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

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

Sh. Anubhav Sharma, Judicial Member

ITA No. 3691/Del/2023 : Asstt. Year: 2021-22

&

SA No. 36/Del/2024 : : Asstt. Year: 2021-22

SNC Lavalin Inc., A-32, First Floor, Khasra No. 56, Village Amberahi, Sector-19, Dwarka, New Delhi-110075	Vs	ACIT, International Taxation, Circle-3(1)(2), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AAKCS5626H		

Assessee by : Sh. S. K. Aggarwal, CA
Revenue by : Sh. Vizay B. Vasanta, CIT-DR

Date of Hearing: 02.04.2024		**Date of Pronouncement: 25.06.2024**

ORDER

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

The present appeal has been filed by the assessee against the order of ld. PCIT-12, Delhi dated 16.03.2020.

2. Following grounds have been raised by the assessee:

"1. On the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel ('Hon'ble DRP') and the Learned Assistant Commissioner of Income Tax, Circle International Tax 3(1)(2), New Delhi ('Ld. AO') (collectively referred as "the Revenue") erred in proposing the addition of Rs. 7,41,83,452.

2. The Revenue erred in proposing the addition in relation to GIT infrastructure charges ('GIT charges') without appreciating that the receipts of GIT charges ('GIT Charges) by the Appellant from its group companies for use of various software shall not be taxable as Fee for Included Services ('FIS') / Fee

for Technical Services ('FTS') under section 9(1)(vii) of the Act read with the Article 12 of India-Canada DTAA.

2.1. Based on the facts and circumstances of the case and in law, the receipts of the Appellant from GIT charges to its group companies for use of various software shall not be taxable as FTS / FIS as per beneficial provisions of Article 12(4) of the India-Canada DTAA, as the Appellant does not make available any technical knowledge, experience, skill, know- how, or processes or consist of the development and transfer of a technical plan or technical design under Article 12(4) of India-Canada DTAA.

2.2. Based on the facts and circumstances of the case and in law, the receipts of the Appellant from Indian group entities in relation to non-exclusive, non-transferrable licensed software (owner by third party vendors) shall not be taxable as decided by the Hon'ble Supreme Court in the case of Engineering Centre of Excellence Private Limited v CIT [2021] 125 taxmann.com 42 (SC).

2.3. The Appellant prays that the conclusion that the income in nature of consultancy in the hands of appellant is taxable as FIS under the provisions of Income-tax Act and also under the relevant provision of India-Canada DTAA is erroneous, unwarranted and should be deleted.

General

3. On the facts and in the circumstances of the case and in law, the Ld. AO erred in proposing to initiate penalty proceedings u/s 270A of the Act for under reporting of income."

3. The assessee company is incorporated in Canada and is a tax resident therein. It is engaged in the business of rendering consultancy, design, and engineering services to various clients. The assessee filed its return of income u/s 139(1)/139(9) of the Income Tax Act, 1961 for A.Y. 2021-22 declaring total income of Rs. 41,36,27,860/- out of which Rs.34,05,55,800/- was declared to be taxed at the rate of 15% and receipts of Rs.7,41,83,452/- being amount cross charged from group companies in India for use of third-party standard software were claimed as non-taxable under India-Canada DTAA.

4. In A.Y. 2021-22, the assessee cross charged Rs. 7,41,83,452/- from group companies for actual use of various third-party standard software like Auto CAD software, Civil 3D, 3ds Max, etc. which is called GIT Infrastructure ('GIT') charges in the books of accounts. The assessee as a measure of commercial expedience, acquires software licenses from third-party owners for use in its business of providing engineering services to its clients, and also use of such software licenses by the group companies from which it cross charges the cost of software license plus mark-up based on actual use by the group companies.

Excerpts Assessment proceedings u/s 143(3) r.w.s 144C of the Act:

5. The Assistant Commissioner of Income Tax, Circle International Tax-3(1)(1), Delhi issued draft assessment order u/s 144C(1) of the Act dated December 27, 2022 wherein the AO proposed an addition of Rs. 7,41,83,452 in relation to above amount cross charged from group companies for use of third-party software (GIT charges) alleging it to be taxable as FIS under the provisions of the Act and India-Canada DTAA.

6. Aggrieved by the draft assessment order, the assessee filed objections before the ld. DRP on January 23, 2023. The ld. DRP passed its directions on September 13, 2023, affirming the action of the Assessing Officer.

7. Pursuant to directions of the ld. DRP, The AO passed the final assessment order dated October 18, 2023, u/s 143(3)

r.w.s. 144C of the Act and determined taxable income of the Appellant for AY 2021-22 making the addition of Rs.7,41,83,452/- being the amount cross charged from group companies for use of third- party software (GIT charges), alleging as FTS/ FIS under India- Canada DTAA.

8. Aggrieved, the assessee filed appeal before the Tribunal.

9. The ld. AR submitted that the assessee raised monthly invoices/ debit notes for amount cross charged for use of third-party owned software licenses i.e., Auto CAD software, Civil 3D, 3ds Max, etc. (GIT charges) from its group companies. The Appellant has enclosed the sample copies of debited notes and sample copy of agreement with group company. It was submitted that the licensor of the said software is third-party vendor and the SNC group companies merely use these software on need basis.

10. At the outset, it was argued that the debate whether the use of third-party software is Royalty under DTAA stands settled by the judgement of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited v The Commissioner of Income Tax & ANR (Civil Appeal Nos. 8733-8734 of 2018) wherein the Hon'ble Supreme Court held that grant of non-exclusive software license is not use or right to use the copyright and hence, not in the nature of Royalty under DTAA. It was argued that the Assessing Officer in the assessment order held the amount cross charged from group companies for use of third-party software as FIS under India-

Canada DTAA. In doing so, the AO wrongly alleged that the amount cross charged is for IT services and meets the condition of make available provided in the definition of FIS under India-Canada DTAA. It was argued that the receipts from the GIT charges are not in the nature of Fee for Included Service ('FIS') as envisaged under Article 12(4)(b) of the India-Canada DTAA And the allegations made in the assessment order are factually incorrect and there is no basis to hold that the amount cross charged from group companies for use of third-party software meets the conditions of "make available".

11. On the other hand, the ld. DR supported the order of the ld. DRP.

12. Heard the arguments of both the parties and perused the material available on record.

13. Article 12(4) of the India Canada DTAA defines Fee for Technical Services as:

"For the purposes of this Article, 'fees for Technical services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of 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.

14. Further, as per the above definition, FIS means payment for technical or consultancy services which additionally satisfy the conditions specified under clause (b). In view of the conditions as per clause (b), as per the India-Canada DTAA, FIS means any payment for technical or consultancy services which make available technical knowledge, skill, know-how or process.

Meaning of 'make available'

15. The meaning of the term make available has been explained as per the Memorandum of Understanding of the India-USA DTAA concerning FIS in Article 12 ('MOU'). "Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to "make the technology available." The concept of 'make available' has been interpreted as transmitting the technical knowledge so that the recipient of service can derive an enduring benefit and utilize the technical knowledge or skill in future on his own without the aid of the service provider. In other words, to fit into the terminology "make available", the technical knowledge, skills etc. must remain with the person receiving the services even after the particular contract comes to an end.

16. Further, various judicial precedents have also dealt with the issue as to what constitutes make available, especially in light of the provisions of the India-USA DTAA and the MOU to the India-USA DTAA. As per the judicial precedents, services are said to be made available when as a result of provision of such services, the recipient of the services is enabled to perform such services in the future on its own without recourse to the service provider. Mere provision of technical services shall not suffice for consideration for services to qualify as FIS.

17. In this regard, the reliance is being placed on the judgment of the Hon'ble Jurisdictional Delhi High Court in the case of DIT vs. Guy Carpenter & Co. Ltd. (2012) 346 ITR 504 (Delhi) where it has been held as under:

"We find that the common thread in all these tax treaties is the requirement of 'make available' clause. As learned counsel rightly puts it, its not simply the rendition of a technical service which is sufficient to invoke the taxability of technical services under the make available clause. Additionally, there has to be a transfer of technology in the sense that the user of service should be enabled to do the same thing next time without recourse to the service provider. The services provided by non residents did not involve any transfer of technology. It is not even the case of the Assessing Officer that the services were such that the recipient of service was enabled to perform these services on its own without any further recourse to the service provider. It is in this context that we have to examine the scope of expression 'make available'."

18. Similar views expressed by various forums of the judiciary in a plethora of judgments:

- Cushman and Wakefield Pte. Ltd (2008) 305 ITR 208 (AAR)
- Invensys Systems Inc., In Re (2009) 317 ITR 438 (AAR)
- Federation of Indian Chamber of Commerce and Industry (2010) 320 ITR 124 (AAR)
- Ernst & Young (P) Ltd (2010) 323 ITR 184 (AAR)
- R. R. Donelley India Outsource Private Ltd (2010) 241 CTR 305 (AAR)
- C.E.S.C. Ltd. vs. Deputy Commissioner of Income-tax (2003) 87 ITD 653 (Kolkata)
- Raymond Ltd. vs. Deputy Commissioner of Income-tax (2003) 86 ITD 791 (Mumbai)
- NQA Quality Systems Ltd. vs. DCIT (2005) 92 TTJ 946 (Delhi)
- Me Kinsey and Co. vs. ADIT 284 ITR (AT) 227
- Cable and Wireless Networks India (P) Ltd. vs. DIT (2009) 315 ITR 72 (AAR)
- Dell International Services India Pvt. Ltd. vs. CIT (Intl. Taxation) (2008) 218 CTR 209 (AAR)
- DCIT vs. PanAmSat International Systems Inc. (2006) 9 SOT 100 (Delhi)
- Cummins Ltd., In re (2016) 283 CTR 241 (AAR - New Delhi)
- Nielsen Company vs. Deputy Commissioner of Income Tax (2019) 109 taxmann.com 264 (Mumbai - Trib.)
- EOS Power India (P.) Ltd. vs. Deputy Commissioner of Income Tax (2019) 108 taxmann.com 417 (Mumbai - Trib.)

19. Basis the above, it can be held that the assessee do not "make available" any technical knowledge, experience, skill, know-how or processes to group companies which may enable

them to apply any technology contained therein without recourse to the Appellant. The amounts received as GIT charges is only for providing use of third-party software and is not in the nature of FIS as envisaged under Article 12(4)(b) of India-Canada DTAA.

20. We have considered as to whether the receipts can be considered as royalty as per Article 12 India-Canada DTAA has also been examined.

21. We find that the facts of the assessee are covered by the decision of Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Private Limited vs. CIT (CA Nos. 8733-8734 of 2018), the Hon'ble Supreme Court, after determining various clauses of EULA/ Distribution agreement held that payments made by the Appellant to non-resident vendors shall not be taxable as Royalty under the relevant DTAA, the relevant extract of decision is as under:

"Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright The provisions contained in the Income Tax Act (section 9(1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the appellant have no application in the facts of these cases.

Our answer to the question posed before us, is that the amounts paid by resident Indian end- users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act."

22. In the light of above, we hold that payment made by Indian group entities to the Appellant is in consideration for use of software provided by third party vendor and is towards the 'copyrighted article', without any copyrights being granted for its commercial exploitation, hence, the same shall not qualify as 'Royalty' as per Article 12(3) of the India-Canada DTAA.

23. In the result, the Appeal of the assessee is allowed, the Stay Application of the assessee is dismissed as infructuous.
Order Pronounced in the Open Court on 25/06/2024.

Sd/-	**Sd/-**
(Anubhav Sharma)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 25/06/2024
Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR