

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'B' BENCH, BANGALORE**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER AND  
SHRI SOUNDARARAJAN K, JUDICIAL MEMBER**

IT(IT)A No.344/Bang/2024
Assessment Years : 2017-18

Western Digital Technologies Inc, 5061, Great Oaks, Parkway, San Jose, CA - 95119 3355, Michelson Drive, Suite 100 Irvine, California 92612, United States of America.  56/1, First Floor, Kanakapura Road, Bangalore – 560 004.  <b>PAN – AACCW 9270 F</b>	Vs.	The Dy. Commissioner of Income Tax, (International Taxation), Circle – 2(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Ajay Rotti, CA
Revenue by	:	Shri Sridhar E, CIT (DR)

Date of hearing	:	12.09.2024
Date of Pronouncement	:	10.12.2024

**ORDER**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

This appeal filed by the assessee is against the Final Assessment order passed by the CIT-(International Transaction), Bangalore dated 06/01/2024 in DIN No. ITBA/AST/M/147/2023-24/1059435065(1) for the assessment year 2017-18.

2. The issues raised by the assessee in **Grounds No. 1 & 8** of the appeal are general in nature and do not require specific adjudication. Therefore, these grounds are dismissed as infructuous.

3. The issues in **Ground No. 5 & 6** relate to the levy of interest under **Section 234A & 234B** of the Act. Since the levy of interest under Section 234A & 234B is consequential in nature and dependent on the outcome of the assessment, these grounds are also dismissed as infructuous.

4. The issue raised in **Ground No. 11** pertains to the initiation of penalty proceedings under **Section 270A, 271A, 271AA and 271BA** of the Income Tax Act. The penalty proceedings are premature at this stage; therefore, these are dismissed accordingly as infructuous.

5. The issue raised by the assessee in Grounds Nos. 2 and 4 of the appeal is that the Id. AO/ Ld. DRP erred in treating M/s SanDisk India as a **Dependent Agency Permanent Establishment (PE)** of the assessee and, consequently, the taxation of the assessee's income in India.

6. The facts in brief are as follows: the assessee is a foreign company based in California, United States. SanDisk India Device Design Centre Pvt. Ltd. (now known as Western Digital India, hereinafter referred to as SanDisk India) became part of the assessee's group by virtue of the acquisition of its parent company, SanDisk USA LLC, in May 2016.

6.1 The assessee is engaged in several transactions with SanDisk India and other Indian entities during the year under review but did not file a return of income in India. Subsequently, SanDisk India was subjected to a survey proceeding on January 16 and 17, 2019 at its office premise. During the survey operation, various documentary materials, emails, and statements of several employees were examined. The analysis of the documents and statements revealed that SanDisk India undertakes a broad range of operations, such as marketing, technical support, sales, customer assistance, and product development, which go beyond auxiliary services. Based on these findings, the Assessing Officer (AO) made the following observations:

- SanDisk India has fully operational teams, including sales, marketing, product development, technical support, and customer service. Its Indian operations are overseen by a country head who represents the parent company's business interests in India. This indicates that Western Digital Technologies (WDT) conducts business activities in India through SanDisk India.
- The various teams at SanDisk India are involved in every stage of the sales process for the products of the SanDisk group or other SanDisk overseas entities in India. Their roles include product customization, customer support, and price negotiations.
- The **Sales Team** identifies potential customers and connects them with SanDisk Ireland's distributors. It acts as an intermediary between SanDisk Ireland, distributors, and customers, handling tasks such as product identification, customization, and order routing. The team influences pricing by negotiating with SanDisk Ireland and is also responsible for

identifying resellers and conducting awareness programs, training, and incentive schemes to onboard them into SanDisk Ireland's network.

- The **Technical Team** and Field Application Engineers (FAEs) assist customers with pre-sales, post-sales, and technical support. They work closely with R&D teams to resolve customer issues and develop tailored solutions.
- The **Business Development Team** manages price negotiations with suppliers, which, in turn, guide the Sales Team in setting prices for customers.
- The **Marketing Team** develops strategies and promotional programs to support resellers and customer acquisition.
- **Operational Framework:** Once pricing is finalized, orders are processed through SanDisk India's account management system for coordination and execution. Logistics are handled by third-party vendors to ensure timely delivery.
- **Revenue Attribution:** Although the sales and marketing functions are carried out in India, revenue is attributed to SanDisk International Limited, Ireland.

6.2 Based on the above, the AO concluded that SanDisk India operates an indirect sales model involving distributors and resellers, with its activities extending beyond basic support functions. These activities include marketing strategies, distributor reward programs, customer identification, and supplier negotiations. SanDisk India is heavily involved in price negotiations and customer interactions, fulfilling customer requirements. However, procurement, product delivery, and payment

collection are handled by the Ireland office. The Ireland office manages supplier interactions, shipment arrangements, and payment handling. While the Indian teams carry out critical business processes, the revenue is recognized by the Ireland office, which also issues the final purchase orders. Products are shipped directly from overseas warehouses to customers in India. Sales and performance targets are provided by the Ireland/USA offices. The Indian operations actively support these processes but avoid direct involvement in procurement or payment collection to maintain a specific operational structure.

6.3 This framework led the AO to conclude that SanDisk India's involvement in various stages of the business and sales processes classifies it as a **Dependent Agency PE** of the assessee in India under the India-USA Double Taxation Avoidance Agreement (DTAA). Consequently, the income attributable to these operations is taxable in India.

6.4 The AO in the light of the above proposed to bring income of the assessee to tax for Rs. 194,44,62,000/- by observing as under:

*"Having concluded that SanDisk India (presently Western Digital India) is a PE of the assessee in India, considering that all Indian operations of the assessee are connected with SanDisk India (presently Western Digital India). Therefore, the profit attribution is required to be made in the instant case. Since the assessee has not furnished any details regarding its global income and other indices, therefore it is difficult to make FAR Analysis in this case. As a result the AO is constrained to attribute profit based on estimation. In the case of Daikin (Supra) ITAT Delhi had estimated profit at the rate of 10% relatable to direct sales and 30% of profits attributable to operations carried out by DAPE in India. Accordingly, a net profit rate of 30% on revenue from operations is being estimated as business income of the assessee. The revenue from the sale of products earned by the Indian subsidiaries SanDisk India (presently Western Digital India) for the year ending 31/03/2017 is Rs.648,15,40,010/-. Net profit of 30% on revenue of Rs. 648,15,40,010/- is Rs.194.44,62,000/-. Hence a sum of Rs.*

*194,44,62,000/- is estimated as business income of the assessee company for the FY 2016;17 relevant to AY 2017-18."*

7. The aggrieved assessee filed objections before the **Dispute Resolution Panel (DRP)**. The assessee submitted that during the year under dispute, while it had made sales in India, **SanDisk India was not involved in these sales in any capacity**. It further argued that **SanDisk India did not provide marketing support services** to the assessee for the year in question.

8. To support its claims, the assessee submitted various documents, including the **financial statements, Form 3CEB, and the Transfer Pricing (TP) Study Report** of SanDisk India. These documents indicated that the marketing support services provided by SanDisk India were exclusively rendered to **SanDisk International Ltd., Ireland**, and not to the assessee. Based on this, the assessee contended that in the absence of marketing support services, the creation of a **Dependent Agency PE** could not be established.

8.1 However, the DRP rejected the assessee's contentions and upheld the Assessing Officer's (AO) findings. The DRP aligned its decision with the observations made by the AO, thereby confirming the existence of a Dependent Agency PE and the related tax implications.

9. Being aggrieved by the order of the learned DRP and AO, the assessee is in appeal before us.

10. The learned AR before us filed a paper book running from pages 1 to 355 and contended that there was no transaction between the

assessee and SanDisk India in relation to marketing selling or distribution of its product in India. Accordingly, the question of dependent agency permanent establishment does not arise for calculating the income chargeable to tax in the hands of the assessee being a foreign company.

11. The learned DR supported the findings of the AO and the DRP, asserting that **SanDisk India played a significant role in facilitating the assessee's business in India**, as evidenced by the survey findings. The DR highlighted that the activities of SanDisk India—such as price negotiations, customer support, and marketing—were not ancillary but integral to the sales process.

11.1 The Id. DR further contended that the AO and DRP had rightly concluded that **SanDisk India constituted a Dependent Agency PE** of the assessee in India under the provisions of the India-USA DTAA. Consequently, the income attributable to these activities was rightly brought under the tax ambit in India.

12. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, it is evident that a survey operation under Section 133A of the Income Tax Act was conducted at the business premises of SanDisk India. During the survey, various documents, including emails, were recovered, and statements from several employees were recorded.

12.1 Based on the findings of the survey, the Assessing Officer (AO) concluded that SanDisk India was actively working to generate business

for the assessee company, thereby creating a Dependent Agency Permanent Establishment (hereafter DAPE) for the assessee in India. Consequently, the AO determined that the income generated by the foreign company (the assessee) from operations attributable to India which was subject to tax in India. This view was subsequently upheld by the learned Dispute Resolution Panel (DRP).

12.2 Before addressing the specific issue, it is essential to refer to the relevant clauses of the Double Taxation Avoidance Agreement (DTAA) between India and the USA. Article 5 of the DTAA addresses the concept of permanent establishment (PE), with Clauses 4 and 5 specifically dealing with the issue of DAPE. The relevant provisions are as follows:

*4. Notwithstanding the provisions of paragraphs 1 and 2, where a person—other than an agent of an independent status to whom paragraph 5 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if :*

*(a) he has and habitually exercises in the first-mentioned State an authority to conclude on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph ;*

*(b) he has no such authority but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise ; or*

*(c) he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise.*

*5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent, or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. **However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise and the transactions between the agent and the enterprise are not made under arm's length conditions, he shall not be considered an agent of independent status within the meaning of this paragraph.***

12.3 Clauses 4 and 5 of Article 5 outline the circumstances under which a dependent agent creates a permanent establishment for a foreign enterprise. A key criterion is the authority of the agent to conclude contracts on behalf of the foreign company. If the agent habitually exercises such authority, it establishes a PE for the foreign enterprise. If the agent has such authority and regularly exercises it, then the agent is considered to create a permanent establishment for the foreign company.

12.4 To determine whether SanDisk India qualifies as a DAPE of the assessee under the given and facts circumstances, it is pertinent to summarize the AO's findings based on the survey:

- The **Sales Team** identifies potential customers and connects them with SanDisk Ireland's distributors. It acts as an intermediary between SanDisk Ireland, distributors, and customers, handling tasks such as product identification, customization, and order routing. The team influences pricing by negotiating with SanDisk Ireland and is also responsible for identifying resellers and conducting awareness programs, training, and incentive schemes to onboard them into SanDisk Ireland's network.
- **Revenue Attribution:** Although the sales and marketing functions are carried out in India, revenue is attributed to SanDisk International Limited, Ireland.

**12.5** From the above, it is transpired that SanDisk India was involved in sales activities connected to SanDisk Ireland's operations in India. SanDisk India disclosed in its financial statements and Transfer Pricing

(TP) study report that it provided marketing support services exclusively to SanDisk Ireland, not the assessee company.

12.6 There is no material on record to prove that any transaction or substantial transaction between the assessee and SanDisk India in the nature of sale and market support or the SanDisk India was involved in any manner in sales made by the assessee company in India which can be made basis for the treating the SanDisk India as DAPE of the Assessee company.

12.7 Thus, the question arises, whether the company namely SanDisk India can be treated as DAPE of the assessee in the given facts and circumstances. Under the DTAA, an Indian entity qualifies as a DAPE for a foreign enterprise only if it:

1. Exercises or habitually exercises authority to conclude contracts on behalf of the foreign enterprise;
2. Maintains stock and delivers goods on behalf of the foreign enterprise;
3. Secures orders wholly or almost wholly for the foreign enterprise;  
or
4. Devotes its activities wholly or almost wholly to the foreign enterprise, with transactions not conducted at arm's length.

12.8 Only under these conditions specified above, an Indian entity will be considered a Dependent Agency Permanent Establishment (DAPE) of the foreign enterprise. Nevertheless, there are no transactions occurring between the two parties i.e. assessee and SanDisk that satisfy the criteria outlined, therefore, there is no

basis for treating the Indian entity as a dependent agent capable of creating a PE.

12.9 In simple terms, if the Indian company (SanDisk India) has not provided any services or entered into any agreement to provide services related to the sales or marketing of the foreign company's (assessee's) products, the concept of a Dependent Agency PE does not arise. As noted earlier from the observations made by the Assessing Officer (AO), which were based on materials found during the survey proceedings, SanDisk India was, to some extent, involved in the sales made by SanDisk Ireland. The materials on record also indicate that there was a formal agreement between SanDisk India and SanDisk Ireland for providing market research support and services, for which SanDisk India received fees.

12.10. It is further observed that the survey materials used against the appellant assessee were also utilized by the Revenue Authorities in making assessments in the hands of SanDisk Ireland. Based on the same materials and employee statements from SanDisk India, the Revenue Authorities held that SanDisk India constituted a Dependent Agency Permanent Establishment (DAPE) of SanDisk Ireland, and consequently, the income of SanDisk Ireland was deemed taxable in India. Assessments were accordingly made in the case of SanDisk Ireland for the Assessment Years (AYs) 2012-13 to 2017-18.

12.13 The dispute in the case of SanDisk Ireland was brought before this Tribunal in the assessee's appeals bearing ITA Nos. 763 to 768/Bang/2022. The coordinate bench of the Tribunal, in its order dated August 25, 2023, after analyzing the statements recorded, referenced

materials, and agreements, concluded that the activities carried out by SanDisk India for SanDisk Ireland did not constitute a DAPE. In view of the above, we hereby set aside the order of the Id. DRP/ AO with the direction not to hold M/s SanDisk India as dependent Agency PE and consequently the assessee income is not chargeable to tax in India. Hence, the ground of appeal of the assessee is allowed.

13. The issue raised by the assessee in **Ground No. 3** of the appeal pertains to the alleged error by the learned Assessing Officer (AO) and Dispute Resolution Panel (DRP) in treating the reimbursement of salary expenses for seconded employees as Fees for Technical Services (FTS).

13.1 The facts of the case indicate that the assessee seconded its employees to its Indian subsidiary, SanDisk India, under a secondment agreement. SanDisk India reimbursed the salary expenses of these seconded employees to the assessee company, after deducting Tax Deducted at Source (TDS) under Section 192 of the Income Tax Act, 1961, in the names of the employees.

14. The AO observed that secondment arrangements typically occur in group companies where global organizations send employees to subsidiaries in other countries for a temporary period to optimize skills, expertise, and resources. These arrangements aim to share technical and administrative knowledge, enabling the local employees of the subsidiary to benefit in future operations. The AO noted that the seconded employees remained under the purview of their original employer, with their employment relationship continuing with the assessee company. There was no direct employer-employee relationship

between SanDisk India and the seconded employees. Instead, the AO concluded that the contractual relationship existed between the assessee company and SanDisk India, with the seconded employees providing services on behalf of the assessee.

14.1 The AO further determined that the services rendered by the seconded employees were technical, managerial, and administrative, thereby qualifying as FTS under Section 9(1)(vii) of the Act. The AO also concluded that the arrangement fulfilled the "make available" clause under the Double Taxation Avoidance Agreement (DTAA), as the expertise shared by the seconded employees with SanDisk India was intended to enable the latter to use such knowledge independently in future operations. The AO relied on the judgment of the Delhi High Court in the case of *Centrica India Offshore Pvt. Ltd.* [44 taxmann.com 300] to support this conclusion.

14.2 The AO rejected the assessee's argument that the payments were mere reimbursements of salary on which TDS under Section 192 had been duly deducted by SanDisk India. It was held that the amount received by the assessee from SanDisk India constituted income in the nature of FTS and was taxable in India. The AO noted that SanDisk India was required to deduct tax at source under Section 195 on such payments to the assessee company. Furthermore, the AO clarified that the salary paid to the seconded employees was taxable as individual income, and the assessee company was liable to deduct tax under Section 192. By transferring this responsibility to SanDisk India, the assessee company could not claim exemption from tax liability.

14.3 Relying on additional judgments, including *Northern Operating Systems Ltd.* (Supreme Court) [138 taxmann.com 359] and *Morgan Stanley & Co. Inc.* [292 ITR 416], the AO proposed to treat the amount of ₹2,15,86,374 received by the assessee from SanDisk India as FTS taxable in India. Accordingly, the AO proposed an addition to the total income of the assessee.

15. The aggrieved assessee preferred to file objection before the learned DRP.

16. The aggrieved assessee filed objections before the learned DRP, contending that the amount received was a reimbursement of employee costs on a cost-to-cost basis without any profit element and, therefore, could not be treated as Fees for Technical Services (FTS). The assessee further argued that SanDisk India had deducted the appropriate tax under Section 195 of the Act while reimbursing the employee costs, eliminating any additional tax liability.

17. However, the learned DRP rejected the assessee's contentions and upheld the findings of the AO. Consequently, the assessee has appealed before this tribunal.

18. Before us, the learned Authorized Representative (AR) argued, among other contentions, that the agreement between the assessee and SanDisk India did not contain a "make available" clause. As a result, the payment received by the assessee could not be subjected to tax in India under the provisions of the DTAA.

19. On the other hand, the learned Departmental Representative (DR) reiterated the findings of the lower authorities and strongly supported their conclusions.

20. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, the issue arises for adjudication whether the reimbursement of salary as claimed by the assessee represents the fees for technical services and therefore the same is liable to TDS under the provisions of section 195 of the Act. Indeed, the fees for technical services (FTS) are subject to Tax Deducted at Source (TDS) under the Double Taxation Avoidance Agreement (DTAA) between India and the USA. The Article 12 of the DTAA between India and the USA deals with Fees for Technical Services (FTS)

20.1 Article 12 of the India-US DTAA deals with the taxation of fees for technical services (FTS). It provides specific rules for taxing FTS, which are payments made for services that are technical or advisory in nature. Article 12(1) – General Rule for FTS

20.2 Under Article 12(1) of the DTAA, the country of the source of income (i.e., India) has the right to tax fees for technical services, subject to the provisions of the agreement. This means that if a US-based company is providing technical services to an Indian entity, India has the right to tax these fees, provided certain conditions are met.

*"Payments of fees for technical services may be taxed in the Contracting State in which the services are rendered."*

Article 12(2) – Definition of Fees for Technical Services

20.3 The DTAA defines technical services as services that:

- Are of a technical or consultancy nature,
- Typically involve skills, expertise, or knowledge in specific fields like engineering, architecture, or scientific work.

20.4 However, there are exceptions to this general rule, depending on the nature of the services provided. For example, the DTAA provides exemptions in cases where the service is related to routine or simple services that do not involve technical expertise.

20.5 Be that as it may be, certainly, the "make available" clause is an important consideration in the taxation of fees for technical services (FTS) under the India-US DTAA. This clause helps in determining whether certain services will be classified as technical services subject to tax in India, based on whether the services "make available" technical knowledge, skills, or expertise to the recipient. If the make available clause is absent in the agreement or contract, the taxation of fees for technical services may be affected. The clause limits the scope of fees for technical services to situations where the service provided makes available technical knowledge, skills, or expertise to the recipient. "Fees for technical services" means payments for services of a technical, managerial, or consultancy nature, but does not include services where the recipient is not able to apply the technical knowledge, skills, or expertise received to further their own business or activities.

### **The "Make Available" Clause in Article 12 of the India-US DTAA**

20.6 Under Article 12(4) of the India-US DTAA, the treaty provides a specific definition of fees for technical services (FTS), which includes a provision that requires the technical knowledge, experience, skill, or process to be "made available" to the recipient for it to qualify as fees for technical services. The term 'fees for technical services' means payments of any kind to any person in consideration for the rendering of any technical, managerial, or consultancy services (including the provision of services of technical or other personnel), but does not include any payments for services rendered in connection with the sale of goods or merchandise, or the performance of any other activity of a preparatory or auxiliary character, unless the services make available technical knowledge, skills, or processes.

20.7 If the make available clause is included in a tax treaty, then only those services that make available technical knowledge, skills, or expertise (which the recipient can then use independently in the future) are subject to taxation as technical services.

20.8 Now turning to the facts of the present case, we note that the Id. AR before us submitted that agreement between the assessee and the SanDisk India is of indefinite period which implies that the assessee did not make available the technical know-how to the SanDisk. Hence, there was no reason for deducting the TDS under the provisions of section 195 of the Act read with DTAA (between India and USA).

20.9 In our considered view, an agreement of indefinite may indicate that the recipient is dependent on the service provider, as there is no point at which the recipient is equipped to handle the services

independently. In such cases, payments under the agreement are unlikely to qualify as FTS under the "Make Available" clause. In view of the above, we hold that the amount received by the assessee against the services rendered to SanDisk India cannot be classified as FTS under the provisions of the DTAA and therefore the same cannot be made subject to the provisions of tax in the hands of the assessee. However, in the absence of the relevant agreement to justify indefinite period, we are accordingly, inclined to set aside the finding of the Id. DRP and remit the issue to the file of the AO for fresh adjudication as per law and in the light of above stated discussion. Hence, the ground of appeal of the assessee is hereby allowed for statistical purposes.

21. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in court on 10<sup>th</sup> day of December, 2024

Sd/-  
**(SOUNDARARAJAN K)**  
Judicial Member  
Bangalore  
Dated, 10<sup>th</sup> December, 2024  
/ vms /

Sd/-  
**(WASEEM AHMED)**  
Accountant Member

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore