IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.567/Mum./2023
(Assessment Year : 2020-21)

Cadmatic OY, 72, Itainen Rantakatu
Turku Finland 208100
C/o Suresh Joshi & Co., C.A.
4th Floor, Kamer Building
38, Cawasji Patel Street, Fort
Mumbai 400 001 PAN – AAECC1385P ……. Appellant

v/s

Asstt. Commissioner of Income Tax
International Taxation, Circle-2(1)(1)
Mumbai ……. Respondent

Assessee by : Shri Jitendra Singh
Revenue by : Shri Anil Sant

Date of Hearing – 18/12/2023	Date of Order – 29/12/2023

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned final assessment order dated 13/01/2023, passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (*"the Act"*), pursuant to the directions 30/12/2022, issued by the learned Dispute Resolution Panel-1, Mumbai (*"learned DRP"*), for the assessment year 2020-21.

2. In this appeal, the assessee has raised the following grounds:–

"1.(1) The AO erred in making an addition of Rs.5,24,16,102/- off with amount of Rs. 5,21,08,333.00 being amount received on sale of software to Indian Companies by treating the same as fees for technical services without appreciating the fact that the assessee has not rendered any technical services by selling the software to the Indian Companies. Thus, the said amount received on sale of software is not chargeable to tax in India. Therefore, the addition of Rs. 5,21,08,333/- made by the AO is unjustified and the same may be deleted.

(ii) Further AO eared in adding Rs. 3,07,769/- being Income Tax Refund to be taxed at 40%.

This making total addition of Rs. 5,24,16,102/-
Since the Refund has not been issued during the previous year.

2. The AO failed to appreciate that the assessee is a Non-Resident Company and not having any business operations in India. Thus, the amount received on sale of software to the Indian entities is not taxable in India. The said amount has duly been disclosed by the assessee while filing the return in Finland and the taxes have been paid on the same. Hence, taxing a sum of Rs. 5,21,08,333/- again in the hands of the assessee would amount to double taxation and the same is not justified.

3. The AO failed to appreciate that the amount received by the appellant from the Indian Companies on sale of software is not a fee for technical services and the same does not attract TDS provisions as per section 195 of the Act. Thus, the said payment cannot be treated as Income taxable in India merely because the Indian Companies have deducted and paid TDS out of abundant caution on such payment and the appellant has claimed refund of the same. Therefore, the AO is not justified in making addition of Rs. 5,21,08,333/- in the hands of the appellant and the same may be deleted.

4. The AO failed to appreciate that the appellant's claim is supported by the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd vs. CIT [2021] 432 ITR 471 (SC) wherein it has been held that the amounts paid by resident Indian Company to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India. Thus, the addition of Rs. 5,21,08,333/- made by the AO is not justified and the same may be deleted.

5. The assessee reserves its rights to raise additional grounds, amend or alter or revise any of the above grounds."

3. The only dispute raised by the assessee, in the present appeal, is against the addition made by treating the income received from the sale of software as Fees for Technical Services.

4. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is a non-resident company and is a tax resident of Finland. For the year under consideration, the assessee filed its return of income on 13/02/2021 declaring a total income of Rs. 3,07,770. The return filed by the assessee was selected for scrutiny assessment through CASS and statutory notices under section 143(2) as well as under section 142(1) of the Act were issued and served on the assessee. During the year under consideration, the assessee received an amount of Rs.5,21,08,333, from the sale of software to its clients who are Indian companies. On the said payment, tax amounting to Rs.53,53,664, was withheld by the Indian companies while making the payment to the assessee. The assessee did not offer the above receipt for tax in its return of income and claimed a refund of the tax withheld by its clients on the basis that sales have been affected from Finland and the assessee does not have any place of business/Permanent Establishment in India. Further, the assessee claimed that the receipts are not in the nature of Fees for Technical Services or Royalty.

5. The Assessing Officer ("*AO*") vide draft assessment order dated 15/03/2022 passed under section 143(3) read with section 144C(1) of the Act did not agree with the submissions of the assessee and held that the software and services supplied by the assessee to the Indian companies are highly specialised and services provided by the assessee company in the form of maintenance is a part of the supply of software. It was further held that the software provided by the assessee is not a shrink-wrapped or off-the-shelf product but is highly specialised and technical in nature and therefore requires

support and maintenance activity from the assessee. The AO further held that the charges for services provided by the assessee are inseparable from the software and form a single, indivisible, and composite package. It was also held that the assessee provides active maintenance services warranting a separate "*Maintenance Agreement*" and the provision of maintenance charges in the sale/purchase agreements, which requirement is not there in case of ordinarily routine changes in software such as upgrades, updates, or fixing the bugs. Therefore, it was held that this makes the entire bundle of software and subsequent or concurrent maintenance/change management an extended exercise of providing technical services towards the aid of business and professional requirements of the client. Accordingly, the AO held that the revenue earned by the assessee is in the nature of Fees for Technical Services under section 9(1)(vii) of the Act as well as Article 12(3) of the India–Finland DTAA.

6. The assessee filed detailed objections before the learned DRP against the findings of the AO in the draft assessment order. The learned DRP vide its directions dated 30/12/2022 issued under section 144C(5) of the Act rejected the objections filed by the assessee and held that the payment made by the companies in India to the assessee is in the nature of Fees for Technical Services and is liable to be taxed in India under the provisions of the Act as well as under Article–12(3) of India–Finland DTAA. In conformity with the directions issued by the learned DRP, the AO passed the impugned final assessment order dated 13/01/2023, under section 143(3) read with section 144C(13) of the Act

computed the total income at Rs.5,24,16,102. Being aggrieved, the assessee is in appeal before us.

7. We have considered the submissions of both sides and perused the material available on record. The assessee is engaged in the development of 3D design, information management, and CAD engineering software systems for plant and marine industries. During the year under consideration, the assessee received a revenue of Rs. 5,21,08,333 from the sale of software to its customers in India. The details of fees received by the assessee during the year from its clients in India are as under:-

Sr. No.	*Name of Client*	*PAN no.*	*TAN*	*Total Transaction Value*	*TDS Deducted*
1.	*Buoyancy Consultants & Engineering LLP*	*AAMFB8150C*	*BLRB13764C*	*49,33,741*	*4,93,406*
2.	*Larsen & Toubro Limited*		*CHEL04161D*	*57,99,450*	*5,79,945*
3.	*Tata Consulting Engineers Ltd.*	*AABCT0072E*	*MUMT06732F*	*56,81,780*	*5,68,178*
4.	*Cadmatic Software Solutions P. Ltd.*	*AAECC1424F*	*PNEC09178B*	*3,56,93,362*	*37,12,135*
				5,21,08,333	*53,53,664*

8. As per the assessee, the amount paid by the Indian customers is not taxable in India and accordingly the same was not offered to tax while filing the return of income. Further, the assessee claimed the refund of tax withheld by the Indian companies while making payment to the assessee. As per the assessee, the entire amount is in respect of the sale of software by the assessee to its Indian customers and since the sale is affected from Finland, therefore in the absence of any place of business/Permanent Establishment in India, such

income is not taxable in India. It is also the claim of the assessee that such receipt is also not taxable as Royalty or Fees for Technical Services under the provisions of the Act as well as the India-Finland DTAA. On the contrary, as per the Revenue, the assessee undertook the supply and maintenance of software to company/entities based in India, and the software is highly specialised, and services provided by the assessee in the form of maintenance are part of the supply of software. Accordingly, the assessee has also entered into a maintenance agreement with its customers and has separately charged for such services. Thus, it was concluded that the charges for services provided by the assessee are inseparable from the software and form a single, indivisible, and composite package, unlike in case of ordinary routine changes in software such as upgrades, updates, or fixing the bugs which are normal life cycle of software development. The Revenue also noted that such maintenance charges were in respect of multiple instances of maintenance service provided by the assessee. The Revenue also took into consideration the information on assessee's website that the assessee supports its customers in the implementation and daily use of the software, which is beyond the AMC that presupposes only troubleshooting.

9. During the hearing, the learned Authorised Representative ("*learned AR*") submitted that the income earned by the assessee from its Indian clients is in respect of the sale of software as well as the maintenance services provided by the assessee. It was further submitted that the copyright of the software remains with the assessee and only the copyrighted article, i.e. the software, is sold to the Indian customers. Thus, the income earned from the sale of software is not taxable in India in view of the decision of the Hon'ble Supreme Court in

Engineering Analysis Centre of Excellence Pvt. Ltd. v/s CIT: [2021] 432 ITR 471 (SC). As regards the maintenance charges received by the assessee, the learned AR submitted that these charges are in respect of the regular software updates provided by the assessee and therefore the same is intrinsically linked with the sale of software and no separate service was rendered by the assessee.

10. As is discernible from the record, in the present case, the Revenue has treated the payment received by the assessee as Fees for Technical Services and considered the sale of software and subsequent maintenance as one entire bundle wherein the services are provided for the purpose of business or profession of the client and not for the purpose of updating the software alone. Accordingly, the entire payment of Rs. 5,21,08,333 is considered taxable in India under the provisions of the Act as well as the India-Finland DTAA. As per Explanation-2 to section 9(1)(vii) of the Act, Fees for Technical Services means any consideration for the rendering of any managerial, technical, or consultancy services. Similarly, Article 12(3)(b) of the India-Finland DTAA defines the term "*Fees for Technical Services*" as payment of any kind as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel. Therefore, under the provisions of the Act as well as the India-Finland DTAA, the term "*Fees for Technical Services*" has been defined in the widest term and unlike certain tax treaties, there is no make-available clause in the India-Finland DTAA.

11. At the same time, it is an undisputed position that the invoices raised by the assessee on its Indian customers were for the sale of the software as well as

maintenance charges. This fact is evident from the following details as noted on page 4 of the final assessment order:-

Sr. No.	*Name of Client*	*How may invoices were raised towards receipts of total payment from the party*	*How many instances (cumulative) of raising maintenance charges are mentioned in the invoices*
1.	*Buoyancy Consultants & Engineering LLP*	*24*	*8*
2.	*Larsen & Toubro Limited*	*1*	*1*
3.	*Tata Consulting Engineers Ltd.*	*1*	*1*
4.	*Cadmatic Software Solutions P. Ltd.*	*10*	*3*

12. Further, the sample copy of invoices furnished by the assessee, though pertains to the preceding year, also substantiates this fact as these invoices were raised not only for the sale of software but the same were also raised for the provision of maintenance services to the Indian customers. Thus, even though during the assessment proceedings, no details were furnished by the assessee in respect of receipt for the sale of software and receipts for services, however, the aforesaid facts clearly show that the assessee charged its client for the sale of software and provision of maintenance services separately. Such being the facts of the case, we are of the considered view that it is necessary to examine the taxability of the receipts from the sale of software and receipts from the provision of maintenance services separately. Considering the taxability of receipts from maintenance charges in the light of receipts from the sale of software or vice versa is not correct, as the parties agreed to separate consideration for the sale of software and the provision of maintenance services.

Such a separate examination of taxability is also relevant as the nature of maintenance service can vary with respect to each client.

13. It is pertinent to note that in respect of certain Indian clients, the assessee may have mentioned only one maintenance charge in its invoice, however there is no further examination of whether the same is for any routine installation or up-gradation of the software, or it was for maintenance service provided at the request of the client. Further, there may also be a case wherein the assessee has sold the software in the previous year and has only rendered maintenance services during the year under consideration. However, it is evident from the record that all these aspects were not examined by the lower authorities, and income earned by the assessee from the sale of software as well as from the provision of maintenance charges is being taxed under one head by considering the same to be intrinsically linked to each other. It is worth noting that multiple instances of provision of maintenance services cannot be equated with standalone service. Thus, the nature of the maintenance service is also required to be examined before coming to the conclusion that the income received in respect of the same is Fees for Technical Services. In this regard, the terms of the agreement between the parties are also required to be analysed vis-a-vis the actual transaction for which the invoice has been raised. Therefore, in the present case, it is necessary to examine all these aspects, and for the same, we restore this issue to the file of the jurisdictional AO for *de novo* adjudication and direct the assessee to provide complete information including the agreements entered with the clients and all the invoices raised in respect of the income earned during the year under consideration. The assessee is also

directed to furnish all correspondence with its clients for a complete understanding of the transaction. The assessee is also directed to furnish any other information as may be required by the AO for a thorough examination and complete adjudication of this issue. Further, the AO is directed to examine all the information as may be submitted by the assessee and determine the taxability of the income received by the assessee from the sale of software and provision of maintenance services to its clients in India, as per law. Since the issue is restored to the file of the AO for fresh consideration, the assessee shall be at liberty to raise any plea in support of its claim. As a result, the impugned final assessment order is set aside and the grounds raised by the assessee are allowed for statistical purposes.

14. In the result, the appeal by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 29/12/2023

Sd/-	**Sd/-**
AMARJIT SINGH	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 29/12/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai