

।आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणेमें।

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "C" :: PUNE**

**BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER**

आयकर अपील सं. / ITA No.987/PUN/2023

निर्धारण वर्ष / Assessment Year : 2020-21

Sungard Availability Services LP, C/o.Suite 320, 565 Ease Swedesford Road, Wayne, Pennsylvania19087, USA. B.O.Bhavan, Sector No.17, Pune Satara Road, Parvati, Pune – 411009. PAN: ABTFS0527J	V s	The Income Tax Officer(IT), Ward-4, Pune.
Appellant/ Assessee		Respondent /Revenue

Assessee by	Shri Siddesh Chaugule – AR
Revenue by	Shri Ganesh Bare – CIT(DR)
Date of hearing	15/02/2024
Date of pronouncement	20/02/2024

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This is an appeal filed by the assessee against the final assessment order dated 11.07.2023 passed by Income Tax Officer(IT), Ward-4, Pune under section 143(3) r.w.s 144C(13) of the Income Tax Act, passed in pursuance to directions issued by Dispute Resolution Panel(DRP) under section 144C(5) of the Income Tax Act, 1961 dated 27.06.2023.The grounds of appeal raised by the assessee are as under :

“General Grounds

1. *On the facts and in the circumstances of the case and in law the Hon’ble DRP/Ld.AO has erred in assessing the total income of the Appellant at INR 842,703,639.*

2. *On the facts and circumstances of the case and in law, the Hon'ble DRP /Ld. AO has erred in not following the orders of Hon'ble Income Tax Appellate Tribunal and learned Commissioner of Income Tax (Appeals) on identical facts for earlier years i.e. AY 2018-19 & 2019-20.*

Addition in respect of Fees for Included Services(‘FIS’) – INR 842,703,639

3. *On the facts and circumstances of the case and in law, the Hon'ble DRP /Ld. AO has erred in taxing the amount of INR 842,703,639/- received by the Appellant from its Indian customer as ‘Fees for technical services’ as per the provisions of Section 9(1)(vii) of the Act and under Article 12 of the India-ISA Double Tax Avoidance Agreement(‘DTAA’).*

The appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the Hon'ble ITAT to decide this appeal according to law.”

Submission of Id.AR:

2. The Id.Authorised Representative(Id.AR) for the assessee explained that the assessee is a foreign firm situated in USA. The assessee is engaged in the business of Cloud and Hosting Services, Disaster Recovery Services, IT Consultancy Services. In the Return of Income assessee had shown receipt of Rs.84,27,03,639/- from Infosys Limited. Assessee claimed the said income exempt for following reasons :

“i) The services do not accrue or arise in India since they fall within the exception provided under clause (b) of section 9(1)(vii) of

the Act as the source of income is outside India and hence not taxable in India.

ii) Also they do not make available any technical knowledge, skill, know-how or process and hence, not chargeable to tax in India as per provisions of Indo-US tax treaty (Article 12).”

3. The ld.AR submitted that Assessing Officer(AO) taxed the said receipts. Ld.AR submitted that for earlier years on identical facts, the ITAT has allowed the appeal of the assessee. The ld.AR filed copies of ITAT Orders in assessee’s own case in ITA No.258/PUN/2021, ITA No.838/PUN/2022 & ITA No.839/PUN/2022. Ld.AR read out the relevant paragraphs of the ITAT’s Order and AO’s order.

Submission of ld.DR :

4. Ld.Departmental Representative(ld.DR) for the Revenue relied on the order of the Assessing Officer and DRP. However, ld.DR admitted that for A.Y.2017-18, the identical issue in assessee’s case has been decided by ITAT in assessee’s favour.

Findings & Analysis :

5. We have heard both the parties and perused the records. On perusal of the DRP’s order, it is observed that DRP has accepted that for A.Y.2017-18, 2018-19 and 2019-20 the ITAT has decided

the very same issue in favour of assessee. The relevant paragraph 7.16 of the DRP's order is reproduced here as under :

“7.16 We note that the assessee has claimed before us that Hon'ble ITAT has decided the issue in its favour for A.Y. 2017-18, 2018-19 and 2019-20. We have confirmed from the assessing officer that department has not accepted the decision of Hon'ble ITAT.

5.1 Thus, DRP has accepted that the issue involved for the current year is same as that decided by ITAT Pune for A.Y. 2017-18, 2018-19 & 2019-20 in assessee's own case.

6. The ITAT in ITA No.258/PUN/2021 for A.Y.2017-18 has held as under :

“6. Mr. Chavan could hardly dispute that the even if we agree to Revenue's arguments under section 9(1)(vii) r.w.s. 9 (2) Explanation that the above services give rise to application of Sec.9's applicability (supra), the assessee is found very well entitled for the benefit of India USA double taxation avoidance agreement “DTAA” u/s 90(2) of the act wherein Article 12 (4) (b) stipulates taxability of the income arising therefrom only if the services concerned “make available technical knowledge” to the recipient/payer. Mr. Chavan could not refer to any material in the case file satisfying the forgoing “make available” condition in assessee's services. This tribunals recent coordinate bench decision in M/s.Faurecia Automotive Holding V/s. DCIT ITA No. 784/PN/ 2015 dated 08.07.2019 holds in light of CIT V/s. De Beers India Minerals Pvt. Ltd. (2012) 346 ITR 467 (Kar.) that such “make available” condition stipulates that the payer concerned is independently able to make use of the technical know-how etc. coming from the service provider's side. We thus affirm the CIT(A)'s findings reversing the Assessing Officer's action holding the amount in issue of

Rs. 68,72,39,090/- as taxable in India. The Revenue's instant sole substantive grievance fails accordingly."

7. Since the facts are same for the current year also, following the rule of consistency, we hold that the assessee is entitled for benefit of "India USA DTAA." and since the condition of 'make available' has not been satisfied in the case of the assessee, the services are not taxable in India. Accordingly, we allow the appeal of the assessee.

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

Order pronounced in the open Court on 20th February, 2024.

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 20th Feb, 2024/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, "सी" बेंच,
पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.