

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

**BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

ITA No.1620/Del/2022
Assessment Year: 2019-20

Bain & Company Inc., C/o- Bain & Company India Pvt. Ltd., 20 th Floor, Building No. 10, Tower C, DLF Cyber City, Phase-II, Gurgaon	Vs.	DCIT, International Taxation, Gurgaon
PAN :AAECB9564H		
(Appellant)		(Respondent)

Assessee by	Sh. Himanshu Sinha, Advocate
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	03.10.2023
Date of pronouncement	12.10.2023

ORDER

The present appeal has been filed by the assessee challenging the final assessment order dated 18.05.2022 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 pertaining to assessment year 2019-20, in pursuance to directions of learned Dispute Resolution Pane (“DRP”).

2. In ground nos. 2 and 3, the assessee has challenged the addition of an amount of Rs.9,09,98,733/- by characterizing it as Fee for Included Services (“FIS”) under Article 12(4)(b) of India – USA Double Taxation Avoidance Agreement (“DTAA”) as well as under section 9(1)(vii) of the Act. Whereas, in ground no. 4, the assessee has challenged addition of Rs.10,39,89,404/-, being reimbursement of cost as FIS, both under the treaty provisions as well as under the provisions of the Act.

3. Briefly the facts relating to these two issues are, the assessee is a non-resident corporate entity and a tax resident of Unites States of America (“USA”). As stated, the assessee is engaged in the business of providing consultancy services to multinational companies in the field of strategy, performance improvement, organization enhancement, mergers & acquisitions, and private equity. It also provides support services to its subsidiaries for which it is remunerated at arm’s length basis. In the assessment year under dispute, the assessee had following streams of income:

(i)	Royalty from Bain India	Rs.5,78,18,060
(ii)	Receipt from consultancy services provided to Bain India	Rs.9,09,98,733

(iii)	Receipt from professional support services provided to Bain India	Rs.18,54,90,269
(iv)	Receipt from reimbursement of expenses from Bain India	Rs.10,39,89,404

4. In the return of income filed for the impugned assessment year, the assessee offered the royalty income earned of Rs. 5,78,18,060/- to tax. However, various other receipts as enumerated at serial no. (i) to (iv) were not offered to tax on the ground that they are in the nature of business profit, hence, in terms with the treaty provisions, are not taxable in India in absence of a Permanent Establishment (PE).

5. In course of assessment proceeding, the Assessing Officer called upon the assessee to furnish all relevant and necessary details relating to the aforesaid receipts. After going through the details, the Assessing Officer was of the view that the receipts from consultancy services and reimbursement of expenses are in the nature of FIS in terms of Article 12(4)(b) of the treaty, as, they are consultancy services. He further held that they are in the nature of FIS under section 9(1)(vii) of the Act.

6. Insofar as receipts of reimbursement of expenses are concerned, the Assessing Officer observed that such receipts are

also in the nature of FIS/FTS, both under Article 12(4)(b) of the tax treaty as well as under section 9(1)(vii) of the Act. He further observed that not only the services rendered are in the nature of consultancy services, but while rendering such services, the assessee had made available technical know-how, knowledge, skill etc. Further, he observed that similar dispute relating to the aforesaid two receipts arising in assessment years 2011-12 to 2014-15, assessment years 2016-17 and 2017-18 have been settled by the assessee under the Direct Tax Vivad Se Vishwas Scheme, 2020, which shows tacit acceptability of the additions as FIS/FTS by the assessee. Thus, in the aforesaid premises, the Assessing Officer brought both the receipts to tax under Article 12(4)(b) of the tax treaty. Contesting the aforesaid additions, the assessee raised objections before learned DRP. However, following their directions in assessment year 2018-19 in respect of similar dispute, learned DRP rejected the objections of the assessee.

7. Before us, it is a common point between the parties that the issues relating to taxability of receipts from consultancy services and reimbursement of expenses have been decided in favour of the assessee by the Tribunal in assessment year 2018-19. They submitted that due to parity of facts the issue stands squarely

covered by the decision of the Tribunal in assessment year 2018-19. A copy of the order dated 29.08.2023 passed by the Tribunal in ITA No.567/Del/2022 was placed on record.

8. Having considered submissions of the parties and perused the materials on record, we find, identical issue arising in assessee's own case in assessment year 2018-19 came up before the Tribunal in the appeal referred to above. While deciding the issue, the Tribunal having analyzed the nature and character of the services rendered and the provisions contained under Article 12(4)(b) of the tax treaty, has concluded that the receipts cannot be treated as FIS/FTS, either under the treaty provisions or under the provisions of the Act. On the issue of taxability of receipts from business consultancy services, observations of the Tribunal are as under:

“13. We have considered rival submissions in the light of decisions relied upon and perused the material available on record. Upon analyzing the consulting service agreement between the assessee and Bain India, it is observed that the consulting services provided by the assessee are as under:

“The nature of services performed by the Parties would vary for each project/case based on specific project requirements. The Parties will provide Professional management consulting services to each other from time to time upon request, including without limitation market research, strategic research and planning, data collection, liaising with clients, in each case as may be arranged and agreed to in any given instance and from time to time between Bain India and Company or the applicable Subsidiary, as applicable.”

14. As could be seen from the nature of services provided by the assessee are in relation to market research, strategic research and planning, data collection, client engagement etc. Article 12(4) of India-USA DATA defines FIS as under:

“Article 12(4) of the DTAA defines ‘Fee for included Services’ as under:

“Article 12-ROALTIES AND FEES FOR INCLUDED SERVICES

4. For purposes of this Article, “fee for included 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 3 is received ; or (b) make available technical knowledge, experience, skill, knowhow, or processes, or consist of the development and transfer of the development and transfer of a technical plan or technical design.”

15. As per Article 12(4), FIS includes any payment received towards rendering technical or consultancy services. In the facts of the present appeal, admittedly, the departmental authorities have categorically held that the receipts are covered under Article 12(4)(b). Thus to qualify under Article 12(4)(b) of the Tax Treaty, the following two conditions are to be fulfilled:

- i) The services rendered must be technical or consultancy services;
- ii) Rendering of such services result in making available technical knowledge, expertise, skill, knowhow or processes etc.

16. So firstly it has to be seen whether the services rendered are of the nature of technical or consultancy. To understand the true import of the expression of technical or consultancy, it is necessary to refer to the Memorandum of Understanding to the Tax Treaty. As per the Memorandum of Understanding, Article 12 includes only certain technical and consultancy services. Technical services would mean, services requiring expertise in a technology. Whereas, consultancy services would mean advisory services. The categories of technical and consultancy services are to some extent overlapping, because, a consultancy service could also be a technical services. However, the category of consultancy services

also includes an advisory service, whether or not expertise in technology is required to perform it. The nature of services provided under the agreement, such as, client engagement, market research, strategic research and planning etc., in our view, certainly, do not fall under the category of technical services.

17. Further, even assuming that they fall under the category of consultancy services, however, the most crucial condition to be satisfied to qualify as FIS under Article 12(4)(b) is the make available condition. In the facts of the present appeal, the departmental authorities have not brought any material on record to demonstrate that while rendering services, the assessee had made available technical knowledge, expertise, skill, knowhow etc. to Bain India to apply such technology, knowhow etc. independently without the aid and assistance of the assessee. The fact that Bain India is still dependent on the assessee for such services is established from the fact that since the year 2010, the assessee had been providing such services to Bain India on year to year basis. Had assessee made available the technical knowledge, knowhow skill etc. to Bain India, there would not have been any occasion for the assessee to provide such services on year to year basis as the making available or transfer of such technical knowledge, knowhow, skill etc. would have enabled Bain India to apply them on its own without requiring the assessee to continue with providing them.

18. It is further relevant to observe, as per Example 7 of the Memorandum of Understanding to India-USA DTAA, a receipt cannot be treated as FTS merely because the service provider while providing consultancy services has used substantial technical skill and expertise. Because, while providing such services, the American Company is not making available to the Indian Company, any technical expertise, knowledge or skill etc. but is merely transferring commercial information to the Indian Company by utilizing technical skill. Thus, keeping in perspective the aforesaid factors as well as the ratio laid down in the judiciary precedents cited before us, we have no hesitation in holding that the receipts in dispute are not in the nature of FIS under Article 12(4)(b) of India-USA DTAA. We order accordingly.”

9. Whereas, on the issue of taxability of reimbursement of expenses, the observations of the Tribunal are as under:

“23. We have considered rival submissions and perused the material on record.

24. It is observed, while considering the issue relating to the nature and character of identical receipts and whether it requires withholding of tax, the Tribunal in case of the payer i.e. Bain India in assessment year 2009-10, in the order referred to above, has held that the payment cannot be treated either as FIS under Article 12(4)(b) of the Tax Treaty or royalty. Therefore, it was held by the Tribunal that there was no requirement on the part of the payer i.e. Bain India to withhold tax.

25. In our considered opinion, the controversy stands resolved by the aforesaid decision of the Tribunal. Therefore, we hold that the receipts are not in the nature of FIS under Article 12(4)(b) of the Tax Treaty. We order accordingly.”

10. There being no difference in the factual position in the impugned assessment year, respectfully following the decision of the Coordinate Bench, as discussed above, we hold that the receipts from business consultancy services and reimbursement of expenses are not taxable as FIS/FTS. Ground nos. 2, 3 and 4 are allowed.

11. In ground no. 5, the assessee has challenged addition of Rs. 18,54,90,269/-, being receipts from provision of support services as FIS.

12. Briefly the facts are, the assessee had entered into a support service agreement with its Indian subsidiary, Bain India on 1st April, 2010. In terms with the agreement, the assessee provide support services to various group entities including Bain India so as to enable them to get access to standardized support services. By providing such services, the assessee helps the group entities

realize economies of scale, and other operating and financial efficiencies and function more efficiently in an increasingly globalized and competitive scenario. The cost incurred for providing such services is allocated to Bain India on a cost-to-cost basis, based on allocation keys, such as, revenue, attendance of employees at training seminars, etc. In the year under consideration, the Indian entity availed support services in the nature of TSG support services, information services, training, and global VP meetings. Before the Revenue authorities, the assessee claimed exemption qua taxability of this receipt primarily on two grounds. Firstly, the services rendered are not technical services. It was submitted that consultancy services not having any element of technical skill cannot be treated as technical services under the tax treaty. Secondly, contention of the assessee was, in terms of Article 12(4)(b) of India – USA DTAA, the assessee had not made available technical knowledge, skill, know-how etc. to Bain India while rendering such serviced.

13. The Assessing Officer, however, did not accept the claim of the assessee and proceeded to hold that not only the services are in the nature of technical/consultancy services, but while rendering such services, the assessee had made available

technical knowledge, know-how, skill etc. as the services rendered include training of personnel. Thus, he concluded that the receipts would qualify as FIS under Article 12(4)(b) of the tax treaty. Learned DRP upheld the aforesaid decision of the Assessing Officer.

14. Before us, learned counsel appearing for the assessee reiterated the stand taken before the departmental authorities. Whereas, drawing our attention to the support services agreement placed on record, learned Departmental Representative submitted that not only the services rendered are in the nature of technical and consultancy service, but while rendering such services, the assessee had made available technical knowledge, know-how, skill etc. as a part of the services in relation to training the personnel of Bain India. Thus, he submitted, the conditions of Article 12(4)(b) stand satisfied.

15. We have considered rival submissions and perused the materials on record. The short issue arising for consideration is whether the receipts from provision of support services would qualify as FIS under Article 12(4)(b) of India – USA DTAA. To qualify as FIS under Article 12(4)(b) of India – USA DTAA, two conditions have to be satisfied. Firstly, the nature of services

must be technical or consultancy and, secondly, in course of rendition of such services, there must be transfer of technology from the service provider to the service recipient, through which, the service provider makes available technical knowledge, know-how, skill etc. to the service recipient. On a perusal of the support service agreement, a copy of which is placed at page 41 of the paper-book, it is observed that the services rendered are as under:

1.1 Financial Administration

Assistance in improving financial practices and procedures. Such services may include:

- 1) *Corporate-wide accounting practices*
- 2) *Cost accounting methods*
- 3) *Forecast and profit analysis*
- 4) *Relations with banks*
- 5) *Foreign currency management methods and techniques*
- 6) *Insurance and risk management*
- 7) *Improving financial practices and procedures*
- 8) *Assistance with tax filing obligations*
- 9) *Assembling and analyzing information on global developments in accounting, tax, banking, capital markets and related fields of potential significance to the parties.*

1.2 Personnel Administration

Assistance in maintaining and improving the parties' work forces (executive, administrative, and professional personnel). Such activities may include:

- 1) *Analyzing and advising on the reallocation of responsibilities to enable employees to perform specified functions.*
- 2) *Advice on international developments in employee relations.*
- 3) *Evaluating salaries, incentives and fringe benefits*
- 4) *Developing competitive employee relations policies and practices.*
- 5) *Developing and improving management and executive policies.*

- 6) *Administering personnel training programs, both internal and external*
- 7) *Assisting in external recruiting programs*
- 8) *Administrating a forum for executive development*

1.3 **Professional Services**

With a view to protecting Bain India's interests, assistance in complying with applicable laws, locating and evaluating outside consultants. Such activities may include; assistance in:

- 1) *Negotiating and drafting agreements, e g. rent, purchase and sales contracts, agent agreements, patents, trademarks, leases, service agreements, etc.*
- 2) *Claims, disputes, litigation and governmental proceedings.*
- 3) *Locating and evaluating outside consultants and experts for legal, tax and other specialist services*
- 4) *General and legal advice and assistance in the review of all legal problems on a case-by-case basis and procedures in the above-mentioned areas.*

1.4 **Field Service Support and Local Marketing Support**

- 1) *Provide assistance in the development of local marketing programs, and the. selection of media and promotional services. Advice on field visits of marketing personnel and contact with customer personnel.*
- 2) *Provide aid in preparation of forecasts.*
- 3) *Aid by providing information and assist in the development of local public relations programs.*
- 4) *Provide assistance concerning structure and functions of the organization*

1.5 **Computer, communication and Information Services**

Assistance on centralized and decentralized computer, communication and information systems. Such services may include:

- 1) *Advise and assist in maintenance and support of suitable accounting, personnel and related systems.*
- 2) *Advise and assist in the evaluation of data processing results.*
- 3) *Provide assistance in implementation of information, communication and computer systems.*
- 4) *Assistance with communications technology and evaluation of communication alternatives and assistance in implementation of communication systems.”*

16. On a detailed analysis of the services rendered, it appears that some of the services rendered may not fall in the category of technical or consultancy services. However, some of the services rendered may fall either under technical or consultancy services. But the most crucial aspect, which requires examination is, whether in course of rendition of such services, the assessee has made available any technical knowledge, know-how, skill etc. to Bain India so as to enable Bain India to employ such technology, know-how, skill etc. without the aid and assistance of the assessee. In this context, it must be borne in mind that the agreement for providing support services was executed between the assessee and Bain India on 1st day of April, 2010. Whereas, the present appeal relates to assessment year 2019-20. Thus, it is patent and obvious that from the year 2010 onwards, the assessee is providing support services to Bain India on regular basis. Had it been a case of transfer of technology from the assessee to Bain India by making available technical knowledge, know-how, skill etc. qua the services performed, it would certainly have enabled Bain India to employ such technical knowledge, know-how, skill etc. in performing such services independently without seeking aid and assistance of the assessee. There would

have been no necessity for Bain India to continuously avail such services from the assessee since the year 2010 till the current assessment year. Had it been a case of transfer of technology in such a long duration Bain India certainly would have acquired the technical knowledge, know-how, skill etc. to perform such services on its own, without requiring the assessee to provide them. The very fact that Bain India is still dependent upon the assessee for the support services, establishes the fact that the assessee has not made available technical, know-how, skill etc. relating to such services to Bain India, the service recipient.

17. At this stage, we must also observe that at the time of hearing, learned counsel appearing for the assessee has made a statement at bar that prior to the impugned assessment year, in no other assessment year the Assessing Officer has treated the receipts from support services as FIS and brought it to tax. Thus, on overall consideration of facts and materials on record, we are of the view that the Revenue has not brought on record any materials to establish the fulfillment of make available condition of Article 12(4)(b) of India – USA DTAA.

18. For the sake of completeness, we must observe that in course of hearing, learned Departmental Representative has relied

upon a decision of the Coordinate Bench in case of H.J. Heinz Company Vs. ADIT [2019] 108 taxmann.com 473 (Delhi – Trib.).

19. On a careful reading of the said judgment, we find that the decision of the Coordinate Bench is distinguishable on facts as the services rendered in case of that assessee is in relation to manufacture of products. Whereas, in the facts of the present appeal, services rendered are not in relation to any manufacturing activity. In this view of the matter, the receipts cannot be treated as FIS under Article 12(4)(b) of the tax treaty. The Assessing Officer is directed to delete the addition.

20. Before parting, we must observe that while bringing to tax the receipts from business consultancy services and reimbursement of expenses, the Assessing Officer had observed that in respect of similar additions made in earlier assessment year, the assessee had settled the dispute under the Vivad Se Vishwas Scheme, 2020, thereby tacitly accepting the additions.

21. In our view, the aforesaid observations of the Assessing Officer is not, at all, relevant for deciding the issue, as, settlement of dispute under the Vivad Se Vishwas Scheme, 2020 cannot be construed to mean a tacit acceptability of the additions, in fact,

the aforesaid position stands clarified by the CBDT Circular no. 09/2020, dated 22nd April, 2020.

22. Ground nos. 9 and 10, being consequential and premature at this stage, do not required adjudication.

23. In the result, the appeal is allowed.

Order pronounced in the open court on 12th October, 2023

Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
VICE-PRESIDENT

Dated: 12th October, 2023.

RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi