

आयकर अपीलीय अधिकरण
मुंबई पीठ "आई", मुंबई पीठ
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री गगन गोयल, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
आअसं. 2367/मुं/ 2022 (नि.व.2019-20)
ITA NO. 2367/MUM/2022(A.Y. 2019-20)

Tech Data (Singapore) Pte Limited,
10, #05-17/20 Techpoint, Ang Mo Kio Street 65,
Singapore -569059

PAN: AAGCT-0951-J

..... अपीलार्थी /Appellant

बनाम Vs.

The Deputy Commissioner of Income Tax
International Taxation, Circle -4(1)(2)

Mumbai .

..... प्रतिवादी /Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Nitesh Joshi

प्रतिवादी द्वारा/Respondent by : Shri Avneesh Tiwari

सुनवाई की तिथि/ Date of hearing : 22/05/2023

घोषणा की तिथि/ Date of pronouncement : 21/08/2023

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 19/07/2022 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [in short 'the Act], for the assessment year 2019-20.

2. The assessee in appeal has raised five grounds. The gist of grounds raised by the assessee in appeal is as under:

(i) Challenge to validity of assessment – Notice u/s. 143(2) of the Act issued without authority.

(ii) Income from sale/distribution of off-the shelf Software held as taxable income

(iii) Management fee held as Fee for Technical Services (FTS) under the Act r.w. Article -12 of the India -Singapore DTAA.

(iv) Levy of interest u/s. 234A and 234B of the Act

(v) Initiation of penalty proceedings u/s. 274 r.w.s. 270A of the Act.

3. Shri Nitesh Joshi appearing on behalf of the assessee narrating facts of the case submitted; The assessee is a tax resident of Singapore. The assessee provides management services and is also engaged in sale of software/information technology products to its Indian Associated Enterprise (AE) Tech Data Advanced Solutions (India) Pvt. Ltd. and third party customers. During assessment proceedings, the assessee was asked to show cause as to why the receipts from India be not treated as royalty/ FTS. The Id. Counsel for the assessee explaining business model of the assessee submitted that the assessee buys off-the shelf Software in bulk in Singapore and sells the same to its distributor in India (a group concern). The Indian distributor further sells the said software to various authorized re-sellers. The assessee while filling return of income offered income from sale of software as 'royalty'. After the decision of Hon'ble Supreme Court rendered in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT, 432 ITR 471/125 taxmann.com 42, the assessee realized that the assessee has been wrongly offering income from sale of software as royalty. In fact, income from sale of software falls under the head, 'Business Income'. Shri Joshi referred to Distribution Agreement dated 01/10/2010 at page 154 of the paper book. He pointed that

the said agreement is between F5 Networks Inc US (in short 'F5') and the assessee (Avenet Technology Solutions (Singapore) Pte. Ltd. erstwhile name of the assessee). F5 is a developer of the software. The assessee has been appointed as non-exclusive distributor for the promotion, sale and delivery of authorized products and services of F5. Clause (9) of the said agreement provides non-exclusive, non-transferable right to use F5 trade mark and marketing slogans within the authorized territory. The Id. Counsel for the assessee further referred to Participation Agreement at page 150 to 153 of the paper book. He pointed that the Base Agreement dated 01/10/2010 is extended from time to time and the Participation Agreement with modification/amendment, if any, revalidates distribution agreement. The Participation Agreement relevant to the assessment year under appeal is at page 150 of the paper book. The assessee during assessment proceedings placed reliance on the judgment rendered in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT (supra). The Assessing Officer distinguished the said judgment stating that the assessee does not fall in any of the categories mentioned in the aforesaid judgment. The Assessing Officer erred in holding that, the Hon'ble Apex Court considered computer software as affixed to hardware and sold as integrated unit/equipment by foreign non-resident supplier to resident Indian distributor or end user. The Id. Counsel for the assessee referring to the decision of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT (supra) submitted that the Hon'ble Apex Court in para-4 of the judgment has divided software vendors in four categories. The assessee falls in second category i.e. where Indian Resident Company acts as distributor or re-seller by purchasing computer software from foreign non-

resident suppliers or manufacturers and then resell the same to resident Indian end users. He submitted that the assessee filed objections before the DRP against the findings of the Assessing Officer. The Dispute Resolution Panel (DRP) held that, since no adjustment has been proposed by the Assessing Officer in the income returned by the assessee, the objection raised by the assessee does not require any consideration.

3.1 The Id. Counsel for the assessee submitted that the Hon'ble Apex Court in para 45 of the judgment has held that where the distributor is granted non-exclusive, non-transferable licence to resell computer software and it has been expressly provided that no copy right in the computer programme is transferred either to the distributor or to the ultimate end user and the distributor is making profit on resale of such software, the income from sale of such software shall be income from business.

3.2 The Id. Counsel for the assessee further referring to Article -12 of India-Singapore DTAA submitted that sub- clause (iv) of Article-12 states that FTS means payment of any kind to any person in consideration for services of managerial, technical or in the nature of consultancy. If such services are ancillary and subsidiary to application or engagement of any right or make available technology know-how or consist of the development and transfer of technical plan or technical design. In the instant case none of the conditions are satisfied, hence, the payment made to the assessee do not fall within the meaning of either royalty or fee for technical services.

3.3 In respect of ground No.3 of appeal, the Id. Counsel for the assessee submits that during the period relevant to assessment year under appeal, the

assessee has received fee for providing management support services. He referred to service agreement at page 26 of the paper book. He contended that support services provided by the assessee are given in Schedule –A to the service agreement. The assessee is remunerated for providing such services at cost plus 7.5%. The Assessing Officer has erred in treating fee for providing management support services as ‘fee for technical services’ under Article -12 of India-Singapore DTAA. He submitted that a perusal of the service agreement would clearly show that the case of the assessee does not fall within Article -12 of India –Singapore DTAA.

4. Per contra, Shri Avneesh Tiwari representing the Department vehemently defended the impugned order and placed reliance on the findings of Assessing Officer and the DRP.

5. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered the decision on the which the Id. Counsel for the assessee has placed reliance in support of his submissions and the agreements that were referred to during the course of making submissions.

6. In ground No.1 of appeal, the assessee has assailed validity of assessment/notice issued u/s. 143(2) of the Act. No submissions were advanced by Id. Counsel for the assessee in respect of ground No.1, hence, the same is dismissed as not pressed.

7. In ground No.2 of appeal, the assessee has assailed assessment order on the ground that the receipts from sale/distribution of off the shelf software is not taxable as royalty under India-Singapore DTAA. At the outset it is

relevant to mention here that the assessee in its return of income has offered income from sale of off the shelf software as royalty and the same has been accepted by the Assessing Officer. During the course of assessment proceedings, the assessee made a fresh claim based on the decision rendered in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (supra). The claim of the assessee was rejected by the Assessing Officer. The DRP refused to entertain the claim on the ground that no adjustment has been proposed by the Assessing Officer, hence, the objection raised by the assessee does not fall within the parameters of section 144C of the Act.

7.1 The facts as emanating from records are: The assessee is a distributor of off the shelf software . The software is developed by F5. F5 has appointed the assessee as a distributor for the promotion, sale and delivery of its various products and services within the authorized territory solely to authorized seller and other approved channel partners for the resale to end users. In terms of Clause-9 of the Distributor Agreement(at page-154 to 169 of the paper book), during the term of agreement the assessee has been given non-exclusive, non-transferable rights to use trademarks to represent F5 as authorized distributor and to advertise its various products. Thus, from a perusal of the Distributor Agreement between F5 and the assessee , it emerges that the payment received by the assessee on sale of off the shelf software prima-facie doesn't fall within the definition of 'royalty' as defined under Article-12 of India-Singapore DTAA or section 9 of the Act.

7.2 As pointed earlier, the assessee for the first time during assessment proceedings made a claim before the Assessing Officer that the receipts from

sale of off the shelf software are not taxable as royalty but are assessable under the head “business income”. The Assessing Officer rejected the claim of assessee by holding that the receipts from sale of software are in the nature of royalty. Dehors, the findings of Assessing Officer on this issue, the Assessing Officer could not have entertained the fresh claim made during assessment proceedings in the light of decision rendered by Hon’ble Apex Court in the case of Goetze (India) Ltd. Vs. CIT, 284 ITR 323. Nevertheless, the Appellate Authority has the power to entertain a fresh claim made by the assessee. The case of the assessee is that the assessee falls in second category, as classified in para-4 of the judgment rendered in the case of Engineering Analysis Centre of Excellence (P) Ltd. vs. CIT (supra). For the sake of completeness, para-4 of the judgment is reproduced herein below:

“4. The appeals before us may be grouped into four categories:

(i) The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.

(ii) The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.-

(iii) The third category concerns cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.”

(iv) The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users.”

We deem it appropriate to restore this issue back to the file of Assessing Officer for fresh adjudication of assessee’s claim in respect of income from sale of off the shelf software. Here it would be relevant to mention that the Assessing Officer shall not be carried away by the fact that the assessee had

suo-motu offered income from sale of software as royalty. It is a well settled principle that the State cannot collect taxes more than what is due. The CBDT Circular No.14(XL-35) dated 11/04/1995 has emphasized this principle and has accordingly issued directions to its Officers.

7.3 The Hon'ble Kerala High Court in the case of Parekh Brothers vs. CIT, 150 ITR 105, after referring to the above Circular has observed:

“12. We are referring to this circular only to highlight the spirit behind this circular. In our opinion, the circular envisages that 'Officers of the department' which will certainly take in the Head of the Department - the Commissioner (first respondent herein), should bear in mind the spirit of the said circular in affording relief to the assessee, as indicated therein. At least when the matter is brought to their notice, without raising technical objections, the matter should receive attention. The circulars have got the force of law. The circulars, at any rate, are binding on the department. The assessee is entitled to the benefit of such circulars. It is unnecessary to refer to the scope and enforceability of such circulars, in view of the fact that we are not resting our decision based on the above circular. But we are referring to such circular only to highlight the spirit behind the circular in the approach to be made by the departmental officials, when a claim for deduction or relief is claimed. The binding nature of the circulars has been considered in the decisions reported in CIT v. B.M. Edward India Sea Foods [1979] 119 ITR 334 (Ker.) (FB), CIT v. T.S. Venkheswaran [1979] 120 ITR 675 (Ker.) and CWT v. Gammon India (P.) Ltd. [1981] 130 ITR 471 (Bom.).”

We are of considered opinion that this issue requires fresh adjudication in the light of the decision by Hon'ble Apex Court in the case Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT(Supra). The Assessing Officer is directed to give reasonable opportunity of hearing/make submissions to the assessee before deciding the issue afresh, in accordance with law. Thus, ground No.2 of appeal is allowed for statistical purpose in the terms aforesaid.

8. In ground No.3 of appeal, the assessee has assailed assessment order in treating management/services fee received by the assessee as FTS under the Act r.w. Article-12 of India-Singapore, DTAA. The assessee has drawn our attention to the Service Agreement at pages 23 to 29 of the paper book. The assessee has received management fee under the said Service Agreement. The nature of services rendered by the assessee are specified in Schedule-A to the aforesaid agreement. The gist of services provided by the assessee in different areas as detailed in Schedule –A is as under:-

- Strategic business advisory services that shall and TDI in formulating its business plan for any given period.
- Information Technology Services.
- Finance (FP&A and controlling)
- Logistics support from base country
- Branding
- Tax
- Treasury
- Legal
- Ethics and compliance
- Trade compliance
- Human Resources
- Real Estate

Clause (3) of the said agreement specifies the compensation to be paid for providing the services. The rate of compensation is given in Schedule-B to the said agreement. A perusal of Schedule-B shows that for performing the services described in Schedule-A, the assessee shall be compensated at cost + mark up @ 7.5%. We find that the Assessing Officer has held that management fee received by the assessee for rendering services is in the nature of FTS. Article-12(4) of India – Singapore DTAA defines the expression

FTS. For the sake of ready reference clause -4 of Article 12 is reproduced herein under:-

“4. The term “fees for technical services” as used in this Article means payments of any kind to any person in consideration for services of a managerial technical or consultancy nature(including the provision of such services through 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, know-how or processes, which enables the person acquiring the services to apply the technology contained therein; or*
- (c) Consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply technology contained therein.*

For the purpose of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee or transferee of such person.”

A perusal of the service agreement along with Annexure-A, that gives an exhaustive list of services to be rendered would show that none of the conditions mentioned in sub-clause (a)(b) and (c) of Clause -4 to Article -12 of India –Singapore DTAA are satisfied. There is no make available of technical knowhow nor there is any service rendered consisting of the development and transfer of a technical plan or technical design. The pre-requisite for invoking Clause-4 of Article-12 of the DTAA is that either there should be transfer of some technical knowhow i.e. make available condition is satisfied or there should be development and transfer of technical plan or technical design. The services rendered by the assessee as per Schedule-A of the Service Agreement does not in any manner show that any technical knowhow has been made available or there is development and transfer of technical plan or technical design. The services rendered are in the nature of operational

management and providing support system. The services also includes providing of training and developing strategies, etc. We find that the Assessing Officer has taken pains to segregate services rendered by the assessee under the segments technical, managerial and consultancy. However, no effort has been made by the Assessing Officer to examine whether the services rendered under the three segments fulfil the criteria so as to fall within the definition of FTS under Article-12(4) of the DTAA. In so far as the definition of FTS as defined in Section 9(vii) of the Act is concerned, we observe that the definition is much broader. The services rendered by the assessee may fall within the sweep of FTS as defined under the Act, but the assessee would be protected by provisions of section 90(2) of the Act. Section 90(2) of the Act lays down that, where the Central Government has entered into an agreement with any other Sovereign Nation for granting relief of tax or for avoidance of double taxation, then the provisions of the Act shall apply to the assessee only to the extent they are more beneficial to it. In case the provisions of the Act are more stringent, the assessee would be governed by the provisions of the DTAA. In the instant case, we find that the remuneration received by the assessee in lieu of services rendered do not fall within the meaning of FTS under Article-12(4) of the India-Singapore DTAA. Consequently, we hold that the payments received by the assessee in respect of management services are not taxable as FTS. In the result, ground No.3 of appeal is allowed.

9. In ground No.4 of appeal, the assessee has assailed charging of interest u/s. 234A and 234B of the Act. Levy of interest under the aforesaid section is consequential and mandatory, hence, ground No.4 of the appeal is dismissed.

10. In ground No.5 of appeal the assessee has assailed initiation of penalty proceedings u/s.274 r.w.s. 270A of the Act. Challenge to penalty proceedings at this stage is premature, hence, ground No.5 of appeal is dismissed as such.

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

Order pronounced in the open court on Monday the 21st day of August, 2023.

Sd/-

(GAGAN GOYAL)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 21/08/2023

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
- 4.. विभागीय प्रतिनिधि, आय.अपी.अधि ., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

BY ORDER,

(Dy./Asstt. Registrar), ITAT, Mumbai

//True Copy//