IN THE INCOME-TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER
&
SMT. RENU JAUHRI, ACCOUNTANT MEMBER

ITA No.4711/MUM/2023
(A.Y. 2021-22)

Shell Information Technology International BV C/o. BSR & CO. LLP, 2nd Floor, Lodha Excelus, Apollo Mills Compound, N.M. Joshi Marg, Mahalakshmi, Mumbai-400011	v/s. बनाम	DCIT (International Tax)-4(2)(1), 17th Floor, Room No. 1708, Air India Building, Nariman Point, Mumbai-400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAICS9091A		
Appellant/अपीलार्थी	..	**Respondent/प्रतिवादी**

Appellant by :	Shri Madhur Agarwal
Respondent by :	Smt. Shaileja Rai

Date of Hearing	10.06.2024
Date of Pronouncement	06.09.2024

आदेश / O R D E R

PER RENU JAUHRI [A.M.] :-

This appeal is filed by the assessee against the order dated 31.10.2023 of the DCIT (International Tax) 4(2)(1)- Mumbai passed as per the directions of Dispute Resolution Panel, DRP -2, Mumbai u/s. 144C(5) of the Income-tax Act, 1961 [hereinafter referred to as "Act"] for Assessment Year [A.Y.] 2021-22.

2. The assessee has raised following grounds of appeal:

"General
1. Erred in assessing the total income at Rs. 10,26,70,96,070 as against Rs.49,51,493 offered by the Appellant,

Final assessment order passed by the learned AO is bad in law

2. On the facts and circumstances of the case and in law, the learned AO erred in passing/issuing the final assessment order dated 31 October 2023 under section143(3) read with section 144C(13) of the Act beyond the time limit as prescribed under section 153 of the Act. The Appellant submits that the final assessment order being barred by limitation is without jurisdiction and void ab initio and hence, the same is liable to be quashed.

Receipts towards software access and IT support services does not constitute 'income'

3. Erred in holding that the payments received by the Appellant constitutes 'income' without appreciating that the appellant works on cost - only arrangement and the receipts were reimbursements being in the nature of cost allocation without markup and hence does not constitute 'income' under section 2(24) of the Act;

Receipts from Key Application Service ('KAS') providers and Shell group entities towards software access treated as 'royalty' under the Act as well as the India-Netherlands Double Taxation Avoidance Agreement ('the India-Netherlands DTAA')

4. Erred in holding the payments of INR 1,60,69,58,808 received by the Appellant from KAS and Shell group entities for access to use copyrighted software as royalty taxable under the Act as well as Article 12 of the India-Netherlands DTAA,

5. Failed to appreciate that the payments received were only for the use of copyrighted article' as compared to 'use of copyright', 'use of process', "use of property similar to patents, design, trademark and invention', which does not constitute 'royalty' under the Act as well as India-Netherlands DTAA;

Receipts towards IT Support services held as 'Fees for Technical Services' ('FTS') under the Act as well as the India-Netherlands DTAA

6. Erred in holding that payments of Rs. 8,65,51,85.767 received by the Appellant for IT Support Services constitutes 'FTS' under the

provisions of the Act and under Article 12 of the India-Netherlands DTAA

7. Failed to appreciate that IT support services do not 'make available' any technical knowledge, experience, skill, know-how or processes, etc. to the service recipient under Article 12(5)(b) of the India-Netherlands DTAA and hence not subject to tax in India:

8. Failed to also appreciate that IT support services are not for providing specialized technical inputs or any technical services which are ancillary and subsidiary to the application / enjoyment of the any right/property/information and hence cannot be termed as FTS under Article 12(5)(a) of the India-Netherlands DTAA and hence not subject to tax in India;

Receipts towards IT Support services held as 'Royalty' under the Act as well as India-Netherlands DTAA

9. Erred in holding that payments of Rs. 8,65,51,85,767 received by the Appellant for IT Support Services constitutes 'Royalty' under the provisions of the Act and under Article 12(4) of the India-Netherlands DTAA without appreciating the fact that receipts towards IT support services are not for information concerning industrial, commercial or scientific experience;

Short granting of credit for TDS

10. Erred in not granting the TDS credit of Rs. 1,03,96,003 without appreciating the facts and circumstance of the case.

Interest under section 234A of the Act

11. Erred in levying interest under section 234A of the Act without appreciating the facts and circumstance of the case.

Interest under section 234B of the Act

12. Erred in levying interest under section 234B of the Act without appreciating the facts and circumstance of the case.

Interest under section 234C of the Act

13. Erred in levying interest under section 234C of the Act without appreciating the facts and circumstance of the case.

Incorrect amount of refund issued

14. Erred in considering a refund amount of Rs. 15,15,615 issued to the Appellant wherein no refund was received by the Appellant without appreciating the facts and circumstance of the case."

Penalty under section 270A of the Act
15. Erred in levying penalty under section 270A of the Act for misreporting/underreporting particulars of income without appreciating the facts and circumstances of the case.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of the appeal."

3. Brief facts of the case are that the assessee is a company formed and registered in Netherlands and is a tax resident of Netherlands as per the provisions of Article 4 of the India-Netherlands tax treaty. It is engaged in providing Information Technology services to the Shell Group entities. The return declaring total income of Rs. 49,51,493/- was filed on 09.03.2022. The AO issued the draft assessment order dated 30.12.2022 u/s 144C proposing assessment of total income at Rs. 10,26,21,44,575/-. After considering the objections of the assessee, the DRP-2, Mumbai gave directions to the AO vide order dated 28.09.2023 The assessee has not offered the receipts of Rs.10,25,91,39,610/- as taxable income which includes Rs.1,60,69,58,808/- for software services, Rs.3,23,754/- as reimbursement and balance amount of Rs.8,65,51,85,767/- as IT support services. Accordingly, the final assessment order was passed on 31.10.2023, assessing the total income at Rs. 10,26,70,96,068/- after making the following additions:

a. For Software Access Services - Rs.160,69,58,808/-
b. Income from IT Support Services - Rs.86,55,18,576/-

Ground No. 4 & 5 - Receipts towards software access treated as ' royalty' Rs. 160,69,58,808/-

4. At the outset, it was submitted by the Ld. A.R. that the issue regarding software access charges is covered in the favour of the assessee in its own case by the order of the Coordinate Benches in A.Y. 2006-07 to 2015-16. In A.Y. 2016-17 to 2020-21, the Ld. AO accepted the stand of the assessee during assessment and hence no addition was made on this ground. However, in A.Y. 2021-22, this issue has again come up on account of the addition made by the Ld. AO as approved by the Hon'ble DRP.

5. The assessee has claimed that there is no element of income as the company provides restricted software access to KAS as well as Shell's group entities. The software receipts were treated as royalty income as per section 9(1) (vi) of the Act and article 12 of the DTAA. Thus, the revenue of Rs.160,69,58,808/- received by the assessee during the year towards software access was added to the income of the assessee as royalty.

6. We have heard the rival submissions and it is seen that the issue has been decided by the Coordinate Benches for earlier years in favour of the assessee as pointed out by the Ld. A.R. The relevant portion of the order for A.Y.s 2009- 10 and 2010-11 in **ITA No. 2204/Mum/2014** and **ITA No. 1203/Mum/2015** is reproduced below:

"4. The learned Counsel then took us through the findings of the DRP, who is relied on the CIT(A)'s decision for AY 2008-09 and DRP has also gone through the decision of CIT(A) in AYs 2006-07, 2007-08 and 2008-09 and noted as under: -

> *"4.2.6 We have also gone through the decisions of the CIT(A) in the case of assessee for the AY 2006-07 and 2007-08. We find that the at that time the decisions of Karnataka High court and ruling of AAR as mentioned above were not available for consideration. The decision of jurisdictional ITAT in the case of DDIT (IT) v. Reliance Infocom Ltd. and Others [TS-433-ITAT-2013 (Mum)] was also not available for consideration. The retrospective amendment was also made after the decisions in the case of assessee by the Ld. CIT(A). For this very reason the Ld. CIT(A) while deciding the case assessee for AY 2008-09 vide order dated 30-11-2011 has held that the income on this account is taxable as royalty. The Relevant para of the order of the CIT(A) is reproduced hereunder:*
>
> > *The present case is also a case of grant of license to use various software's held by the appellant. Such right to use was granted by the appellant to the IT services providers M/s. IBM & M/s. Wipro software to exploit the commercially and provide IT services to the group companies, of the appellant. Therefore, considering the judgments of Hon'ble Karnataka High court in the case of Samsung Electronics C. Ltd., Lucent Technologies Hindustan Ltd. & Wipro Ltd., it is held that payment received by the appellant is consideration for grant of right to use various software's to IBM Wipro*

under licence and therefore, it is taxable as "royalty". Hence, the first ground of appeal is dismissed".

In conclusion, considering the above factual and legal matrix, we are of the opinion that the action of the AO in treating the above receipt as royalty does not require any inference.

5. In view of the above, the learned Counsel for the assessee stated that in view of the Tribunal in assessee's own case has taken the view that the payments received by the assessee from WIPRO, IBM and Logica in pursuance to the MSA cannot be treated as royalty under Article 12(4) of the Indian- Netherlands DTAA.

6. Exactly on identical facts, this was confronted to the learned CIT DR, he fairly agreed that the issue is covered by the Tribunal's decision. After hearing both the sides and having gone through the facts of the case, we find that exactly on identical facts, the issue is covered by Tribunal's decision for AY- 2006-07 and 2007-08 in ITA No. 551/Mum/2009 and 3818/Mum/2011 respectively, vide order dated 15-03-2017. Respectfully following the above order of the Coordinate Bench, we allow this ground in favour of the assessee."

7. In view of the above, respectfully following the decision of the Coordinate Bench, we allow the assessee's appeal in this ground.

Ground No. 6 to 9 - Receipts towards IT support services held as fee for Technical Services/Royalty - Rs. 86,55,18,576/-

8. The assessee company is engaged in providing IT support services such as help desk services, network infrastructure services, etc. The assessee has

received fees for providing IT support services to several customers based in India. The assessee has claimed that receipts are not in the nature of income as it is only cost allocation of services and there is no income element in the receipts. The Ld. A. R. pointed out that the issue is covered in the latest order for A.Y. 2020-21 passed by the Coordinate Bench.

9. We have heard the rival submissions and perused the material on record. Relevant portion of the order of the Coordinate Bench in **ITA No. 3339/M/2023 for A.Y. 2020-21** on this issue is reproduced below:

> *"8. We have heard the rival submission and perused the material on record. We find that the issue under consideration relating to taxability of IT Support Services Fee in the hands of the Appellant as Fee for Technical services or as royalties in terms of provisions of the Act read with Article 12 of the DTAA is recurring in nature. While disposing of appeal preferred by the Appellant for the Assessment Year 2017-2018 [ITA No. 1245/Mum/2021, dated 11/05/2022] the Mumbai Bench of the Tribunal had Concluded as under:*
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> > *9. We have considered the rival submissions and perused the material available on record. We find that the Co-ordinate Bench of the Tribunal in assessee's own case in Shell Information Technology International, B.V v/s DCIT, in ITA no.6638/Mum./2019, vide order dated 06.03.2020, for assessment year 2016-17, inter-alia, while holding that the payment received by the assessee towards IT Support services does not constitute Fee for Technical Services under the provisions of the Act as well as under Article-12 of the DTAA, observed as under:*
> >
> > > *9. We have perused the material on record including the decisions of the coordinate Benches of the Tribunal relied upon by the Ld. counsel As pointed out by the Ld. counsel, the coordinate Benches have decided the identical issue in favour of the assessee in the assessee's appeals pertaining to the A.Y.s 2011-12 to 2014-15. We further notice that Ground No. 5 and 6 of the present appeal are identical to the assessee's appeal for the A.Y. 2015-16 and the coordinate Bench has decided the said issue in favour of the assessee by following the decision of the Tribunal in assessee's own appeals pertaining to the earlier assessment years. The findings of the coordinate Bench are as under:-*

7. Coming to Ground Nos. 5 and 6 of Grounds of appeal, Ld. Counsel for the assessee submitted that these grounds relates to receipts towards IT support services held as FTS under the Act as well as the India Netherlands DTAA, and it was decided in favour of the assessee for the A.Y.2011-12 to 2014-15 by the Tribunal. Copy of the order is placed on record.

8. Ld. DR vehemently supported the orders of the authorities below.
9. We have heard the rival submissions and perused the orders of the authorities below. We have perused the order of the Tribunal for the A.Y.2010-11 to 2011-12 in ITA NO. 2058/MUM/2016 dated 28.05.2018 wherein the Tribunal following the order for the A.Y. 2009-10 to 2010-11 in ITA. No. 2204/MUM/2014 and 1203/Mum/ 2015, held as under:

"16. We have heard the rival submissions and also perused the material on record. The co-ordinate Bench has decided the identical issue in favour of the assessee in the assessee's own case ITA No. 2204/Mum/2014 for the A.Y. 2009-10 and ITA No. 1203/Mum/2015, for the A.Y. 2010-11 holding as under: 7. The next issue common issue in both the appeals of assessee is as regards to taxability of payment received by assessee from IT support services which constitutes Fees for Technical Services ('FTS') and royalty under the India Netherlands Treaty DTAA. For this Assessee has raised following ground:-

> *"Payments towards IT Support fees held in be Fees for Technical Services 'FTS') and royalty.*
>
> *4. Erred in holding that payments received by the Appellant for IT support DTAA.*
>
> *5. Failed to appreciate that IT support services do not 'make available any technical knowledge, skill, experience etc. to the services recipient under Article 12 of the India-Netherlands DTAA and hence not subject to tax in India.*
>
> *6. Erred in alternatively holding that the receipt from IT support services qualify as Royalty' under the India Netherlands DTAA."*

8. The facts and circumstances are exactly identical in both the A.Y.s i.e. 2009-10 and 2010-11 and also the grounds raised are identically worded hence, we will take- the facts from 2009-10.

9. The learned Counsel for the assessee, first of all, took us through the findings of the DRP on the issue which is recorded in Para 53 as under:

"5.3 Discussions and directions of DRP

5.3.1 We have considered the draft assessment order, submissions of assessee and material. We have seen that under the Master Services Agreement, the assessee SITI BV has furnished technical and advisory services to various clients based in India. The delineated services are significantly technical in nature and the resultant fees are liable to be treated as Fees for Technical Services. We are also in agreement with the AO that the Ruling of Hon'ble

Authority for Advance Rulings in the case of ARE VA T&D India Limited (A TD/L) is applicable in the case of assessee. In this case, the Aar held as below:

> *"We have noted that under the IT French company is to provide support the area of Information the Applicant and to its other subsidiaries in the world a central team in the provision of support services by the French company would itself make available, the technical knowledge/ experience to the Applicant.*
>
> *In Porfetti Van Melle Holdings B.V1 this Authority held the view that the expression in available only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilize the knowledge or knowhow in future on his own. Here, information technology relating to design, engineering, manufacturing and supply of electric equipment that help in transmission and distribution of power, commissioning and servicing of tr'1nernv ion and distribution system is provided to the Indian entity which is applied in running the business of the Applicant and the employees of the Applicant would got equipped to carry on the systems on their own without reference to the French Company, when the IT Agreement comes to an end. It is not as if for making available, the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the agreement on its expiry. We are of the view that the services provided under the IT agreement are in the nature of Fees for Technical Services and taxable under the DTAA as well as under the Act.*
>
> *Though the ruling is technically not binding in the present case, the 7 ratio and logic followed by the Hon'ble Authority have very high degree of persuasive value. in any case, this technical know-how is of an enduring nature and has a direct nexus with the assessees business.*
>
> *5.3.2 considering the above factual and leg& matrix we are of the opinion that the action of the AO in treating the above receipt is fee for technical services does not require any interference The alternate arguments on taxability of the receipt as royalty do not require any direction from the penal as we have already upheld the taxability of the services as "fees for included service".*

10. The learned Counsel for the assessee explained the facts that the SITI BV is a company registered in the Netherlands. SIT! BV is in the business of providing information technology (IT) support services. During the financial year ended 31.03.2006 SIT! BV provided IT (mobile office) support services, IT helpdesk and network infrastructure related services to: Indian customers. SITI BV is a tax resident of the Netherland and is eligible to claim benefits under the Double Taxation Avoidance Agreement entered into between India and The Netherlands. He explained that SITI BV is in the business of providing information technology support services SITI BV typically, provides helpdesk services-and network infrastructure services to Shell group companies comprising. Information Technology (II) support for solving any IT related problems faced by users i e any problem faced by users for accessing any application software c-mails, Computer repairs and

maintenance etc. desktop laptop and workstation support, Services related to Wide area network ('WAN') arid Local area network ('LAN') for connection to the global servers', and Facilitating teleconferencing and video conferencing services Further, in the event Shell requires IT services from external service providers like WIPRO and IBM SITI BV is engaged in providing the necessary network access and related services as well. For this purpose, reference can be made to the scope of services to be rendered by SITI BV to WIPRO under the Services Agreement (copy of which is enclosed in the paper book of the assessee) and from the same Article 3 is reproduced below:

Article 3 Provision of Services

SITI BV shall provide the IT Service Provider with the service."

Further, 'Service' has been defined in Article 1 Definitions as 'the combined Sub-services provided by S/TI BV to she IT Services Provider wider this Agreement, which Sub- services include the (if Services, the STO Services and she provision by S/T BV to the IT Service Provider and Service Personnel of access to and/or use of GI software and Optional Software...

11. Further, SIT BV is company incorporated in The Netherlands. SITI BV is a resident of The eligible to claim the benefits, conferred by the Double Taxation Avoidance Agreement entered into and The Netherlands (Treaty). Section 90 of the Act read with the Circulars and several judicial precedents issued thereunder provide that non-resident taxpayer is eligible to be assessed as per the provisions of the Act or as per the provisions of the relevant double taxation avoidance agreement, whichever is more beneficial services. SIT! BV is a non resident for indian tax purposes. Accordingly, SITI BV could be assessed as per the provisions of the Actor as per the Treaty, whichever is more beneficial to SIT! BV. IN view of the same, the non-taxability of the services rendered by SITI BV has been examined under the provisions of the Treaty. Article 12(4) of the Treaty defines the term.

> *"Payments of any kind received as a consideration for the use, or the right to use, any copyright of literacy, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience."*

13. From the above, it is clear that SITI BV is engaged in providing IT services to Indian entities but does not provide any right to use any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. Even under the agreements entered into with WIPRO and IBM, SITI BV only provides them access to the software i.e. computer Programme. SITI BV does not provide them the right to use the copyright embedded in the software. In other words, WIPRO, IBM are not permitted to make copies and sell the software. Under the Services Agreements, WIPRO and IBM-have been granted the mere under the right in the copyrighted software and not the right of, use of copyright'. Whereas use of copyright encompasses exploitation of the rights embedded in a copyright but a mere user right is a limited right and consideration paid for Such user right cannot be regarded as consideration for use of or right to use a copyright. In view of the above,

the learned Counsel for the assessee stated that the issue is fully covered by the decision of Hon'ble Delhi High Court in the case of DIT Vs Guy Carpenter & Co Ltd (2012) 20 taxmann.com 807 (Del HC), wherein India-UK DTAA was under consideration of Hon'ble Delhi High Court and Hon'ble High Court after considering the Article 13 of the DTAA of India-UK and also the facts of the assessee finally held the concept of 'make available' of technical services that such receipts would not amount to fee for technical services so as to the "concept of make available clause contained in Article 13(4)() of the treaty has not been satisfied In the given facts and circumstances of the case Hon, ble Delhi High Court vide Para 8 to 13 held as under: -

"8. Before we go on to examine the findings of the Tribunal it would be pertinent to refer to article 13 of the DTAA to the extent it is relevant: "ARTICLE 13- Royalties and fees for technical services

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that Stale; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) In the case of royalties within paragraph 3 (a) of this Articles, and fees for technical services within paragraphs 4 (a) and (c) of this Article,-

(i) during the first five years for which this Convention has effect;

(aa) 15% of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for services is the Govern rent of the first mentioned Contracting State or a political sub-division of that State and

(bb) 20% of the gross amount of such royalties or fees for technical services in all other cases, and

(ii) during subsequent years 15% of the gross amount of such royalties or fees for technical services; and

(b) in the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article, 10% of the gross amount of such royalties and fees for technical services.

(3) XX XX

(4) For the purpose of paragraphs And this Article, and subject to paragraph 5, of this Article, the term 'fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary to the application of enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or

b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received, or

Make available technical knowledge, experience, skill, knowhow or processes, or consist of the development and transfer of a technical plan or technical design.

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricable and essentially linked, to the sale of property, other than property described in paragraph 3 (a) of this Article;

(b) For services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic

(c) For teaching in or by educational institutions;

(d) For services for the private use of the individual or individuals making the payment, or

(e) TO an employee of the person making the payments --Or to any individual or partnership for professional services as defined in Article 15 (Independent personal services) of this Convention

(3), (7), (8) XX XX

9. A plain reading of Article 13(4)(c) of the DTAA indicates that 'fees for technical services' would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which, inter alia, "makes available" technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. According to the Tribunal this make available condition has not been satisfied inasmuch as no technical knowledge, experience, skill, knowhow, processes, have been made dye/lab/c by the assessee to the insurance companies operating in India. It also does not consist of the development and transfer of any technical plan or technical design.

10. The Tribunal examined the evidence available on record in order to return a finding on the issue as to whether the payments received by the assessee from the insurance companies operating in India would fall within the expression 'fees for technical services' as appearing in article,. 13(4)'(c) of the DTAA read with section 9(1)(vii) of the said Act. While doing so the Tribunal, inter alia, found that the assessee company was an international reinsurance intermediary (broker) and was a tax resident of United Kingdom. Further, that it was a recognized broker by the Financial services authority of United Kingdom, it was also an admitted position that the assessee did not maintain any office in India and mat it had a referral relationship with JB Boda reinsurance (Broker) Pvt. Ltd of Mumbai and that J. B. Boda was duly licenced by the Insurance Regulatory & Development Authority to transact reinsurance business in India

10. The Tribunal also observed as under.

"27. In the illustrative transaction, New India Insurance Co. Ltd in India has entered into an agreement to reinsure on an Excess Loss basis the catastrophe risk arising from its primary insurance cover in conjunction with J.B. Boda and Alsford Page and gems Ltd. (the reinsurance brokers). The terms of the agreement specifies that the assessee in conjunction with J.B. Bode are recognized as intermediary, through whom all communications relating to this agreement shall pass. The terms of the agreement further provides that the assessee will provide all the details of agreed endorsements to the reinsurers by e-mail or facsimile and shall submit the slip policy to XIS (Lloyd's processing market) for signing. The assessee will act as a claim administrator and Will submit claims advices to relevant market systems. For the services rendered, the assessee along with the other reinsurance brokers acting as an intermediary in the reinsurance process for New India Assurance Co. will be entitled to 10% brokerage. From the role played by the assessee in the reinsurance process as discussed above, it is evident- to us that the assessee was rendering only intermediary services while acting as an intermediary/facilitator in getting the reinsurance cover for New India Insurance Co. There exists no material or basis on the basis of which, it Would be said that the assessee was rendering any kind technical/consultancy service within the meaning of Article 13 of Indo-UK treaty. The consideration received by the assessee acting as an intermediary in the reinsurance process cannot, by any stretch of imagination, be qualified as a consideration received for rendering any financial analysis related consultancy services rating agency advisory services, risk based capital analysis etc. as alleged by the A.O." The Tribunal also noted the process by which the transactions takes place It has been pointed out that the originating insurer in India would contact J. B. Boda/ M, B. Boda for placing identified risks/ class of risks with international reinsurers. J.B. Boda, in turn, would contact one or more international firm(s) of reinsurance broker(s) like the assessee for competitive proposals from the international reinsurer. Then, the international reinsurance brokers like the assessee would contact other primary brokers and various syndicates in the Lloyds market for competitive proposals. Based on the various offers or proposals given by the international reinsurance brokers, like the assessee, to J.B. Boda, the latter would present various options to the originating insurer in India, which would take a final-decision in the matter. Based on the decision of the originating insurer in India, the policy terms would then be agreed upon and the risk would be placed with the international reinsurer it was also pointed out that as per the normal industry practice, tea reinsurance premium net of brokerage al 10% as per the policy contract is remitted to the assessee, i.e., reinsurance brokers, for onward transmission to international reinsurers. The intermediation fee which is another word for brokerage is paid separately by the originating insurance in India to J.B. Bodo, the international reinsurance brokers like the assessee and other intermediaries, based on a mutually agreed ratio which accounts for their relative contribution in the reinsurance process.

12. Based on this manner of transacting, the Tribunal came to a conclusion that the payment received by the assessee could not be regarded as 'fees for technical services'. Further, more, the Tribunal also held that such receipts would not amount to fees for technical services as the "make available" clause contained in article 13(4)(c) had not been satisfied in the facts and circumstances of the present case.

13. In our view, the Tribunal has arrived at these conclusions purely on assessing the factual matrix of the case at hand. The findings are in, the nature of factual findings and, therefore, according to us, no substantial question of law arises for our consideration, particularly, because the learned counsel for the Revenue was unable to point out any perversity in the recording of such findings. As such No substantial question of law arises for our consideration. The appeal is dismissed. There shall be. no order as to costs. " 13. Further, the learned Counsel for the asséssee stated that the reliance placed by DRP in Arevay T and D India Limited of Perfeti Van Melle Holdings B.V. In re [20111 16 taxmann.com 207 (AAR - New Delhi) was reversed by Hon'ble Delhi High Court and reported in 2014 52 taxmann.com 161 (Delhi), wherein Hon'ble Delhi High Court has considered as under: -

> *"1. This writ petition is directed against the ruling dated 09.12.2011 in AAR the. 86912010 given by the Authority for Advance Rulings. One of the pleas raised by the petitioner was that the said authority had not considered the Double Taxation Avoidance Agreement between India and Portugal which is an OECD country. The learned counsel for the petitioner submitted that any agreement between India and an OECD country could be looked into while construing the Indo Netherlands Double Taxation Avoidance Convention. The learned counsel for the petitioner had also raised the plea that the memorandum of understanding concerning fees for included services referred in Article 12(4) of the Indo USA DTAA concerning the expression? Available? was also not considered by the Authority for Advance Rulings; It-was submitted that the said Authority refused to look into the Indo Portugese DTAA or the Indo USA DTAA and memorandum of understanding between India and USA on the ground that only the Indo Netherlands DTAC needed to be looked into.*
>
> *2. The learned counsel for the respondent states that the Authority for Advance Rulings was correct in not looking, into the Indo Portugese DTAA, but insofar as the Indo-USA DTAA is concerned a provision similar to that DTAA has been incorporated in the Indo Netherlands DTAC by virtue of paragraph 5 of Article 12 of the same, whereby the very same make available clause, which is to be found in the DTAA between India and USA read with the memorandum of understanding connected therewith, has been incorporated into Indo Netherlands convention by way of amendment on 30.08.1999, notification No. S.O. 693 (E) [reported in (1999) 239 ITR (Stat) 56]. It is evident that the Authority for Advance Rulings had not considered the said amendment."*

14. In view of the above, we are of the that the concept of make available of technical services that such receipts would not amount to fee for technical services so as to the "concept of make available clause contained in Article 13(4)(c) of the treaty has not been satisfied. Accordingly, we delete the addition and allow this issue of assessee's appeal."

17. Since, the co-ordinate Bench has decided the identical issue in favour of the assessee in assessee"s own appeals for the A.Y. 2009-10 and 2010-11 referred above, we respectfully following the order of the co-ordinate Bench allow Ground No. 5, 6 and 7 of this appeal.

10. Facts being identical, respectfully following the said decision of the Tribunal we allow Ground Nos. 5 and 6 of the assessee.

11. In so far as Ground No.2 is concerned the Ld. Counsel for the assessee submitted that since it was held in favour of the assessee on Royalty and FTS ground, the ground raised by the assessee in respect of receipts towards access to use software and IT support services does not constitute "income" may be kept open. Accordingly, this ground is kept open which may be contested as and when the situation arises.

12. The rest of the grounds are only consequential in nature and the same are restored to the file of the Assessing Officer for adjudication in accordance with law."

10. The coordinate Bench has decided the identical issue in favour of the assessee in assessee's own appeal ITA No. 7283/Mum/2018 AY 2015-16 by following the decisions of the coordinate Benches rendered in assessee's own appeals pertaining to the AY 2011-12 to 2014-15 and AY 2015-16. Since there is no change in the facts of the present case and since the findings of the AO are not in accordance with the decision of coordinate Benches discussed the decision of the above, we respecte impugned order and allow ground No. 5 and 6 of the assessee's appeal."

10. The learned Departmental Representative could not show us any reason to deviate from the aforesaid order and no change in facts and in law was alleged in the relevant assessment year. The issue arising in present appeal is recurring in nature and has been decided in favour of the assessee by decisions of Co-ordinate Bench of the Tribunal for preceding assessment years. Thus, respectfully following the order passed by Co- ordinate Bench of the Tribunal in assessee's own case cited supra, which has also followed the judicial precedents in assessee's own case, the Impugned addition made by treating payment received for IT support services as Fee for Technical Services under the provisions of the Act and under Article-12 of the DTAA, is deleted. As a result, ground nos.3, 4 and 5 raised in assessee's appeal are allowed.

11. In so far as grounds nos.6 and 7, raised in assessee's appeal are concerned, the learned DRP has already held that the payment towards IT support services could not fall under royalty" in the instant case. Thus, the Assessing Officer is directed to follow the directions issued by the learned DRP under section 144C(5) of the Act. As a result, grounds nos.6 and 7, raised in assessee's appeal are allowed."

9. The above decision was followed by the Mumbai Bench of the Tribunal while disposing appeal preferred by the Appellant for the Assessment ear 2018-2019 [ITA No. 996/Mum/2022, dated 28/11/20221 which in was followed by the Tribunal while disposing appeal preferred by the Appellant for the Assessment Year 2019-2020 [ITA No. 2308/Mum/2022, dated 30/11/2022.

"10. It is admitted position that there is no change in facts and circumstances during the Assessment Year 2020-2021. The contracts in terms of which IT

Support Service Fee was received by the Appellant as well as the nature of IT Support Service Fee continue to be the same.

11. On perusal of record for the Assessment Year 2020-2021 placed before us, we find that the authorities below had relied upon their respective orders passed for the Assessment Year 2017-2018 and 2019-2020 while making/confirming the addition on account for IT Support Services in the hands of the Appellant. However, the aforesaid decisions have since been overturned by the Appellant/Assessee. Tribunal in appeal preferred by the

12. On perusal of above decision of the Tribunal in appeal for the Assessment Year 2017-18 to 2019-2020, we find that the Tribunal had held that payment for IT Support Services were not in the nature of 'Fee for Technical Services' under the provisions of Act read with Article 12 of the DTAA in view of decisions of the coordinate Bench of the Tribunal in the case of the Appellant for preceding assessment years.

13. Further, we note that for the Assessment Year 2019-2020, the DRP had, following the judgment of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT: 2021] 432 ITR 471 (SC), directed the Assessing Officer not to treat Software Access Fee as 'royalties'. Since according to the Assessing Officer the IT Support10. It is admitted position that there is no change in facts and circumstances during the Assessment Year 2020-2021. The contracts in terms of which IT Support Service Fee was received by the Appellant as well as the nature of IT Support Service Fee continue to be the same.

11. On perusal of record for the Assessment Year 2020-2021 placed before us, we find that the authorities below had relied upon their respective orders passed for the Assessment Year 2017-2018 and 2019-2020 while making/confirming the addition on account for IT Support Services in the hands of the Appellant. However, the aforesaid decisions have since been overturned by the Appellant/Assessee. Tribunal in appeal preferred by the

12. On perusal of above decision of the Tribunal in appeal for the Assessment Year 2017-18 to 2019-2020, we find that the Tribunal had held that payment for IT Support Services were not in the nature of 'Fee for Technical Services' under the provisions of Act read with Article 12 of the DTAA in view of decisions of the coordinate Bench of the Tribunal in the case of the Appellant for preceding assessment years.

13. Further, we note that for the Assessment Year 2019-2020, the DRP had, following the judgment of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT: 2021] 432 ITR 471 (SC), directed the Assessing Officer not to treat Software Access Fee as 'royalties'. Since according to the Assessing Officer the IT Support Services were intricately connected with the provision of Software Access service, the IT support services would also not qualify as 'royalties' in terms of Article 12(4) of the DTAA or as 'Fee for Technical Services' in terms of Article 12(5) (a) of the DTAA

14. Thus the Tribunal has, in appeals preferred by the Appellant for Assessment Years 2017-18 to 2019-20, deleted the addition made in the hands

of the Appellant in respect of IT Support Services Fee and therefore, the basis of making addition in the hands of the Appellant does not survive. Therefore, the addition of INR 306,89,93,843/- on account of IT Support Service Fee made by the Assessing Officer as per the directions of the DRP is deleted and Ground No. 4 to 6 raised by the Appellant are allowed."

9. Respectfully following the decisions of the Coordinate Benches for A.Y. 2020-21, the addition of Rs.86,55,18,576/- as IT support services is hereby deleted.

10. With regard to the remaining grounds, it is seen that Ground No. 1 is general. Ground No. 2 is regarding limitation which is being left open. Ground No. 10 is regarding Short Grant of TDS. The Ld. AO is directed to verify the records and grant TDS to the assessee, accordingly.

11. Ground No. 11, 12 and 13 relate to levy of interest u/s. 234A, 234B and 234C. Ld. AO is directed to recalculate these as per law.

12. Ground No. 14 is regarding incorrect amount of refund issued. The Ld. AO is directed to consider the claim of the assessee, examine it with reference to the records and re-compute the tax liability as per law.

13. In the result, the assessee's appeal is partly allowed.

Order pronounced in the open court on 06.09.2024

Sd/-	**Sd/-**
KAVITHA RAJAGOPAL	**RENU JAUHRI**
न्यायिक सदस्य/JUDICIAL MEMBER)	**(लेखाकार सदस्य/ACCOUNTANT MEMBER)**

Place: मुंबई/Mumbai
दिनांक/Date 06.09.2024

अनिकेत सिंह राजपूत/स्टेनो

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai