

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

Before Sh. Saktijit Dey, Vice President

&

Dr. B. R. R. Kumar, Accountant Member

ITA No. 335/Del/2023: Asstt. Year: 2016-17

Solvay Asia Pacific Pte. Ltd., 55, 10 th Floor, Wave Place Building, Wireless Road, Kumpini, Sub Pathum Wan District, Bangkok, Thailand	Vs	DCIT (IT), Circle-3(1)(2), International Taxation, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAWCS3061L		

Assessee by : Sh. Anuj Kisnadwala, Adv.

Revenue by : Sh. P. Praveen Siddharth, CIT-DR

Date of Hearing: 18.01.2024

Date of Pronouncement: 22.01.2024

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 16.12.2022 passed by the AO u/s 147/144C of the Income Tax Act, 1961.

2. The assessee has raised the following grounds of appeal:

"1. On the facts and circumstances of the case and in law, the notice issued u/s 148 of the Act is bad in law.

2. On the facts and circumstances of the case and in law, the draft order passed by the AO u/s 147 r.w.s. 144C of the Act is bad in law.

3. On the facts and circumstances of the case and in law, the AO erred in taxing the receipts of the Assessee amounting to Rs. 11,99,47,943/- as Fees for Technical Services (FTS) at the rate of 10% plus applicable surcharge and cess u/s 115A of the Act."

3. The grounds are being adjudicated on the merits of the issue as to "whether Fees for Technical Services is taxable in India as per the India-Thailand Treaty or not".

4. Brief facts for adjudication of the case are that the assessee is a company incorporated in Thailand and is a tax resident of Thailand. During the year under consideration, the assessee has rendered services to its group entities in India. The assessee has received Rs. 11,99,47,943/- from its Indian group entities. The details of the same are as under:

S. No.	Name	Amount (in INR)
1	Rhodia Specialty Chemical India P Ltd.	4,84,73,023/-
2	Rhodia Polymers & Specialist India P Ltd	1,92,21,068/-
3	Sunshield Chemicals Ltd.	41,609/-
4	Solvay Specialists India P Ltd.	5,22,12,943/-
Total		11,99,47,943/-

5. These amounts have been received against the specific agreement with Beneficiary to provide services mentioned below:

1. Communications
2. Finance
3. General Management
4. Human Resource
5. Human Resource Operations
6. Accounting
7. Legal and Compliance
8. Purchasing
9. Information Technology Services

6. Before the revenue authorities, the assessee submitted that these are all Business Support Services and therefore Business Income, and therefore its taxability will be covered under article 5 read with article 7 of DTAA with Thailand.

7. The definition of Business as per Section 2(13) of the Act include any trade, commerce or manufacture or any adventure or concern in the nature of a trade, commerce or manufacture. The business income received generally partakes the nature of regularity of receipts, substantial involvement of taxpayer, frequency and volume of transaction etc. The assessee submitted that such attributes are missing in the impugned transaction between the Service Provider and the Beneficiary in this case. Further, such incomes are being received by the assessee at a predetermined amount as specified by the Service Level Agreements. Scrutiny of nature of service provided as specified in the agreement indicates that these are broadly managerial technical or consultancy services in nature, which broadly comes within the sweep of FTS.

8. The chargeability of FTS is provided u/s 9(1)(vii) of the Act, which is as below:

"Income by way of fees for technical services payable by-

(a) The Government; or

(b) A person who is a resident, except where the fees are payable in respect of service utilized in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India: or

(c) A person who is a non-resident, where the fees are payable in respect of service utilized in a business or profession carried on by such person in India or for the purpose of making or earning any income from any source in India."

9. The assessee argued that since the fee for technical services is absent in DTAA between India and Thailand and therefore even if the assessing officer has treated these receipts as FTS u/s 9(1)(vii) the same cannot be taxable in India as per provision Section 90(2), of the Act. Provision of Section 90(2) is reproduced below:

"4.6 Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be under sub-series (1) for granting relief of tax, or as the case may be avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."

10. After going through the arguments of the assessee, the Id. DRP held that the assessee can take the benefit section 90(2) on those issues and clauses where there is agreement between two Sovereign Nations. Since both India and Thailand have not agreed to taxability of FTS under relevant DTAA, the assessee cannot claim benefit of absence of FTS clause in the DTAA to its advantage. The tax treaties do not levy tax but allocate the taxing rights among the contracting states. Further the income of nature of FTS is clearly sourced from India and such income has to be taxed in India in the absence of specific benefit under DTAA. The Id. DRP held that the assessee has tried to structure these FTS payments through group entities in such way to avoid

attracting of taxation under the Act and this is clearly a tax avoidance scheme which is squarely assailed under limitation of benefit (LOB) as specified under article 27 of DTAA between India and Thailand. The Id. DRP held that the matter is still not settled judicially and hence, contention of the assessee is to be rejected. Accordingly, the AO passed an order treating the amount received by the assessee as FTS and charged 10% on the total receipts.

11. Aggrieved, the assessee filed appeal before the Tribunal.

12. Before us, the Id. AR reiterated the arguments taken up before the revenue authorities and argued that in the absence of any clause for taxability of FTS even in the residuary clauses, the amount cannot be taxed in India.

13. The Id. DR strongly supported the order of the Id. DRP and the order of the Assessing Officer.

14. Heard the arguments of both the parties and perused the material available on record.

15. It is an undisputed fact that the assessee is a non-resident and the amounts received fall under the Fee For Technical Services (FTS) and the India-Thailand DTAA do not have a provision of taxing of FTS under any of the Articles of the treaty and also cannot be treated as miscellaneous income under any residual clause. Hence, the assessee cannot be made liable tax in India. Similar, proposition laid down by the Hon'ble High Court of Madras in the case of Bangkok Glass Industry Co. Ltd. Vs. ACIT (34 Taxman 77).

16. The Co-ordinate Bench of Tribunal in the case of Paradigm Geophysical Pvt. Ltd. (25 SOT 94) held that where the business profits of the non-resident include items of income for which specific or separate provisions have been made in other articles of the tax treaty, then those provisions would apply to the items. However, in case it is found that those provisions are not applicable then the items of income would have to be considered in Article 7. The relevant extract of the judgment has been reproduced below:

"... It was also contended by the revenue that if article 12(3)(g) of the DTAA was not applicable then one had to go back to the domestic law, namely, the Act and tax; the receipt as fees for technical services within the meaning of section 9(1)(vii)(b) read with Explanation 2 there under. What article 7(7) seems to convey is that where the business profits of the non-resident include items of income for which specific or separate provisions have been made in other articles of the treaty, then those provisions would apply to those items. Per contra, if it is found that those provisions are not applicable to those items of income, then the logical result would be that those items of income would remain in article 7 and would not go out of the same. Such items of income which do not fall under any other provision of the double tax treaty, would continue to be viewed as business profits covered by article 7. Fees for technical services is essentially business profit, since the rendering of such services is the business of the non-resident. In order to take out an item of income from the business profits, it is necessary under article 7(7) that there should be some other provision in the treaty dealing specifically with the item of income sought to be taken out from the business profits. If there is no other provision in the treaty or if the provision made in the treaty is not found applicable or to

cover the item of income sought to be taken out from the business profits, for whatever reason, then it follows that the particular item of income should continue to remain under article 7... "

17. Further, the Co-ordinate Bench of Tribunal in the case of Bharti Airtel Ltd. [2016] 67 taxmann.com 223 held that where there is no FTS clause available in the treaty with a country, then the income in question would be assessable as business income and it can be taxed in India only if there is a permanent establishment in India and the income is attributable to activities or functions performed by such permanent establishment. The relevant extract of the judgement has been reproduced below:

"41. The next aspect of this issue, which is raised as Ground No. 8 in the Department's Appeal is that, when the treaties do not contain FTS clause, what is the impact on taxability. Wherever FTS clause is not available in the treaty with a country, then the income in question would be assessable as business income and it can be brought to tax in India, only if the FTO has the permanent establishment in India and if the earning of income is attributable to activities or functions performed by such permanent establishment. This view is supported by the decision of the Coordinate Bench.

44. In view of the above reasons, we hold that wherever under the DTAA' Make available clause is found, then as there is no imparting, the payment in question is not 'FTS' under the Treaty and when there is no 'FTS' clause in the treaties, the payment falls under Article 7 of the Treaty and is business income."

18. The aforesaid expositions are fully applicable here. The assessee company has no Permanent Establishment (PE) in

India. The income which has been earned in this case in absence of FTS clause in DTAA would fall as business income. Their nature would not change to be that of other income. Hence the same cannot be taxed in India in absence of a PE.

19. Further, we also find that the similar receipt by the assessee has not been taxed by the department in any of the subsequent years as depicted below:

Chart showing receipt of business income from group entities

S.No	Name of entity	AY 2014-15	AY2015-16	AY2016-17	AY 2017-18	AY 2018-19	AY 2019-20	AY2020-21
1	Rhodia Specialty Chemicals India Pvt. Ltd.	25,40,419	48,04,037	4,84,73,023	2,01,22,829	-	-	-
2	Rhodia Polymers and Specialities India P Ltd.	3,86,856	53,95,506	1,92,21,068	1,24,73,692	2,81,36,137	3,11,49,333	1,68,89,758
3	Solvay Specialities India P Ltd.	2,81,02,280	2,48,13,832	5,22,12,243 (Note 1)	4,28,85,810	10,22,50,217 (Note 2)	17,14,24,759	9,87,14,801
4	Total	3,10,29,555	3,50,13,375	11,99,06,334	7,54,82,331	13,03,86,354	20,25,74,092	11,56,04,559

20. Hence, keeping in view, the provisions of the Act, Articles of India-Thailand DTAA and the history of the assessee, the appeal of the assessee is hereby allowed.

21. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 22/01/2024.

Sd/-
(Saktijit Dey)
Vice President

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

Dated: 22/01/2024

Subodh/NV, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR