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

BEFORE,
SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.2242/Del/2022
(ASSESSMENT YEAR 2019-20)

M/s Service Now Nederland BV, Hoeknorode-3, Amesterdam Zuidoost Netherlands-2202 BR PAN-AASCS 7933F	Vs.	Asst. CIT Circle International Taxation,3(1)(2) Delhi 'the Ld. AO)
(Appellant)		**(Respondent)**

Appellant by	S/Sh. Ajay Vohra, Sr. Adv., Aditya Vohra, Adv.& Arpit Goyal, CA
Respondent by	Mr. Vizay B. Vasanta, CIT-DR

Date of Hearing	01/06/2023
Date of Pronouncement	29/08/2023

ORDER

PER M. BALAGANESH AM:

This appeal is preferred by the Assessee against the final assessment order dated 15/07/2022 passed u/s 143(3) r.w.s.144C of the Income Tax Act, 1961 (hereinafter called 'the Act')

subsequent to the direction of the Ld. Dispute Resolution Panel (DRP) vide direction dated 16/06/2022 for Asst. Year 2011-12.

2. The first issue to be decided in this appeal is as to whether the ld. AO was justified in making an addition of Rs 125,11,22,698/- as income of the assessee by treating the receipts on account of subscription, professional and training services as Fee for Technical Services (FTS), in the facts and circumstances of the instant case.

3. We have heard the rival submissions and perused the materials available on record. The assessee is a foreign company incorporated under the laws of Netherlands, engaged in the business of providing enterprise cloud computing solutions that define structure, manage and automate services for global enterprises. The company submitted its Tax Residency Certificate (TRC) issued by the Netherlands Tax Authorities. The assessee had filed its revised return of income for the Asst Year 2019-20 on 30.11.2020 declaring total income of Rs 125,75,01,160/- and claimed exemption on the entire income based on India Netherlands Double Taxation Avoidance Agreement (DTAA). During the year under consideration, the assessee has rendered subscription ,

professional and training services to various customers in India from which it has earned income of Rs 125,11,22,698/-.

3.1. The income from subscription services is for use of software applications (offerings) i.e. Software as a Service . There is no transfer of all or any rights in respect of, or the use of or the rights to use underlying copyrights of such software application to the customers. Accordingly, it was pleaded that such software services do not fall within the definition of 'royalty' as per Article 12(4) of India – Netherlands DTAA.

3.2. As a part of professional and training services rendered by the assessee, the technical knowledge, knowhow etc is not made available to the customers. Also, the said services are ancillary to royalty. Therefore, such services do not fall within the definition of 'fees for technical services' as per Article 12(5) of India Netherlands Tax Treaty.

3.3. Further, the company does not have a Permanent Establishment (PE) in India. Hence the aforesaid services rendered are not taxable as business profits as per Article 7 of India Netherlands Tax Treaty. Accordingly, income earned by the assessee from aforesaid subscription, professional and training

services has not been offered to tax in the revised return of income filed by the company.

3.4. The details of total receipts of Rs 125,11,22,698/- are enclosed in Pages 1 to 6 of the paper book filed before us. Out of this, total receipts on account of subscription services amount to Rs 119,15,25,786/- and receipts on account of professional and training services amount to Rs 5,95,96,912/-. The assessee pleaded that with regard to the aforesaid services, the same were provided from Netherlands and not from India and therefore such services cannot be taxed in India by virtue of Most Favoured Nation (MFN) Clause provided in India Netherlands DTAA read with Indian Finland DTAA.

3.5. The assessee clarified that the platform in operation is not a service per se but a model where the software is hosted at one particular place and is licensed by way of subscription to its customers. The assessee under this model is able to quickly address the routine maintenance / updates effectively and efficiently. Thus, the subscription provided by the company to its customers in India is not a service but only a revenue model. It is software solutions provided through a subscription. Further, the

company grants only the right to use various standard ServiceNow Solutions delivered over the solutions platform to the customers. The customers are only granted a non-exclusive and non-transferable license to access the software / platform for the limited purpose of availing the access for its applications / software. The customer does not have the right to use or commercial exploit the IPR. They only get a right to access or use the applications / software. Similarly, the assessee is not granted any access or right to any IPR of its customers. A customer only gains access to use the copyrighted software applications of the assessee and has no access / rights in the copyright so created. Hence it was pleaded that the impugned receipts are in the nature of payments received for the sale of software and squarely fall within the ratio decidendi of the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited vs CIT in Civil Appeal Nos. 8733 -8734 of 2018 and hence is neither liable to tax under the provisions of the Act or under the India Netherlands DTAA.

4. The ld./ AO concluded that the receipts in question are services of a technical nature and hence taxable as FTS.

5. It was submitted ServiceNow Software Development India Private Limited is an Associated Enterprise (AE) of the assessee and works on a cost-plus model wherein it provides support services to the assessee. It was clarified that the disputed receipts have no bearing whatsoever on the payments made by the assessee to its AE.

5.1. The entire understanding of the ld. AO in terms of the business model and the nature of services rendered in India is based on information available on the assessee's website which pertains to its activities the world over. The illustrations of Airbus and Weslayen University cited at para 7 on Page Nos. 5 & 6 of the order of the ld. AO have no link with the impugned receipts as both Airbus and Weslayen University were not Indian clinets to begin with.

5.2. It was submitted that the ld. AO completely misconstrued the nature of services / product developed by the assessee. In this regard, it was clarified that under this model, access to the application is provided to the customer over the assessee's cloud infrastructure. A customer in India can acess said applications via a web browser. In other words, there is no specific need to install and run the software application in a customer's own infrastructure / server. The assessee simply hosts the software

application which can be used by the customer when required. The customer can access to the solutions which are in standard format. The customers are granted a right to use or access the software application i.e. through a user ID and password for an annual subscription fee.

5.3. Further the ld. AO had accepted the contentions of the assessee and characterized the application / facility as a 'product' in para 8 Page 5 of his order. The assessee is merely selling its product on a subscription basis unlike the traditional method of selling the produce on a one-time payment basis and accordingly it was pleaded that the revenue model can in no way change the character of the impugned receipts. It was further submitted that the assessee renders services which only helps to create a work flow so as to increase efficiency of internal operations for the customers.

5.4. Further it was submitted that subscription , professional and training services rendered by the assessee does not make available any technology, knowhow etc to the service recipient and hence the same does not fall within the definition of FTS under Article 12(5) of India Netherlands DTAA. It was further submitted since the coming into foce of the India Netherlands DTAA on 21.01.1989,

India has also signed a DTAA with Finland (a member of the OECD since 1969) which has come into effect from 01.04.2011. In this regard, the assessee had submitted that the first sentence of Article 12(5) of India Finland DTAA states that FTS shall be deemed to arise in India when the payer is a resident of India and thus, may be taxed in India. However, the second sentence in Article 12(5) of India Finland DTAA qualifies the first sentence and states that where FTS relates to services performed in Finland, then such FTS shall be deemed to arise in Finland and accordingly, shall be taxable in Finland and shall not be taxable in India. Accordingly, it was submitted that where fees relate to services performed in Finland, the second sentence in Article 12(5) of India Finland DTAA would override the first sentence and thus the income from such services shall be deemed to arise in Finland only.

5.5. The assessee submitted that in the instant case, the services were provided by the company in Netherlands. Accordingly, in terms of Article 12 of India Netherlands DTAA (as modified by the MFN clause present in the Protocol forming part of the DTAA read with Article 12 of India Finland DTAA) , the amount received by the company from its customers in India for provision of such services

shall be deemed to arise in Netherlands and thus, should not be taxed in India.

6. The ld. DRP observed that the assessee had stated that since the subscription services were offered from Netherlands, it was not taxable in India even as FTS by virtue of the MFN clause of India Netherlands DTAA read with India Finland DTAA. The assessee is a tax resident of Netherlands but this fact alone does not prove that the cloud infrastructure supporting the software subscription services was hosted in Netherlands. No documentary proof has been submitted by the assessee that the software services were rendered from Netherlands. The ld. DRP further observed that analysis of the agreement between the assessee and its AE namely ServiceNow Software Development Indian Pvt Ltd shows that the latter provides marketing support, sales and customer services, IT support, finance and accounting, human resources, facilities and legal support and other related services. Thus the assessee very much has a ground presence in India. With these observations, the ld. DRP upheld the action of the ld. AO. The ld. AO by following the directions of the ld. DRP reiterated the same contentions as was made in the draft assessment order and made an addition of Rs

125,11,22,698/- as FTS from subscription, professional and training services taxable at the rate of 10%.

7. We find that the Master Agreement of ServiceNow was placed on record and the same was also furnished before the lower authorities. It would be relevant to address some of the clauses in the said contract :-

> ***Definitions:***
> *Clause 1.14:* ***"Intellectual Property Rights"*** *means all intellectual property rights throughout the world, including, without limitation, patents, copyrights, trademarks, trade secrets and contractual or other rights in confidential information , moral rights, rights of privacy and publicity , and any other intellectual and industrial property and proprietary rights including registrations, applications, renewals and extensions of such rights worldwide.*
> *Clause 1.29:* ***"ServiceNow Professional Services"*** *means consulting, training, implementation integration or other professional services provided by ServiceNow, including: (a) standardized and branded professional services as published by ServiceNow; or (b) customized professional services including the production of any related deliverables, performed y ServiceNow pursuant to a statement of work.*
> *Clause 1.32:* ***"Subscription Service"*** *means the ServiceNow subscription services and the Technology used by the ServiceNow or its affiliates to deliver such subscription services, including Configurable Elements and APIs, but excluding Ancillary Software.*
>
> ***2. PARTNERNOW OVERVIEW***
> *2.1.* ***Enrollment in PartnerNow****. PartnerNow consists of Programs, including the Sales Partner Program and Services Partner Program, described in the applicable Program Terms and Guides. Participant shall be deemed enrolled in PartnerNow, subject to the terms of this Agreement, when it is initially appointed to one or more Programs as evidenced by an Appointment Confirmation.*
> *2.3.* ***Benefits.*** *Upon appointment to a Program, Participant may access certain ServiceNow Technology, including one or more Partner Instances, all subject to and in accordance with the Licenses and use authorizations granted under Section 4 (Licenses to Participant) below and the other terms and conditions of this Agreement.*
>
> *4.* ***LICENSES TO PARTICIPANT****. Subject to the limitations set forth below in Section 4.7 (Certain Limitations) , the other terms conditions of this Agreement and the applicable Program Terms, ServiceNow hereby grants to Participant the following*

licenses and use authorizations with respect to ServiceNow Technology upon Participant's acceptance into any PartnerNow Progam:
4.1. ***Partner Instances.*** *ServiceNow grants to Participant a limited, non-exclusive right and license to access and use the Partner Instances (if any) provided by ServiceNow , solely to: (a) configure and customize the Partner Instance to develop and test Partner Applications; (b) evaluate the Partner Instances; (c) train Participant's employees in the use of the Partner Instances; (d) conduct demonstrations for existing and prospective Customers to promote the use of Partner Applications and the Subscription Service; and (e) any other purpose permitted in the applicable Program Terms. ServiceNow may determine the number of Partner Instances that Participant is permitted to access hereunder in ServiceNow's sole discretion, except as provided in an applicable Guide or Program Terms for a Program to which Participant was appointed.*

7. INTELLECTUAL PROPERTY
7.1. ***Ownership****. Subject to the limited licenses set forth in this Agreement, nothing in this Agreement transfers or assigns to ServiceNow any of Participant's Intellectual Property Rights in Participant Technology (including in any source code originally authored by Participant using the Subscription Service), Participant Trademarks, or Participant's marketing materials; and nothing in this Agreement transfers or assigns to Participant any of ServiceNow's Intellectual Property Rights in ServiceNow Technology (including in any preexisting works of ServiceNow that are modified by Participant), ServiceNow Trademarks, or Collateral. There are no implied licenses under this Agreement, and any rights of a party that are not expressly granted to the other party hereunder are reserved.*

PROGRAM TERMS *(APPENDIX 1 to the aforesaid Agreement)*

FOR THE PARTNERNOW SALES PARTNER PROGRAM

3. RESLLER RIGHTS

3.1. Appointment. *An Appointment Confirmation that appoints Participant to the Program alone does not constitute an authorization for Participant to resell the Subscription Services, ServiceNow Professional Services or any other products or services of ServiceNow. Such resale authorization may only be granted pursuant to an Appointment Confirmation that expressly appoints Participant as ServiceNow's authorized reseller (which may be provided separately or in the same communication that appoints Participant to the Program). Upon Participant's receipt of such Appointment Confirmation, Participant may resell ServiceNow products and packaged professional services as provided in the Guide.*

8. We find that this is no different than a copyrighted article. The revenue had all along been treating the same as Royalty and during the year under consideration, the same is sought to be treated as Fee for Technical Services (FTS).

7. It would be pertinent to examine the FTS clause in Article 12 of India Netherlands Treaty which reads as under:-

ARTICLE 12

ROYALTIES AND FEES FOR TECHNICAL SERVICES

1.....

[2][*2.....*

3. .....

[1][*4.....*

5. For purposes of this Article, "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(*a*) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article 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.

6 to 9. .....

7.1. We find that Article 12(5)(a) above is not applicable in the instant case. Article 12(5)(b) insist on make available clause to fall within the ambit of FTS. In the instant case, the assessee has only access to software. There is no transfer of technology by the assessee. We are unable to persuade ourselves to accept to the argument of the ld. DR in this regard wherein it was argued that services provided by assessee are standard and customized services and that 'make available' clause is not relevant for the second part of Article 12(5)(b) i.e it is not relevant for development and transfer

of a technical plan or technical design. In our considered opinion, 'make available' is for the entire expressions mentioned in Article 12(5)(b) of the India Netherlands Treaty. In this regard, it would be relevant to address the decision of *Hon'ble Karnataka High Court in the case of CIT vs De Beers India Minerals (P) Ltd reported in 346 ITR 467 (Kar)* to understand the meaning of expression 'make available'. The relevant operative portion of the judgement of Hon'ble Karnataka High Court is reproduced hereunder:-

> ***13.*** *Under the Act if the consideration paid for rendering technical services constitutes income by way of fees for technical services, it is taxable. However, Article 12 of the aforesaid India-Netherlands Treaty defines fees for technical services for the purpose of Article 12 which deals with royalties and fees for technical services. The fees for technical services means the payment of any amount to any person in consideration for rendering of any technical services only, if such services make available technical knowledge, expertise, skill, know-how or processes. If the technical knowledge expertise, skill, know how or process is not made available by the service provider, who has rendered technical service for the purpose of Article 12 of DTAA it would not constitute fees for technical services. To that extent the definition of fee for technical services found in the agreement is inconsistent with the definition of fees for technical services provided in Explanation 2 to Clause (vii) of sub Section (1) of Section 9. In view of Section 90 the definition of fees for technical services contained in the agreement overrides the statutory provisions contained in the Act. In fact, the latest agreement between India end Singapore further clarifies this position, where they have explained the meaning of the word 'make available'. According to the aforesaid definition fees for technical service means payments of any kind to any person in consideration for services of technical nature if such services make available technical knowledge, experience, skill, know how or processes, which enables the person acquiring the service to apply technology contained therein. Though this provision is not contained in India Netherlands Treaty, by virtue of Protocol in the agreement, Clause (iv) (2) reads as under:-*
>
> > *"If after the signature of this convention under any Convention or Agreement between India and third State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."*

> ***14.*** *Therefore the Clause in Singapore agreement which explicitly makes it clear the meaning of the word 'make available', the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know how or processes. To attract the tax liability, that technical knowledge, experience, skill, know how or process which is used by service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know how or processes so as to render such technical Services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know how or process to the recipient of the technical service, in view of the Clauses in the DTAA. the liability, to tax is not attracted.*

7.2. In the instant case, as stated earlier, we find that the assessee had merely granted only access to software and there is no transfer of technology by the assessee. Hence we have no hesitation to hold that the services rendered by the assessee does not fall within the definition of FTS as per the Treaty. In any case, we find that the since assessee had merely granted access to software, it does not fall within the definition of FTS even as per the Act. In this regard, analogy could be drawn from the decision of Hon'ble Supreme Court in the case of CIT vs Kotak Securities Ltd reported in 383 ITR 1 (SC)

wherein it was held that service made available by Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which transaction charges are paid by members of BSE are common services that every member of Stock Exchange is necessarily required to avail of to carry out trading in securities in Stock Exchange; such services do not amount to 'technical services' provided by Stock Exchange, not being services specifically sought for by user or consumer and, therefore, no TDS would be deductible under section 194J on payments made for such services.

8. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we hold that the subscription, professional and training services rendered by the assessee does not fall within the definition of FTS both under the Act as well as under the DTAA and accordingly the same cannot be taxed in India. Accordingly, the Grounds 1 to 3 raised by the assessee are allowed.

9. The Ground No. 4 raised by the assessee is only to seek correct TDS credit. This matter requires factual verification and hence the ld. AO is hereby directed to grant TDS credit after due verification in

accordance with law. Accordingly, the Ground No.4 raised by the assessee is allowed for statistical purposes.

10. The Ground No. 5 raised by the assessee is challenging the initiation of penalty proceedings u/s 274 read with section 270A of the Act, which would be premature for adjudication at this stage and hence dismissed.

11. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 29th August, 2023.

Sd/-	Sd/-
(KUL BHARAT)	**(M. BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 29/08/2023
Pk/sps
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI