

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

Before Sh. C. N. Prasad, Judicial Member

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

ITA No. 1572/Del/2022 : Asstt. Year : 2018-19

ITA No. 1573/Del/2022 : Asstt. Year : 2019-20

ITA No. 301/Del/2023 : Asstt. Year : 2020-21

Backbase Europe BV, Jacob Bontiusplaats 9, 1018 LL, Amsterdam, Netherlands	Vs	ACIT, International Taxation, Circle-1(2)(2), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAGCB1699B		

Assessee by : Sh. S. Sridhar, Adv. &

Sh. N. Arjun Raj, CA

Revenue by : Sh. Vizay B. Vasanta, CIT DR

Date of Hearing: 30.01.2024

Date of Pronouncement: 24.04.2024

ORDER

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

The present appeals have been filed by the assessee against the orders dated 12.05.2022 and 19.01.2023 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Since, the issue involved in all the appeals are similar, they were heard together and being adjudicated by a common order. In ITA No. 1572/Del/2022, the assessee has raised the following grounds:

"1. The order of the Assistant Commissioner of Income Tax, Circle International Tax - 1(1)(2), New Delhi dated 12.05.2022 for the above mentioned Assessment Year is contrary to law, facts, and in the circumstances of the case.

2. The ACIT erred in bringing to tax Rs.4,14,70,000/-being the annual maintenance and support service receipts received from the clients as fee for technical services on the application of

section 9(1)(vii) of the Act in the computation of taxable total income without assigning proper reasons and justification.

3. The ACIT erred in bringing to tax Rs.6,03,362/-being the consultancy receipts received from the clients as fee for technical services on the application of section 9(1)(vii) of the Act in the computation of taxable total income without assigning proper reasons and justification.

4. The ACIT failed to appreciate that the provisions of section 9(1) (vii) of the Act had no application to the facts of the case and ought to have appreciated that the support services/consultancy services were erroneously reckoned as fee FTS upon misreading the related provisions in the treaty as well as in the statute.

5. The ACIT failed to appreciate that the receipts from the transactions which were subjected to Indian Taxation suo moto were erroneously compared with the disputed receipts and ought to have appreciated that the transactions which were subjected to Indian Taxation were clearly distinguishable from the facts pertaining to the receipts which are now disputed for inclusion as part of the computation of taxable total income.

6. The ACIT failed to appreciate that the provisions of Article 12 of the concerned treaty were wrongly understood and applied and ought to have appreciated that the disputed receipts would be subjected to taxation only in Netherlands by virtue of tax residency status of the appellant, thereby vitiating the related findings both in the impugned order as well as in the order passed by the DRP.

7. The ACIT failed to appreciate that the annual maintenance and support services were in connection with perpetual licence given to the clients for ensuring the copy righted software being maintained/updated by providing new version/by providing patches and hence ought to have appreciated that having not made available the technical knowledge, the decision to bring the related receipts under Indian Tax Regime should accordingly be reckoned as bad in law.

8. The ACIT failed to appreciate that having not disputed the fact of the appellant/assessee not making available the technical knowledge, the taxability of the related/disputed receipts under Indian Tax Regime within the scope of the related treaty provisions read with the statutory provisions in the Act was wrong, incorrect, erroneous, invalid, unjustified and not sustainable both on facts and in law.

9. The ACIT failed to appreciate that the findings of the DRP were wrong, incorrect, erroneous, invalid, unjustified and not sustainable both on facts and in law and ought to have appreciated that the mechanical adoption of such findings in the

impugned order as a consequence should be considered as nullity in law.

10. The ACIT failed to appreciate that the evidences filed in support of the stand were not considered and looked into and ought to have appreciated that non recording of findings in relation to the evidences filed in support would vitiate the related findings in the impugned order.

11. The ACIT failed to appreciate that the provisions governing the definition of FTS both under the treaty as well as in the statute under consideration were completely misread and ought to have appreciated that the tangential findings in this regard were wrong, incorrect, erroneous, invalid, unjustified and not sustainable both on facts and in law.

12. The ACIT failed to appreciate that the entire re-computation of taxable total income was wrong, incorrect, erroneous, invalid, unjustified and not sustainable both on facts and in law.

13. The ACIT failed to appreciate that the impugned order was passed out of time, invalid, passed without jurisdiction and not sustainable both on facts and in law.

14. The ACIT failed to appreciate that there was no proper opportunity given before passing the impugned order/DRP order and any order passed in violation of the principles of natural justice is nullity in law."

3. The Assessee is a tax resident of Netherlands and holds a valid tax residency certificate. The Assessee is part of Backbase group with Twinspark BV as holding company and the said group consists of operating companies specialized in development, licensing and implementation of digital banking software. The companies provide Fin-tech software for financial institutions.

4. The main issue in the above three appeals pertain to taxability of the amounts received from the ancillary services provided in relation to the software sold to HDFC Bank and IDFC Bank.

5. According to the assessee, the services rendered in upgrading / updating the software already sold should be

reckoned as transfer of software and hence would not fall within the ambit of FTS or royalty. The assessee relied on Article 12 of India Netherlands Double Taxation Avoidance Agreement submitted that the receipt was not chargeable to tax in India.

6. The Id. DRP after considering the objections raised by the appellant had followed their findings rendered for the assessment year 2016-17 with respect to the disputed sum.

7. The Id. DRP in their directions had extracted their decision rendered for the said assessment year 2016-17 and wherein it was concluded that the services to IDFC Bank should be reckoned as ancillary / subsidiary to the payments received by the Appellant as **Royalty** in as much as the technical knowledge and know-how was rendered / shared to IDFC Bank and therefore, the payment would qualify as **FTS**. The decision of the Id. DRP is as under:

*"After hearing the contentions of the assessee and its submissions, the Panel is of the view that the services provided by assessee to IDFC are ancillary or subsidiary to the payments received by the assessee, and which qualify as **royalty** and that the technical knowledge and know how has been rendered to IDFC and the payment therefore qualify as **FTS**.*

The software maintenance and support services cannot operate independent of the software service being provided by the assessee. In fact the agreement to purchase or acquire the software service is integral with the maintenance and support service. Service clause of the agreement provided mentions "by making use of backbase support your development team is powered with direct channel to the heart of all backbase expertise-directly accessible via web or phone" which supports the condition of providing technical knowledge and know how rendered to IDFC which qualifies is FTS."

8. In this process, the software maintenance and support services according to the Id. DRP could not operate independent of the software service being provided which was based on the agreement to purchase or acquire software services. As a consequence, such services would be integral part of maintenance and support services and in this regard, the service clause of the agreement provided *'by making use of Backbase support your development team is powered with direct channel to the heart of all Backbase expertise-directly accessible via web or phone* would fortify the directions for treating the disputed payment received from IDFC Bank as FTS falling in the Indian tax regime.

9. The ratio / directions issued by the Id. DRP summarized in the preceding paragraph pertaining to the assessment year 2016-17 was followed for the payments received from HDFC Bank during the assessment year under consideration and justified their directions to tax it either as royalty or FTS.

10. On going through the record, we find that there has been overlapping findings of the Id. DRP on the two receipts contested in the present appeal. The decision rendered by the Id. DRP by reckoning the disputed components as royalty as well as FTS is self-contradictory. The principles governing for considering the particular components of receipt as royalty involve the consideration as prescribed under the relevant DTAA and in contra distinction for reckoning the very same receipts as FTS, there are different set of principles governing in relation thereto. The disputed receipts cannot fall under both the categories of royalty and FTS.

11. At this juncture, it was pleaded by the Id. AR for setting aside the directions of the orders and to direct the Id. DRP to consider the issue afresh. The Id. DR objected in principle. We find no prejudice would be caused to the Revenue if the matter is referred to the Id. DRP to independently examine the issue for the years involved and pass appropriate directions as deemed fit. The AO shall complete the Assessment Order *de-novo* as per the new directions issued by the Id. DRP.

12. In the result, the appeals of the assessee are allowed for statistical purpose.

Order Pronounced in the Open Court on 24/04/2024.

Sd/-

(C. N. Prasad)
Judicial Member

Dated: 24/04/2024

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR