

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

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, HON'BLE VICE-PRESIDENT**

ITA No.9483/Del/2019
Assessment Year: 2010-11

With

ITA No.9484/Del/2019
Assessment Year: 2011-12

With

ITA No.3410/Del/2016
Assessment Year: 2010-11

Aluminium Pechiney, C/o- CA, Praveen Gambhir, 87-B, Masjid Moth Ph-2, DDA Flats, G.K. 3, New Delhi	Vs.	DCIT, Circle-1(1)(1), International Taxation, New Delhi
PAN :AAICA3338C		
(Appellant)		(Respondent)

Assessee by	Sh. Praveen Gambhir, CA
Department by	Sh. Sanjay Kumar, Sr. DR Sh. Mrinal Kr. Das, Sr. DR

Date of hearing	09.06.2023
Date of pronouncement	06.09.2023

ORDER

Captioned appeals by the assessee arise out of separate orders of learned Commissioner of Income Tax (Appeals), New Delhi, for the assessment years 2010-11 and 2011-12.

2. At the outset, we must observe, appeals in ITA Nos. 9483/Del/2019 and 9484/Del/2019 are delayed by 45 days.

After considering the submissions of the parties and perusing the materials on record, we are satisfied that the delay in filing the appeals was due to genuine cause. Accordingly, we condone the delay and admit the appeals for adjudication on merits.

ITA No.9483/Del/2019
AY: 2010-11

3. This appeal arises out of order dated 24.07.2019 passed by learned Commissioner (Appeals) under section 154 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

4. Briefly the facts are, the assessee is a non-resident corporate entity incorporated in France and a tax resident of that country. As stated, assessee owns certain right, know-how, designs, and processes required to design, build and implement integrated aluminium production plants. The assessee is also a leader in primary metals and their by-products and also provides a variety of technical and related services that include quality control, the design of machines, equipment and production processes, supervision and advice on industrial installations, along with their commissioning and operations, mainly in the field of aluminium and associated installations. For the assessment year under dispute, the assessee filed its return of income on

23.03.2012 declaring income of ₹ 113,44,74,298/-. The assessee claimed the income declared to be in the nature of Royalty/Fee for Technical Services (FTS) under Article 13 of India – France Double Taxation Avoidance Agreement (DTAA). In course of assessment proceeding, the assessee came up with fresh claim that the income declared in the return of income is not taxable in India. In this context, the assessee drew support from Clause 7 of the Protocol to India – France DTAA and submitted that the scope of FTS/royalty in treaties entered into by India with various other OECD Member countries is much restricted, hence, the restricted definition of FTS provided in India – Portugal DTAA has to be adopted. It was claimed by the assessee that while rendering services, it has not made available any technical know-how, knowledge, skill etc., hence, the receipts are not taxable as FTS. However, completely ignoring the fresh claim made by the assessee in course of assessment proceeding, the Assessing Officer completed the assessment under section 143(3) of the Act vide order dated 26.03.2013 assessing the income declared in the return of income.

5. Being aggrieved with the assessment order so passed, the assessee preferred an appeal before learned first appellate

authority. While deciding the appeal of the assessee, learned Commissioner (Appeals) granted partial relief by reducing an amount of ₹ 1,08,22,488/-, being receipt towards supply of goods from the income determined. Thereafter, the assessee moved an application for rectification under section 154 of the Act. While considering assessee's rectification application, learned Commissioner (Appeals) granted further relief by reducing an amount of ₹ 2,64,70,667/-, being supervision fee during the installation of equipment, from the income determined. Whereas, he upheld the addition of licence fee, engineering packaging fee and man-day fee for on-site. Being aggrieved with the aforesaid order of learned Commissioner (Appeals), assessee is before us.

6. Learned counsel appearing for the assessee submitted, the assessee had entered into Technology Licencing Agreement (TLA) with Hindalco Industries Ltd. ('HIL') on 19.09.2007. Whereunder, the assessee provided licence to HIL to use its technology. He submitted, similar agreement was also entered into with National Aluminium Company Ltd. ('Nalco'). He submitted, the amount received by the assessee towards licence fee has been offered as royalty income, and there is no dispute between the parties with regard to that. He submitted, in addition, the assessee received

and amount of ₹ 15,94,34,150/- towards engineering package fee.

He submitted, in the return of income, the assessee by mistake had offered the amount as income by treating it as FTS. He submitted, the disputed amount was received from HIL in connection with certain services relating to their plant in Orissa.

The break-up of such service is as under:

Nature of Services (1)	• Installations or Structures in connection with services rendered (2)	Eligible Exclusion under Article 12(5)(f) &(g) (3)
Hindalco paid for technical documentation in the form of an Engineering Package made, based on an agreed Basic Site Data List that included flow sheets, specifications, drawings, layouts, and operating procedures to implement Aditya Smelter in Odisha to produce Aluminium.	Aditya Aluminium Smelter at Lapanga, Distt. Sambalpur, Odisha paid under clause 4.2. (c) & (d); 4.19.2 (g) & (h), read with Articles 3.2; 3.3; 4.19; 4.19.2; & Schedule 3.2 of the TLA.	₹10,35,94,783
For getting Main Drawings to enable Hindalco to Study and comment on the Solios Proposal i.e., Process specifications, equipment lists for Paste Plant and Anode Recycling Shops of Green Anode based on RHODAX Technology.	Aditya Smelter at Lapanga, Distt. Sambalpur Odisha under Purchase Order No. 8183 dated 22/01/2009	₹ 49,42,601
For getting Paste Plant Layout Drawings & Process operation manual; material proportionating specification and material balance; assembly drawings electrical & automation specifications for anode recycling shop; and process specifications & flow diagram along with equipment list for the fines handling based on RHODAX Technology for installing Hindalco 35 TPH capacity Green Anode plant.	35 TPH capacity Green Anode plant of Hindalco at Mahan Smelter Singrauli (M.P.) under Purchase Order No. 9150 dated 24/09/2009	₹ 1,12,62,600
Technology package for the design, construction, commissioning, and operation of 2nd Ph. Expansion. It included bauxite laboratory tests to provide process parameters and equipment design information. The Basic Engineering Documentations like codes and standards; basic set-up a process model; basic Heat	Nalco Damanjodi Alumina Refinery 2nd Phase Expansion Odisha paid under clause 6.2. (ix); read with clauses 6.1; 2.2; 2.2.1 and 3.2 of the proposal dated 06/07/2005.	₹ 3,96,34,166
TOTAL		15,94,34,150

7. Learned counsel submitted, as per paragraph 7 of Protocol to India – France DTAA, in case, the definition of FTS given under a treaty between India and a third state, which is a member of the OECD, is more restricted or limited, then it will be applicable. He submitted, as per Article 12(4) of India- Portugal DTAA, the receipts cannot be treated as FTS, as, neither the services are ancillary and subsidiary to the royalty income, nor the assessee has made available any technical knowledge, know-how, experience, skill, or technical plan or technical design, which enables the service recipient to apply the technology contained therein. He submitted, even otherwise also, the receipts cannot be treated as FTS under Article 12(4) of India – Portugal, as it falls within the exceptions provided under Article 12(5)(f) read with Article 5(2)(g) of India – Portugal DTAA. Proceeding further, he submitted, the contracts with Nalco and HIL are for rendering services in connection with plants used for extraction or exploitation of aluminium, which is a natural resource. He submitted, aluminium is drawn from Bauxite, which is an ore extracted from mines. He submitted, aluminium extraction/exploitation involves various steps, such as, (i) taking bauxite out of the mines; (ii) refining of bauxite in a refinery to

produce alumina, a white powder, and (iii) smelting of alumina in a smelter to produce ingots, an usable raw material for the industry.

8. He submitted, learned first appellate authority has erroneously concluded that the amounts received by the assessee towards basic site data list, including flow sheets, specifications, drawings, layouts, and operating procedures under TLA as FTS falling under Article 12(4)(a) of India - Portugal DTAA. He submitted, the observations of the first appellate authority that the services provided have no connection with the tangible plant, is completely wrong. He submitted, without the aid of such services, the service recipient could not have erected the plant or expanded their capacities. He submitted, the services provided were highly site-centric, tailor-made, and were delivered in the form of deliverables like drawings, layouts, manuals, on-site supervision, flow-charts etc., which cannot be termed as intangible service or property. He submitted, the services are neither ancillary nor subsidiary to the application or enjoyment of the right, property or information for which the assessee had received payment in the nature of royalty, nor while rendering such services the assessee had made available any technical

knowledge, know-how, skill, etc. to enable the service recipient to apply the technology contained therein.

9. Thus, he submitted, the receipts cannot be treated as FTS under Article 12(4) of the tax treaty. Further, he submitted, Article 12(5)(f) simply requires rendering of services in connection with installation or structure. He submitted, the expression 'in connection with' is very wide, which includes all types of the services so provided. The installation or structure may be old or new. The scope also covers ancillary and support services rendered in connection with an installation or structure used for the exploration or exploitation of a specified natural resource, i.e., aluminium. He submitted, Article 12(5)(f) read with paragraph 2(g) of Article 5 of the tax treaty covers all the three stages of aluminium production, i.e., mining and refining of bauxite including smelting, till production of ingots, a basic raw material for the industry. Therefore, the exception provided under Article 12(5)(f) cannot be restricted only to the mining part. He submitted, extraction and exploitation would cover all the three stages of production of aluminium that starts with the mining of bauxite and ends with the smelting of alumina in a smelter. He submitted, the treaty nowhere stipulates that only mining of

natural resource is covered under the exclusion, otherwise there was no need to use words 'extraction and exploitation'. Had it been the case, then the expression could not have been 'extraction or exploitation' under Article 12(5) read with para 2(g) of Article 5 of India – Portugal DTAA. He submitted, the mined bauxite is of no use, unless converted to aluminium. Therefore, the interpretation given by learned Commissioner (Appeals) to Article 12(5)(f) cannot be accepted. He submitted, the treaty nowhere stipulates that an installation or structure eligible for exclusion must be at the place of mine, oil, or gas-well, quarry, or place of taking out bauxite. Therefore, the reasoning of the first appellate authority that the refinery and smelting plants are not the places of extraction or exploitation of natural resources, cannot be accepted.

10. Without prejudice, he submitted, out of the disputed receipts, amounts of Rs. 1,62,25,201/- were received by the assessee under two separate purchase orders:

Nature of Services (1)	Installations or Structures in connection with services rendered (2)	Eligible Exclusion under Article 12(5)(f) &(g) (3)
For getting Main Drawings to enable Hindalco to Study and comment on the Solios Proposal i.e., Process specifications, equipment lists for Paste Plant and Anode Recycling Shops of Green Anode based on RHODAX Technology.	Aditya Smelter at Lapanga , Distt. Sambalpur Odisha under Purchase Order No. 8183 dated 22/01/2009	X49,42,601
For getting Paste Plant Layout Drawings & Process operation manual; material proportionating specification and material balance; assembly drawings electrical & automation specifications for anode recycling shop; and process specifications & flow diagram along with equipment list for the fines handling based on RHODAX Technology for installing Hindalco 35 TPH capacity Green Anode plant.	35 TPH capacity Green Anode plant of Hindalco at Mahan Smelter Singrauli (M.P.) under Purchase Order No. 9150 dated 24/09/2009	,12,62,600
TOTAL		1,62,05,201/-

11. Firstly, there is a factual error in the observations of learned Commissioner (Appeals) that HIL has obtained any drawings/layouts for a power plant. Drawing our attention to the purchase order, he submitted, the primary purpose of getting documents prepared by HIL was to study and comment on the Solios Proposal i.e. Process specifications, equipment lists for Paste Plant and Anode Recycling Shops of Green Anode based on RHODAX Technology. He submitted, preparation of document based around a technology does not per se mean inclusion and transfer of that very technology under the deliverables. He submitted, RHODAX Technology is a crushing technology in the process of recycling anodes. He submitted, anodes are positively

charged terminals by which electrons leave an electrical device. He submitted, there is nothing on record to suggest that the assessee was the owner of RHODEX Technology. He submitted, it was one-time site-specific single-use service with no enduring benefit. He submitted, the purpose for which the HIL obtained the service was to study and comment on the pros and cons of Solios Proposal. He submitted, in second purchase order deliverables contained process flow diagrams, process specifications, and equipment list that work around and with RHODAX technology. He submitted, the assessee was not required to supply source codes, drawings, or diagrams to build RHODAX crushers, hence, the service did not contain RHODEX Technology. All that the assessee did was just to provide the deliverables/inputs that primarily enables HIL to simply study and comment on a proposal. He submitted, in the second purchase order for Mohan Smelter Singrauli, the deliverables contained paste plant layout drawings and process operation manual, material proportionating specification and material balance, assembly drawings, electrical and automation specifications for anode recycling shop, and process specification and flow diagram along with equipment list for the fines handling based on RHODAX Technology. He

submitted, these were again created for a plant-based around RHODAX technology but did not contain the technology. He submitted, the assessee did not supply any machine diagram or codes to build an RHODAX crusher under site-specific conditions. He submitted, the services rendered did not tantamount to transfer of technical plan or design that enabled HIL to apply the technology contained therein independently in future at any site without the aid and assistance of the assessee. He submitted, the job of getting site and project-specific drawings/layouts/plans/designs cannot be termed as FTS. In support of such contention, he relied upon the following decisions:

- i. *CIT Vs. De Beers India Minerals Ltd. (2012) 346 ITR 467 (Kar.)*
- ii. *Raymond Vs. Dy. CIT (2003) 86 ITD 791 (Mumbai)*
- iii. *DCIT Vs. ITC Ltd. (2002) 82 ITD 239 (ITAT-Kol)*
- iv. *DIT Vs. Guy Carpenter & Co. Ltd. (2012) 346 ITR 504 (Del.)*
- v. *Intertek Testing Services India Pvt. Ltd. (2008) 307 ITR 418 AAR*
- vi. *Steria (India) Ltd. Vs. CIT (2016) 72 taxmann.com 1 (Del)*

12. He submitted, Article 12(4)(b) presupposes an 'application of technology' (commercial use) as an owner, not for the limited use of a service/technology. Therefore, unless the technology is made available to the service recipient, which can be applied by him as

an owner for commercial use, it cannot be said that the assessee has made available technology, knowledge, skill etc. to satisfy the condition of Article 12(4)(b) of the tax treaty. Thus, he submitted, the receipts cannot be treated as FTS under Article 13 read with paragraph 7 of Protocol to Indian – France DTAA read with Article 12(4) and 12(5)(f) of India – Portugal tax treaty.

13. Strongly relying upon the observations of the Assessing Officer and learned first appellate authority, learned Departmental Representative submitted that the receipts under the TLA are very much ancillary and subsidiary to the royalty income, hence, has to be treated as FTS under Article 12(4)(a) of the tax treaty. He submitted, firstly, the assessee had initially offered the entire receipts as royalty/FTS. He submitted, subsequently, the assessee has altered its position and treated a part of the receipts to be not taxable in India. He submitted, such claim made by the assessee should not have been entertained as it was not made through revised return of income. Without prejudice, he submitted that the technical specific drawings and designs were transferred by the assessee to the entities in India for consideration. Drawing our attention to Article 12(4)(b) of

India – Portugal treaty, he submitted, as per the second limb of the said Article, if services rendered consist of development and transfer of technical plan or technical design, it will constitute FTS. Thus, he submitted, there is no reason to interfere with the decision of learned Commissioner (Appeals).

14. We have considered rival submissions and perused the materials on record. We have also applied our mind to the decisions relied upon. The issue arising for consideration before us is, whether the engineering package fee of Rs. 15,94,34,150/- and on-site man-day charges of Rs.1,39,90,735/- can be treated as FTS under the treaty provisions.

15. Undisputedly, the assessee claiming benefit of the Most Favoured Nation ('MFN') clause in paragraph 7 of Protocol to India – France DTAA has claimed benefit by taking shelter under the definition of FTS as provided under Article 12(4) of India – Portugal DTAA. It is a fact on record that learned first appellate authority has accepted assessee's claim of benefit under India – Portugal DTAA. Therefore, we have to examine whether the aforesaid amounts would qualify as FTS under Article 12(4) read with Article 12(5) of India – Portugal DTAA.

16. Insofar as engineering package fee of Rs.15,94,34,150/- is concerned, the break-up of the same has been provided elsewhere in the order. In the written submission dated 27.04.2022 furnished before us, learned counsel for the assessee has accepted the position that the receipts of Rs.10,35,94,783/- received from HIL under the TLA and Rs.3,96,34,166/- received from Nalco would qualify as FTS under Article 12(4)(a) of India – Portugal DTAA. However, it is the claim of the assessee that the aforesaid two amounts would not qualify as FTS due to exceptions provided under Article 12(5)(f) and 12(5)(g) of India – Portugal DTAA. Obviously, learned Commissioner (Appeals) has rejected the aforesaid claim of the assessee by observing that the services rendered by the assessee are in respect of intangible in the form of technology process/solution, which has no connection with the installation or structure, which is tangible in nature. He has observed that the function of installation of HIL and Nalco plant is not within the scope of work given to the assessee. He has further observed that the production of alumina involves three stages from mining of bauxite, at the first stage, to the process of smelting, which is the third stage. He observed that the technology solution provided by the assessee is for the process of

smelting and not related to the mining of bauxite. According to learned Commissioner (Appeals), the exceptions carved out in the treaty is only in respect of installation or structure for the first stage of mining of natural resources and not for the other stages.

17. At this stage, it is necessary to look into the provisions contained under Article 12(5)(f) and 12(5)(g) of India – Portugal DTAA.

“5. Notwithstanding paragraph 4, "fees for included services" does not include payments :

(f) for services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred to in paragraph 2(g) of Article 5;

(g) for services referred to in paragraph 3 of Article 5.”

18. As could be seen from the aforesaid provisions of Article 12(5)(f), which exclude the receipts from services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred in paragraph 2(g) of Article 5 from being treated as FTS. Similarly, Article 12(5)(g) excludes receipts from services rendered in paragraph 3 of Article 5 from being treated as FTS. At this stage, it is necessary to look at the provisions contained in Article 5(2)(g) and Article 5(3) of India – Portugal DTAA. Article 5(2)(g), which is

part of definition of Permanent Establishment (PE) says that '*a mine, an oil or gas well, quarry or any other place of extraction of natural resources, including an installation or structure used for the exploration or exploitation of nature resources only if so, used for a period of more than 120 days in a financial year shall qualify as a PE*'. Whereas, Article 5(3) provides that '*a building site, structure, installation or assembly project or supervisory activity in connection therewith constitutes a PE, only if it lasts more than 9 years*'. A conjoint reading of Articles 12(5)(f), 12(5)(g), Articles 5(2)(g) and 5(3) would make it clear that fees received towards services in connection with a mine, an oil or gas well, quarry or any other place of extraction of natural resources, including an installation or structure used for the exploration or exploitation of nature resources, a building site a construction, installation or assembly project, including supervisory activities in connection therewith would fall within the exceptions provided under Article 12(5)(f) & 12(5)(g).

19. On perusing the relevant agreements and other facts and materials on record, it is observed that the amount of Rs.10,35,94,783/- was received by the assessee for providing

basic site data lists, which included flow sheets, specifications, drawings, layouts, operating manuals, procedures to build/construct/install/assemble these smelter plants. It is not a simple case of loading a technology solution/software as observed by learned Commissioner (Appeals). The smelter plant certainly requires installation of multiple plants and machineries. It involves on-site planning and supervision of erection and installation of not only civil work but also the plant and machinery. There cannot be any dispute that the installation/erection process has to be taken up as per the flow-sheets, equipments, specifications, drawings, layouts, operating manuals, procedures etc., without which, the installation process cannot be carried out. Therefore, in our view, the service rendered by the assessee is in connection with installation/erection of plant and machinery involved in mining of natural resources. Moreover, scope of Article 5(2)(g) of India – Portugal DTAA is not merely limited to mining or extraction of natural resources but also covers installation or structure used for exploration and exploitation of nature resources. Therefore, in our considered view, the amounts received would fall within the exceptions

provided under Article 12(5)(f) and 12(5)(g) of India – Portugal DTAA, hence, not taxable at the hands of the assessee.

20. Insofar as the balance amount of Rs.1,62,05,201/- out of the engineering package fee, it is observed from the facts on record that they are not part of the TLA, but in pursuance to two independent purchase orders. In fact, learned first appellate authority has accepted the aforesaid factual position in paragraphs 5.2.12 and 5.2.13 of the order passed under section 154 of the Act. Therefore, they cannot be treated as fall out of the TLA so as to qualify as FTS under Article 12(4)(a) of the tax treaty. In fact, learned first appellate authority has treated it as FTS under Article 12(4)(b) of India – Portugal DTAA by stating that it comes within the ambit of second limb of Article 12(4), which does not require fulfillment of make available condition. However, on a reading of Article 12(4)(b) as a whole, it certainly appears that even the second limb that “consists of development and transfer of technical plan or technical design”, also requires the satisfaction of make available condition, as such words are qualified by “which enables the persons acquiring services to apply the technology contained therein”.

21. Keeping in perspective the aforesaid legal provisions, if we examine the facts on record, the assessee has received the amount for providing drawings to enable HIL to study and comment on specific proposal involving process specification, equipment lists for paste plant and anode recycling shops of green anode based on RHODAX Technology. Facts on record reveal that the primary purpose of providing such documents, designs and drawings was for the appraisal of the contractee. It does not per se mean transfer of technology. There is nothing on record to suggest that the assessee is also the owner of RHODEX Technology. There is no evidence brought on record by the Revenue to establish that the drawings, designs etc. provided by the assessee has enabled the recipients to apply the technology contained therein independently. Thus, in our considered opinion, the amount of Rs. 1,62,25,201 included in the engineering package services would not qualify as FTS under Article 12(4)(b) of India – Portugal DTAA.

22. Insofar as on-site man-day fee of Rs.1,39,90,735/- is concerned, though, it is in pursuance to TLA and may

qualify for FTS under Article 12(4)(a), however, in our view, the receipts fall within the exceptions provided under Article 12(5)(f) and 12(5)(g) of India – Portugal DTAA, hence, would not qualify as FTS. Thus, we hold that the receipts in dispute are not taxable as FTS at the hands of the assessee. Grounds are allowed.

23. In the result, the appeal is allowed.

ITA No. 3410/Del/2016
AY: 2010-11

24. In view of our decision in ITA No. 9483/Del/2019 for assessment year 2010-11, this appeal has become infructuous, hence, dismissed.

25. In the result, appeal is dismissed.

ITA No. 9484/Del/2019
AY: 2011-12

26. In course of hearing, both the parties have agreed before us that the facts and issues involved in the present appeal are identical to the facts and issues involved in ITA No.9483/Del/2019.

27. Additionally, learned counsel appearing for the assessee submitted that the present appeal factually stands on a slightly

different footing as the Technical Collaboration Agreement (TCA) has expired on 19.01.2010. Therefore, the receipts cannot fall under Article 12(4)(a) of India – Portugal DTAA.

28. Having considered rival submissions and perused the materials on record, we are convinced that the facts and issues involved in the present appeals are identical to ITA No.9483/Del/2019 decided by us in the earlier part of the order. Therefore, our decision therein will apply *mutatis mutandis* to the present appeal.

29. Further, in our view, assessee's case in this appeal stands on a much better footing as a part of the engineering package fee received, which was treated as FTS under Article 12(4)(a) of India – Portugal DTAA, cannot be so as the TCA was not in force in the impugned assessment year. Therefore, the provisions of Article 12(4)(a) of India – Portugal tax treaty will not get attracted. In view of the aforesaid, we direct the Assessing Officer to delete the additions. Grounds are allowed.

30. In the result, the appeal is allowed.

31. To sum up, ITA Nos. 9483/Del/2019 and 9484/Del/2019 are allowed and ITA No. 3410/Del/2016 is dismissed.

Order pronounced in the open court on 6th September, 2023

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
VICE-PRESIDENT

Dated: 6th September, 2023.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi