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. 683/Del/2020
Assessment Year: 2016-17

Labvantage Solutions Inc., C/o Deloitte Haskins & Sells LLF, Bengal Intelligent Park, Building Omega, 13th & 14th Floor, Block-DP & GP, Sector-5, Salt Lake Electronic Complex, Kolkata. **PAN: AABCL8994J**	Versus	ACIT, Circle 2(2)(1), Intl. Taxation, New Delhi.
(Appellant)		(Respondent)

Assessee by	:	Mr. Ketan Ved & Mr. Yishu Goel, A.R.
Revenue by	:	Sh. Sanjay Kumar, Sr. DR
Date of hearing	:	06.10.2023
Date of pronouncement	:	29.12.2023

ORDER

This is an appeal by the assessee against order dated 29.11.2019 of learned Commissioner of Income-tax (Appeals)-43, New Delhi pertaining to assessment year 2016-17.

2. On merits, the issue raised by the assessee in main grounds is whether the fees received of Rs.4,23,81,848/- would amount to fees

for included services (FIS) under Article 12 of India-USA Double Taxation Avoidance Agreement (DTAA). In addition to the main grounds, the assessee has raised the following additional grounds:

> "1 : 1 The Commissioner of Income-tax (Appeals) ['CIT(A)] erred in holding the impugned assessment Order to be valid which has been passed without passing a draft Assessment Order u/s. 144C(1) of the Income-tax Act, 1961 ['Act'] for the year under consideration.
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> 1 : 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, a draft Assessment Order ought to have been passed u/s. 144C(1) of the Act, and hence the impugned Order passed without a draft Assessment Order is incorrect, illegal and void ab-initio and the CIT(A) ought to have held as such.
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> 1 : 3 The Appellant submits that the impugned Order be struck down void ab initio and bad in law."

3. Since the issue raised in the additional grounds is purely legal and jurisdictional issue going to the root of the matter, which can be disposed of based on facts and materials available on record without requiring investigation into fresh facts, we are inclined to admit the additional grounds for adjudication. In sum and substance, the issue raised in additional ground is whether, the assessee, being an eligible assessee in terms of section 144C(15) of the Income-tax Act, 1961, the Assessing Officer should have passed draft assessment order in terms of section 144C(1) of the Act before passing the final

assessment order. For deciding this issue, few relevant facts are required to be gone into.

4. Briefly stated, the assessee is a non-resident corporate entity incorporated in USA and a tax resident of USA. For the assessment year under dispute, the assessee filed its return of income on 30.03.2017 declaring total income at Rs.4,49,20,980/-. The total income so declared comprised an amount of Rs.4,23,81,848/- received towards rendition of marketing, support and research services to TCG Life Science Pvt. Ltd. In addition, the assessee received an amount of Rs.25,39,132/- as royalty income from Labvantage Solutions Pvt. Ltd. The royalty income was offered to tax by the assessee in India with payment of tax @ 10%. Whereas, claiming that it had no permanent establishment (PE) in India, and treating the fee received of Rs.4,23,81,848/- as business income, the assessee did not offer to tax such income. In course of assessment proceedings, the Assessing Officer called upon the assessee to explain why the fee received of Rs.4,23,81,848/- for provision of marketing, support and research services should not be treated as FIS. In response, the assessee submitted that the amount does not

qualify as FIS under Article 12(4) of India-USA DTAA, as the make available condition enshrined therein is not satisfied.

5. The Assessing Officer, however, did not find merit in the submissions of the assessee. He observed that for rendering such services, the assessee had deputed its personnel to India, who worked along with employees of service recipient and in course of rendition of such services, employees of the assessee had made available technical know-how, knowledge, skill etc. through training to the employees of the service recipient. Thus, the Assessing Officer held that since, the services rendered are in the nature of managerial, technical and consultancy services and in course of rendering such services, the assessee has made available technical know-how, knowledge, skill etc. to the service recipient, the fee received would be in the nature of FIS under Article 12(4) of the DTAA. Accordingly, he completed the assessment by bringing to tax the fee received by the assessee towards rendition of such services. Against the assessment order so passed, the assessee filed an appeal, inter alia, on the ground that the assessee, being an eligible assessee in terms of section 144C(15) of the Act, the Assessing Officer at the first

instance should have passed a draft assessment order and only thereafter could have proceeded to pass the final assessment order. He submitted, since the Assessing Officer has not followed the mandate of section 144C(1) read with section 144C(15) of the Act, the assessment order is void ab initio. Learned Commissioner (Appeals), however, was not convinced with the submissions of the assessee. He was of the view that since the Assessing Officer has not made any variation in the income returned, which is prejudicial to the assessee, there was no requirement for passing any draft assessment order under section 144C(1) of the Act.

6. Before us, learned counsel appearing for the assessee submitted that in the return of income filed for the impugned assessment year, though, the assessee has returned income of Rs.4,49,20,980/-, however, it has offered to tax only the royalty income of Rs.25,39,132/-. Drawing our attention to a sample copy of return form ITR-6, learned counsel submitted, since there is no specific column for claiming exemption under DTAA, the assessee did not claim exemption under DTAA in respect of the fee received towards provision of marketing, support and research services. He

submitted, though, technically the Assessing Officer has not made any variation to the income returned, however, actually, he has made a variation by bringing to tax the fee received from support services. Thus, he submitted, the assessee qualifies as an eligible assessee under section 144C(15) of the Act. He submitted, since, the Assessing Officer has not passed a draft assessment order under section 144C(1) of the Act before passing the final assessment order, the assessment order is invalid.

7. Strongly relying upon the observations of learned first appellate authority, learned Departmental Representative submitted, there being no variation made by the Assessing Officer to the income returned, which is prejudicial to the interest of assessee, there is no requirement to pass a draft assessment order under section 144C(1) of the Act. In support of such contention, learned Departmental Representative relied upon following decisions :

(i). M/s. Amadoroco Limited vs. ACIT, ITA No. 784/Del/2020 dated 03.03.2023.

(ii). M/s. Worldpart Limited vs. DCIT (ITA No. 36/Chny/2018) dated 01.07.2022.

8. We have considered rival submissions in the light of decisions relied upon and perused materials on record. A reading of section 144C sub-section (1) makes it clear that the said provision has overriding effect over all other provisions contained in the Act. It says that in case of an eligible assessee, if the Assessing Officer proposes to make, on or after 1st day of October, 2009, any variation on the income or loss returned, which is prejudicial to the interest of such assessee, then in the first instance, the Assessing Officer must forward a draft of the proposed assessment. Keeping in perspective the aforesaid provisions, if we examine the facts of the present case, it can be seen that the assessee has returned income of Rs.4,49,20,980/- and the Assessing Officer has completed the assessment adopting the same income. The variation, if any, is with regard to the taxability of the said income. While the assessee has claimed that the income is not taxable under the provisions of tax treaty, the Assessing Officer has rejected such claim. Thus, essentially, the AO has not made any variation to the returned income, which is prejudicial to the interest of assessee. In case of Amadoroco Limited vs. ACIT(supra), the coordinate Bench while

faced with a similar situation, has held that in cases, in which no variation in the income or loss returned is proposed by the Assessing Officer, there is no requirement for passing draft assessment order in terms of section 144C (1) of the Act. Same view has been expressed by the coordinate Bench in case of M/s. Worldpart Limited vs. DCIT (supra). No contrary decision has been brought to our notice by learned counsel for the assessee.

9. We may further observe that Finance Act, 2020 has amended the provisions of section 144C (1) of the Act by omitting the words "in the income or loss returned" w.e.f. 01.04.2020. Thus, by virtue of the aforesaid amendment, any variation, which is prejudicial to the interest of the assessee, can lead to assumption of jurisdiction under section 144C(1) of the Act. However, this is a case relating to a period prior to the aforesaid amendment. Therefore, the amendment, being prospective in nature, would not apply. Thus, respectfully following the decisions of the coordinate Benches, we hold that the Assessing Officer has rightfully proceeded to assess assessee's income under section 143(3) of the Act. Additional grounds are dismissed.

10. The substantive issue raised in the main grounds relate to addition of an amount of Rs.4,23,81,848 as FIS under Article 12 of India-USA (DTAA). In the year under consideration, assessee had received an amount of Rs.4,23,81,848 from TCG Life Sciences Pvt. Ltd., an Indian Entity, for providing marketing support and research services etc. While assessee had claimed it to be in the nature of business receipts, the Assessing Officer has treated as FIS under Article 12(4) India-USA-DTAA by holding that the nature of services provided by the assessee are technical and consultancy services but in course of rendition of such services, assessee had made available technical knowledge, experience, skill, know-how etc. to the service recipient. Learned First Appellate Authority has endorsed the view expressed by the Assessing Officer.

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

12. The crux of the arguments advanced by the learned counsel for the assessee is to the effect that even assuming the services rendered are in the nature of technical or consultancy services, still,

to make available condition enshrined under Article 12(4)(b) of the treaty is not fulfilled.

13. Before we proceed to examine the aforesaid contention of the assessee, it is necessary to observe that the assessee company is an innovative global solution provider of enterprise solution tailored for leading laboratories. It provides services in genomics, proteomics, drug discovery and development, formulation, process research, manufacturing, raw-material testing and quality management laboratories across multiple industries including Life Sciences. Whereas, TCG Life Sciences Private Ltd., an Indian entity, is a lifetime research organization and as per the facts and material on record, TCG Life Sciences Pvt. Ltd. offers a comprehensive suite of discovery research services and provides integrated drug discovery solution platform to its customers that include leading pharmaceutical companies in Europe and USA.

14. The assessee had entered into an agreement with TCG Life Sciences Private Ltd. on 1st March 2015 for providing services for the purpose of improvement and marketing of products and TCG Life Sciences Pvt. Ltd.. As per the terms of agreement, assessee shall

deploy its marketing and research advisory personnel to work alongside TCG Life Sciences Pvt. Ltd. so as to improve the quality and marketing of the products and services.

15. Reading of the agreement reveals that the advisory personnel assigned to perform the services rendered must be professionally capable and acceptable to TCG Life Sciences Pvt. Ltd. They are to perform the duties assigned by the TCG Life Sciences Pvt. Ltd. adopting best efforts, skills and abilities to promote the interest of TCG Life Sciences Pvt. Ltd. The agreement further provides that after completion of work, assessee shall return all such information in any form, products and all study related documents to TCG Life Sciences Pvt. Ltd., which were provided to assessee during the period of research. The agreement further provides, assessee shall provide necessary advisory services related to products and services of TCG Life Sciences Private Ltd. and scientific research application in the development of its products and services. The agreement further provides that TCG Life Sciences Private Ltd. shall have the right to engage its officers to co-monitor the work assigned to the assessee. Thus, on a reading of the agreement as a whole, it appears that,

though, the advisory personnel of the assessee were deployed to carry out certain work relating to services required by TCG Life Sciences Private Ltd., however, there is nothing in the terms of the agreement to suggest that in course of providing such services, the personnel deployed by the assessee have imparted any training to the professionals of the TCG Life Sciences Private Ltd. and through such training, made available technical know-how, knowledge, skill etc. The terms of the agreement indicate that the advisory personnel deployed by the assessee would be working on their own and in case it is so required, the officers of TCG Life Sciences Private Ltd. can co-monitor their work. Though, the Assessing Officer and learned First Appellate Authority have observed that in course of rendering of services the assessee has made available technical know-how, knowledge, skills etc. to the service recipient, however, such observation is not backed by substantive evidence.

16. On the contrary, on a reading of observations made by learned First Appellate Authority in paragraph 5.2.3 of the appellate order, it is evident that the conclusion drawn regarding fulfilment of make available condition is more on conjecture and surmises rather than

based on evidences. In fact, the specific observations of learned First Appellate Authority are as under:

> "…….in the present case, it is acknowledged that the persons providing the services are highly skilled and knowledgeable in their respective field. Their entire skills in no manner, be passed on the client during the course of rendering of advice. It is, however, also equally important to note, that in view of the scope specifically laid out a part of the skills would certainly be transferred and made available to the clients in India……".

17. From the aforesaid observations of learned First Appellate Authority, it is very much clear that he himself is of the opinion that the entire skills in no manner be passed on to the client in course of rendering of services. Therefore, what is the extent of skill, know-how, knowledge etc., which has been made available, has neither been specified nor demarcated. Therefore, the conclusion drawn by learned First Appellate Authority is more in the realm of imagination rather than based on facts. It is fairly well settled, technical know-how, knowledge, skills etc. can be considered to have been made available when the person acquiring the services is in a position to apply the technology independently. Merely because, the provision of

service may require technical input by the person providing the services does not mean that technical know-how, skill etc. are made available to the person receiving such service.

18. In the facts of the present appeal, in our view, the Revenue has failed to establish on record that while rendering services, assessee has made available technical knowledge, know-how, skill etc. to TCG Life Sciences Private Ltd. so as to bring it within the ambit of Article 12(4)(b) of the tax-treaty. That being the factual position emerging on record, we have no hesitation in holding that the fee received by the assessee from TCG Life Sciences Private Ltd. cannot be treated as FIS under Article 12(4)(b) India-USA DTAA. The Assessing Officer is directed accordingly.

19. In the result, the appeal is partly allowed.

Order pronounced in the open court on 29 /12/2023.

Sd/-	Sd/-
(G.S. PANNU)	**(SAKTIJIT DEY)**
VICE-PRESIDENT	**VICE-PRESIDENT**

Dated: 29.12.2023
*aks/-

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Assistant Registrar
ITAT New Delhi