

आयकर अपीलिय अधिकरण
दिल्ली पीठ "डी", दिल्ली
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री नवीन चंद्र, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", DELHI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

आअसं.3540/दिल्ली/2023 (नि.व. 2021-22)
ITA No.3540/DEL/2023 (A.Y.2021-22)

Keller Asia Pacific Ltd.,
18 Boon Lay Way, No. 4, 104 Tradehub 21,
Singapore, 609966
PAN: AAGCK5505R

..... अपीलार्थी/Appellant

बनाम Vs.

Assistant Commissioner of Income-Tax,
Circle International Taxation-2(1)(2)
Civic Centre, New Delhi 110002

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Ashik Shah, CA
प्रतिवादीद्वारा/ Respondent by : Ms. Anjula Jain, CIT-DR
सुनवाई की तिथि/ Date of hearing : 03/06/2025
घोषणा की तिथि/ Date of pronouncement: : 26/08/2025

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 12.10.2023 passed u/s 143(3) r.w.s 144C(13) of the Income Tax Act 1961 (hereinafter referred to as 'the Act') for assessment year 2021-22.

2. Shri Ashik Shah, appearing on behalf of the assessee submitted at the outset that he is not pressing ground no. 1 to 3 of appeal. The only ground assailed by the assessee is ground no 4, relating to taxability of management fees as Fee for Technical Services (FTS).

2.1. Narrating facts of the case, he submitted that the assessee was incorporated in Singapore and is a tax resident of Singapore. The assessee is providing ground engineering services used in construction of buildings. The assessee entered into Management Services Agreement with various Keller Group entities in Asia Pacific Region including Keller Ground Engineering India Pvt. Ltd. (Keller India). The Management Services Agreement dated 01.01.2016 is at pages 117 to 131 of paper book. The services provided by the assessee to its Indian AE are given in Schedule 1 to said agreement at page no. 126 & 127. In lieu of providing services, the assessee receives management fee from Keller India. The services are in nature of strategic management consultancy services, legal services, engineering & technical advice, marketing & advertising services, human capital, procurement and I.T services. Except for I.T services, none of the services provided by assessee to Indian AE qualify 'make available' clause. The revenue from I.T Services was offered to tax by the assessee *suo-motto*. The assessee is rendering these services since 2016. The AO holds management fee as FTS on the presumption that the assessee is making available Technical Knowledge Skill, etc to its AE. In preceding assessment years, the AO made addition for similar reasons. The assessee carried the issue in appeal before the Tribunal. However, the appeals of the assessee were allowed on the technical issue of DIN. Hence, this is the first year for adjudication of the issue on merits.

2.2 Aggrieved by the draft Assessment Order dated 28.12.2022, the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP without appreciating the facts upheld findings of the AO in draft Assessment Order. The Id. AR of assessee contended that assessee is giving his expert opinion/advice and is not transferring any technology or know-how. The assessee is providing services

through emails. The AO has erred in assuming that the assessee has transferred technology or know-how over the period of time. He referred to the observations of the AO, in para 11 of assessment order, wherein the AO has remarked that, *'technical skill if made available for a longer period of time, the customers gain the technical knowledge of resolving that issue in future independently'*. The Id. AR asserted that said observations are without any basis and are arising from assumptions and presumptions of the AO. Nowhere in the assessment order the AO has given any finding based on documentary evidence that there is transfer of technology or know-how by the assessee to Keller India. The Id. AR to demonstrate that the assessee is providing expert advice/opinion only and not transferring technology referred to emails at pages 156 to 159 of the paper book. Referring to the said mails, he submitted that assessee in one of the cases gave technical advice in respect of foundation works for L&T staff colony at Azadpur, New Delhi. The assessee's engineering manager reviewed the project and provided technical comments and the steps that are to be taken to resolve the problem. He further referred to another set of mails at pages 163 to 168 of the paper book where in another project, the assessee had provided expert technical comments in relation to D Walls works to be undertaken at Dahej.

2.3. With regard to other services viz. legal services, financial services, human resource services etc. the Id. AR submitted that the AO in assessment order has nowhere discussed that 'make available' criteria is satisfied in providing of said services. He submitted that it is a well settled law that where there is no transfer of technology, technical know-how or technical knowledge, make available clause in Article 12 of India-Singapore DTAA does not get attracted. To support his submissions, he placed reliance on following decisions:-

1. *Tagit (P.) Ltd. Vs. DCIT, 159 taxmann.com 93 (Delhi-Trib.);*
2. *Inter Continental Hotels Gorup (Asia Pacific) (Pte.) Ltd. Vs. ACIT, 133 taxmann.com 99 (Delhi-Trib.);*
3. *Bramhacrop Hotels & Resorts Ltd. Vs. DCIT (International Taxation-1), 61 taxmann.com 186 (Pune-Trib.).*

2.4 Without prejudice to the submissions made on merits, the Id. AR submits that in ground no. 5 of appeal, alternate contention of the assessee is, that, if the payment received in lieu of services is held to be fee for technical services, the same should be taxed at flat rate of 10%, as per India-Singapore DTAA without levy of surcharge and cess. In support of his submissions, he placed reliance on the following decisions:-

1. *FCC Co. Ltd. Vs. ACIT in ITA No. 1789/Del/2022 for AY 2017-18, decided on 26.12.2022;*
2. *Soregam SA Vs. DCIT, 101 taxmann.com 94 (Delhi-Trib.);*
3. *R.A.K Ceramics, UAE Vs. DCIT 104 taxmann.com 380 (Hyd.).*

2.5. In respect of ground no. 6 of appeal, the Id. AR submits that the AO has erred in charging interest u/s. 234A of the Act, without appreciating that the assessee had filed return of income within due date. He pointed that the actual date of filing return of income for impugned assessment year was 31.10.2021. Due to Covid-19 pandemic, the due date of filing return of income was extended to 15.03.2022 by the CBDT vide Circular No.01/2022 dated 11.01.2022. The assessee filed return of income on 10.03.2022, hence the return of income was filed by the assessee well within the extended time, therefore, interest u/s. 234A is not leviable on the assessee.

3. Per contra, Ms. Anjula Jain representing the Department strongly supporting the assessment order submitted that the nature of services rendered by the assessee to Keller India are in the nature of managerial technical and consultancy services and 'make available' clause as per Article 12(4) (b) of India-Singapore DTAA is also satisfied. She contended that Schedule 1 to Management Service Agreement (at page 126 of the paper book) clearly show that the assessee is providing technical know-how and technical skills to Keller India. She referred to Clause D in recitals of the agreement, wherein it has been mentioned that in order to increase the volume of sales, distribution of the services and to improve personal qualifications connected with management and technical skills Keller India would use the services of the assessee. She further referred to Clause 2.1 of said agreement which narrates scope of services. She pointed that the services are not only provided through correspondence, telephone, email but are also supplemented by periodic visits of personnel; this clearly shows that there is transfer of know-how and skill, thus make available condition is satisfied in the present case. To substantiate his submissions she placed reliance on the decision in the case *H.J. Heinz Company Vs. ADIT, 108 taxmann.com 473 (Delhi - Trib.)*.

3.1. In respect of ground no. 6 of appeal, the Id. DR submits that the issue can be restored to AO with a direction to verify the facts.

4. We have heard the submissions made by rival sides and have examined the orders of authorities below. At the outset Id. Counsel for the assessee submitted that he is not pressing ground no. 1 to 3 of appeal. Accordingly, ground no. 1 to 3 of appeal are dismissed as not pressed.

5. The solitary issue that requires adjudication is taxability of management fee as Fee for Technical Services (FTS), raised in ground no. 4 of appeal. The assessee is a Singapore based company and is in 6th year of operation in India. In so far as tax residence status of assessee, the same is not in dispute. Schedule-I annexed to Management Services Agreement dated 01.01.2016 between the assessee and Keller India lists the scope of services provided by assessee. The services *inter alia* includes:

- (i) Strategic Management Consulting Services;
- (ii) Legal Services;
- (iii) Engineering and Technical Advice;
- (iv) Marketing and Advertising Services;
- (v) Human Capital
- (vi) Procurement; &
- (vii) IT Services.

6. As per the agreement these services are provided on an ongoing basis through correspondence, telephone, email, telefax, periodic visits of personal for short term and any other mode mutually agreed between the parties. The assessee has offered to tax receipts in respect of IT Services. In so far as the other services mentioned in the agreement, it is contended that they are Advisory and Managerial Services. To substantiate nature of services, the assessee has placed on record some sample emails at page no. 156 to 188 of the paper book. A perusal of Management Service Agreement (supra) would show that the services provided by the assessee can be classified as technical, managerial and consultancy. A perusal of emails placed on record by the assessee also show that the nature of services are technical, consultancy advisory and managerial. No material is brought on record by the Revenue to substantiate that there is transfer of knowhow or technology. Even in the scope of work as detailed in

Schedule 1 to Management Service Agreement and in the agreement there is no reference of transfer to knowhow under any category of services. Be it Strategic Management or Engineering or Technical Services, the nature of services are consultancy, support and advisory. The contention of the assessee is “make available” clause in terms of Article 12(4) of India-Singapore DTAA is not satisfied.

7. Article 12(4) of India-Singapore DTAA deals with taxability of FTS, the relevant extract for the same is reproduced herein under:-

“.....4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services :

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

(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or

(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person....”

Thus, as per treaty ‘make available’ of know how or technology or processes or skill is sine qua non for holding any payment as FTS, if, the services do not fall under sub clause (a) or sub clause (c) of Article 12(4). Certainly, the case of the assessee neither falls under sub clause (a) or sub clause (c) of Article 12(4). To come within the sweep Article 12(4)(b), “make available” of technical

knowledge, experience, skill, knowhow or processes which enables the person acquiring the services to apply the technology is must. Nowhere in the agreement there is any covenant for transferring/making available any technical knowhow. Even from the scope of work as detailed in the agreement and exchange of mails between assessee and Keller India it is not emanating that there is transfer of any knowhow or technical knowledge or processers. A perusal of Management Services Agreement would show that there is no specific life time of agreement. That mean the term of said agreement is perpetual unless the same is terminated for the reasons mentioned in clause 7 of the agreement by any the parties to the agreement. Thus, the services are provided by the assessee to Keller India on year on year basis. This itself shows that there is no transfer of any technical knowhow or skill or process or technology. Had it been a case of transfer of knowhow, Keller India would not have entered into such perpetual agreement. Further, from perusal of mails it emerges that Keller India is seeking technical consultancy and advisory services on each of the projects it undertakes. Since, the preconditions for holding any payments as FTS as per Article 12(4) are not satisfied the payments received by assessee from Keller India cannot be held as FTS.

8. In the case of *Bio Rad Laboratories Inc. vs. ACIT, 149 taxmann.com 342* the coordinate Bench after referring to provisions of Article 12(4) of India-US DTAA which contains similar “make available” clause and various decisions of the Tribunal held that where there was no transfer of technology of services, the recipient of service was unable to make use of said technology only by itself in its business or of its own benefit without recourse to assessee year after year. The receipts on account of provision of Information Technology and other Administrative Services to its affiliate in India were not in the nature of FTS under

India-US DTAA. The said decision of the Tribunal was upheld by the Hon'ble Delhi High Court in appeal by the Revenue reported as 459 ITR 5 (Del).

9. In the case of *Criteo Singapore Pte. Ltd. vs. ACIT, 170 taxmann.com 162 (Delhi-Trib.)* the coordinate Bench while dealing with a similar situation after referring to catena of judgments and Article 12(4) of India-Singapore DTAA held as under:-

"56. In the instant case, we find that the receipts in question are for rendering the services categorized as Business support services which pertains to routine administrative services and that too, on a recurring basis year-on-year and thus, cannot have any enduring benefit for Criteo India as held by the Assessing Officer. We find that the intercompany agreement was effective since November 10, 2016 and the said support services are being provided to Criteo India year-on-year since the inception of the Agreement. We also find that travel related services was merely for supervisory activities and for very short duration. We are, therefore, of the considered view that such services, having a recurring nature, does not satisfy the "make available" clause. Mere incidental advantage to the recipient of services is not enough. The view is supported by the decision of Hon'ble Delhi High Court in the case of CIT (International Taxation) v. Bio-Rad Laboratories (Singapore) Pte. Ltd. [2023] 155 taxmann.com 646/[2024] 296 Taxman 167/[2023] 459 ITR 5 (Delhi) wherein it has been held as under:

"13. The Tribunal, in concluding that services offered by the respondent/assessee to its Indian affiliates did not come within the purview of FTS, as reflected in article 12(4)(b) of the Indo Singapore DTAA, concluded that they did not fulfil the criteria of 'make available' principle.

14. According to the Tribunal, the agreement between the respondent/assessee and its Indian affiliate had been effective from 1-1-2010, and if, as contended by the assessee/revenue, technical knowledge, experience, skill, and other processes had been made available to the Indian affiliate, the agreement would not have run its course for such a long period.

14.1 Notably, this aspect is adverted to in paragraphs 17 to 23 of the impugned order. For convenience, the relevant paragraphs are extracted hereafter:

"17. A perusal of the aforementioned provision shows that in order to qualify as FTS, the services rendered ought to satisfy the 'make available' test. Therefore, in our considered opinion, in order to bring the alleged managerial services within the ambit of FTS under the India-Singapore DTAA, the services would have to satisfy the 'make available' test and such services should enable the person acquiring the services to apply the technology contained therein.

"18. As mentioned elsewhere, the agreement is effective from 11-2010 and we are in Assessment Years 2018-19 and 2019-20 [sic...20]. In our considered opinion, if the assessee had enabled the service recipient to apply the technology on its own, then why would the service recipient require such service year after year every year since 2010?

19. This undisputed fact in itself demolishes the action of the Assessing Officer/DRP. Facts on record show that the recipient of the services is not enabled to provide the same service without recourse to the service provider, i.e., the assessee.

20. In our humble opinion, mere incidental advantage to the recipient of services is not enough. The real test is the transfer of technology and on the given facts of the case, there is no transfer of technology and what has been appreciated by the Assessing Officer/Id. CIT(A) is the incidental benefit to the assessee which has been considered to be of enduring advantage.

21. In our understanding, in order to invoke make available clauses, technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider."

57. In the light of the judicial precedents referred to above, we are of considered opinion that in order to invoke 'make available' clause, to fit into the terminology "making available", the technical knowledge and skill must remain with the person

receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Thus, the technical or consultancy services may be said to be 'made available' only when the service recipient is enabled to apply the technology/ skill/ services in future without recourse to the service provider. A mere incidental advantage to the recipient of service is not enough. The test is the transfer of technology/ skill and not the incidental benefit to the recipient.

58. In the instant case, Criteo India is unable to apply the technical knowledge/ skill on its own, i.e., without recourse to such personnel, in future. The technical knowledge and skill does not remain with the Criteo India after the particular contract comes to an end and the technical knowledge or skills of the assessee is not imparted to and absorbed by Criteo India so that it can deploy similar technology or techniques in the future without depending upon the assessee. The services are in the nature of support services, which are rendered by the Assessee to all group companies in the APAC region. Operational support (such as finance, accounting, business and legal support, statutory compliance, financial planning etc.) has been rendered by the Assessee with an intention to ensure consistency with the Assessee's global brand standard, and hence needs to be rendered continuously based on the requirements of Criteo India. Training/ recruitment and human resource support neither result in transfer of technology or knowledge or skill or know-how. The receipts on account of travelling, by no stretch of imagination, can be considered in the nature of managerial, technical or consultancy services or for any use or right to use of any technology or software or equipment. Employees of the assessee travelled to India on certain occasions for a very short duration in relation to supervisory activities only. In view of the above, the receipts in the hands of the assessee for providing Business support services, travelling related services and external consultants' services to Criteo India are not in the nature of 'FTS' as defined in Article 12(4) of the India-Singapore DTAA. We direct the AO to delete the said addition. Accordingly, Ground No. 2.1 is allowed."

10. In the case of *Crocs Inc. vs. ACIT, 174 taxmann.com 419 (Delhi)*, the Tribunal in a case where the AO had held payments received by the assessee as FTS, the Tribunal after examining various decisions came to the conclusion that where make available condition is not satisfied. The receipts cannot be held as FTS under

Article 12(4) of India-US DTAA. It would be relevant to mention here that the provisions of Article 12(4) of India-US DTAA and India-Singapore DTAA are pari materia.

11. We have also considered decision on which Id. DR has placed reliance. The said decision is distinguishable on facts hence the same has no persuasive effect.

12. Thus, in light of above facts and decisions discussed above, we find merit in ground no. 4 of appeal. The addition made by AO treating the receipts as FTS, is directed to be deleted.

13. In ground no. 5 of appeal, the assessee has assailed levy of surcharge and cess on treaty rates. Since, we have allowed primary contention of the assessee in ground no.4 of appeal. The ground no. 5 of appeal has become academic, thus, the same is not deliberated upon.

14. In ground no. 6.1 of appeal, the assessee has assailed levy of interest u/s. 234A of the Act on alleged delay in filing of return of income. The Id. Counsel for the assessee has pointed that the return of income for impugned assessment year was filed within the extended time. The CBDT vide Circular No.1/2022 dated 11.01.2022 had extended the due date of furnishing return of income for AY 2021-22 to 15.03.2022. The assessee filed return of income on 10.03.2022. Since, the return of income was filed within the extended time, no interest u/s. 234A of the Act is to be levied. The ground of appeal no. 6.1 is allowed.

14.1. In ground no. 6.2 of appeal, the assessee has assailed levy of interest u/s. 234B of the Act. Charging of interest u/s. 234B of the Act is mandatory and consequential. Hence, ground no. 6.2 of appeal is dismissed.

14.2. In ground no. 6.3 of appeal, the assessee has assailed adjustment made by AO towards amount refunded while arriving at demand payable. The Id. Counsel for the assessee has stated that while arriving at demand payable in computation sheet, the AO has erred in making adjustment of refund Rs.2,26,437/-, whereas no such refund was granted to the assessee. The AO is directed to examine above contentions of assessee and after verification re-compute the demand payable. Thus, ground no. 6.3 of appeal is allowed for statistical purpose.

15. In the result, appeal of the assessee is partly allowed in the terms aforesaid.

Order pronounced in the open court on Tuesday the 26th day of August, 2025.

Sd/-

(NAVEEN CHANDRA)

लेखाकार सदस्य/ACCOUNTANT MEMBER

दिल्ली/Delhi, दिनांक/Dated 26/08/2025

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

NV/-

प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., दिल्ली /DR, ITAT, दिल्ली
5. गार्ड फाइल/Guard file.

BY ORDER,

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(Asstt. Registrar) ITAT, DELHI