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

BEFORE SHRI VIMAL KUMAR, JUDICIAL MEMBER AND
SHRI AVDHESH KUMAR MISHRA, ACCOUNTANT MEMBER

ITA No. 3753/Del/2023
(Assessment Year : 2021-22)

Harley – Davidson Motor Company Inc. C/o. H-D Motor Company India Pvt. Ltd. Building No.5, Tower A, Level-18, DLF Cyber City Gurgaon, Haryana – 122 002 **PAN : AACCH 6849 M**	Vs.	**ACIT, International Tax** Circle –2(1)(1), New Delhi
(Appellant)		(Respondent)

Assessee by	Shri K. M. Gupta, Adv. and Shri Jaskaran Sarkaria, C.A.
Respondent by	Shri Vijay B. Vasanta, CIT-D.R.

Date of Hearing	26.11.2024
Date of Pronouncement	27.12.2024

O R D E R

PER VIMAL KUMAR, JM:

1. The appeal filed by assessee challenging the final Assessment order under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as "the Act"] dated 31.10.2023 of the Asst. Commissioner of Income Tax, Circle Int. Tax 2(1)(1) [hereinafter referred as ('Ld. AO')] in pursuance to the direction of

learned Dispute Resolution Panel-1, New Delhi dated 19.09.2023 under section 144C(5) of the Act for the Assessment Year 2021-22.

2. Brief facts of the case are that the assessee/appellant is engaged in the business of sale of motorcycles and related parts, accessories, and general merchandise and also engaged in resale of merchandise bearing the Harley Davidson Brand name. The assessee electronically filed its return of income for the A.Y. 2021-22 declaring total income of Rs.2,85,38,016/- on 15.03.2022. The case was selected for scrutiny under CASS. Notice under section 143(2) of the Act was issued on 29.06.2021 and duly served upon the assessee and notice under section 142(1) of the Act along with detailed questionnaire were issued during the assessment proceedings from time to time. In compliance the above notices, the assessee filed various details which were examined and placed on record.

3. During the assessment proceedings, the assessee submitted that he is a tax resident of USA and received interest income on ECB loan given to its Indian AE, H-D Motor Company India Pvt. Ltd. (herein after referred as "HD India") along with income from offshore supply of Rs.7,30,528/-, reimbursement of expenses of Rs.8,65,87,527/- and reimbursement of GIS Support services of Rs.14,33,10,396/- from M/s. HD India. The assessee further claimed that the said GIS Support services are only cost to cost reimbursement or recovery of cost allocated to the HD India without

any mark-up. In view of the same, the assessee was show-caused vide letter dated 13.12.2022. In compliance with, assessee filed its submission vide letter dated 20.12.2022. The reply of the assessee was considered but not found acceptable as the services provided by the assessee are of specific nature and therefore, liable to be taxed under fees for taxable services. Accordingly, the addition of Rs.14,33,10,396/- is hereby proposed to be made and should be subject to charge at the rate of 10% under section 115A(1)(b) of the Act. After considering the submissions made by assessee and examining the facts, draft assessment order dated 27.12.2022 under section 144C of the Act was forwarded to the assessee. Against the draft assessment order, assessee filed his objections in Form 35A before Dispute Resolution Panel-1, Delhi ('DRP-1') on 25.01.2023 under section 144C(2)(b) of the Act. Hon'ble DRP vide order dated 19.09.2023 issued directions under section 144C(5) of the Act. In compliance of directions, assessment order dated 31.10.2023 under section 143(3) read with section 144C(13) was passed.

4. Being aggrieved by the assessment order, assessee/appellant preferred appeal.

5. Learned Authorized Representative for the assessee/appellant submitted that learned DRP and learned AO erred in concluding that the receipts amounting to Rs.14,33,10,396/- accruing to the Appellant on account of provision of Global Information Services

(GIS) being services in the nature of general maintenance of software and hardware including services procured from third party and overhead thereof ('routine GIS Services') to its affiliate in India are in the nature of fees for technical services ('FTS') / Fees for Included Services ('FIS') under Article 12 of the India - US Double Taxation Avoidance Agreement ('DTAA') (erroneous reference to the India- Singapore DTAA in the order by the DRP). Learned DRP and AO erred in not appreciating that the routine GIS services provided by the appellant do not make available technical knowledge, experience, skill, know-how or processes, which can enable the recipient of services to apply the technology contained therein, thus not satisfying the 'make available' clause in the D'TAA. The learned DRP and learned AO erred in concluding that the routine services rendered by the appellant provide enduring benefits to the recipient of services.

5.1 Learned Authorized Representative for the assessee/appellant submitted that learned DRP and learned AO erred in not appreciating that the GIS Service charges are recovered from HD India on a cost to cost basis without addition any markup and in absence of income element embedded in it, the amount is not chargeable to tax under the Act.

5.2 Learned Authorized Representative also submitted the description of the services rendered are as under:

A.	Infosys maintenance	:	Rs.2,27,88,766/-
B.	Maintenance and development (Software and hardware)	:	Rs.3,95,03,304/-
C.	Salary & Overheads i.e., Corporate allocation	:	Rs.3,84,98,865/-
D.	Depreciation of assets used in Providing GIS services	:	Rs.4,25,19,461/-

5.3 The cross-charging mechanism of the aforesaid services has been referred in the Clause 1 of the GIS agreement. The learned AO alleged that the impugned reimbursements are in the nature of FTS/FIS and satisfy the make-available clause. Even if the activities detailed in para 5 are assumed to be 'services' in nature, these do not satisfy the 'make available criteria and therefore cannot be taxed as FTS/FIS in view of the provisions of Article 12 of the India-USA-DTAA. The learned AO has alleged that enduring benefit has been provided by the appellant to the Indian AE. The appellant recovers GIS charges every year from the group affiliates. So, no enduring benefit is being provided at all to the recipient of services.

5.4 As per the provisions of Article 12 of the India-USA DTAA, a service is said to be FIS if the same satisfies the 'make available' condition. In this regard, it is relevant to refer to the Memorandum of Understanding (MOU') entered between India and USA which defines the term 'make available with suitable examples. According to the MOU entered between the parties, the services which do not make available any technical knowledge/technology are excluded from the ambit of the term fee for included services as defined in

Article 12(4)(b) of the DTAA. On a perusal of the MOU between India and USA, it is evident that for a fee to be called fee for included services, it is essential that technical knowledge, skill, know-how should be "made available" to the service recipient and the service recipient should be able to perform the services at its own without recourse to the performer of the services. The MOU provides that technology is considered to be 'made available', when the person acquiring the services is enabled to apply the technology. Mere fact that the rendering of service requires technical input by the person rendering the services cannot mean the technical knowledge, skills, know-how are made available. The copy of the MOU entered between India and USA is provided on page no. 279-305 of the Paper book.

5.5 In order to bring the impugned payments for services within the ambit of FTS/FIS under the India-US DTAA, the services would have to satisfy the 'make available' test meaning thereby that the services rendered must be such that the Indian AE i.e., HD India will be able to perform said activities in the future without any assistance from the Company which is not true in the present case, since the appellant is recovers GIS charges every year from the group affiliates which clearly shows that no enduring benefit is being provided.

5.6 Reliance is placed by the appellant on the order of Hon'ble ITAT Delhi in the case of *GE Energy Management Services Inc. vs.*

Assistant Director of Income-tax, (International Taxation), New Delhi [2022] 135 taxmann.com 173 (Delhi - Trib.) wherein it was held that *"The term of the agreement is five years and services provided by the assessee are repetitive and ongoing in nature. This means that PGCIL is not able to apply technical or skill use by the assessee for rendering such services. Given that repetitive nature of the services, it would be factually incorrect to allege that the services make available any technical knowledge, expertise, skill. know-how or processes to PGCIL."*

5.7 The assessee/appellant placed reliance on the following judicial precedents:

- Hon'ble Delhi Tribunal in the case of Inter-Continental Hotels Group (Asia Pacific) (Pte.) Ltd. v. ACIT [2023] 148 taxmann.com 27 (Delhi - Trib.)
- Hon'ble Delhi ITAT in the case of Netafim Irrigation India Pvt. Ltd. [ITA No.1427/Del/2015 and ITA No.975/Del/2016]
- DIT vs. Guy Carpenter & Co Limited (2012) 346 ITR 504 (Delhi)
- CIT vs. Bio-Rad Laboratories (Singapore) Pte. Ltd [2023] 155 taxmann.com 646 (Delhi)

6. Learned Authorized Representative for the assessee/appellant submitted that learned AO and DRP did not sought details while concluding the make available and wrongly held that invoices had no details.

7. Learned Departmental Representative for the department of Revenue submitted that learned AO and learned DRP discussed the technical services provided by Infosys. Invoice at page 252 of the paper book does not mention details of services provided by Infosys. So, as per make available is to be taxed. The matter requires to be sent to the learned AO for re-appreciation of facts.

8. From examination of record in light of aforesaid rival contentions, it is crystal clear that learned DRP and learned AO concluded receipts accruing to the assessee/appellant on account of provision of GIS being services in the nature of general maintenance of software and hardware procured from 3rd party and other head thereof ('routine GIS services') to is affiliate in India are in the nature of Fees for Technical Services ('FTS') / Fees for Included Services ('FIS') under Article 12 of the India – US Double Taxation Avoidance Agreement ('DTAA'). Undisputedly, learned DRP and AO did not sought details of the invoices. Copy in detailed filed as copy of GIS Agreement at pages 42-44, copy of invoices raised for GIS Charges at pages 45-60, copy of email correspondences made in respect of delivery of services for GIS support services at pages 61-72 and copy of invoices, on a sample basis, raised by the third parties like Infosys, SAP, Microsoft, Adobe etc. at pages 252-278 of the paper book.

9. It is the fact that HD India had shut down its business of distribution of motor cycles, spare parts and accessories in India in

the year under consideration which is evident from the fact stated on Page 7 of the DRP directions dated September 19, 2023. It is clearly evident that the contentions of the learned AO as well as the learned DRP that such services provided enduring benefit or enable the employees of HD India to apply the technology embedded in such services in the future is devoid of any merit.

10. In view of above material facts and circumstances, in the interest of justice, the matter is restored to the file of the learned AO for fresh decision in accordance with law.

11. In the result, appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this day 27th December, 2024

Sd/-	Sd/-
(AVDHESH KUMAR MISHRA)	**(VIMAL KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 27.12.2024
Priti Yadav, Sr. PS

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI