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

BEFORE,
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

ITA No.1912/Del/2023
(ASSESSMENT YEAR 2020-21)

SPi Global US Inc 1775, Lisbon Road, Lewiston, Androscoggin Maine, USA-999999 PAN-ABBCS 1722J	Vs.	DCIT International Taxation Circle-3(1)(2) New Delhi
(Appellant)		**(Respondent)**

Appellant by	Mr. Ashik Shah, Advocate
Respondent by	Mr. Vijay B. Vasanta, CIT- DR

Date of Hearing	06/02/2024
Date of Pronouncement	13/03/2024

ORDER

PER YOGESH KUMAR U.S., JM:

This appeal filed by the Assessee against the final assessment order dated 28/04/2023 passed u/s 143(3) r.w.s.144C (13) of the Income Tax Act, 1961 (hereinafter called 'the Act') subsequent to the direction of the Ld. Dispute Resolution Panel (DRP) vide direction dated 16/03/2023 for Asst. Year 2020-21.

2. The grounds taken by the Assessee in this appeal are as under:-

*"**I. General Grounds***

1.1. The Ld. AO and the Ld. DRP (hereinafter referred to as "lower authorities") erred in finalizing an order of assessment which is in violation of principles of natural justice and the provisions of the Act and is devoid of merits and are contrary to facts on record and applicable law and has been completed without adequate inquiries and as such is liable to be quashed.

II. Validity of final assessment order passed in consequence of DRP directions.

2.1. The Ld. DRP erred in issuing the directions under section 1440(5) of the Act dated March 16, 2023, without a valid DIN, in contravention to the Circular No. 19 of 2019 dated August 14, 2019, issued by the Central Board of Direct Taxes ("CBDT"), deeming such a directions to be invalid and never to have been issued as per para 4 to the said Circular, and consequently the final assessment order dated April 28, 2023 passed under section 143(3) read with section 1440(13) of the Act (hereinafter referred to as the "Impugned Order") is invalid and is liable to be quashed.

2.2. The Ld. DRP issued directions to the Ld. AO with a prejudiced mindset to confirm the addition proposed by the Ld. AO and thereby directing the Ld. AO to put forward strong arguments on the merits of the grounds raised by the Appellant. Such directions are in violation of the powers provided under section 144C of the Act and therefore such directions and the final assessment order passed in consequence of such directions are incorrect, invalid and liable to be quashed.

III. Non taxability of sub-contracting charges

3.1. On the facts and circumstances of the case and in law, the lower authorities erred in concluding that the services rendered by the Appellant are in the nature of automated digital services and software services.

3.2. The lower authorities have erroneously formed an opinion on the taxability of sub-contracting charges received by misapplying the provisions of the Act and India-USA DTAA, without considering the information, arguments and evidence provided by the Appellant.

3.3. The lower authorities erred in concluding that the sub-contracting charges paid by SPi India to the Appellant are chargeable to tax by treating the same as FIS under Article 12(4) of the India-USA DTAA, without appreciating that the condition of 'make available' of technical knowledge is a prerequisite for determining whether an income falls under Article 12(4) of the India-USA DTAA.

3.4 The lower authorities have erred in concluding that the sub-contracting sendees were made available to SPi India, without appreciating the meaning of the term 'make available' as defined in the Memorandum of Understanding to India-USA DTAA and various judicial precedents.

3.5 The lower authorities failed to bring any material on record to prove that the sub-contracting services provided by the Appellant have satisfied the conditions of make available in order to conclude that such services are taxable under FIS mentioned in Article 12(4) of the India-USA DTAA.

IV. Non taxability of sales commission

4.1 On the facts and circumstances of the case and in law, the lower authorities failed to appreciate that the services were rendered by the Appellant outside India for customers located outside India and the payment for such services was also received outside India, and hence the same is not taxable under the provisions of the Act.

4.2 On the facts and circumstances of the case and in law, the lower authorities failed to appreciate that marketing service does not fall within the definition of Fees for Technical Services ("FTS") under section 9 of the Act.

4.3 On the facts and circumstances of the case and in law, the lower authorities erred in not appreciating that exception clause of section 9(i)(vii)(b) of the Act, while considering the taxability of the subject transaction in India. Thus, the provision of service is not deemed to accrue or arise in India.

4.4 The lower authorities, in the facts and circumstances of the case and in law, erred in concluding that the sales commission received towards marketing service is FIS under Article 12 of the India-US DTAA.

4.5 The lower authorities erred in concluding that the services were made available to the recipient, without appreciating the meaning of the

term 'make available' as defined in the Memorandum of Understanding to India-USA DTAA and various judicial precedents.

4.6 Without prejudice to the above, the lower authorities, erred in adjudicating sales commission along with sub-contracting charges and therefore erred in not giving a separate direction/finding in respect of sales commission.

Miscellaneous grounds

V. Miscellaneous grounds

5.1 On the facts and circumstances of the case and in law, the Ld. AO erred in levying interest under section 234A of the Act without appreciating that the return of income was filed within the due date specified under the provisions of the Act.

5.2 On the facts and circumstances of the case and in law, the Ld. AO erred in levying interest under section 234B of the Ac

5.3 On the facts and circumstances of the case and in law, the Ld. AO erred in making an adjustment towards amount refunded while arriving at the demand payable, without appreciating that no refund was granted to the Appellant.

The Appellant prays that directions be given to grant all such relief arising from the grounds of appeal mentioned supra and all consequential relief thereto.

The grounds of appeal raised by the Appellant herein are without prejudice to each other. The Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal.

3. The brief facts of the case are that the assessee filed its return of income for Assessment Year 2020-21 on 12/02/2021 declaring total income of Rs.11,98,86,220/- claiming the same as taxable at the rate of zero percent under income from other source, as per Article 12 of India-US DTAA. The case was selected for complete scrutiny under CASS due to claim of high ratio of refund to TDS

relating to Section 195. On perusal of the Assessee's ITR, A.O. observed that that it has claimed a refund of Rs.68,75,050/- against taxes paid amounting to Rs.68,75,050/-. Such TDS has been deducted by SPI Technologies India Private Limited u/s 195 of the Act. In order to examine the veracity of the Assessee's claims, a notices u/s 142(1) along with questionnaires was issued by the A.O. to the Assessee. A final assessment order has been passed u/s 143(3) r.w.s 144C(13) of the Act on 28.04.2023 by making addition on Rs.11,98,86,223/-. Aggrieved by the assessment order and the DRP, the assessee preferred the present appeal on the grounds mentioned above.

4. Ground No.1 is general in nature which requires no adjudication.

5. Ground No.2 and its sub-grounds of the Assessee are regarding violation of Circular No.19 of 2019 dated 14/08/2019, issued by the Central Board of Direct Taxes ("CBDT") in respect of the DIN. The Ld. Counsel for the assessee has not pressed the ground No.2 and its sub-grounds. Accordingly, ground No.2 and its

sub-grounds are dismissed. Further submitted that Assessee will not pressing ground No.3.1, 3.2, 3.5, 4.1, 4.2, 4.3 and 4.4. Accordingly, these grounds are dismissed as not pressed.

6. Ld. Counsel for the assessee arguing on ground No.3.3 and 3.4 submitted that the lower authorities erred in concluding that the sub-contracting charges paid by SPi India to the Assessee are chargeable to tax by treating the same as FIS under Article 12(4) of the India-USA DTAA without appreciating that the condition of 'make available' of technical knowledge is a prerequisite for determining whether an income falls under Article 12(4) of the India-USA DTAA. Further submitted that the lower authorities have erred in concluding that the sub-contracting services were made available to SPi India, without appreciating the meaning of the term 'make available' as defined in the Memorandum of Understanding to India-USA DTAA and various judicial precedents. Further, brought to our notice that the very same issue has been decided by the Co-ordinate Bench of the Tribunal in the Assessee's own case for A.Y.2019-20 in ITA No.1662/Del/2022.

7. The Ld. DR relied on the orders of the Lower Authorities but did not dispute the fact that similar issue has been decided by the Tribunal in A.Y 2019-20 in Assessee's own case.

8. We have heard the parties perused the material. The very same issue involved in Ground No. 3.3 & 3.4 has been decided by the Coordinate Bench of the Tribunal in Assessee's own case for A.Y 2019-20 in ITA No. 1662/Del/2022 dated 07/07/2023, wherein it is held as under:-

> *"7. We have heard the Ld. Representative of the parties and perused the material on record. It is an admitted fact that the assessee is a tax resident of US and hence can opt to be governed by the provisions of India-USA DTAA if more beneficial to it in terms of section 90(2) of the Act.*
>
> *7.1 The perusal of records reveal that the assessee executed a document titled 'statement of work' effective as at 1st January, 2018 with the assessee for the provision of services defined and at the prices agreed upon. This statement of work documents the contract deliverables to be provided by the assessee to SPi India (at page 38 and 39 of Paper Book). The overview of work as contained in the said statement of work is as under:-*
>
> *"OVERVIEW OF WORK*
>
> *Vendor will provide the e-publishing services for titles specified by SPI Technologies India Private Limited (Formerly Lambda Content India Private Limited) using specialized software. This will include updating content, graphics, art and providing page composition services including copy editing services, all corrections and creation of Table of Cases and Table of Statutes, culminating in a final deliverable of high resolution PDF files for print, and updated MS V Word files for future revision."*
>
> *Further the clause on 'Term' states as under:-*

"This Agreement shall be effective on the date hereof and shall remain in effect until terminated by the parties in writing."

7.2 The statement of work though not titled as an agreement clearly sets out the obligation of both the parties, overview of the work to be performed by the assessee and the effective date to be 1st January, 2018. In view of the above the contention of the lower authorities that the assessee has failed to produce an agreement between the parties for rendition of services does not hold good. The assessee has also submitted copies of invoices raised by the assessee on a sample basis before the lower authorities during the assessment proceedings which are placed at pages 40 - 43 of the Paper Book. Hence the contention of the Revenue that the assessee could not produce any other documentary evidence regarding the services provided also does not stand correct.

7.3 Article 12(4) of the India-USA DTAA defines FIS as under:-

"...12(4). The term "fees for included services" as used in this Article means payments of any kind to any person in consideration for rendering of any technical or consultancy services (including the provision of such services through technical or other personnel) if such services:

(a) Are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. "

7.4 In order to constitute FIS under Article 12(4) of the India-USA DTAA the services rendered must make available technical knowledge, experience, skill, know-how or processes to the person availing such services. The Memorandum of Understanding (MOU) to India-USA DTAA contains various instances explaining the meaning of the term 'make available'. The 'make available' clause is satisfied when the person acquiring the services is enabled to apply the technology independently in the future without the assistance of the service provider. The fact that the provision of the service may require technical/consultancy input by the person providing the service does not per se mean that technical knowledge, skills etc. are made available to the person availing the service. There has to be a transfer of the technical knowledge, experience, skill, know-how or processes or a technical plan or technical design from the service provider to the service recipient and the same

should remain with the service recipient even after rendering of the services has come to an end.

7.5 The e-publishing work in the nature of editorial services comprising of page composition, language polishing, indexing, correcting faulty grammar and punctuation etc. sub-contracted to the assessee involves technical expertise, however, such expertise is not transferred by the assessee which can be independently applied by SPi India in future on its own without recourse to the assessee.

7.6 The impugned payment is not in relation to any services which make available any technical skill or know-how etc. to SPi India. In Outotec India P Ltd. Vs CIT (2015) 41 ITR (Trib) 449 (Delhi), Delhi Bench of the Tribunal pointed out that the expression "make available" in the context of 'fees for technical services' contemplates that the technical services should be of such a nature, that the payer comes to possess the technical knowledge so provided which enables it to utilize the same thenceforward. If the services are consumed without leaving anything tangible with the payer for use in future, it will not be 'make available' of the technical services notwithstanding the fact that its benefit flowed directly to the payer. In Mahindra and Mahindra Ltd. vs. Dy. CIT (2009) 313 ITR (AT) 263 (Mumbai) (SB) it has been held that where the payer only obtained the benefit from the services, but did not get any technical knowledge experience or skill in its possession for future use, it cannot be said that technical know-how was made available.

7.7 It is also the grievance of the assessee that the Ld. DRP in earlier years in the case of LW US, a group company has allowed the same issue on similar facts in favour of the assessee concluding that receipt of subcontracting charges is not taxable as FIS under India US Tax Treaty. During AY 2015-16 SPi India had sub-contracted similar e-publishing work to its AE, LW US and received consideration from SPi India for rendition of subcontracting services. When the issue of taxability of sub-contracting charges received by the assessee arose before the Ld. DRP, the Ld. DRP held that sub-contracting charges are not taxable in India as per the India-USA DTAA as the make available clause is not satisfied. However, in the instant case in AY 2019-20 the Ld. DRP held that the sub-contracting charges are taxable as FIS since make available condition is satisfied. In holding so, the Ld. DRP failed to appreciate that the Ld. DRP in the case of LW US held that know how was made available only with respect to the issue of marketing fee and not sub-contracting fee. It is also contended by the assessee that the Ld. DRP misapplied the decision of the Chennai Bench of the Tribunal in the case of LW US for the AY 2015-16 to the present case as in the

said decision the taxability of marketing fee were challenged and not sub-contracting charges which had already attained finality at DRP. We have perused the orders of the Ld. DRP and Chennai Bench of the Tribunal (supra) in the case of LW US for AY 2015-16 (at pages 92-109 of the Paper Book) and find that the contention of the assessee is correct.

7.8 In the light of the above factual matrix and the judicial precedents cited above, we are of the view that the sub-contracting charges received by the assessee does not satisfy the make available condition as envisaged under Article 12(4) of the India-USA DTAA and hence are not chargeable to tax as FIS in India in the hands of the assessee. Accordingly, all the grounds of appeal are decided in favour of the assessee."

By following the order of the Tribunal in Assessee's own case for A.Y.2019-20, we allow the ground No.3.3 and 3.4 and delete the addition made by the AO.

9. Grounds No.4.5 & 4.6 are against the action of the lower authorities in concluding that services were made available to the recipient, without appreciating the meaning of the term 'make available' as defined in the Memorandum of Understanding to India-USA DTAA and various judicial precedents. Without prejudice to the above, the AR contended that the lower authorities erred in adjudicating sales commission along with sub-contracting charges and therefore erred in not giving a separate direction/finding in respect of sales commission. The Ld. Counsel for the assessee submitted that since main services of the assessee has not satisfied

the 'make available' condition as envisaged under Article 12(4) of the India –USA DTAA, connected service of sales and marketing support service also does not satisfy the make available condition and hence is not taxable. In this regard, the assessee placed reliance on the order of the decision of the Co-ordinate Bench in the case of Sheraton International, LLC [142 taxmann.com 520]. Thus, submitted that the grounds No.4.5 and 4.6 deserves to be allowed.

10. Per contra, the Ld. DR relied upon the order of the lower authorities.

11. We have heard the parties and perused the material available on records. The assessee renders services relating to e-publishing work in the nature of editorial services including page composition, language polishing, indexing, correcting faulty grammar and punctuation etc. We have held that the said sub-contracting charges do not come within the purview of "Fees for Included Services" ("FIS") under the India-USA DTAA the connected service of sales and marketing support service also does not satisfy the make available conditions and hence, is not taxable. Accordingly, we allow grounds. No.4.5 & 4.6 of the assessee and delete the addition.

12. Ground No.5 is regarding levying interest under section 234A of the Act. The Ld. Counsel for the assessee submitted that as per the notification No.93/2020/F. No.370142/35/2020-TPL, dated 31/12/2020, the due date for furnishing income tax return for the impugned AY 2020-21 was extended to February, 15, 2021, therefore, the AO erred in levying interest u/s 234A of the Act for the A.Y.2020-21 as the assessee has filed the return of income on February, 2021, which is well within the extended due date. Considering the submission made by the Ld. The Ld. the Assessee's Representative, we remand the issue to the file of the AO with a direction to verify the extended due date for filing the return and the actual date of return filed by the Assessee and pass appropriate order in accordance with law. According, the ground No.5.1 of the assessee is partly allowed for statistical purposes.

13. The Ld. Counsel for the assessee addressing ground No.5.2 which is regarding levying of interest u/s 234B of the Act, submitted that while computing the assessed income and the tax thereon, interest u/s 234B of the Act amounting to Rs.18,91,995/-

was erroneously levied by the Ld. AO in the computation sheet and sought for remanding the matter to the file of A.O. for re-computing. Considering the submission made by the AR, we deem it fit to remand the issue of levying interest u/s 234B of the Act to the file of the AO to verify and re-compute the assessed income and the tax thereon in accordance with law. Accordingly, ground No.5.2 of the assessee is partly allowed for statistical purpose.

14 Ground No.5.3 is regarding non-consideration of refund due to the assessee. The Ld. Counsel for the assessee submitted that while arriving at the demand payable in the computation sheet, the AO erred in making an erroneous in adjustment towards amount refunded of Rs.3,00,300/- without appreciating the fact that no refund was granted to the assessee and sought for remanding in the issue to the file of the AO. Considering the submission made by the AR, we remand the issue involved in ground No.5.3 to the file of the AO to consider the submission made by the assessee and pass appropriate order in accordance with law.

15. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in open Court on 13th March, 2024.

Sd/-	Sd/-
(SHAMIM YAHYA)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 13/03/2024
Pk/R.N Sr ps
Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI