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

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.2169/Del/2023
Assessment Year: 2020-21

Volvo Information Technology AB, 5, 40508 Gothenburg, Goteborg, Sweden	**Vs.**	DCIT, Circle- Intl. Taxation-3(1)(1), New Delhi
PAN :AADCV2382G		
(Appellant)		**(Respondent)**

Assessee by	Sh. Ajay Vohra, Sr. Advocate Ms. Shaily Gupta, CA Ms. Soumya Jain, CA
Department by	Ms. Banita Devi Naorem, CIT (DR)

Date of hearing	19.04.2024
Date of pronouncement	07.05.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

Captioned appeal has been filed by the assessee challenging the final assessment order dated 27.06.2023 passed under section 143(3) read with section 144C of the Income-tax Act, 1961

(in short 'the Act') in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Ground No. 1 of the main grounds is general in nature, hence, does not require specific adjudication.

3. In ground no.2 of the main grounds, the assessee has challenged the validity of the assessment order stating that it is barred by limitation in terms of section 153(1) of the Act. Whereas, in ground no. 3 and additional grounds, the assessee has questioned the validity of DRP's direction in absence of proper Document Identification Number (DIN). However, at the outset, Sh. Ajay Vohra, learned Senior Counsel appearing for the assessee, on instructions, submitted that he would argue the appeal on merits only and the legal issues raised in ground nos. 2, 3 and additional ground, need not be adjudicated at this stage, but be kept open. Further, on instructions, he submitted that ground nos. 4 and 5 are not pressed. Accordingly, ground nos. 4 and 5 are dismissed.

4. The issue on merits arising for consideration, in terms of ground nos. 6, 7 and 8, is in relation to taxability of Rs. 114,31,40,765/- as Fee for Technical Services (FTS) in terms of

Article 12 of India – Sweden Double Taxation Avoidance Agreement (DTAA).

5. Briefly the facts relating to this issue are, the assessee is a non-resident corporate entity incorporated in Sweden and a tax resident of that country. As observed by the Assessing Officer, the assessee is a part of the Volvo Group and is engaged in providing Information Technology ('IT') solutions, particularly catering to IT needs of automotive industries. For the assessment year under dispute, the assessee filed its return of income on 11.12.2020, declaring nil income claiming refund of TDS, amounting to Rs.11,43,58,540/- In course of assessment proceedings, the Assessing Officer called upon the assessee to furnish the details of receipts earned from India corresponding to the TDS. He also called for various other details. On examining the materials on record, he observed that in terms with agreement entered by the assessee and other entities of Volvo Group with three entities in India, viz., Volvo Group India Pvt. Ltd., Volvo Financial Services (India) Pvt. Ltd. and Volvo Eicher Commercial Vehicle Ltd, the assessee has provided various IT facilities for running their business operations. For providing such services

during the year, the assessee has received payment, amounting to Rs.114,31,40,765/-.

6. On going through the agreement with the Indian group entities, he observed that the assessee is providing various services, such as, Business Application related Services, End User Services and Shared Infrastructure, Volvo Corporate Network, Business Consultancy (including, projects and professional services), Support to IT Division and Volvo India entities for local services etc. After examining the nature of services, the Assessing Officer was of the view that the receipts earned by the assessee for providing such services are in the nature of FTS under Article 12 of India – Sweden DTAA. Therefore, he issued a show-cause notice to the assessee, as to why the receipts should not be treated as FTS under the treaty provisions. In response to the show-cause notice, the assessee furnished its reply stating that the services rendered to Indian entities are routine standard services, hence, do not fall under the ambit of FTS.

7. Without prejudice, the assessee further submitted that in view of Most Favoured Nation (MFN) clause incorporated in India – Sweden DTAA vide Protocol to the said DTAA, the more

restrictive scope of DTAA as provided under India – Finland and India – Portugal DTAAs, should be imported to India – Sweden DTAA. It was submitted that as per the restrictive scope of FTS under India – Finland and India – Portugal DTAAs, unless the services are made available, they will not fall within the scope and ambit of FTS/FIS. The assessee further submitted that the receipts cannot be treated as FTS, even in terms of Article 12(4)(a)of India – Portugal DTAA, as, such fees are not ancillary or subsidiary to any royalty income. Thus, it was pleaded by the assessee that the income cannot be treated as FTS under Article 12(3) of India – Sweden DTAA read with Article 12(4) of India – Portugal DTAA. The Assessing Officer, however, was not convinced with the submissions of the assessee.

8. Referring to Article 12(3) of India – Sweden DTAA, the Assessing Officer held that the scope and ambit of the said provision is wide enough to include the receipts earned by the assessee. In this context, the Assessing Officer observed that the restrictive provisions of India – Portugal and India – Finland treaties cannot be automatically imported to India – Sweden treaty in absence of a separate notification issued by India

incorporating such provision in India – Sweden DTAA. In the aforesaid premises, the Assessing Officer ultimately concluded that the receipts to the tune of Rs.114,31,40,765/- are to be treated as FTS under Article 12(3) of India – Sweden DTAA and taxable at the rate of 10% on gross basis. Accordingly, he framed the draft assessment order. Against the draft assessment order so framed, the assessee raised objections before learned DRP. However, learned DRP concurred with the view expressed by the Assessing Officer. In terms with the directions of learned DRP, the impugned assessment order was passed.

9. Before us, while opening his arguments on the issue, learned Senior Counsel appearing for the assessee, at the very outset, fairly conceded that the issue relating to applicability of MFN clause under Protocol to India – Sweden DTAA stands decided against the assessee in view of the decision of Hon'ble Supreme Court in case of AO *vs.* M/s Nestle SA, [Decision dated 19.10.2023 in Civil Appeal No. 1420 of 2023] (SC). Thus, he submitted, his arguments will be based on the applicability of Article 12(3) of India – Sweden DTAA.

10. Proceeding further, he submitted that Master Services Agreement was entered into between AB Volvo and Volvo India Pvt. Ltd. on 01.04.2001 under which the Indian entity was permitted to undertake manufacturing of vehicles under the brand name 'Volvo'. He submitted, the purpose of agreement was to grant licence to Indian entities to manufacture vehicles as per the standard of Volvo Group. He further submitted that by way of addendum to the said agreement, it was agreed between the parties that AB Volvo along with its affiliates will provide services with all technical and necessary managerial assistance required for manufacturing the vehicle. He submitted, in pursuance to the Master Services Agreement, for provision of IT assistance, assessee entered into a separate and specific General Business Contract Agreement (GBC) with AB Volvo and its affiliates in the year 2012. He submitted, pursuant to this agreement, Indian entities are making payments to the assessee for availing IT support services since the year 2012. He submitted, in assessment year 2014-15, the Assessing Officer after analyzing the facts including the agreements, concluded that the receipts

from Indian entities are in the nature of royalty in terms of Article 12 of India – Sweden DTAA, which was approved by the DRP.

11. He submitted, identical stand was taken by the Department till 2017-18. He submitted, after the decision of Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT, [2021] 432 ITR 471 (SC), the Assessing Officer, being conscious of the fact that the receipts cannot be treated as royalty, for the first time, while completing assessment for assessment year 2018, held that the receipts are in the nature of FTS under Article 12(3) of India – Sweden DTAA. He submitted, the same position is being followed by the Department in subsequent assessment years. He submitted, the nature of receipts from Indian entities can be determined only in the first year of assessment. He submitted, once the nature of receipts was examined and held to be in the nature of royalty, the same cannot be re-characterized to FTS in the subsequent years in absence of any change in facts as the rule of consistency would apply. In this context, learned counsel relied upon the following decisions:

1. *Radhasoami Satsang Vs. CIT, 193 ITR 321 (SC)*
2. *CIT Vs. Kotak Securities Ltd. [2016] 67 taxmann.com 356 (SC)*
3. *CIT Vs. Excel Industries Ltd, 358 ITR 295 (SC)*

4. *CIT Vs. Neo Polypack (P) Ltd., 245 ITR 492 (Delhi)*
5. *Johnson Matthey India Pvt. Ltd. Vs. DCIT, ITA No. 14/2013 (Delhi)*
6. *CIT Vs. Alstom Projects India Ltd., 394 ITR 141 (Bombay)*
7. *Pr. CIT Vs. Nippon Leakless Talbross Pvt. Ltd. 455 ITR 335 (P&B)*
8. *SC Enviro Agro India Ltd. Vs. DCIT (ITA No. 704/Mum/2012)*
9. *Donaldson India Filter Systems (P) Ltd. Vs. DCIT, 101 taxmann.com 66 (ITAT, Delhi)*
10. *NIIT Ltd. Vs. DCIT, 180 ITD 141*

12. Without prejudice, he submitted that the nature of support services provided by the assessee are standard and routine services, hence, cannot be considered as managerial, technical or consultancy services to bring it within the ambit of Article 12(3) of the tax treaty. To buttress his submission, learned Senior Counsel took us through various clauses of the agreement to emphasize that the services rendered are not specialized services. In support of such contention, he relied upon a decision of the Hon'ble Supreme Court in case of CIT Vs. Kotak Securities Ltd. (supra). Thus, he submitted, the receipts, being in the nature business income, cannot be taxed in India in absence of a Permanent Establishment (PE).

13. Learned Departmental Representative, on the other hand, strongly relied upon the observations of the Assessing Officer and learned DRP. Further, he submitted, if the Assessing Officer has made a mistake in characterizing the nature of income in earlier assessment years, the same mistake cannot be permitted to be perpetuated for all times to come. He submitted, what is essential is to determine the exact nature and character of income keeping in view the provisions of the Act and the relevant DTAA. He submitted, if on examination of facts on record, the Assessing Officer rectifies his earlier mistake and determines the real nature and character of the income, it cannot be questioned. He submitted, rule of consistency cannot tie the hands of the Assessing Officer to assess the income correctly as each assessment year is a separate unit and the Assessing Officer has to examine the nature and character of the income in each year.

14. We have considered rival submissions and perused the materials on record. We have also applied our mind to the decisions relied upon. Undisputedly, the assessee has entered into an agreement with the Indian group entities for providing various services as discussed elsewhere in the order. Under

Business Application Related Services, the assessee provides access to the business application softwares, which are used for various purposes, such as, inventory management, sales management, data warehousing applications, product design and modeling, human resource management etc. Under the End User Services and Shared Infrastructure, the assessee provides facilities and various services keeping in view the End User requirement, such as, emails, personal computer environment, voice/telephone. Under the voice support, mobile and fixed voice services are provided to connect people in local and global context. Under the IT support services, the assessee operates service desk for all types of IT related issues from end users. Under the Volvo Corporate Network, assessee provides a secured access to Volvo Network, which is prerequisite for use of any business application other IT services provided by the assessee. The assessee also provides Business Consultancy Services in terms of which it renders consultancy services with respect to IT services provided by it.

15. Though, the assessee has claimed that these are standard and routine services, however, fact remains that the assessee has

provided managerial, consultancy and technical services. Copies of invoices placed in the paper-book do not provide the description/details of services provided. At this stage, we may look into the definition of FTS under Article 12(3)(b) of India – Sweden DTAA, which reads as under:

> *"Article 12(3)(b)- The term 'fees for technical services, means payment of any kind in consideration for rendering of any managerial, technical or consultancy services including the provisions of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention."*

16. As could be seen, the definition of FTS under the treaty covers any kind of payment for rendering of any managerial, technical or consultancy services including provision of services by technical or other personnel. Thus, the definition of FTS under Article 12(3)(b) is wide enough to cover all kinds of payments made towards managerial, technical or consultancy services. It is fairly well settled that rules of interpretation of statute will not apply while interpreting treaty provisions. The treaty provisions are to be interpreted based on the language used in the treaty. If we go by the language used in Article 12(3)(b) of the treaty, one cannot escape the conclusion that the payments received by the

assessee are in the nature of FTS. Though, we respectfully agree with the ratio laid down by Hon'ble Supreme Court in case of CIT Vs. Kotak Securities Ltd. (supra), however, any attempt to equate the services rendered by the assessee to the services rendered by the Bombay Stock Exchange (BSE) would amount to over simplifying the issue. The facts on record clearly reveal that the services rendered by the assessee are more complex in nature compared to the services rendered by BSE, as considered in case of CIT Vs. Kotak Securities Ltd. (supra).

17. In any case of the matter, the issue before us is whether the receipts qualify as FTS in terms of Article 12(3)(b) of India – Sweden DTAA. In our view, the definition of FTS under the aforesaid Article is wide enough to cover the amounts received by the assessee towards various services provided to Indian group entities.

18. Now, reverting back to the first part of learned Senior Counsel's argument that applying rule of consistency, the Assessing Officer cannot re-characterize the receipts as FTS, as, in the earlier assessment years, he has consistently treated identical receipts as royalty. Though, it may be a fact that in the

earlier assessment years, the Assessing Officer might have treated similar receipts as royalty, however, that cannot preclude the Assessing Officer to freshly examine the nature of receipts in a subsequent assessment year, as, each assessment year, being an independent unit, the principle of res-judicata does not apply to tax proceedings. Furthermore, in case, the Assessing Officer has made a mistake in the earlier assessment years in characterizing the nature of income, that cannot be allowed to be perpetuated forever. In the facts of the present appeal, undoubtedly, the assessee has rendered certain services to the group entities in India and received payments. Therefore, the nature and character of such services, whether managerial, technical or consultancy have to be examined. Obviously, the receipts qua managerial, technical or consultancy services would definitely fall within the ambit of FTS and not royalty.

19. In the instant case, the Assessing Officer has examined the nature of receipts in respect of certain services rendered by the assessee to the Indian entities and found them to be FTS. The aforesaid factual position is not disputed even by the assessee. Therefore, it is established on record that the receipts are in

respect of certain services rendered by the assessee. If that is the case, it needs to be examined, whether the receipts in relation to services rendered fall within the definition of FTS. The Assessing Officer, in our view, has done exactly the same. Therefore, the action of the Assessing Officer in characterizing the receipts as FTS cannot be called into question by advancing the theory of rule of consistency. Thus, in our view, the judicial precedents cited before us by learned Senior Counsel would be of no help to the assessee, as, what is essential to determine is, the nature and character of receipts in the instant assessment year and not, what the Assessing Officer has erroneously held in earlier assessment years. Thus, on overall consideration of facts and materials on record, we hold that the payments received by the assessee for providing certain services to the Indian group entities are in the nature of FTS as defined under Article 12(3)(b) of India – Sweden DTAA, hence, taxable.

20. As far as grounds raised by the assessee regarding applicability of MFN clause under the Protocol to India – Sweden treaty so as to import the restrictive definition of FTS under India – Portugal and India – Finland DTAAs, in our view, the issue is no

more res-integra in view of the ratio laid down by the Hon'ble Supreme Court in case of Nestle SA (supra). Ground Nos. 6 to 8 are decided accordingly.

21. In ground no. 9, the assessee has raised the issue of levy of interest amounting to Rs.10,00,990/-. In course of hearing, it was brought to our notice by learned Senior Counsel that assessee's rectification application is still pending before the Assessing Officer.

22. Having considered rival submissions, we direct the Assessing Officer to verify assessee's claim in the context of facts and materials on record and decide the issue in accordance with law, after providing reasonable opportunity of being heard to the assessee.

23. In ground no. 10, the assessee has raised the issue of non-grant of TDS credit on the interest issued under section 244A of the Act.

24. Having considered rival submissions, we direct the Assessing Officer to factually verify assessee's claim and decide in accordance with law.

25. Ground no. 11 is premature at this stage, hence, dismissed.

26. In the result, the appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 7th May, 2024

Sd/-	***Sd/-***
(Dr. B.R.R. KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 7th May, 2024.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi