

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

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

ITA No.9659/Del/2019
Assessment Year: 2015-16

Amphenol FCI Asia Pte. Ltd. (Formerly known as FCI Asia Pte. Ltd.), Singapore, 159, #04-01/04 KA Place, Kampong Ampat, Singapore	Vs.	ACIT, Circle-1(1)(1), International Taxation, New Delhi
PAN :AABCF5252B		
(Appellant)		(Respondent)

Assessee by	Sh. Rishabh Malhotra, AR Sh. Ravi Sharma, Advocate
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	10.11.2023
Date of pronouncement	21.11.2023

ORDER

This is an appeal by the assessee challenging the final assessment order dated 21.10.2019 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961,

pertaining to assessment year 2015-16, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. The dispute in the present appeal is confined to taxability of an amount of Rs. 13,19,87,042/- as Fees for Technical Services (FTS) under Article 12(4) of India – Singapore Double Taxation Avoidance Agreement (DTAA).

3. Briefly, the facts are, the assessee is a non-resident corporate entity incorporated in Singapore and a tax resident of Singapore. As stated by the Assessing Officer, the assessee is engaged in the business of manufacturing and distribution of electronic products. In the assessment year under dispute, the assessee had earned certain receipts from India, including an amount of Rs. 13,19,87,042/- on account of provision of management services. In the return of income filed for the assessment year under dispute, the assessee offered income of Rs.3,72,89,800/-. However, the assessee did not offer the receipts from management services to tax pleading that the receipts are in the nature of business profits and in absence of any Permanent Establishment (PE) in India, they are not taxable.

4. In course of assessment proceeding, the Assessing Officer called for various information and details. On going through the details furnished by the assessee, he observed that the assessee has entered into a global management service agreement with group companies, in terms of which, certain common services in the nature of administrative, financial, legal, tax, accounting, insurance, human resources services etc. were provided. He further noticed that the assessee has received royalty from grant of licence for use of patent, know-how, copyright and trademarks by way of export sales to an Indian entity, FCI Oen India Connectors Ltd.

5. On further perusal of record, he found that fee from the provision of management services were brought to tax in assessment years 2009-10 and 2010-11. Therefore, he called upon the assessee to explain, why a decision in similar line should not be taken in the impugned assessment year. In response to the query raised, the assessee furnished a detailed reply stating that the management fee cannot be treated as FTS, as the make available condition under Article 12(4)(b) of the tax

treaty is not satisfied. Upon going through the nature of services provided under the management service agreement, the Assessing Officer observed that the services rendered are of managerial and technical nature, hence, are of the character of FTS. He further observed that while rendering such services, the assessee has made available technical knowledge, experience, skill, know-how etc. to the service recipient. Thus, he held that the amount of Rs.13,19,87,042 to be treated as FTS, both under the provisions of the Act as well as under India – Singapore DTAA. Accordingly, he proposed the draft assessment order.

6. Against the draft assessment order so proposed, the assessee raised objections before learned DRP. While considering the objections of the assessee, learned DRP, though, agreed that the receipts from management services fits into the definition of FTS, both under the Act as well as under Article 12(4) of India – Singapore DTAA, however, diverging from the view expressed by the Assessing Officer regarding applicability of Article 12(4)(b) of the treaty, learned DRP held that since, the services rendered are ancillary and subsidiary to use or right to use of copyright of a

literary, artistic or scientific work, including cinematography films or films of tapes used for radio, television and any patent design, model, plan, secret formula, it will fall within the ambit of Article 12(4)(a) and not under Article 12(4)(b). Therefore, there is no need for fulfillment of make available condition. Accordingly, in tune with the directions of learned DRP, assessment was finalized.

7. Before us, learned counsel appearing for the assessee submitted, the learned DRP has misconceived the facts and fallen into an error while holding that the receipts are from services ancillary and incidental to use or right to use of copyright, trademarks, brand-name, so as to bring it within the ambit of Article 12(4)(a) of the tax treaty. He submitted that the assessee has been providing such services since the assessment year 2009-10 onwards and the agreement is being renewed from time to time. He submitted, in assessment years 2009-10 and 2010-11, though, the Assessing Officer brought identical receipts to tax by treating it as FTS, both under the Act as well as under the treaty provisions, however, learned first appellate authority deleted the additions. He submitted, Revenue's appeals against the decision

of the first appellate authority was dismissed by the Tribunal. He submitted, though, the agreement, under which services have been rendered in the impugned assessment year was executed on 1st January, 2014, however, the terms of the agreement and services rendered therein essentially remain identical to assessment years 2009-10 and 2010-11.

8. To demonstrate such facts, learned counsel furnished the following facts in a tabular format to establish parity in the nature of services under both the agreements:

Particulars	Previous services agreement (relevant for AY 2009-10 and AY 2010-11)	Current services agreement (relevant for AY 2015-16)
<i>Parties to the agreement</i>	FCI Asia Pte. Ltd. FCI Technology Services Limited and FCI OEN Connectors Limited	Multipartite agreement amongst the members of FCI group
<i>Date of agreement</i>	January 01, 2003	January 01, 2014
	<ul style="list-style-type: none"> • Purchasing support services • Communications - Public relations 	<ul style="list-style-type: none"> • Legal and insurance support • Financial matters • Human resources

Scope of services

- Strategy and Development Services
- International relationship matters
- Quality - Environment & Safety Matters
- International Relationship Matters
- Treasury
- Internal Audit
- Industrial security
- The President and Corporate Vice-President contributions
- Purchasing support services
- Communications - Marketing support - Promotion of sales
- Legal support
- Financial Matters
- Human resources support
- Strategy - business development support
- Global operation services
 - Assisting on environmental and safety matters
 - Providing any support in terms of quality
 - Improving supply chain efficiency, etc.
-
- 0)Engineering support on existing products (*General management services*)
- Information systems support

Particulars	Previous services agreement (relevant for AY 2009-10 and AY 2010-11)	Current services agreement (relevant for AY 2015-16)
	<ul style="list-style-type: none"> • Other services 	<ul style="list-style-type: none"> • Other services
<i>Remuneration</i>	Cost plus mark-up of 5%	Cost plus mark-up of 5%
<i>Confidentiality</i>	<ul style="list-style-type: none"> - All services, advises and information provided under this agreement must not be disclosed or made available to third parties without the prior approval of FCI Asia - Each party undertakes to maintain the confidentiality - The confidentiality obligation shall be valid for the entire duration of this agreement and shall survive the expiration or cancellation of this agreement for a period of three years. 	<ul style="list-style-type: none"> - All information provided under this agreement is for the exclusive use of the Parties - Each party undertakes to maintain the confidentiality - The confidentiality obligation shall be valid for the entire duration of this agreement and shall survive the expiration or cancellation of this agreement for a period of three years.
<i>Duration of agreement</i>	<ul style="list-style-type: none"> - Initial term of one year from the date of agreement - It shall be automatically renewed for successive terms of 1 year unless otherwise terminated. 	<ul style="list-style-type: none"> - Initial Term of 12 months from the date of agreement - It shall be automatically renewed for successive terms of 12 months unless otherwise terminated

9. Thus, he submitted, the issue is squarely covered by the decision of the Tribunal in the assessment years 2009-10 and 2010-11. Without prejudice, he submitted, the management services do not have any connection with any services towards use or right to use of any copyright, trademark, brand-name etc.,

as such services were provided under a totally different agreement. In this context, he drew our attention to intellectual property rights licence agreement.

10. Drawing our attention to various clauses of the said agreement, he submitted that this is a combined agreement, both for licence, patents, trademarks, copyrights, know-how etc. and also for providing ancillary and incidental services in connection therewith. He submitted, fee received by the assessee under such agreement has been offered to tax. He submitted, the services rendered under the management service agreement are totally different and have no connection with licensing of patents, copyrights, trademarks, brand-name etc. Thus, he submitted, the receipts under no circumstances, will fall under Article 12(4)(a) of the treaty. Proceeding further, he submitted, since, the make available condition is not fulfilled, the receipts would not fall under Article 12(4)(b) of the treaty.

11. Learned Departmental Representative strongly relied upon the observations of learned DRP.

12. We have considered rival submissions and perused the materials on record. Facts on record reveal that the assessee has certain receipts from an Indian entity towards provision of

management services provided under an agreement. Though, the assessee has claimed that the receipts are not in the nature of FTS under treaty provisions due to non-fulfillment of make available condition under Article 12(4)(b) of the treaty, however, negating assessee's claim, the Assessing Officer has held that the conditions of Article 12(4)(b) are satisfied. Whereas, learned DRP has gone in a completely different tangent by holding that the services rendered, being ancillary and subsidiary to use or right to use of copyright, trade-mark, brand-name, know-how, etc., will qualify as FTS under Article 12(4)(a) of the treaty.

13. Keeping in perspective these facts, we will proceed to decide the issue. It is observed that the assessee is providing management services to the Indian entity from assessment year 2009-10 onwards. In fact, the Assessing Officer has accepted the aforesaid factual position. For this purpose, the assessee has entered into management services agreement, which was earlier known as support services and consulting agreement. The assessee has entered into a separate agreement with FCI Oen India Connectors Ltd. on 22nd July, 2023, in terms of which, the assessee has granted licence for patents, trademark, copyrights, know-how, etc. to the Indian entity and received royalty. The

agreement further provides that ancillary to the right and license granted, the assessee will also provide technical assistance, ancillary services to the Indian entity. Payment to be made under the agreement towards royalty also includes the service component. Whereas, the management service agreement has remained in force since the assessment year 2009-10 onwards, though, with insignificant variations in the terms of the agreement. Thus, in our view, technical assistance and the ancillary services rendered by the assessee in connection with licensing of patents, trademarks, copyrights, know-how etc. cannot be equated with fees for management services, as both are governed under different set of agreements and have no connection with each other. Therefore, in our view, the finding of learned DRP that the fee received from management support services would qualify as FTS under Article 12(4)(a) of the tax treaty cannot be accepted.

14. Insofar as applicability of Article 12(4)(b) of the treaty is concerned, on a comparative analysis of the nature of services provided in assessment years 2009-10 and 2010-11 as well as in the impugned assessment year, as furnished before us in a tabular format reproduced elsewhere in the order, we find, there

is parity in the nature of services provided in assessment years 2009-10 and 2010-11 as well as in the impugned assessment year, except slight variation.

15. Undisputedly, while deciding identical issue in assessment years 2009-10 and 2010-11, the Coordinate Bench in ITA No. 2588 & 2589/Del/2015, dated 06.01.2020 has held that the make available condition under Article 12(4)(b) is not fulfilled so as to bring the receipts to tax in India. Facts being identical, we are of the view that the decision of the Coordinate Bench would squarely cover the issue before us. Accordingly, respectfully following the decision of the Coordinate Bench, we decide the issue in favour of the assessee and the Assessing Officer is directed to delete the addition. Grounds are allowed.

16. In the result, appeal is allowed, as indicated above.

Order pronounced in the open court on 21st November, 2023

Sd/-
(G.S. PANNU)
VICE-PRESIDENT

Sd/-
(SAKTIJIT DEY)
VICE-PRESIDENT

Dated: 21st November, 2023.

RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi