IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER

ITA No.3280/Mum/2023

(A.Y. 2020-21)

Tech Data (Singapore) Pte Limited, 10 #05-17/20 Techpoint, Ang Mo Kio Street 65, Singapore 569059 Tech Data Advanced Private Limited 3rd Floor, A-301, Supreme Business Park, Behind Lake Castle, Powai, Mumbai – 400076	Vs.	The Deputy Commissioner of Income Tax, International Tax, Circle 4(1)(2) Air India Building, Nariman Point, Mumbai – 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:AAGCT0951J		
Appellant	..	Respondent

Appellant by :	Nitesh Joshi
Respondent by :	Anil Sant

Date of Hearing	28.03.2024
Date of Pronouncement	23.04.2024

आदेश / O R D E R

Per Amarjit Singh (AM):

This appeal filed by the assessee is directed against the order passed by the ld. CIT(DRP-2)-2, Mumbai for A.Y. 2020-21. The assessee has raised the following grounds before us:

> ***"1. Ground 1: Issuance of Notice under section 143(2) of the Act by National e- Assessment Centre ("NeAC') without having authority to issue the said notice***
>
> *The learned AO has erred in conducting assessment proceedings for the assessment year 2020-21 and passing a final assessment order under section 143(3) read with section 144C of the Act without issuing a valid notice under section 143(2) the Act The assessment proceedings were*

initiated by issuance of notice under section 143(2) by National e-Assessment Centre ('NeAC") without having authority to issue the said notice.

2. Ground 2: Holding income from sale/ distribution of off-the-shelf software to the tune of INR 58,48,511 as taxable income in the hands of Assessee

Without prejudice to Ground of Objection 1, the learned AO has erred in law and facts in treating the income from sale/ distribution of off-the-shelf software as royalty under the Act read with Article 12 of the India-Singapore Double Tax Avoidance Agreement ('DTAA') and making additions amounting to INR 58,48,511 without considering the Assessee's claim of treating receipt from sale/ distribution of off- the-shelf software as non-taxable receipt under the Act.

3. Ground 3: Holding Management fees to the tune of INR 34,11,68,364 as taxable income in the hands of Assessee.

Without prejudice to Ground of Objection 1, the learned AO has erred in law and facts in treating management/service fee as fees for technical services under the Act read with Article 12 of the India-Singapore DTAA and making additions amounting to INR 34,11,68,364 without appreciating that the services do not make available any technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein as required by Article 12(4)(b) of the India-Singapore tax treaty

4. Ground 4: Erroneous levy of interest under section 234A and section 234B of the Act.

The learned AO has erred on the facts and in circumstance of the case and in law by proposing to levy interest under section 234A and section 234B of the Act amounting to INR 63,476 and INR 12,69,520 respectively

5. Initiation of penalty proceedings under section 274 read with section 270A of the Act.

The learned AO has erred in initiating penalty proceedings against the Appellant under section 274 read with section 270A of the Act for under reporting of income in consequence of misreporting

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 Honorable ITAT to decide this appeal according to law. Each of the above ground of appeal is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

2. The fact in brief is that return of income declaring total income of Rs.58,48,510/- was filed on 31.12.2020. The return was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on

29.06.2021. The assessee Tech Data Singapore Pte Ltd. is a foreign company incorporated under the corporate laws of Singapore on 03.11.2016. The assessee is engaged in distribution or reselling of hardware and software. During the year under consideration the assessee has earned income from sale of hardware/software products of Rs.58,48,511/- and income from management service fees of Rs.34,11,68,634/- which were considered as non-taxable in India under the 'make available' clause contained in Article 12 of the Tax Treaty and exempt under India-Singapore DTAA. Further fact of the case are discussed while adjudicating ground of appeal filed by the assessee.

Ground No. 1: Issuance of Notice under section 143(2) of the Act by National e-Assessment Centre ('NeAC') without having authority to issue the said notice:

3. During the course of appellate proceeding before us no discussion and submission are made by the ld. Counsel on this issue treating the same as academic in nature, therefore, the same stand dismissed.

Ground No. 2: Holding income from sale/ distribution of off the shelf software to the tune of INR 58,48,511 as taxable income in the hands of assessee:

4. During the financial year 2019-20 the assessee has earned income from sale of software of Rs.58,48,511/- and claimed the same as exempt as per Article 12 of India-Singapore DTAA. The assessing officer vide show cause notice dated 21.09.20222 asked the assessee to explain why the said income should not be treated as royalty and tax accordingly. In response the assessee submitted that it has earned income from sale of off-the-shelf software to customers in India amounting to Rs.58,48,511/-. The assessee explained that it buys such licences of software in bulk and sells them to end-users or resellers in

India. The assessee has also placed reliance on the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. Vs. CIT (2021) 125 taxmann.com 42 (SC). After referring the aforesaid decision of the Hon'ble Supreme Court the assessee submitted that the income earned from sale of softwares to Indian customers is not taxable as royalty, since, in the case of the assessee the buyers of the software were granted only a limited right to use the software without any right to sub-licence or to reproduce the software. However, the assessing officer has not agreed with the submission of the assessee. The assessing officer was of the view that the software tools comes with upgrades, and improvement versions in the case of the assessee, therefore, software has a life of continuity and not covered by the decision of the Hon'ble Supreme Court he also stated that periodically upgrades, rendering services like consultancy, training, maintenance, renting of the software or subscription for software was a different situation. Therefore, in the draft assessment order passed u/s 144C(1) of the Act on 29.09.2022 the total receipt shown by the assessee under the sale of software/hardware amounting to Rs.58,48,511/- was treated as receipt as the royalty u/s 9(1)(vi) r.w. Article 12 of the India-Singapore DTAA taxable at 10% of the rate prescribed in the DTAA.

5. Against the draft assessment order the assessee filed objection before the Dispute Resolution Panel (DRP). However, the DRP vide direction issued u/s 144C(5) of the Act dated 28.06.2023 has rejected the objection filed by the assessee.

6. During the course of appellate proceedings before us the ld. Counsel referred the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. Vs. CIT (2021) 125 taxmann.com 42 (SC) wherein it is held that where the distributor is

granted only a non-exclusive, non-transferable license to re-sale computer software and it has been expressly provided that no copyright in the computer programme is transferred either to the distributor or to the ultimate end users the income from sale of such software shall be income from business and not be treated as income from royalty. The ld. Counsel has also referred the decision of ITAT in the case of the assessee itself for the assessment year 2019-20 in the case of Tech Data (Singapore) Pte Limited Vs. the DCIT IT, circle 4(1)(2) vide ITA No. 2367/Mum/2022 and the Article 12 of India-Singapore DTAA.

On the other hand, the ld. D.R supported the order of assessing officer and direction of the DRP.

7. Heard both the sides and perused the material on record. The assessee has earned income from sale of off-the- shelf software of Rs.58,48,511/- and claimed the same as exempt as per Article 12 of India-Singapore DTAA. The assessee buys such licences of software in bulk and sells them to end users or reseller in India. The end users were granted only a limited right to use the software without any right to sub-license or reproduce the software. The Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. Vs. CIT (2021) 125 taxmann.com 42 (SC) held that if the distributor is only granted a non-exclusive, non-transferable license to re-sell computer software and no copyright in the computer programme is transferred either to the distributor or to the ultimate end users, the payments made towards grant of license for use of software is not taxable as royalty under the provisions of tax treaties (DTAA). The Hon'ble Supreme Court in the aforesaid judgement has divided software vendors in 4 categories as under:

> *"a. Category 1- cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.*

b. *Category 2- cases wherein resident Indian companies act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.*

c. *Category 3 - cases wherein the distributor happens to be a foreign, non-resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.*

d. *Category 4- cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users.*

The assessee falls in second category which deals with resident Indian Companies that act as distributors or resellers by purchasing computer software from foreign, non-resident suppliers or manufacturers and then resell the same to resident Indian end-users. In support of its contention the assessee has also filed sample copies of agreements/contracts entered into with Tech Data Advanced solution (India) Pvt. Ltd. (TD India) of distribution agreement and end users license agreement for sale of software/embedded software. The Hon'ble Supreme Court in the aforesaid judgement held that a limited right to use the softwares/make copies of the software for the purpose for which it was granted and without grant of rights of the copyrights owner (such as reproduction issuing copies commercial exploitation) does not qualify as granted of copyright under the Copyrights Act 1957. The assessee demonstrated from the copies of agreement/contracts that receipt from sale of software in India by non-resident tax paper is not taxable as royalty as the customers are granted only a non-exclusive and non-transferable license to install the software and further restrictions are imposed on customers with respect to commercial exploitation of the software. The ld. Counsel demonstrated from para 9.2 of the Distributor Agreement placed in paper book at page 113 that the intellectual properties incorporated in the authorized product remain at all times with the licensors and the licensors hold the copyright patents or other

intellectual property rights to the materials. The distributor shall not copy use or distribute the material or any deviate thereof in any manner or for any purpose, except as expressly authorized in the Agreement. In the light of the above facts and considering the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. Vs. CIT (2021) 125 taxmann.com 42 (SC) the AO has not brought any material on record to substantiate that income received from distribution of copies of software by the assessee was amount to sale of copy right or use or right to use of copy right therefore, following the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. Vs. CIT (2021) 125 taxmann.com 42 (SC) as discussed above we find merit in the submission of the assessee, accordingly this ground of appeal of the assessee is allowed.

Ground No. 3: Holding Management fees to the tune of INR 34,11,68,364 as taxable income in the hands of assessee:

8. During the year under consideration the assessee has earned income from Management Service Fees to the amount of Rs.34,11,68,364/- and claimed the same as exempt as per Article 12 of India-Singapore DTAA. On query the assessee explained that it has entered into an agreement w.e.f 01.02.2018 with T.D. India and pursuant to which the assessee has rendered the following management/business support services to TD India and earns income on account of the same:

> *"**a. Strategic business advisory services** - The Assessee shall assist TD India in developing business strategies for Asia Pacific Region. Further, it shall develop and maintain high level contact with key vendors of TD India.*
>
> ***b. Information Technology Services** - The Assessee shall assist in implementation of group- wide IT policies and manage the infra structure projects. Further, the Assessee shall also ensure the availability of IT systems.*
>
> ***c. Finance (FP&A and controlling)** - The PARTMENT shall assist TD India in devising the overall financial objectives and strategies Further, it will provide advice on accounting/ reporting framework.*

d. Logistics *- The Assessee ensures that warehousing and logistics activities are carried out cost effectively in timely manner*

e. Branding *- The Assessee shall assist in developing communication and brand strategy for TD India and co-ordinate the marketing activities.*

f. Tax - *The Assessee shall review tax returns/ computation for ensuring tax compliance. Further, the Assessee assists in fax assessments, indirect tax issues, formulating transfer pricing policies and maintain documentation*

g. Treasury *- The Assessee shall provide advice on financing structure and assist in obtaining banking facilities. Further, the Assessee shall advice on matters that require regulatory approval from a treasury perspective.*

h. Legal *- The Assessee will provide advice, draft, review, negotiate various agreements and co-ordinate with counsel on legal matters. The Assessee shall ensure that TD India complies with all the applicable relevant legislations*

i. Ethics and compliance *- The Assessee shall assist in the development of adequate procedures in order to mitigate compliance risks*

j. Human resources *- The Assessee shall assist and strategize on all HR matters Further, the Assessee will implement and monitor group HR policies*

k. Trade compliance *- The Assessee shall provide advice on business models in relation to import/export including compliance of regulatory framework and custom laws*

l. Corporate real estate and administration services*-The Assessee shall assist TD India in managing lease life cycle for offices and warehouses."*

The assessee did not offer the receipt from management services to tax as the said receipt are non-taxable in India under the 'make available' clause contained in Article 12 of India-Singapore DTAA. However, the AO was of the view that assessee has made use of information and processes in the form of expert professional services in the nature of commercial use of experience, therefore, the same was characterised as fees for included services/technical services as per the definition given in the I.T. Act, 1961 and the DTAA between India and USA. Therefore, in the draft assessment order the assessing officer treated the aforesaid receipt of Rs.34,11,68,364/- from customers in India as fees for included services/technical services to be taxed @ 10% under the treaty.

9. During the course of appellate proceedings before us the ld. Counsel at the outside submitted that identical issue on similar fact has been adjudicated by the coordinate bench of the ITAT in the case of the assessee itself for A.Y. 2019-20 on 21.08.2023 vide ITA No. 2367/Mum/2022. The ld. Counsel has also referred the copy of agreement placed in the paper book giving the details of services rendered by the assessee company and explained that the services do not 'make available' any technical knowledge, experience, skill, know how or processes, which enables the person acquiring the services to apply the technology contained therein as required by Article 12(4)(b) of the India Singapore Tax Treaty.

On the other hand, the ld. D.R supported the order of lower authorities.

10. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above assesse has entered into an agreement with T.D. India, pursuant to which the assessee renders certain management and business support services to T.D. India. The services rendered inter alia includes finance, logistics, branding, business strategies, treasury, human resources etc. The assessee explained that all the resources undertaken as referred above were either support services, coordination or tax services without transfer of any technology skill to the recipient. With the assistance of ld. representative we have perused the decision of ITAT in the case of the assessee vide ITA No. 2367/Mum/2022 dated 21.08.2023 as referred above wherein identical issue on similar fact has been adjudicated in favour of the assessee. The relevant extract of the decision of the coordinate bench is reproduced as under:

> *"8. In ground No.3 of appeal, the assessee has assailed assessment order in treating management/ services fee received by the assessee as FTS under the Act r.w. Article-12 of India-Singapore, DTAA. The assessee has drawn our attention to the Service Agreement at pages 23 to 29 of the paper book. The*

assessee has received management fee under the said Service Agreement. The nature of services rendered by the assessee are specified in Schedule-A to the aforesaid agreement. The gist of services provided by the assessee in different areas as detailed in Schedule –A is as under:-

- *Strategic business advisory services that shall and TDI in formulating its business plan for any given period.*
- *Information Technology Services.*
- *Finance (FP&A and controlling)*
- *Logistics support from base country*
- *Branding*
- *Tax*
- *Treasury*
- *Legal*
- *Ethics and compliance*
- *Trade compliance*
- *Human Resources*
- *Real Estate*

Clause (3) of the said agreement specifies the compensation to be paid for providing the services. The rate of compensation is given in Schedule-B to the said agreement. A perusal of Schedule-B shows that for performing the services described in Schedule-A, the assessee shall be compensated at cost + mark up @ 7.5%. We find that the Assessing Officer has held that management fee received by the assessee for rendering services is in the nature of FTS. Article-12(4) of India – Singapore DTAA defines the expression FTS. For the sake of ready reference clause -4 of Article 12 is reproduced herein under:-

> *"4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial technical or consultancy nature (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, which enables the person acquiring the services to apply the technology contained therein; or*
> *(c) Consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply technology contained therein.*
>
> *For the purpose of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee or transferee of such person."*

A perusal of the service agreement along with Annexure-A, that gives an exhaustive list of services to be rendered would show that none of the conditions mentioned in sub-clause (a)(b) and (c) of Clause -4 to Article -12 of India – Singapore DTAA are satisfied. There is no make available of technical knowhow nor there is any service rendered consisting of the development and transfer of a technical plan or technical design. The pre-requisite for invoking Clause-4 of Article-12 of the DTAA is that either there should be transfer of some technical

knowhow i.e. make available condition is satisfied or there should be development and transfer of technical plan or technical design. The services rendered by the assessee as per Schedule-A of the Service Agreement does not in any manner show that any technical knowhow has been made available or there is development and transfer of technical plan or technical design. The services rendered are in the nature of operational management and providing support system. The services also includes providing of training and developing strategies, etc. We find that the Assessing Officer has taken pains to segregate services rendered by the assessee under the segments technical, managerial and consultancy. However, no effort has been made by the Assessing Officer to examine whether the services rendered under the three segments fulfil the criteria so as to fall within the definition of FTS under Article-12(4) of the DTAA. In so far as the definition of FTS as defined in Section 9(vii) of the Act is concerned, we observe that the definition is much broader. The services rendered by the assessee may fall within the sweep of FTS as defined under the Act, but the assessee would be protected by provisions of section 90(2) of the Act. Section 90(2) of the Act lays down that, where the Central Government has entered into an agreement with any other Sovereign Nation for granting relief of tax or for avoidance of double taxation, then the provisions of the Act shall apply to the assessee only to the extent they are more beneficial to it. In case the provisions of the Act are more stringent, the assessee would be governed by the provisions of the DTAA. In the instant case, we find that the remuneration received by the assessee in lieu of services rendered do not fall within the meaning of FTS under Article-12(4) of the India-Singapore DTAA. Consequently, we hold that the payments received by the assessee in respect of management services are not taxable as FTS. In the result, ground No.3 of appeal is allowed."

Since, the issue on hand being squarely covered by the decision of the ITAT in the case of the assessee itself as discussed above in this order, therefore, following the decision of the ITAT this ground of appeal of the assessee is allowed.

Ground No.4: Erroneous levy of interest under section 234B and Section 234B of the Act:

11. We find that levy of interest under the aforesaid section is consequential and mandatory, therefore, we don't find any merit in this ground of appeal of the assessee therefore the same stand dismissed.

Ground No.5: Initiation of penalty proceedings under section 274 read with section 270A of the Act:

12. We find that challenging the penalty proceedings at this stage is premature hence ground no. 5 of the assessee is dismissed.

13. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 23.04.2024

Sd/-	Sd/-
(Kavitha Rajagopal) Judicial Member	(Amarjit Singh) Accountant Member

Place: Mumbai
Date 23.04.2024
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.