

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE 'C' BENCHES :: PUNE

BEFORE SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER &
SHRI G.D. PADMAHSHALI, ACCOUNTANT MEMBER

ITA No.1285/PUN/2023
(A.Y. 2021-22)

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| BMC Software Asia Pacific Pte Ltd., 600, Singapore, 20-01/10 Parkview Square, Foreign, Singapore. PAN: AAECB 0642 A | vs | ACIT (Int. Taxation), Circle-1, Pune. |
| Appellant | | Respondent |

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| Assessee by | : | Shri Farrokh V. Irani, Adv. |
| Revenue by | : | Shri Pankaj Kumar, DR |
| Date of hearing | : | 21/02/2024 |
| Date of pronouncement | : | 23/02/2024 |

ORDER

Per PARTHA SARATHI CHAUDHURY, JM:

This appeal preferred by the assessee emanates from the findings of Disputes Resolution Panel (DRP)-3, Mumbai, dated 26/09/2023 for A.Y.2021-22 as per the following grounds of appeal:-

"On the facts and in the circumstances of the case and in law, the Hon'ble DRP and consequentially the Id.AO have:

- I. Erred in considering the receipts on account of support and maintenance services to its customers in India as liable to tax in India:*

The learned AO has erred in facts and in circumstances of the case and in law in considering the receipts of INR 37,88,48,645 from the support and maintenance services rendered in relation to sales as fees for technical services under the India-Singapore DTAA as well as under the Act and liable to tax in India.

II. Other grounds of appeal:

Initiation of penalty proceedings under section 274 r.w.s. 270A of the Act. The learned AO has erred on the facts and in circumstances of the case and in law in proposing to initiate penalty proceedings against the Appellant u/sec. 274 r.w.s. 270A of the Act considering the receipts of INR 37,88,48,645 from support and maintenance services rendered in relation to sale as liable to tax in India.

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 appeal, so as to enable to Hon'ble Income-tax Appellate Tribunal to decide this appeal according to law."

2. At the very outset, Id. counsel for the assessee submitted that the present assessment year 2021-22 involves the same identical facts and circumstances and issues that was involved in assessee's own case from A.Ys. 2018-19 onwards, being the lead year. It was further submitted that from A.Y. 2018-19, the issues involved have been answered in favour of the assessee in subsequent years also by the Tribunal for A.Ys. 2019-20 & 2020-21. Learned counsel for the assessee also submitted that in this year, Id.DRP while passing their order had relied entirely on their own findings for A.Y. 2019-20 and A.Y. 2020-21 which ultimately had been set aside and the issues decided by this Tribunal in assessee's favour in assessee's own case for A.Ys. 2019-20 & 2020-21. Ld.DR conceded to the submissions made before this Tribunal by the Id. counsel for the assessee, also admitting to the similarities of the facts and circumstances and issues involved in the present appeal.
3. That for the purposes of adjudication of this appeal, we would

refer to our lead decision for A.Y. 2018-19 in assessee's own case in ITA No.97/PUN/2022, order dated 15/07/2022 and also would refer to the facts as well as the issues involved therein which are absolutely similar to the present case, in appeal before us. Referring to the facts as appearing in ITA No. 97/PUN/2022 (supra), the assessee in this case is a tax resident of Singapore, engaged in selling software products to endusers and customers. Return was filed declaring total income at Nil. During the draft proceedings, the Assessing Officer (AO) noted that the assessee earned income of Rs.109,01,25,420/- from sale of software licenses and support services in relation thereto, which was not offered for taxation on the ground that the first item was towards sale of software licenses and not transfer of copyright; and the second was for support services which did not 'make available' any technical know-how to the customers. The AO observed that the DRP in earlier assessment years has confirmed the action of the AO in treating such amount as Royalty. The assessee has given its bifurcation as, Rs.67.94 crore from sale of software license and Rs.41.06 crore from rendition of Support and Maintenance of the software licensed (hereinafter also called 'IT Support services'). The AO held that the first component was chargeable as Royalty under the Act as well as Article 12(3)(a) and the second was taxable as 'fees for technical services' under the Act and also Article 12(4)(a) of the DTAA. The contention of the assessee was that the second item was in the nature of provision of services involving technical knowledge without

'making available' such technical knowledge to the customers and hence not hit by Article 12(4)(b) of the DTAA. This did not find favour with the AO and following his view taken for earlier years, the AO notified the draft order including the entire amount from both the streams as chargeable to tax. Thereafter, the assessee raised objections before the DRP by contending that the Tribunal has deleted similar taxability in its own case for the A.Ys. 2010-11, 2016-17 and 2017-18. The DRP held that income from sale of software licenses was not chargeable to tax in the light of the judgment of Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT* [2021] 432 ITR 472 (SC). As regards the income from IT support services, the DRP distinguished the earlier orders of the Tribunal by noting that the Tribunal dealt with both the items of revenue as Royalty without separately noting that the second item was in the nature of fees for technical services. A remand report was called for from the AO, who held that the IT Support service charges were covered by clauses (a) and (b) of para 4 of Article 12 of the DTAA, as against his stand in the draft order to the effect that these were governed by Article 12(4)(a) of the DTAA. The DRP held that the IT Support charges were chargeable as fees for technical services under the DTAA. Giving effect to the directions of the DRP, the AO passed the impugned order including IT Support service charges of Rs.42.42 crore in the total income. Aggrieved thereby, the assessee had preferred the appeal before the Tribunal for A.Y. 2018-19 (supra).

4. That, in the aforesaid case of the assessee, the Tribunal took note of the fact that so far the issue of sale of software is concerned, that was held as not chargeable to tax by following the judgment of Hon'ble Apex Court in the case of Analysis Centre of Excellence Pvt. Ltd. (supra) by the DRP. The issue for adjudication, therefore, remained regarding the taxability of income from IT support services, which was held by DRP as chargeable to tax as fees for technical services under DTAA which was subsequently passed by the AO as giving effect to the said directions of the DRP. Regarding this issue, the assessee had admitted that the income from IT support services is chargeable to tax under the Act but the protection was sought under the DTAA. The DTAA referred here is the India-Singapore Double Taxation Avoidance Agreement (DTAA). The contention of the assessee in this regard was that the said amount was in lieu of providing technical knowledge and experience etc without 'making available' to the customers and, therefore, such amount was not chargeable to tax in terms of Article 12(4)(b) of the said DTAA. That, on contrary, the AO had rejected this submissions by holding that such amount was in relation to software sold thereby falling under Article 12(4)(a) of the DTAA as fees for technical services. During the course of the remand proceedings, the AO canvassed a view that the receipt was also for making available technical knowledge etc. to the software buyers and hence covered under Article 12(4)(b) of the DTAA as well. Therefore, the AO has considered the receipt from IT Support services

both under clauses (a) and (b) of Article 12(4) of the said DTAA.

5. Thereafter, the Tribunal had reproduced Article 12 of DTAA, whereby the definition of royalty and fees for technical services had been explained and the relevant clause that has been discussed is clause/para (3) sub-clause (a) & (b) defining the term royalty and clause/para (4) sub-clauses (a)(b) & (c) defining the terms fees for technical services. That while analyzing the aforesaid relevant Article of the DTAA, the Tribunal observed that the term royalty has been defined in para 3 having two clauses, though the word 'or' has not been used between clauses (a) & (b) still the term royalty means consideration received either for the use or right to uses of (a) any copyright of a literary, artistic or scientific work etc. or clause (b) any industrial, commercial or scientific equipment. In absence of word 'or' being used both these clauses are independent of each other. Therefore, a particular consideration becomes royalty on satisfying the requisite condition in either of the said clauses. It is not required to satisfy cumulative satisfaction of both the clauses to bring a particular amount of consideration within the ambit of 'royalty'. The Tribunal further simplified this proposition by writing in the order if consideration is received for allowing use or right to use copyright in literary, artistic or scientific work etc., it becomes 'royalties'. There is no requirement that such use or right to use of software etc. must necessarily be coupled with the use of any industrial, commercial or

scientific equipment, so as to constitute `royalties`.

6. That, with regard to the Article 12(4), which has three clauses, it was observed that the word `or` has been expressly deployed at the end of the clauses (a) and (b) so as to make it clear that consideration for the services referred to in either of the three clauses constitutes fees for technical services. In other words, if the consideration is received for rendering the services in the nature given in clause (a), the amount will become FTS without examining if the conditions of clauses (b) or (c) are satisfied. Similarly, if some consideration is received for the services which "make available" technical knowledge etc. under clause (b), it automatically becomes FTS without any further need to examine if the prescription of clauses (a) and (c) is satisfied. It follows that paras 3 and 4 of the Article 12 deals with distinct situations, which are mutually exclusive to each other, so as to constitute royalty or fees for technical services, as the case may be, in the given circumstances.

7. Reverting to the facts of the present case, the AO has categorized the receipt on account of software licenses under clause (a) of para 3 of Article 12 in the draft order and finalized its taxability. It is a different matter that DRP has held that such an amount was not falling under para 3 (a) of the Article and hence, not taxable. Similarly, the AO had treated the receipt on account of IT support services, which was the issue for adjudication in the draft proceedings

as falling under para 4(a) of Article 12. That, during the course of remand proceedings, the AO made out a case that the receipt was also governed by clause (b) of Article 12(4). Thereafter, this Tribunal had examined whether the income from IT Support services fell within the ambit of clauses (a) or (b) of para 4 of Article 12 of the DTAA. That, while first examining whether such IT support charges fell within Article 12(4)(a), the Tribunal observed that as evident from para 4(a) which provides that FTS means any consideration for services which are ancillary and subsidiary to the application or enjoyment of the right etc. for which the payment described in para 3 is received. Therefore, it is evident in order an income to fall under para 4(a), it is necessary that there should be some amount falling in para 3(a) and the income as per para 4(a) should be for services ancillary to the enjoyment of the right property etc., *`for which a payment described in paragraph 3 is received'*. If there is no amount falling in para 3(a) which can be described as 'Royalty' for use or right to use any copyright etc., consideration for any services ancillary and subsidiary to the application or enjoyment of such right etc. cannot also, fall within the ambit of para 4(a) of Article 12. The existence of any consideration under Article 12(3)(a) is fundamental for bringing any amount in relation to services under para 4(a) of Article 12. The Tribunal further held that there may be two situations of income arising from licensing of software and also from support and maintenance services for such software. First, where the amount

received by the assessee from licensing of software satisfies the condition of 'royalty' as right to copy is also assigned to the licensee; and second, where copyright is not assigned. In the first situation, income from licensing of software would descend in para 3(a) of Article 12 and accordingly the amount of support and maintenance charges will be governed by para 4(a) of Article 12. In the second scenario, income from licensing of software would not satisfy the condition of 'royalty' and hence will not drop into ambit of para 3(a) of Article 12 and, therefore the question of application of para 4(a) to support and maintenance charges will not arise. That, in this referred judgment, the Tribunal holds that since there was no amount taxable as royalty under Article 12(3)(a) in the case of the assessee, the IT support service charges cannot be brought within the purview of Article 12(4)(a) of the DTAA.

8. We observe from the aforesaid findings of the Tribunal in assessee's own case for A.Y. 2018-19 (supra) on this issue of taxability of IT support services under the purview of Article 12(4)(a) of the said DTAA that the Tribunal has brought out the relevance of interpretation of the concerned article where it has been categorically analysed and held that in order to bring the IT support service charges within the purview of taxation under Article 12(4)(a) of the DTAA there must be a payment received as described in para 3 of Article 12. Since in the case of the assessee, there was no amount taxable as

royalty under article 12(3)(a), there was no question of taxing the same as IT support service charges within the purview of Article 12(4)(a) of the DTAA. The triggering point of applicability of Article 12(4)(a) is only when payment as described in para 3 of the said Article would be received as is clearly mentioned in the body of para (4)(a) of Article 12 of the referred DTAA.

9. Thereafter, the Tribunal proceeds to examine if these IT support service charges would be covered under clause (b) of para 4 of Article 12 of DTAA, as has been held by the AO in alternate. Para 4(b) of Article 12 stipulates that consideration for services of technical nature etc. becomes FTS if such services "make available" technical knowledge, experience, skill, knowhow or process etc. that enables the person acquiring the services to apply the technology contained therein independently. In this regard, the Tribunal had in detail gone into the assessment of services provided by 'BMC' to its customers and observed that these services were only in the nature of attending to the Customers requirements by performing sizing review for new integrations and new lines of businesses along with reviewing applications performance and health checks etc. These services though require technical knowledge for their rendition, but the question to bring such services within tax it has to be seen whether rendering all these services ultimately 'makes available' any technical knowhow, experience, or skill etc. to the customers within the scope of para 4(b)

of Article 12 of the DTAA. To answer this question, the Tribunal had referred to the judgments of the Hon'ble Karnataka High Court in *CIT Vs. De Beers India Minerals Pvt. Ltd.* (2012) 346 ITR 467 (Kar.) where it was held that the condition for the expression 'make available' gets satisfied if the payer of the services is able to utilize the acquired knowledge or knowhow at his own in future without the aid of the service provider. The Authority for Advance Ruling in Production resources group, in Re (2018) 401 ITR 56 AAR has held that "make available" connotes something which results in transmitting the technical knowledge so that the recipient could derive an enduring benefit and utilize the same in future on his own without further aid and assistance of the provider. Having said that the Tribunal observed that though the nature of services that was rendered by the assessee required technical knowhow but the assessee did not make available any technical knowledge or experience or skill etc. to its customers for their application of the same independently in future without assistance of the assessee. Therefore, the Tribunal held that the receipt for IT support services does not become FTS under Article 12(4)(b) also. Therefore, it was held by the Tribunal that such IT support service charges cannot be brought either within the purview of Article 12(4)(a) or Article 12(4)(b), of the DTAA and hence, the appeal of the assessee was allowed.

10. We also observe the significance of the legal validity in the order

of the Tribunal pertaining to the issue of Article 12(4)(b) vis-a-vis the case of the assessee. We find that Article 12(4)(b) itself is crystal clear enumerating the expression 'make available' of technical knowledge, experience, skill etc. Thereafter, the Tribunal relying on various judicial decisions had spelled out distinctly the word 'make available' is when one equips its customer with such technical knowledge skills etc. that the said recipient customer will have an enduring benefit of such services received so as so that the said customer would be able to utilize the said services on its own without any assistance from the service provider in future. However, in the case of the assessee this 'make availability' is not satisfied since whatever services have been provided by the assessee had not make available any technical knowledge, experience or skill etc. to the recipient customer so that they can use these services independently in future without assistance of the assessee. In other words, if the recipients need to perform these services in the future again the assistance of assessee will be required. Therefore, it was found by the Tribunal that on both the grounds i.e. within clauses (a) or (b) of para 4 of Article 12 of DTAA, the receipts from IT support services does not become FTS and, therefore, was not chargeable to tax.

11. We further find that this lead decision in assessee's own case (supra) has been followed subsequently verbatim for A.Y. 2019-20 in ITA No. 680/PUN/2022 order dated 25/01/2023 and A.Y. 2020-21 in

ITA No.148/PUN/2023 order dated 27/06/2023, wherein the issues decided in assessee's favour and the relief provided to the assessee since A.Y. 2018-19 have been followed. The Id.DRP in the present year had relied on their findings for A.Y. 2019-20 and 2020-21 paras 5.3 & 5.4 (DRP) which has been set aside by the Tribunal. Ld.DR fairly conceded that the Tribunal has been consistently taking view in favour of the assessee regarding the issues involved in the same given facts and circumstances. Considering the aforesaid examination of facts and judicial pronouncements, following the same parity of reasoning we allow the appeal of the assessee.

12. In the result, appeal of the assessee is allowed.

Order pronounced in open Court on 23rd February, 2024.

Sd/-
(G.D. PADMAHALI)
ACCOUNTANT MEMBER

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Dated : 23rd February, 2024

vr/-

Copy to :

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The DR, ITAT, "C" Bench Pune.
5. Guard File.

By Order

// TRUE COPY //

Senior Private Secretary
ITAT, Pune.