "make available technical knowledge, experience, skill, knowhow or processes".

20. Having held so, now it is necessary to examine whether by supply of technical, designs, drawing, plans, the assessee has made available technical knowledge, experience, skill, knowhow or processes. As per the settled principle of law, technology is considered to have been made available when the recipient of such technology is competent and authorised to apply the technology contained therein independently as an owner without depending upon the service provider. The recipient of technology should be able to make use of technical knowledge, experience, skill, knowhow or processes by himself in his business or for his own benefit and without recourse to the service provider in future and for this purpose a transmission of the technical knowledge, experience, skill, knowhow or processes, from the service provider to the service recipient is necessary. In other words, the technical knowledge, experience, skill, knowhow or processes, must remain with the service recipient even after rendering of the services has come to an end. The service recipient must be at liberty to use the technical knowledge, experience, skill, knowhow or processes in his own right. Undisputedly, in the present case, as revealed from the material on record, the technical design/drawings/plans supplied by the assessee to the Indian entity are project specific, hence, cannot be used by the Indian entity in any other project in future. Therefore, the claim of the assessee that it has not made available any technical knowledge, experience, skill, knowhow or processes while developing and supplying the technical drawings/designs/plans has to be accepted. If the Department is of the view that through

development and supply of technical designs/drawings/plans the assessee has made available technical knowledge, experience, skill, knowhow or processes, it is for the Department to establish such fact through proper evidence. The assessee certainly cannot be asked to prove the negative. It is worth mentioning, while deciding a dispute of identical nature concerning fees for technical services as per India-USA tax treaty under which definition of fess for included services as per Article-12(4)(b) is identically worded like Article 13(4)(c) of the India-UK tax treaty, the Tribunal, Pune Bench, in Gera Developments Pvt. Ltd. v/s DCIT, [2016] 160 ITD 439 (Pune), has held that mere passing off project specific architectural, drawings and designs with measurements does not amount to making available technical knowledge, experience, skill, knowhow or processes. The Tribunal held that unless there is transfer of technical expertise skill or knowledge along with drawings and designs and if the assessee cannot independently use the drawings and designs in any manner whatsoever for commercial purpose, the payment received cannot be treated as fees for technical services. Though, we have taken note of other decisions cited by the learned Authorised Representative we do not intend to deliberate further on them. As regards the decisions cited by the learned Departmental Representative, we find them to factually distinguishable, hence, not applicable to the present appeal. In any case of the matter, the Department has failed to establish on record that through development and supply of technical designs / drawings / plans the assessee has made available technical knowledge, experience, skill, knowhow or processes to the service recipient so as to bring the amount received within the meaning of fees for technical services under Article 13(4)(c) of the India-UK Tax Treaty. Therefore, in our considered opinion, the amount received by the assessee has to be treated as business profit and in the absence of a PE in India, it cannot be brought to tax in India.

21. Since, we have held the amount received towards consulting engineering services to be not in the nature of fees for technical services, the reasoning of the departmental authorities with regard to cost recharge would also fail, since, they have treated it as ancillary and incidental to consulting engineering services. The, contention of the learned Departmental Representative that the cost recharge fails various tests, such as, need test, benefit test etc. is unacceptable, it is contrary to the finding of the Departmental Authorities. Once, the Departmental Authorities have treated the amount received towards cost recharge to be in the nature fees for

technical services, it implies rendering of service by the assessee. Therefore, applying the very same reason on the basis of which we have held the amount received towards consulting engineering services to be not in the nature of fees for technical services as discussed above, we hold that the amount received towards cost recharge cannot be brought to tax in India in the absence of PE. Therefore, the additions made by the Assessing Officer are hereby deleted. The assessee succeeds in both the grounds.

22. In the result, assessee's appeal is allowed."

6. Further, we observe that in assessee's own case for the A.Y.2019-20 in ITA.No. 1690/Mum/2022 dated 19.12.2022 on identical grounds and facts, following the decision of the Coordinate Bench for the A.Y. 2012-13 observed as under: -

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

Ground No. I- Taxability of amount received for Consulting and Engineering services as Fees for technical services (FTS)

1.1. On the facts and in the circumstances of the case and in law the learned DRP (Dispute Resolution Panel) and DCIT have erred in considering income from consulting and engineering services amounting to INR 15 18 250/- as Fees for technical services (FTS) as per Article 13 of India-UK Double Taxation Avoidance Agreement (DTAA)

2. Ground No. II- Taxability of amount received as management fees & common cost recharge as Royalty and Fees for technical services (FTS)

2.1 On the facts and in the circumstances of the case and in law, the learned DRP (Dispute Resolution Panel) and DCIT have erred in considering management fees & common cost

recharge amounting to INR 5,67 33.937/- as Royalty and Fees for technical services (FTS) as per Article 13 of India-UK Double Taxation Avoidance Agreement (DTAA)

3. Ground No. III-Erroneous rate of tax applied while computing tax payable

3.1. Without prejudice to the above grounds on facts and circumstances of the case and in law, the learned DCIT has erroneously applied a tax rate of 15% as per India-UK DTAA instead of applying a beneficial rate of 10 92% under the Act while computing the amount of tax payable by the Appellant.

4. Ground No. IV-Erroneous levy of consequential interest under section 234B.

4.1. On facts and circumstances of the case and in law, the learned DCIT has erred in levying consequential interest under Section 234B of the Act amounting to INR 32,32,988/-

The appellant craves leave to add alter amend modify or amplify any of the above stated Grounds of Appeal

3. We have heard the rival submissions and perused the materials available on record. The assessee is a company registered in the United Kingdom and is a tax resident of that State. The assessee is an international, integrated engineering and consultancy company. The assessee is engaged in the business of providing structural and MEP (Mechanical, Electrical and Public Healthy) Engineering and consultation services for various buildings & projects in India. During the year under consideration, the assessee has received amounts from India from the following streams:-

a) Consulting Engineering Services – Rs 15,18,250/-

This amount is received from Buro Happold Engineers India Pvt Ltd (Buro India). The assessee provides structural and MEP engineering and consultancy services for various buildings and projects in India to Buro India and other clients. Buro India enters into agreements with various Indian clients for design and consultancy services in relation to various projects. Typically, Buro India renders designing and engineering services to its client. However, wherever it does not have the requisite expertise or requires highly specialized services like master planning, Acoustics Engineering, Environmental Engineering etc, then the said services are availed from the assessee company. Since these are specialized services and Buro India is not in a position to provide these services independently, hence on a

year on year basis, they avail services from the assessee to different projects / buildings. Typically, for each of the project of Buro India, it enters into a specific agreement with assessee, based on the services required. It was submitted that services provided by assessee to Buro India does not make available any technical knowledge or skill etc and accordingly the services would not qualify as fees for technical services under the India-UK Tax Treaty (DTAA in short) and the same should be characterized as Business Income falling under Article 7 of the DTAA. Such business income shall not be taxable in India in the absence of Permanent Establishment (PE) of the assessee in India. The assessee also submitted that similar issue was decided in assessee's favour for the AY 2012-13 by this tribunal.

The ld. AO observed that the decision of this tribunal in AY 2012-13 has not been accepted by the revenue and an appeal against the same could not be preferred before the Hon'ble High Court due to low tax effect. Accordingly, the ld. AO observed that the amount of Rs 15,18,250/- received by the assessee is in the nature of Fee for Technical Services (FTS) and brought to tax the same as per Article 13(2)(a)(ii) of the India UK DTAA in the hands of the assessee.

b) Management Fees & Common Cost recharge – Rs5,67,33,937/-

This is the amount charged to Buro India towards various costs incurred. The same has not been offered to tax by the assessee on the contention that these being management cost recharges does not make available any knowledge, skill, process, know-how and experience to Buro India as per the terms of the India UK DTAA. The assessee made the following submissions before the ld. AO :-

The Assessee has incurred certain common expenses in relation to Information Technology Business Development, Finance, Human Resource Management etc. for the Buro Group entities and the cost for the same is charged to various Buro Group entities based on a predetermined cost allocation/apportionment key (including Buro India) along with 5% mark- up. The sample copies of the invoices pertaining to cost recharge raised by the assessee during the year is attached for your reference

The broad functions performed by the assessee for the Buro group (including Buro India) includes following

- *IT Functions: The central IT team which is based in UK manages the entire group-wide IT systems. The functions of this*

team involves managing general subscriptions, hardware and practice management systems.

- *Business Development: This involves management of the Buro Happold Brand name and performing marketing function.*

- *Finance. This team works on international finance matters which affect the group as a whole Their functions broadly comprise of preparation of management accounts, group reporting for statutory accounts purposes, strategic finance initiatives affecting the whole group, including managing the international tax position and managing the financial position at the group level*

- *Human Resource Management The team based in UK provides support to the HR teams of group entities in the following gtanner*

    - *providing consultancy when required*
    - *setting developing and monitoring HR policies, and*
    - *assisting with performance and disciplinary issues.*

- *Corporate and Commercial Services: The central legal team assists the worldwide group entities by dealing with specific legal issues, reviewing compliance with legal regulations, and dealing with employment and property law matters*

- *Operations. This team is engaged in performing the strategic and operational management function at the group level*

- *Project Management Function. These functions benefit the group as a whole. These includes project management IT systems, quality assurance etc.*

The above services would qualify as managerial services. However, we would like to highlight that Article 13 of India-UK DTAA covers only technical and consultancy services and hence the above services would be qualified as business income and in the absence of Permanent Establishment (PE) of the assessee in India, the said income shall not be considered as taxable in India as per India-UK DTAA

Further, even where it considered that few of the services may be considered as technical or consultancy services, the same would still be not taxable under Article 13(4)(c) of the India-UK DTAA as these services does not make available any technical knowledge, experience, skill knowhow or processes, etc. to the recipient of the service. The said position is also confirmed by the Hon'ble ITAT in Assessee's own case during AY 2012-13"

The ld. AO concluded that the payment received under the head 'Cost Recharge' would be Royalty as per the Act as well as per India UK DTAA as it is received as consideration for the use of, or the right to use the trademark or brand name 'Buro Happold' owned by it. He also observed that description of the services under all heads as per the agreement mentioned earlier clearly shows that the assessee is charging Buro India for the use of , or the right to use the information concerning industrial, commercial or scientific experience. Therefore, the amount of Rs 5,67,33,937/- received by the assessee under the head 'Cost Recharge' was treated by the ld. AO as Royalty u/s 9(1)(vi) of the Act as well as under Article 13 of India UK DTAA.

The ld. AO also held the said receipt to be Fee for Technical Services taxable u/s 9(1)(vii) of the Act as well as under Article 13 of India UK DTAA as consultancy services.

4. The ld. DRP relied on the findings given by it in assessee's own case for the AY 2015-16 and decided the issues against the assessee. The ld. DRP in Para 6.4. of its directions had also addressed the aspect of the impugned issues already decided in favour of assessee by this tribunal in Asst Year 2012-13 by stating that the accepting the tribunal order in the year under consideration would result in closure to the issues involved in view of the fact that the department cannot challenge the order of DRP in an appeal. On this ground, the ld. DRP upheld the action of the ld. AO in the draft assessment order.

5. Pursuant to the directions of the ld. DRP, the ld. AO passed the final assessment order u/s 143(3) rws 144C(13) of the Act on 27/04/2022.

Aggrieved, the assessee is in appeal before us.

6. At the outset, we find that the issue in dispute is squarely covered in favour of the assessee by the order of this tribunal in AY 2012-13 in ITA No. 1296/Mum/2017 dated 15/02/2019 wherein it was held as under: -

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6.1. We find that this tribunal for the AY 2014-15 in ITA No. 7111/Mum/2017 dated 13/11/2019 and for the AY 2015-16 in ITA No. 834/Mum/2019 dated 30/12/2020 had restored the issues to the file of ld. AO in view of the fact that the assessee had actually offered the receipts as its income in the return of income but by way of additional ground claimed to be not taxable in India as per the Act and as well as per the Treaty. In view of this fact, the tribunal restored the issue to the file of ld. AO. Whereas, for the AY 2017-18 i.e the year under consideration before us, the assessee had claimed the subject mentioned receipts as not chargeable to tax in India in the return of income itself. Hence we hold that the decision of this tribunal for AY 2014-15 and 2015-16 would not be applicable here and the decision of this tribunal for AY 2012-13 dated 15/02/2019 would be applicable here in view of same facts. Hence respectfully following the decision of this tribunal in AY 2012-13 referred supra, the Ground Nos. 1 and 2 raised by the assessee are allowed.

7. In view of our decision rendered hereinabove for Ground Nos. 1 & 2, the adjudication of Ground No. 3 would become infructuous as it only pertains to the rate of tax if the aforesaid receipts were

treated as income of the assessee. Hence the Ground No. 3 is hereby dismissed as infructuous.

8. The Ground No. 4 is challenging the levy of interest u/s 234B of the Act which is consequential in nature and does not require any specific adjudication.

9. In the result, the appeal of the assessee is partly allowed."

7. Since the issues are exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2019-20 and A.Y. 2012-13 and also following the principle of consistency, we allow the appeal filed by the assessee. Grounds raised by the assessee are allowed.

8. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 13th July, 2023.

Sd/-	Sd/-
(RAHUL CHAUDHARY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 13/07/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

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BY ORDER

(Asstt. Registrar)
ITAT, Mum