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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 212 OF 2018

The Commissioner of Income International
Taxation-1

1st Floor, Room No.107, Scindia House,
Ballard Pier, N.M. Road, Mumbai - 38

..... Appellant

Vs.

Alibaba.Com Singapore E-Commerce
Private Ltd.

c/o SRBC & Associates LLP, 14th Floor,
The Ruby, 29, Senapati Bapat Marg,
Dadar (West), Mumbai - 400 028

..... Respondent

Mr.P.C.Chhotaray for Appellant.

Mr.P.J.Pardiwalla, Sr.Advocate a/w Mr.Atul K. Jasani for
Respondent.

**CORAM: K.R. SHRIRAM, J &
FIRDOSH P. POONIWALLA, J.
DATED : JUNE 16, 2023**

ORAL JUDGMENT (PER K.R. SHRIRAM, J.):

1. The Respondent i.e. the Assessee is a non-resident company incorporated in Singapore. The Assessee filed its Return of Income for the Assessment Year 2011-12 on September 27, 2011 showing a total income of NIL. The case was selected for scrutiny and assessed under section 143(3) read with section 144C (13) of the Income Tax Act, 1961 ('said Act'). The Assessing Officer (AO) assessed the returns of the Assessee at Rs.2,73,69,585/- by order dated April 28, 2015. The AO denied the benefit of the India-Singapore Double Tax Avoidance Agreement (DTAA) to the assessee by holding that the

assessee is merely an intermediary between the Indian subscribers and one Alibaba.com Hong Kong Limited. The AO did not accept the certificate of incorporation and the Tax Residency Certificate (TRC) issued to the assessee by the authorities in Singapore.

2. The AO also held that the assessee had a 'business connection' in India by way of its agreement and transactions with M/s.Infomedia 18 Pvt. Ltd. (Infomedia) an Indian company, and therefore, the assessee's income was taxable in India as per the provisions of section 9(1)(i) of the said Act.

The AO also held that in the alternative, the payments made by the Indian subscribers to the assessee was also taxable in India as Fees for Technical Services (FTS) within the meaning of the said Act, as well as the DTAA.

3. The Dispute Resolution Panel (DRP) confirmed the order of the AO in respect of denial of treaty benefit. The DRP also held Infomedia was a dependent agent permanent establishment (DAPE). The DRP accordingly held that there was a permanent establishment / business connection of the assessee in India and its income was taxable in India as a business profit / business income. The DRP, however, rejected the argument of the AO that the payments received by the assessee was not taxable in India as FTS. The

assessee and the department filed Appeals and Cross-Appeals before the ITAT, Mumbai against the directions of the DRP for the Assessment Years 2009-10, 2010-11 and 2011-12 as the issues involved in all these three assessment years were identical. The Department also filed an Appeal before the ITAT against the decision of the DRP. All the Appeals were disposed by the ITAT vide common order dated November 30, 2016. All Appeals of the Department were dismissed and the Appeals of Respondent assessee were allowed.

4. It is this order dated November 30, 2016 of the ITAT that is impugned in the Appeal by the Revenue and the following questions of law are proposed:

“A. Whether on the facts and in the circumstances of the case and in law, the Hon’ble ITAT has erred in holding that Infomedia 18 Pvt. Ltd. does not constitute a ‘business connection’ of the assessee in India under the provisions of section 9(1)(i) of the Income Tax Act, 1961 (the Act) and accordingly, the income of the assessee was not taxable in India as business income?

B. Whether on the facts and in the circumstances of the case and in law, the ITAT has erred in holding that Infomedia 18 Pvt.Ltd. does not constitute a ‘permanent establishment’ of the assessee in India under the provisions of Article 5 of the DTAA between India and Singapore and, accordingly, the

income of the assessee was not taxable in India as business profit under the provisions of Article 7 thereof?

C. Without prejudice, whether on the facts and in the circumstances of the case and in law, the ITAT has erred in holding that the payments made by the Indian Suppliers to the assessee is not taxable in India as Fee for Technical Services (FTS) under the provisions of section 9(1)(vii) of the Act?

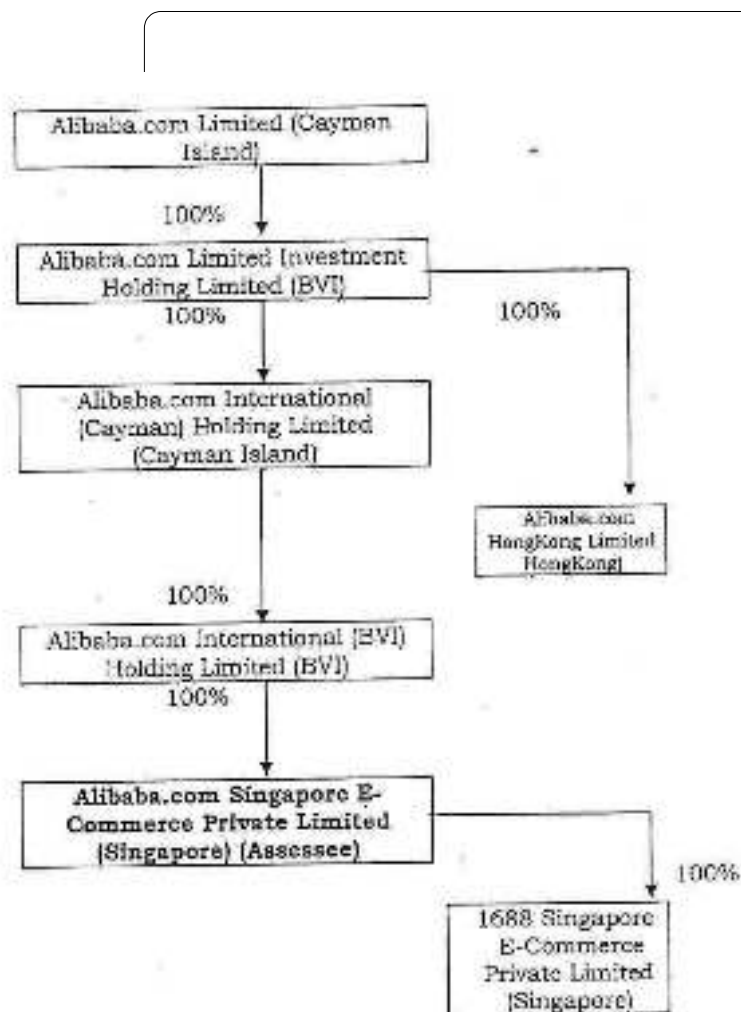
D. Without prejudice, whether on the facts and in the circumstances of the case and in law, DTAA between India and Singapore would be applicable and whether therefore, the ITAT has erred in holding that the payments made by the Indian Suppliers to the assessee is not taxable in India as Fee for Technical Services (FTS) under the provisions of Article 12 of the DTAA?

E. Any other questions of law may be allowed to be added either by leave of the Court or filing appropriate proceedings, the Appellant reserves the right to do so.”

5. The assessee, Alibaba.com Singapore E-Commerce Private Ltd., is a company incorporated under the laws of Singapore and the same is evidenced from the certificate of incorporation. The Assessee was incorporated on November 06, 2011 in Singapore. The document indicates that the entire control and management of the assessee is from Singapore.

6. Since the entire control and management of the company is

from Singapore, therefore, in terms of Article 4 of Indo-Singapore DTAA, it is a tax resident of Singapore, holding a valid 'tax resident certificate' which has been placed in the paper book. The entire structure of various holding companies of the 'Alibaba.com Group' shows the immediate holding company is 'Alibaba.com International (BVI) Holding Ltd.', a company incorporated in British Virgin Island and the ultimate holding company is 'Alibaba.com Ltd.', a company incorporated in Cayman Island. The Group Structure Chart of Alibaba.com Group has been explained in the impugned order as under:-



7. During years under consideration, the assessee has transacted with 'Alibaba.com Hong Kong Ltd.' (Alibaba Hong Kong) by way of availing of a Web Hosting and related services. It has been clarified that Alibaba Hong Kong is not the parent company of the assessee as has been wrongly mentioned and presumed by the A.O. in the impugned assessment order. The Assessee has been regularly filing its accounts with Singapore Corporate Law authorities and its Income-Tax return with Singapore Tax authorities. The notice of assessment issued by the Singapore Tax authorities is also produced. Regarding the operating model of the assessee, Mr.Pardiwalla submitted that the Alibaba website, that is, www.alibaba.com, is commonly used by the entire Alibaba Group and services are being provided to the suppliers from all across the countries including India but excluding China, Hong Kong and Macau. The website facilitates Indian suppliers to do business online through a global trade market place. Indian subscribers subscribe to the assessee's service / facility offering under the "International Trust Pass" (ITP) and "Gold Suppliers Services Arrangement" (GSS) for which it charges a service fee. Through this subscription, the Indian subscribers place there storefront and have their products advertised/listed when visitors go to the website for search of products required by them. The entire subscription revenue is

received by the assessee from the customers / subscribers all over the world including from the Indian subscribers in its own right and it alone is the beneficial and legal owner of the entire revenue collected on which it pays the taxes in Singapore. The assessee is a global company which provides the subscription services to the customers all across the world and it is a hub of Alibaba Group Global business, except in China and Hong Kong. 'Alibaba.com Ltd.' is only the owner of IPR and has the copyright with respect to the trademarks and brand name "Alibaba" and Alibaba logo. It is also the owner of the domain name of Alibaba.com. Only the website is operated by a Group Company, 'Alibaba.com Hong Kong Ltd.'. The servers which host the website are located in California USA. In nutshell, it has been pointed out that, firstly, Alibaba.com Ltd. is the owner of the IPR and of the domain name Alibaba.com; secondly, the website is operated by Alibaba Hong Kong; and lastly, the server is located in California USA. The assessee is doing online business providing business to business services (B2B services). It is akin to digital yellow pages. Earlier the yellow pages used to provide the information regarding various business and trading entities with their product and services, and customers who were looking or searching for such product and services would refer to the yellow pages. The assessee is also providing same kind of facility by

providing portal for giving information about the different product and services in the electronic form. Explaining the brief overview of the subscription arrangement for the services, Mr.Pardiwalla submitted that:

- a. The subscribers would register with the Company availing services provided by the assessee (i.e., putting advertisements on its website) by agreeing to the terms of the ITP/GSS agreement and payment of the applicable fees;
 - b. The company would then authenticate and verify the details provided by the Subscribers through a third party agency;
 - c. Each subscriber would be given an Account upon receipt of payment by the Company and successful authentication and verification by the third party agency;
 - d. Once the Account is received by the Subscribers, they could proceed to display information about their business, products sold and offer to buy or sell products or services for visitors to the assessee's Website to browse;
 - e. The users would click on the products that they wish to buy the further details about such products for contract details of the Subscriber, who has displayed / advertised the product;
- and

f. The subscribers and the buyers reach out to each other and the communication is taken forward independently without any participation or involvement of the assessee. The limited role of the assessee is to provide a facility of posting an advertisement or displaying of the information about product of services in the electronic form (i.e., similar to digital Yellow Pages).

To explain the process followed by the assessee, assessee had also filed copy of screen shots of the site displayed in the computer as to how the products and services are displayed on the Alibaba website and how it is being used by the subscribers. Mr.Pardiwalla submitted the assessee has a very limited role which is merely confined to providing facility of posting and advertising or displaying of the information about the product and services in the Electronic Form.

8. It is the case of the department, as submitted by Mr.Chhotaray, and as appears from the finding and observation of the AO in the Assessment Order, that alibaba.com is the trademark of Alibaba.com Hong Kong Company as the website is registered in Hongkong and not in Singapore. Therefore, entire activities are carried from Hongkong. According to the AO, the assessee has not produced any

document to show that the website www.alibaba.com belongs to a company based in Singapore. The AO further notes that the Trust Pass Agreement (TPA) between the Indian subscribers and the assessee refers to the terms and conditions for use of the website, product listing policy, privacy policy etc., and according to the AO, these kinds of policies can be entered only by a company which owns the website and in this case it is the Hong Kong Company. The AO concludes that the assessee has nothing to do with the subscription services as everything is done by Alibaba.com Hong Kong. Even the IPR etc. belongs to the Hong Kong Company. Mr.Chhotaray submitted that from the website of www.alibaba.com, the AO has taken note of various addresses of the Alibaba entities and their place of global businesses and noted that Alibaba.com has office in India and there is absolutely no mention about presence of Alibaba in Singapore on its website.

9. The entire thrust of the AO is that not only the website is owned by Alibaba.com Hong Kong, but also entire subscription services are provided by the said Hong Kong Company, and, since, India and Hong Kong do not have a DTAA, the benefit under DTAA will not be applicable to the assessee. The AO, on the issue of apportionment of income in the hands of the assessee, thereafter

concluded that revenue of the assessee is partly taxable as “Royalty” partly as “Fee for technical services”, and partly as business receipts. The Revenue’s stand as concluded by AO can be summarized in the following manner:

“a) Alibaba Singapore is not eligible to avail the benefits of the India-Singapore Tax Treaty on the grounds that, firstly, the assessee has no presence in Singapore and that the entire management of the assessee is based in Hong Kong; secondly, the Services to the Indian Subscribers are provided by Alibaba Hong Kong, since it is the owner of the Website; and lastly, the Website is a trade mark of Alibaba Hong Kong;

b) Information constitutes a ‘business connection’ for the assessee in India since the definition of business connection is an inclusive one;

c) The subscription fees earned is partly in the nature of business income, royalty and fees for technical services;

d) Business income:- The term ‘source’ does not mean the location of the payer, but the place where profit-making activities are carried out. In other words, source is a ‘profit-making apparatus’, and since the Website constitutes a profit making apparatus for which payments are made to the assessee by the subscribers, therefore,

income is deemed to accrue or arise in India under section 9(1)(i) of the Act.

e) Fees for Technical Services:- The subscription fees earned is in the nature of fees for technical services on the ground that the scope of term 'fees for technical services' is very wide and needs to be interpreted very broadly.

The issue of taxability under Royalty had been rejected by the DRP and department did not challenge this aspect. Therefore, this issue was not a dispute before ITAT.

The AO eventually assessed the total taxable income of the assessee as business income and taxed the assessee accordingly.

10. The DRP, except on the issue of 'royalty', upheld the conclusion and contention of the Assessing Officer. The DRP also upheld that the assessee is ineligible to the claim of the benefit of India Singapore DTAA, because the assessee is only an intermediary between Indian subscribers and Alibaba Hong Kong. The relationship between Infomedia and Alibaba Hong Kong is highly interlinked and interdependent, therefore, it cannot be reckoned as an independent agent. The assessee has been allowed to have business connection and permanent establishment in India in the

form of Infomedia. The DRP accordingly directed that income attributable to the business connection shall be *interalia*, 50% of the remittance received by the assessee from Infomedia. The ITAT has observed that the DRP, however, does not provide any basis / rational with respect to the adoption of attribution @ 50%.

11. As noted in the impugned order of ITAT, the CIT DR, mostly relied upon the various observations made by the Assessing Officer and DRP. After referring to the decision of the Hon'ble Supreme Court in the case of ***Vodafone International Holdings B.V. vs. UOI***¹, it was submitted that the Income Tax Department can ignore the tax residency certificate provided by the foreign tax authorities and then in such situation the treaty benefit can be denied.

12. It was submitted by the Revenue that the assessee had no presence in Singapore and the entire management as well as the services provided to the Indian subscribers is through Alibaba Hong Kong based at Hong Kong and not at behest of the assessee, that is, Alibaba Singapore. It was submitted that the assessee does not have a permanent establishment in terms of Article 5(8a) and 5(8c) in the form of Infomedia, that is, it would constitute a dependent agent of permanent establishment of assessee in India.

1 (2012) 341 ITR 1

13. We find, the ITAT, after hearing the rival submissions, has given extensive factual findings as to why the conclusion of the AO as well as DRP were erroneous.

14. We have also considered the orders passed by the AO and the DRP. As correctly noted by the ITAT, the entire focus of the AO is that the website www.alibaba.com is registered in Hong Kong and is the trademark of Alibaba Hong Kong. AO has completely denied the existence of the assessee as an independent entity as if the assessee was only a front or a shadow entity of Alibaba Hong Kong. If the AO was so convinced that the entire activity in India to various subscribers was actually carried out by Alibaba Hong Kong and not by assessee, then we would have expected him to do something to Alibaba Hong Kong and not the assessee.

15. The ITAT has considered various documentary evidences, including the Tax Residency Certificate of assessee, and has come to a factual finding that it cannot be held that assessee is either non-existent entity or some kind of conduit of Alibaba Hong Kong which is not even the parent company. The ITAT has even reproduced a group structure of Alibaba.com and has come to a conclusion that Alibaba.com Hong Kong is a separate entity than the assessee. There is a finding of fact that the assessee has been incorporated under the laws of Singapore and a tax residency certificate has been issued by

the Inland Revenue Authority of Singapore. The tax residency and residence status of the assessee is also established by filing certificate of incorporation of assessee. It shows it was incorporated in Singapore on November 06, 2007. Audited financial statements and the return of income of the assessee for the relevant years, which have been filed before the Singapore Authorities, show subscription fees received by the assessee from the subscribers all over the world, including from India, as its own income. The ITAT has concluded that these facts go to show that the assessee alone is the economic owner of the subscription it received from Indian subscribers and it receives the revenue in its own right and not on behalf of Alibaba Hong Kong. The ITAT has also taken note of the notice of assessment issued by Singapore Tax Authorities and has come to the conclusion that not only the assessee is assessed in Singapore but the place of control and management of the assessee is also in Singapore. The ITAT has also considered the meeting of the board of directors of assessee, web-based agreement between Alibaba Hong Kong and the assessee to come to the conclusion that Alibaba Hong Kong has absolutely no connection or contract with the Indian subscribers or assessee's customers in India and that the contractual rights, privileges and liabilities of the assessee under the agreement with the Indian subscribers wholly lie with the assessee.

The ITAT also came to a finding that only the alibaba.com logo is registered in Hong Kong and assessee only uses the website of alibaba.com. There are various factors which have been considered by ITAT to come to its conclusion. For the sake of brevity, we are not reproducing all those findings which persuaded ITAT to come to the conclusion that it was not agreeing with the view taken by DRP as well as the AO that either assessee is not a tax resident of Singapore in terms of India Singapore DTAA or that the benefit should not be given to the assessee.

16. The ITAT has also held that the tax residency certificate is sufficient to determine the proof of residency and the income-tax authorities cannot ignore the valid tax residency certificate issued by the Government authority of the other contracting state, that is, Singapore.

17. The ITAT also rejected the submissions of the revenue, relying on *Vodafone International Holdings B.V.* (Supra), that the I.T. authorities have blanket powers to negate or ignore the tax residency certificate given to the assessee by Singapore Tax Authority. The ITAT held that the Hon'ble Supreme Court, in that case, only observed that the Tax residency certificate does not prevent the tax authority to enquire into a possible tax fraud, which is not even the allegation in the matter at hand.

18. On the issue of as to whether assessee has any business connection in India in the form of Infomedia and whether Infomedia constitutes a dependent agency PE for the assessee in India, the ITAT first of all reiterates the finding it gave to the first issue on applicability of India-Singapore DTAA which was given after considering the business / operating model of the assessee in India. Thereafter, ITAT came to the conclusion on facts that assessee has limited role as its role is confined to facilitate the posting of the advertisement or displaying of the information about the product and services in the electronic form in to the web portal. The ITAT has come to a factual finding that the subscribers and the buyers reach out to each other from the information provided by the assessee and the communication is taken forward independently by the parties without any participation or involvement of the assessee, and most importantly, the assessee neither maintains a stock of product for Indian subscribers nor undertakes any delivery on behalf of the Indian subscribers. The ITAT has also come to a factual finding that assessee is neither involved in the supply of goods or provision of services or involved in any financial transaction, i.e. transfer of sale price from purchaser to seller.

19. After considering the Co-operation Agreement between assessee and Infomedia, the ITAT has come to a finding that

Infomedia, a listed company which specializes in the business of directories, magazine publishing, direct marketing etc., permitted assessee's website and also provided customer support and after sales support. Infomedia also provided payment collection services from subscribers in India etc. for which Infomedia was paid remuneration by assessee ranging between 40% to 50% plus cash bonus depending upon the target achieved by Infomedia as per the terms of the Co-operation Agreement.

20. In light of these documents and facts, the ITAT after considering the provisions of section 9(1) (i) r/w Explanation 2 and the proviso to the explanation, came to a finding that the assessee cannot be reckoned to have any kind of business connection in India in the form of Infomedia.

21. On the reliance of the judgments of the Apex Court in the case of *the Commissioner of Income-tax, Punjab vs. R.D. Aggarwal and Co. and another*² and *Anglo French Textile Co.Ltd. vs. Commissioner of Income-tax, Madras*³, ITAT very clearly came to the conclusion that these decisions were rendered much prior to the insertion of Explanation 2 to section 9(1)(i) which was inserted by the Finance Act, 2003, w.e.f., April 01, 2004. The Explanation 2 read with proviso categorically excludes from the purview of business

2 42 ITR 155

3 23 ITR 101

connection the activities of an independent agent acting in the ordinary course of their business. The ITAT also relied upon Circular 7 of 2003 dated May 09, 2003 issued by CBDT which clarified that the term “business connection” would not include the cases of business activities being carried out through, inter alia, any independent agent if any such independent agent is acting in the ordinary course of its business. Therefore, this is also a factual finding of ITAT.

22. While coming to its conclusion on the independence of Infomedia, the ITAT has held on facts that Infomedia has entered into several collaborations with other partners like assessee and assessee does not have any financial, managerial or any other type of participation in Infomedia, that Infomedia carries out host of other activities for other clients and Infomedia is an independent entrepreneur. Further while dealing with the assessee, Infomedia has been compensated for its services by the assessee. ITAT also has concluded on facts that the activities of Infomedia under the “Co-operation Agreement” with the assessee is in the ordinary course of business and in no way it is dedicated wholly or almost wholly to the assessee.

23. After arriving at these factual findings, ITAT came to the conclusion that when Infomedia is not a dependent agent, then, in

view of Explanation 2, r/w proviso to section 9(1)(i), the income of the assessee cannot be held to be deemed to accrue or arise in India in terms of section 9(1)(i) of the Act. Once the income of the assessee cannot be taxed as business income in India under 9(1)(i) then it is not necessary to go into the DTAA.

24. On the revenue's appeal, where it had challenged the DRP's direction that the revenues received from India are taxable as "Fees for Technical Services" @ 10% under provisions of section 9(1)(vii) of the Act on the ground that scope of the terms of fees for technical services used in the said section is very wide which needs to be broadly interpreted, the ITAT has not accepted the observation of the AO because there was nothing to indicate the source based on which the AO has made observation that that assessee within and outside India has rendered various kind of services as has been highlighted by the AO in paragraphs 37 and 38 of the Assessment Order.

25. After considering the facts, the ITAT has come to the conclusion that activities highlighted by the AO are not carried out by the assessee at all and the services provided by the assessee to the Indian Customers were merely that of displaying / storing of data of Indian Subscribers, such services are limited to provision of E-commerce platform for advertising of products or services in

India. The ITAT came to the factual finding that the arrangement between assessee and the subscribers was for the provision of services for standard facility and not for “rendering of any technical, managerial or consultancy services” as provided in section 9(1)(vii) r/w Explanation 2 of the Act.

26. The ITAT has also relied upon the judgment of the Apex Court in the case of *Commissioner of Income-tax-4, Mumbai vs. Kotak Securities Ltd.*⁴ and held that constant human endeavour or human intervention is essential requirement for treating the rendering of services as “technical”. If any technology or a process has been put to operation automatically, wherein it operates without much human interface or intervention, then such technology *per se* cannot be held as rendering of technical services by human skills. Where there is a standard facility made available for public at large, without giving any special or exclusive services whether to a particular client or class of clients, then it cannot be brought within the ambit of technical services as stipulated in Explanation 2 to section 9(1)(vii). Therefore, on facts, even these grounds of the Revenue were correctly rejected in coming to a finding that no technical services had been provided by the Assessee to treat the subscription fees as to be in the nature of fees for technical services.

4 383 ITR 1 (SC)

27. In the circumstances, the entire subject matter of the appeal is fact based and in our view, no substantial question of law arises.

28. Appeal dismissed.

(FIRDOSH P. POONTIWALLA, J)

(K.R. SHRIRAM, J)