

**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. 2393/Del/2023 : Asstt. Year: 2020-21**

**&**

**SA No. 326/Del/2023 : Asstt. Year: 2020-21**

Korn Ferry (US), 1900, Avenue of the Stars, Suite 1500, Los Angeles, California,	Vs	ACIT, International Taxation, Circle-1(1)(2), New Delhi-110002
(APPELLANT)		(RESPONDENT)
<b>PAN No. AAFCK6169C</b>		

**Assessee by : Sh. Deepak Chopra, Adv. &  
Ms. Manasvini Bajpayi, Adv.  
Revenue by : Sh. Vizay B. Vasanta, CIT-DR**

**Date of Hearing: 09.05.2024**

**Date of Pronouncement: 29.07.2024**

**ORDER**

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

The present appeal and Stay Application has been filed by the assessee against the order dated 26.06.2023 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

**"Re: Jurisdictional Ground**

*3. That the directions dated 28.04.2023 passed by the DRP are void ab initio arid non-est as the same have been issued without a valid document Identification Number (DIN) and falls foul of the pre-requisites enunciated by CBDT Circular No. 19/2019 dated 14.08.2019 mandating generation / allotment / quoting of system generated Document Identification Number on all communications/correspondence/order by the Income Tax Department.- **Not pressed***

**Payment received as "Training and Consultancy Fees" being taxed as FIS**

4. That the AO/DRP has erred in bringing to tax the receipts of INR 7,18,00,010, received as consultancy and training fees, as being in the nature of Fees for Included Services ('FIS') under Article 12 of the India-USA Double Taxation Avoidance Agreement (DTAA) read with section 9(1)(vii) of the Act

5. That the AO/DRP failed to appreciate that in absence of any "make-available", payments received by the Appellant as consultancy fees could not be taxed as FIS under Article 12 of the India-USA Double Taxation Avoidance Agreement ('DTAA') read with section 9(1)(vii) of the Act.

6. That the AO/DRP failed to appreciate that the training(s) were provided to employees of the customers for their internal consumption and hence, would not satisfy the requirement of "make-available under Article 12(4)(b) of the India-US DTAA

7. That assuming, without admitting, that these trainings were technical in nature, even then they cannot be taxed as FIS under Article 12(4)(b) of India- US DTAA, as "technical trainings have been specially excluded from the ambit of FIS under the Protocol to India-US DTAA.

8. That the AO/DRP failed to appreciate that mere technical input by the person providing the service does not per se mean that technical knowledge, skills, etc, have been made available to the person receiving the service.

9. That apart from making general observations, the AO/DRP have failed to discharge the onus cast upon them to establish as to how the recipient of such services could apply the same.

10. That the AO/DRP also failed to appreciate that these services were recurring in nature which clearly establishes that there was no element of "make-available" and it was repeat business for the Appellant.

**Re: Reimbursements on account of General Management Charges being taxes as FIS**

11. That the AD/ DRP erred in taxing payments of INR 55,29,572, received as General Management Charges as FIS under Article 12 of the India-USA DTAA as well as section 9(1)(vi) of the Act, whilst completely ignoring that these payments were in the nature of pure reimbursement and did not involve any element of income

12. That on the facts and circumstances of the case and in law, the AO/DRP have grossly erred in not appreciating that the predominant character of the transaction was reimbursement of

*the license fees paid by the Appellant to the seller/s (such as Cyberreason Antivirus, LinkedIn, Microsoft) on behalf Futurestep Recruitment Services Private Limited and Hay Consultants India Private Limited (both of which are group companies) and therefore, payment received in lieu of subscription charges would not constitute "FIS" under Article 12 of the India- US DTAA or section 9(1)(vii) of the Act, in the hands of the Appellant, as it was merely a pass-through entity.*

*13. Without prejudice to the above, assuming without admitting, that these payments were not in the nature of reimbursement, the same would not partake the character of FIS, as no knowledge/skill/know-how was made available*

*14. That the AD erred in levying interest under section 234B of the Act.*

*15. On the facts and circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 274 read with section 270A of the Act."*

3. The assessee company is incorporated under the laws of USA and is engaged in the business of providing consultancy and professional services. During the year, the assessee received an amount of Rs.5.16 Cr. as product license fee which has been offered to tax as royalty. The amount received as Consultancy fee of Rs.5.59 Cr., Referral fee of Rs.1.68 Cr. and General Management charges of Rs.55.29 lacs have been claimed as non-taxable under India-USA DTAA under the definition of FIS.

#### **Training and Consultancy Fees –FIS:**

4. During the year, the assessee claimed to have offer consultancy services pertaining to organizational strategy, assessment & cessation, talent acquisition, leadership & professional development, evaluation of Rewards & benefits like ESOPs and compensation, payment structure.

5. The Assessing Officer held that the amount of Rs.7.18 Cr. falls under the purview of FIS under Article 12 of India-USA DTAA.

6. The Assessing Officer held that on perusal of the submission of the assessee and sample invoices provided with submission it has been observed that during the year the assessee has provided consulting services to its customers for various field like consultancy services for outlining effective talent mapping strategy and assistance in outlining organisational structure to help convert clients' plan into action, for carrying talent assessment, by comparing the clients' needs with the talent they have and talent they need, and outline strategy to help close the gap between the two, consulting services for attracting and retention of right people across all functions for leadership and professional development. The AO held that consulting services were provided to help organizations evaluate their reward such as compensation, ESOPs, etc. and payment structure from talent retention and point. Further, all the invoices were raised for professional fee and administrative fee to its clients which are related to various assignment such as Leadership, assessments, Webinar, ESOP review, Emotional Intelligence and other training programmes.

7. The AO held that the submission of the assessee revolves around to stress the fact that the services provided by the assessee doesn't make available to the group company in India and therefore the same is not taxable in India keeping in mind non-satisfaction condition of make available clause. The AO held that as per the submission of the assessee, it is clear that the

assessee disseminate its experience, know-how and expertise in various field such as strategy for talent mapping, talent assessment, leadership and professional development etc. It was held that through strategy for talent mapping the assessee helps the clients organization's workforce capable for delivering its future strategy in the terms of the skills, behaviors and mindsets for the talent at present, and the talent need to deliver for future strategy. Further, the AO held that the assessee helps its clients by consulting them to hire the right people and advise them on how to reward and motivate their workforce while developing professionals and through, consultancy services assessee helps its clients for overall comprehensive development, effective strategies that improve their organizational structures, create attractive rewards and benefits packages, build thoughtful assessment and succession programs and develop current talent and future leadership.

8. The AO concluded by holding that the services enable the clients to perform better in the area of work for development of business in which the assessee had adequate expertise. The AO held that the training has been provided by people who are highly qualified and the services were customized to suit the needs of the people. The AO held that the services provided by the assessee made the clients capable enough to solve the problems on their own.

9. The AO relied on the judgment of the Co-ordinate Bench of ITAT in the case of H.J. Heinz Company, USA in ITA No.6252/Del/2012 and Mersen India Pvt. Ltd. (20 taxmann.com 475 AAR).

10. Aggrieved, the assessee filed appeal before the Id. DRP. The Id. DRP affirmed the action of the Assessing Officer and held that "the make available" clause has been met. The order of the Id. DRP on this issue is as under:

*"5.3 The assessee filed reply to the remand report vide letter dated 27/04/2023. The assessee in its rejoinder has reiterated its contention that the consultancy service provided by it to the Indian client do not satisfy the 'make available' criteria as required in terms of Article 12 of India-US DTAA and consequently, the receipts are not taxable as FTS.*

*5.4 The Panel has considered the detailed submissions of the assessee vide Form 35A dated 27/10/2022, the DAO dated 29/09/2022, the remand report of the AO as well as the rejoinder to the remand report filed by the assessee. As per Article 12 of the India-US DTAA, FIS means consideration for rendering any technical or consultancy services if such services.....*

*(a).....*

*(b) Make available technical knowledge, experience, skill, knowhow or processes, or consist of development and transfer of a technical plan or technical design.*

*5.5 It is not in doubt that the services provided by the assessee to its Indian clients are in the nature of consultancy services. The only issue that needs to be ascertained is whether the make available criteria is satisfied in the facts and the circumstances of the case. The AO in para 4 of the remand report as well as in paras 6 to 9, 11 and 14 of the DAO has clearly established that the services rendered by the assessee are provided by the employees of the assessee who are having technical knowledge, experience and skills in their respective*

*files. Each components of the activities is complex and intricate that these cannot be understood or performed by a layman or a person with limited knowledge/ skills. None of these services can be provided by a person who does not possess technical training. Further, it is evident that the services provided by the assessee are customized to suit the needs of the customer. The customer gain the technical knowledge of resolving that issue in future independently and do better performance. The services provided by the assessee enable them in a way that if the issue comes up again, they can solve it on their own. The assessee is helping, guiding Indian customers in various strategic decision making related to their businesses. These activities do enable the customers of the assessee to better equip themselves with technical knowledge, experience, skill, knowhow or processes in respect of the services rendered by the assessee. In view of the above, panel finds no fault with the AO's arguments that the 'make available' criteria is fulfilled in this case, and accordingly the receipts on this account have been rightly held as FTS taxable as per the Act as well as the DTAA. Consequently, the objections raised in ground number 2 are rejected."*

11. Aggrieved, the assessee filed appeal before the Tribunal.
12. During the hearing, the Id. AR relied on the submissions made before the authorities below and the Id. DR supported the orders of the Id. DRP.
13. Heard the arguments of both the parties and perused the material available on record.

14. The relevant extract of India-USA DTAA is as under:

Article 12 of India-USA DTAA on "Royalties and Fees for Included Services"

For purposes of this Article, "fees for included 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:

.....

(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.

Thus, in order for a payment to qualify as FIS under the India-USA DTAA, the services should be in the nature of technical or consultancy services, and these services should "make available technical knowledge, experience, skill know-how or processes." The services which are in the nature of "technical" or "consultancy in nature and which satisfy the "make available" condition gets covered under the definition of FIS as per the India-USA DTAA.

Further, "technical services" means the services requiring expertise in a technology which could be related to a particular subject, art or craft or its techniques requiring special knowledge to be understood in the context in which it is used. FIS is meant to cover technical as are capable of being provided

by the way of providing services for a fee. Use of expertise in technology in providing the services is a requisite to treat a service as technical.

“Consultancy services” involves the provision of advice or advisory services by a professional. It can be said that not all kind of advisory could qualify as technical services. For any consultancy to be treated as technical services, it would be necessary that a technical element is involved in such advisory. Thus, the consultancy should be rendered by someone who has special skills and expertise in rendering such advisory.

“Make available” arise when the person acquiring the service is enabled to apply the technology independently. 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.

15. From the above, it can be said that mere rendering of services is not roped into FIS unless the person utilizing the services is able to make use of the technical knowledge, etc., by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill, etc. must remain with the person utilizing the services even after the rendering of the services has come to an end. Thus, the consideration for technical services can be taxed as FIS under the India- USA DTAA) only when the person acquiring the service is able to apply the technology on its own i.e. the recipient acquires a

means to an end. This means that the recipient in this situation is able to reproduce and make use of the technical knowledge, etc. by itself in the business or for their own benefit and without recourse to the performer of the services, in future. "Make available" is akin to the concept of transfer and involves the transfer of technical knowledge, experience, skill, know-how, or processes to the recipient by the service provider so that the recipient can apply the same on his own. Further, merely because the rendering of consulting service requires any expertise by the person providing the service would not per se mean that technology has been made available to the service recipient.

16. In the instant case, the assessee has received payment for rendition of consultancy service in the field of organizational strategy, talent, reward and benefits etc. While rendering of such services, the assessee does not transmit any knowledge, skill or technical know-how in a manner that clients/customers are able to perform the aforesaid functions in future on its own without recourse to the service providers and hence, the element of "make available" is absent in such services. The same is clearly evident from the fact that such services are rendered on continuous basis from preceding years. In the present case, assessee is merely providing consulting services such as organizational strategy, talent strategy, consulting in relation to rewards and benefits and related leadership and development consulting services for which clients / service recipients need to come back to assessee, as and when they

have such requirement and service recipients do not get equipped in providing such services.

17. We find that the assessee has provided services to Deloitte, Flipkart and gone through the work order and the scope of service, details of project team and cost of services. On going through the entire details, we find no technical knowledge has been made available to the client. Similarly, the review of ESOPs is a continuous process taking into consideration various parameters. Even in that, it cannot be said that the assessee "Korn Ferry" has made the clients enriched by imparting or passing permanently any technical inputs. From the terms of agreements and also from the conduct of the party, it cannot be said that the "make available" requirement has been satisfied. Hence, we hold that the services rendered were not in nature of FIS under Article 12(4)(b) of the India-USA DTAA.

**Reimbursements on account of General Management Charges:**

18. During the year, the assessee has received Rs.55,29,572/- on account of reimbursement/general management charges. The assessee submitted before the AO that reimbursement/general management charges were received by it from Futurestep Recruitment Services Pvt. Ltd. and Hay Consultants India Private Limited which are wholly-owned subsidiaries of the assessee and assessee acts as a centralized procurement center for its affiliates and obtains subscription services such as Cyberreason Antivirus, LinkedIn, Microsoft, etc. The assessee procures these services from third parties and allocates the

relevant cost to affiliates benefitting from such services, thereby achieving operational and cost efficiencies i.e., affiliates would incur higher costs and require additional resources if they were to procure such services independent of the assessee.

19. Further, the assessee submitted that the amount of Rs.55,29,572/- received by the assessee pertains to reimbursement of expenses incurred by the assessee on procurement of software subscription services. The assessee has submitted copy of Master Services Agreement entered between mResource LLC and Korn/Ferry International Futurestep. The agreement reveals that mResource LLC is hosting and operating a mobile and online services in its capacity as a Global Provider of Mobile Services on software as a Service (SaaS) basis. The assessee has taken access of these services through mResource LLC by making monthly and associated fees as per the terms of agreement. mResource LLC appoints the assessee as distributor of the platform to client companies. As per the term, for the sole purpose of enabling partner to utilization the platform for its own use or on behalf of clients.

20. The AO reproduced the relevant part of the agreement which is as under:

*"C. License to Partner*

*1. Distribution. Loop appoints Partner to be a non-exclusive distributor of the Platform to client companies described in Addendum I during the Term, for the sole purpose of enabling partner to utilize the platform for*

*its own use, or on behalf of clients or promote the platform with the relevant clients under the Agreement.*

2. *Distribution Agreement- For the avoidance of doubt, partners agrees to be bound by Loop as to recommended pricing for license and fees payable by clients in consideration for services provided to them arising out of the rights granted to Partner pursuant to clause C. 1 Loop agrees that partner may elect to procure the services on the following basis:*

a. *Direct Licensing contract with the Partner, for the partners own use, in compliance with Schedule B, Services and fees. In which case the partner may benefit from the discounted terms in Schedule B.*

b. *Direct Licensing contract with the partner, for use on behalf of clients, in compliance with schedule B; services and fees, or a SOW prepared for a specific client. In which case the partner may add mark-up or margin in accordance with the terms in schedule B to monetize the platform.*

C. *As a promoter or distributor facilitating sale of the platform to clients, in compliance with schedule B, Services and fees, or a SOW prepared for a specific client. In which case the partner may be entitled to an Agency commission of 15% calculated on the total value of the applicable client contract, and paid in the form of a separate rebate quarterly in arrears, or as required by the partner in the applicable SOW."*

21. The AO held that on perusal of the terms of the agreement, it is clear that the assessee company is providing services to its clients after obtaining the license from service providers and installed the same in its infrastructure i.e. by making centralized platform for further licensing. The assessee has charged costs only towards usages of the infrastructure and not the cost of any identified software. Further, these services were provided by the assessee on cost mark up basis as allowed in the contract quoted above. Therefore, the AO held that it is

not a case of reimbursement of expenses as was made out by the assessee due to the reason that when once a mark-up is added, the nature of the receipt goes outside the ambit of reimbursement. The AO held that the services provided by the assessee to its clients are ancillary services of technical/consultancy services which were provided by it during the year which are intrinsically linked with the core services that the assessee provides for. Holding thus, the AO treated these receipts also comes under the technical services and liable to be taxed as FTS income under the provisions of the Act as well as DTAA.

22. The AO placed reliance on the judgment in the case of Rieter Machine Works Limited Vs. ACIT (International Taxation), Circle-2, Pune (134 taxmann.com 326) wherein it was held that the costs recovered by assessee, a non-resident for third party software which was integrated into assessee's information technology infrastructure used for rendering services to an Indian company, would be taxable as 'Fees for Technical Services'/'royalty' as per relevant DTAA.

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

24. Before us, it was submitted that the assessee received Rs.28,76,000/- from Futurestep Recruitment Services Pvt. Ltd. and Rs.26,52,000/- from Hay Consultant India Pvt. Ltd. which are the only one subsidiary of the assessee. WE find that the assessee procures services from third parties and relevant costs was passed on to by the assessee to the affiliates benefiting from such services. The assessee paid to the sellers and in turn got the money reimbursed from their associates. Hence, the

same cannot be taxed. Even otherwise also, it would not partake the character of fee for inclusive services (FIS) as no knowledge or know-how was made available to the associates. The appeal of the assessee on this ground is allowed.

25. Since, the appeal of the assessee is allowed, the Stay Application filed by the assessee is dismissed as infructuous.

26. In the result, the appeal of the assessee is allowed and the Stay Application of the assessee is dismissed.

Order Pronounced in the Open Court on 29/07/2024.

**Sd/-**

**(Anubhav Sharma)**  
**Judicial Member**

**Sd/-**

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

**Dated: 29/07/2024**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

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

**ASSISTANT REGISTRAR**