

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH :D: DELHI)**

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

**ITA No. 1283/Del/2023
Assessment Year: 2017-18**

ACIT, International Taxation Circle-1(1)(1), New Delhi (PAN:AAKCA1127B)	Vs.	Avnet International Hong Kong Ltd., 16F Spectrum Tower, 53 To Road, Kwun Tong, Kowloon, Hongkong (Not listed)
(Appellant)		(Respondent)

Present for:

Department by : Shri Sanjay Kumar, Sr. DR
Assessee by : Shri Tapas Misra, Adv.

Date of Hearing : 09.10.2023
Date of Pronouncement : 16.10.2023

ORDER

PER SAKTIJIT DEY, VICE PRESIDENT:

This is an appeal by the Revenue arising out of order dated 29.01.2022 of learned Commissioner of Income-Tax (Appeals) -42, Delhi pertaining to assessment year 2017-18.

2. The only effective ground raised by the Revenue is as under:
 1. That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in deleting the addition of Rs.10,59,08,487/- made by the Assessing Officer on account of General Operational

and administrative services as Fees for Technical Services u/s. 9(1)(vii) of the Income-Tax Act, 1961.

3. Briefly, the facts relating to the issue are, the assessee, a non-resident corporate entity, is a tax resident of Hong Kong. As stated by the Assessing Officer, the assessee is engaged in the business of providing general operation and administrative services to its group entities including the entities in India. Additionally, it is also engaged in the business of hardware. In the assessment year under dispute, assessee had the following receipts from India:

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|------------------------------------|-------------------|
| i) Sales of software | : Rs.2,83,29,690 |
| ii) Provisions of support services | : Rs.10,59,08,487 |
| iii) Reimbursement of expenses | : Rs. 48,64.492 |

4. However, for the purpose of the present appeal, we are concerned with the receipts from provision of support services and reimbursement of expenses.

5. Undisputedly, in the return of income for the assessment year under dispute, assessee did not offer these receipts as income by stating

that the services rendered are neither managerial nor technical, hence, the receipts there-from cannot be treated as Fee for Technical Services (FTS). It was submitted that the assessee is rendering support services for providing strategic direction in certain aspects of the business only for the purpose of protecting the interest of the group as a whole. It was submitted, the services are more in the nature of liaising, coordination, facilitator, supervision to ensure that the back office operation runs smoothly without any hassles. The Assessing Officer, however, did not accept the claim of the assessee and held that the services rendered are of managerial and technical nature, hence, would qualify as FTS under Section 9(1)(vii) of the Income-Tax Act,1961. Further, he held that the receipts even would qualify as FTS under Article 13 of the Tax Treaty as it includes receipts from provision of managerial, technical or consultancy services. He observed that Article 13 of India-Hong Kong Treaty does not require satisfaction of make available condition. Thus, he ultimately concluded that the receipts from provision of general operation and administrative services would qualify as FTS both under the domestic law as well as treaty provisions. He further held that the

reimbursement expenses would qualify as FTS. Accordingly, he brought the receipts of Rs.11,07,72,979 to tax as FTS by applying the rate of 10% under Section 115A of the Act.

6. The assessee contested the aforesaid addition before learned first appellate authority. After considering the submissions of the assessee in the context of facts and material on record as well as ratio laid down in the judicial precedents cited before him, learned Commissioner (Appeals) observed that the services rendered by the assessee do not qualify either as managerial or technical or even consultancy services. Further, he observed that, though, identical nature of services were rendered by the assessee in past assessment years and had earned income in India, however, the Assessing Officer has accepted assessee's stand that the receipts do not qualify as FTS either under the domestic law or under the treaty provisions. Further, he observed that there is no change in the factual matrix in the impugned assessment year compared to the past assessment years. Thus, considering the above aspects, learned Commissioner (Appeals) ultimately concluded that the receipts from general operation and administrative services would not qualify as

FTS so as to bring them to tax in India. Accordingly, he deleted the addition.

7. Before us, learned Departmental Representative drew our attention to the copy of centralized and other services agreement entered with the Indian entity, a copy of which is at page 15 of the paper book and submitted that the scope of services under the agreement would squarely fall in the category of managerial and consultancy services. Therefore, the receipts from rendering of such services to the Indian entity would qualify as FTS both under Section 9(1)(vii) of the Act as well as under India-Hong Kong Tax Treaty. Proceeding further, he submitted, merely because in the past assessment year the Assessing Officer has not taxed identical receipts as FTS, would not debar the Assessing Officer from treating it as FTS in the impugned assessment year as rules of res judicata do not apply to tax proceedings since each assessment year has to be seen as a distinct and separate unit.

8. Learned counsel appearing for the assessee strongly relied upon the observations of the learned First Appellate Authority and submitted

that there being no change in the factual position, the Assessing Officer cannot take a different view in the current assessment year.

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

10. Undisputedly, the assessee is a tax-resident of Hong Kong and it has provided general operation and administrative services to its group entities in India. For this purpose, assessee has entered into a service agreement with the Indian group entities on 02.07.2011. On a perusal of agreement, it is observed that the scope of services are as under:

- (i) Strategic value-added services – including but not limited to the Headquarter Executive Management Services Marketing and Business Innovation Services, Business Operation Services etc.
- (ii) Back office support services – including but not limited to Accounting and Finance Services, Legal and Contract Management Services, Human Resources Administrative Services, Global Information Solutions Services etc.

11. The details of services provided under the aforesaid two categories are as under:

Services	Brief Description of Nature of Services
<i>Executive management</i>	<i>These services represent evaluation of the existing functions of the top management of ATS India related to business strategy and evaluation of policy designed by them for the operational team which activity of ATHK does not constitute Control of the business of ATS India.</i>
<i>Business operation</i>	<i>Business operation services provide support on operations by delivering information to respective units bridging gap between the global/ regional budget and actual, facilitating smooth interacting with different supporting departments, e.g. logistic department, IT, etc. Business operation is like an internal role, helping other teams collaborate and coordinate between businesses and internal teams, to ensure business success at Group Level</i>
<i>Logistics</i>	<i>Logistics services include guiding the local logistics teams at ATS India in areas such as assisting them to take independent, yet synergetic decisions on strategic direction considering the interest of the group as a whole and helping them managing logistics, which is important to the assess as a group entity distributor to have the right product in stock in the territory and to be able to deliver it on time to be able to protect the brand image of the Group.</i> <i>It is also involved periodical supervision of policies by ATS India top management on maintenance of logistics infrastructure, and the appropriate level of investment in warehouses and shipping as well as preparing budgeting for logistics spending and planning the future development to adhere with the respective policies of the Group as a whole.</i>
<i>Marketing Communication</i>	<i>Marketing communication involves the promotion of the Brand image of the Group in the market, branding and advertising activities such as corporate communication, public relations, employee communications web publishing, event management and marketing intelligence - all to fall in line with the global brand image the group and crucial to the AT India as well as the group's business success.</i>
<i>Contract Review and Legal Council</i>	<i>Review of existing and new Contracts & legal counsel service include contract secondary and cursory review of various legal issues from time to time and seeking professional advice from external experts and management of legal affairs to assess and be aware of the risk exposure the local entity takes that may impact the Group</i>
<i>Global information system (GIS)</i>	<i>GIS services include providing external support to IT infrastructure including systems and tools regarding support of the business such as SAP systems, warehouse management, treasury, sales, etc.</i> <i>Consistent IT systems and programs are critical for the ATS India to streamline its own operations and hence achieve desired level of productivity, knowledge-share across regions, and align to a global IT strategy.</i>
<i>Central human resource Services</i>	<i>Central HR services include support in matters relating to recruitment/ termination, compensation and benefit, training development, talent management / development and employee engagement and relations.</i>
<i>Central finance and accounting</i>	<i>Central finance and accounting services include the providing guidance in matters relating to reporting of the cash flows, including accounts receivables, accounts payables, and intercompany payments, as well as budgeting and financial reporting.</i>
<i>Central AP tax</i>	<i>Central AP tax services include the provision of tax compliance services This service majority include co- ordination with the external consultants on compliance matters, review of submissions before tax authorities for confirmation on factual accuracy, review of tax positions taken by the consultants with a view to reduce the associated risks to the group.</i>
<i>Central AP treasury</i>	<i>Central AP treasury services include assistance to the local teams in controlling and</i>

	<i>managing cash flows with third parties as well as with internal parties. It also includes assistance to the local finance team with regard to management of currency, assessment of interest risk, hedging, getting better interest rates on loans, better forex rates and hedging rates as well as coordination of treasury activities such as investor relations, financing current operations by providing credit facilities and providing corporate guarantees, forecasting cash flows, and insurance to achieve better profitability to the Group and reduce overall risk to manageable levels for the entire Group.</i>
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12. On careful analysis of the nature and character of services provided by the assessee, it has to be noted that such services were rendered to provide various group companies including the Indian group companies a standard facility so that not only common benefits accrue to the group entities but also to ensure that group interest is protected. While providing such services, the assessee certainly doesn't control the functioning of the group entities. It was merely acting as a facilitator. Therefore, in our view, the services rendered would not qualify as managerial services. Even, the services cannot qualify as technical services as the services rendered do not require expertise in technology or skill or knowledge in the field of technology. The services rendered certainly do not qualify as consultancy services as such services require specialization, qualification of professional knowledge and expertise. In the facts of the present appeal, the services do not relate to the core business of the Indian entities but are more in the nature of support

advisory and support services to conduct the day to day business activities in a smooth and hassle free manner. Therefore, in our view, the services rendered would not fall within the categories of consultancy services as well.

13. Most crucial factor which clinches the issue in favour of the assessee is, undoubtedly, the service agreement was executed between the parties as early as on 02.07.2011. In past assessment years i.e. assessment years 2013-14 to 2015-16, though, the assessee had earned receipts in India from rendering similar nature of services to the Indian entities, however, in the assessment proceedings carried out under Section 143(3) of the Act, the Assessing Officer, after detailed examination, has accepted assessee's claim that the receipts do not qualify as FTS either under the domestic law or under the treaty provisions. Though, in principle, we fully agree with the submissions of learned Departmental Representative that principle of res judicata do not apply to tax proceedings, each assessment year being a distinct and separate unit, however, if the Assessing Officer has taken a consistent view in the past assessment years and the factual position permeating

through different assessment years are identical, then, rule of consistency must apply. The Assessing Officer and for that matter, the department cannot disgrace from the consistent approach taken in the past assessment years without bringing on record the difference in the factual position, which made him not to follow his earlier view and take a different view. In the facts of the present appeal, a reading of the impugned assessment order goes to reveal that the Assessing Officer has not brought on record any difference in the factual position in the impugned assessment year compared to the past assessment years wherein, he has taken a view that the identical receipts are not in the nature of FTS.

14. Learned Commissioner (Appeals) has also recorded a finding of fact that the Assessing Officer has not brought any difference in facts while taking apparently a different view in the impugned assessment year. On a specific query from the Bench, learned Departmental Representative fairly accepted that the Assessing Officer has not brought any distinguishing features in factual position in the current assessment year compared to the past assessment years. Thus, when the Assessing