

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT BEENA PILLAI, JUDICIAL MEMBER**

IT(IT)A No. 1092/Bang/2023
Assessment Year : 2021-22

<p>M/s. Toyoda Gosei Company, Japan C/o. Toyoda Gosei South India Pvt. Ltd., Building No. 1, Toyoda Techno Park, Plot No. 20, Bidadi Industrial Area, Bidadi, Karnataka – 562 109. PAN: AAFT2706N</p>	Vs.	<p>The Deputy Commissioner of Income Tax, International Taxation Circle 2(2), Bangalore.</p>
APPELLANT		RESPONDENT

Assessee by	:	Shri Rohit Tiwari, Advocate
Revenue by	:	Shri G. Manoj Kumar, CIT-DR

Date of Hearing	:	01-02-2024
Date of Pronouncement	:	25-04-2024

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal arises out of order dated 16.10.2023 passed by the Ld.DCIT (International Taxation), Circle – 2(2), Bangalore for A.Y. 2021-22 on following grounds of appeal:

“General Grounds

1. On the facts and circumstances of the case, the assessment order passed by the Learned Assessing

Officer ('Ld. AO') under section 143(3) r.w.s. 144C(13) of the Income tax Act, 1961 ('the Act') pursuant to the directions of the Ld. Dispute Resolution Panel ('Ld. DRP') is bad in law, unlawful and unjust.

2. On the facts and circumstances of the case and in law, the Ld. AO has erred in determining the total income of the Appellant at INR 178,947,349 as against the returned income of INR 151,569,050 offered to tax by the Appellant.

Taxability of employee cost reimbursements as Fee for Technical Services ('FTS') amounting to INR 25,602,606

3. On the facts and circumstances of the case and in law, the IA. AO/La. DRP was not justified in holding that the employee cost reimbursements amounting to INR 25,602,606 by the Indian associated enterprises (AEs) i.e., Toyoda Gosei South India Private United and Toyoda Gosei Minda India Private Limited to the Appellant is taxable as FTS as per the provisions of section 9(1)(vii) of the Act as well as Article 12 of the India- Japan Double Taxation Avoidance Agreement ('DTAA').

3.1 On the facts and circumstances of the case and in law, the Ld. AO /Ld. DRP has erred in not appreciating that there exists an employer-employee relationship between the expatriates and the Indian AEs and thus, no service was rendered by the Appellant to the Indian AEs.

3.2. On the facts and in the circumstances of the case, the Ld.AO/Ld.DRP erred in ignoring the fact that seconded/transferred employees were reporting to and working under control, direction and supervision and in accordance with the policies and rules of the Indian AEs. The salary was paid by the Appellant to the expatriates only for administrative convenience, which has been later on reimbursed by the Indian AEs to the Appellant. Further, such amount paid by the Appellant has been recorded as 'advances' in its books of accounts while the Indian AEs have accounted the same as 'salaries'.

3.3. On the facts and circumstances of the case and in law, the Ld.AO/DRP has erred in ignoring and not taking cognizance of documents/ information and explanations (including documents submitted as additional evidence which inter-alia included the debit notes, Form 16, sample copies of offer letter, sample certificate of coverage letter etc.) to substantiate the existence of employer-employee

relationship between the Indian AEs and the expatriates and thereby, erroneously concluding that no employer-employee relation existed between Indian AEs and the seconded/ transferred employees.

3.4. The principle of determining employment relationship through the "economic criteria" is also supported by OECD Commentary on the Model Convention. The Commentary supports the concept of "economic employer" (rather than formal/legal employer) in the context of taxation of dependent personal services. It states that the term "employer" should be interpreted as "the person having rights on the work produced and bearing the relative responsibility and risks". It is the substance that prevails over the form. The real employer is the user of the labour. The Ld. AO/Hon'ble DRP has erred in not relying on the concept of economic and legal employer.

3.5. On the facts and circumstances of the case and in law, the Ld. AO/Ld. DRP has erred in not appreciating the fact that the Appellant has not performed any specific function apart from transfer of personnel in order to support the Indian AEs and thus, there could be no FTS in the absence of any service being rendered.

3.6. On the facts and circumstances of the case and in law, the Ld. AO/Ld. DRP has erred in not appreciating the fact that the reimbursement amount constitutes salary which is not taxable as FTS as per the provisions of section 90(vii) of the Act and Article 12 of India – Japan DTAA.

3.7. On the facts and circumstances of the case and in law, the Ld. AO/Ld. DRP has erred in not appreciating that the Indian AEs have withheld taxes under section 192 of the Act on the entire salary paid to the expatriates as evidenced by Form 16 issued to the expatriates and such expatriates have offered the entire income to taxes in their respective returns of income filed under the Act.

3.8. On the facts and circumstances of the case and in law, the Ld. AO/Ld. DRP has erred in not appreciating that the payments made by the Indian AEs to the Appellant are pure reimbursements of the actual employee costs, without any element of income.

3.9. On the facts and circumstances of the case and in law, the Ld. AO/DRP erred in not following the order of the

Hon'ble Tribunal in the Appellant's own case in IT(IT) A No.800/ Bang/ 2022) for AY 2019-20 and (IT(IT) A No.172/ Bang/ 2023 for AY 2020-21) based on identical facts and therefore not following the principle of judicial discipline.

3.10. On the facts and circumstances of the case, the Ld. AO/DRP erred in comparing the instant case with the case of Northern Operating System Private Limited (2022-VIL-31-SC-ST), which dealt with entirely different and clearly distinguishable facts and law vis a vis the Appellant's case.

Taxability of other reimbursements as FTS amounting to INR 17,75,693

4. On the facts and circumstances of the case, the Ld.AO has erroneously considered other reimbursements as reimbursements towards salary of the seconded employees without appreciating the fact that the reimbursements are pure cost to cost reimbursements of expenses such as private line charges, product liability insurance premium etc. which are not related to salary of seconded employees.

5. On the facts and circumstances of the case, the Ld.AO/DRP erred in not appreciating the additional evidence relating to reimbursement of cost which was duly substantiated through copies of debit notes (supported by back to back invoices from third party evidencing cost - cost reimbursements).

Levy of interest under section 234B of the Act

6. On the facts and circumstances of the case and in law, the Ld. AO has erred in charging interest of INR 6,03,945 under section 234B of the Act

Initiation of penalty proceedings

7. On the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270A of the Act against the Appellant on account of the addition made in the final assessment order.

All the above grounds are without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case.”

2. Brief facts of the case are as under:

2.1 Assessee is a company incorporated under the laws of Japan and is a tax resident of Japan. It is engaged in the business of manufacture and sale of automobile components. It e-filed its return of income for AY 2021-22 on 14.03.2022 admitting total income of Rs.15,15,69,050/-. During assessment proceedings, notice u/s. 142(1) of the Income Tax Act, 1961 dated 21/10/2022,06/12/2022,13/12/2022 and 20/12/2022 and a show cause notice dated 20/12/2022 have been issued to the assessee calling for the information and offered opportunities of being heard. The assessment proceedings had been taken up online and therefore all the above mentioned notices have been generated online and issued to the assessee on its registered e-filing profile and system generated e-mails enclosing copies of the notices have been sent to the assessee on its registered e-mail ID. In response to the notices issued, the assessee has furnished the information online. The information furnished by the assessee has been examined and placed on records.

2.2 The assessee is in receipt of reimbursements from Indian AEs towards reimbursement of salary expenses of Expats. However, the assessee contends that since during the period of deputation it does not have any employer employee relationship with the expat and that the Indian entity to whom the employee is expatriated is the real employer, therefore the said

reimbursement cannot be treated as FTS under India Japan DTAA. The assessee vide letter dated 26.12.2022 submitted that

“With respect to Reimbursement of Salary

It is humbly submitted that owing to the business requirements and on specific requests made by Indian AEs, the Assessee has dispatched some of its employees to the Indian AEs on secondment as expatriates. To facilitate the expatriate arrangement, the Assessee has entered into individual 'Expatriation Agreements' with Indian AEs (as submitted vide reply dated 16 December 2022 and again vide reply dated 23 December 2022). In accordance with the said agreement, during their term of dispatch, all such employees belong to the Indian AEs and work under supervision and control of Indian AEs as their employees. Further, Indian AEs have also entered into separate employment agreements / contracts with the respective seconded employees (as already submitted vide our reply dated 23 December 2022.”

2.3 The Ld.AO observed that the services squarely fall under the ambit of managerial and technical services provided by the seconded employees. The Ld.AO thus held that the same falls within the ambit of FTS both under IT Act and DTAA between India and Japan. The Ld.AO thus proposed to make addition in the hands of the assessee amounting to Rs.2,73,78,299/- as FTS. On receipt of the draft assessment order, assessee preferred objections before the DRP. Before the DRP, assessee had submitted additional evidence in support of its claim of reimbursement of other expenses such as debit notes issued by the assessee to the Indian entities. However, on remand being called from the Ld.AO, it was noted that they were held to be technical in nature. The DRP thus upheld the view taken by the Ld.AO in the draft assessment order. On receipt of the draft assessment order, the Ld.AO passed the final assessment order by making addition in the hands of the assessee.

2.4 Aggrieved by the final assessment order, the assessee is in appeal before this *Tribunal*.

3. At the outset, the Ld.AR submitted that identical issue has been considered in assessee's own case for A.Y. 2019-20 in *IT(IT)A No. 800/Bang/2022* vide order dated 16.12.2022. He submitted that the facts for the year under consideration is identical to the facts considered by this *Tribunal* in assessee's own case in the preceding assessment year. He also placed reliance on the decision of *Coordinate Bench of this Tribunal* in assessee's own case for A.Y. 2020-21 in *IT(IT)A No. 172/Bang/2023* vide order dated 31.05.2023. The Ld.AR submitted that for the year under consideration, 21 employees were seconded under similar circumstances; the details of whom have been reproduced in the draft assessment order. These employees were appointed at various positions and TDS have been deducted against the salary paid by the Indian AE. It is also submitted that, all the expat employees retain their status as employees of assessee but were under direct control of the Indian company during the secondment period.

4. Ground nos. 3 to 3.10 are in respect of disallowance of employee cost reimbursement received from the Indian AE in respect of the seconded employees.

4.1 The Ld.AR submitted that TDS has been deducted on the entire salary paid by Indian AE to the seconded employees in

India and what is reimbursed is the payment which has been partly made out of the total salary by the assessee to the families of such seconded employees. The Ld.AR submitted that though the 100% salary has been subjected to TDS, by Indian AE, the assessee has paid part of that salary to the family of seconded employees in Japan and balance of the salary was paid to the employees in India. It is submitted that the amount paid by assessee to family of seconded employees was received as cost reimbursement from Indian AE. The Ld.AR submitted that all the details relevant in respect of the salaries and the TDS deduction done by the Indian AE were submitted before the authorities below which has not been considered. He has placed reliance on the observation of Coordinate Bench of this *Tribunal* in case of *M/s. Toyota Boshoku Automotive India Pvt. Ltd. vs. DCIT* reported in (2022) 138 *taxmann.com* 166 and in the case of *Goldman Sachs Services Pvt. Ltd. vs. DCIT* reported in (2022) 138 *taxmann.com* 162. Identical issue has been considered at length.

4.2 On the contrary, the Ld.DR placed reliance on orders passed by authorities below.

We have perused the submissions advanced by both sides in the light of records placed before us.

4.3 We note that the evidences in the form of Form 16, TDS having deducted in the hands of the employee and whether the reimbursement received by the assessee forms part of the salary paid to the seconded employees and taxed in India filed by assessee has not been considered by the revenue authorities.

4.4 We therefore remand this issue to the Ld.AO to consider the claim in accordance with the principles laid down by *Coordinate Bench of this Tribunal* in the above referred cases *M/s. Toyota Boshoku Automotive India Pvt. Ltd. vs. DCIT (supra)*, *Goldman Sachs Services Pvt. Ltd. vs. DCIT (supra)*, having regard to the evidences filed by the assessee. Needless to say that proper opportunity of being heard must be granted to assessee in accordance with law.

Accordingly ground nos. 3 to 3.10 raised by assessee stands allowed for statistical purposes.

5. Ground nos. 4-5: It is submitted that the Ld.AO has erred on the facts and circumstances of the case and in law in considering the reimbursement of other expenses of INR 17,75,693 to be salary reimbursements and the same to be taxable as FTS, without providing any valid reasons for holding so.

5.1 The Ld.AR submitted that, while passing the draft assessment order, Ld. AO chose to tax other reimbursements to be in the nature of salary reimbursement, without any cogent reasons. He submitted that, such expenses were miscellaneous expenses (in the nature of product insurance premium, diary cost etc.) that were paid by the assessee on behalf of the Indian entities which were later recovered on a cost-to-cost basis by the assessee by way of debit notes.

5.2 It is submitted that the Ld.AO failed to provide proper opportunity of being heard in respect of this issue before making the impugned adjustment. It is also submitted that the assessee was not served with any show cause notice for the impugned adjustment and thus, the draft order was passed in violation to the principles of natural justice is not valid in law.

5.3 The Ld.AR submitted that against the draft assessment order, the assessee preferred objections before the DRP. The assessee filed additional evidences to support its claim of reimbursement of other expenses such as debit notes issued by the assessee to the Indian AE against which a remand report was called for by the DRP. The Ld.AR submitted that in the remand report, the Ld.AO has considered the nature of expenses to be for technical services.

The DRP followed its decision by the earlier panel for A.Y. 2020-21 and disallowed the claim by observing as under:

“Having considered the submission of the assessee, remand report of the AO we note that the expenses incurred on the database, insurance premium, etc are eventually for imparting services by the expats in the Indian entity and therefore they are also in the nature of fees for technical services.

In view of the above discussion we are of the opinion that the services rendered and other expenses incurred by the assessee in India were for the benefit of the Indian entity and therefore income was accrued and arise in India in the form of Fees for technical services, accordingly the objections raised by the assessee is rejected.”

5.4 We note that the authorities below have not analysed the nature of the alleged expenses that has been submitted to be

reimbursement of actual cost. It has not been analysed whether there is an element of income which went untaxed by the Indian AE, before making the payment to the assessee. The authorities below have proceeded on the footing that the payment made is in the nature of salary. Insofar as the *Coordinate Bench of this Tribunal* for preceding years relied by the Ld.AR, we note that this issue was not separately raised.

Under such circumstances, we remand this issue to the Ld.AO/TPO to verify the alleged expenses i.e. reimbursed to the assessee. The invoices raised by assessee to the Indian AE may be called for and the exact nature of the expenses may be ascertained. We accordingly direct the Ld.AO/TPO to carry out necessary verification and to consider the claim in accordance with law. Needless to say that proper opportunity of being heard must be granted to assessee.

In the result, the appeal filed by the assessee stands allowed for statistical purposes.

Order pronounced in the open court on 25th April, 2024.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 25th April, 2024.
/MS /

Copy to:

1. Appellant
3. CIT
5. Guard file

2. Respondent
4. DR, ITAT, Bangalore
6. CIT(A)

By order

Assistant Registrar,
ITAT, Bangalore