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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 143/2024

THE COMMISSIONER OF INCOME TAX -

INTERNATIONAL TAXATION -3 Appellant

Through: Mr. Ruchir Bhatia, SSC.

versus

SERVICE NOW NEDERLAND BV Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Aditya Vohra & Mr.
Hardeep Singh Chawla, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINdra KUMAR

KAURAV

ORDER

18.03.2024

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1. The Revenue impugns the judgment rendered by the **Income Tax Appellate Tribunal**¹ dated 29 August 2023 and asserts that the following questions of law would arise for consideration: -

“2.1 Whether the Ld. ITAT has erred in law in holding that the consideration received by the assessee on account of receipts of subscription, professional and training services are not to be taxed as income from Fees for technical services under provisions of sub section 9(1)(vii) of Act read with explanation 2 thereof and article 12(5) of India-Netherlands DTAA ignoring the fact that assessee is not selling any standard off the shelf/non customized software but instead is offering comprehensive services or solutions with the help of technology embedded in software?

2.2 Whether the Ld. ITAT has erred in holding that consideration received by the Assessee on account of receipts of subscription, professional and training services are not to be taxed as income from Fees for technical services under provisions of sub section 9(1)(vii) of Act read with explanation 2 thereof and article 12(5) of India-

¹ ITAT



Netherland DTAA thereby wrongly relying on the decision of the Hon'ble Supreme Court in the case of GIT vs Kotak Securities Ltd. when facts of both the cases are entirely different and distinguishable from each other?"

2. The respondent-assessee is stated to be in the business of providing access to its software and software applications on the payment of a subscription fee. It had asserted that since the same did not entail or envisage any transfer of an intellectual property right, the same was not be liable to be treated as 'royalty'. It had additionally questioned the stand of the **Assessing Officer**² and which rested on certain conclusions arrived at by the **Dispute Resolution Panel**³ which had sought to place the income in the category of 'fee for technical services'.

3. The ITAT in the impugned order has observed as follows: -

“7.1. We find that Article 12(5)(a) above is not applicable in the instant case. Article 12(5)(b) insist on make available clause to fall within the ambit of FTS. In the instant case, the assessee has only access to software. There is no transfer of technology by the assessee. We are unable to persuade ourselves to accept to the argument of Id. DR in this regard by assessee are standard and customized services and that make available clause is not relevant for the second part of article 12(5)(b) i.e. it is not relevant for development and transfer of a technical plan or technical design. In our considered opinion, 'make available' is for the entire expressions mentioned in Article 12(5)(b) of the India Netherlands Treaty. In this regard, it would be relevant to address the decision of Hon'ble Karnataka High Court in the case of CIT vs De Beers India Minerals (P) Ltd reported in 346 ITR 467 (Kar) to understand the meaning of expression '-make available'. The relevant operative portion of the judgement of Hon'ble Karnataka High Court is reproduced hereunder:-

13. Under the Act if the consideration paid for rendering technical services constitutes income by way of fees for technical services, it is taxable. However, Article 12 of the aforesaid India-Netherlands Treaty defines fees for technical services for the purpose of Article 12 which deals with

² AO

³ DRP



royalties and fees for technical services. The fees for technical services means the payment of any amount to any person in consideration for rendering of any technical services only, if such services make available technical knowledge, expertise, skill, know-how or processes. If the technical knowledge expertise, skill, know how or process is not made available by the service provider, who has rendered technical service for the purpose of Article 12 of DTAA it would not constitute fees for technical services. To that extent the definition of fee for technical services found in the agreement is inconsistent with the definition of fees for technical services provided in Explanation 2 to Clause (vii) of sub Section (1) of Section 9. In view of Section 90 the definition of fees for technical services contained in the agreement overrides the statutory provisions contained in the Act. In fact, the latest agreement between India and Singapore further clarifies this position, where they have explained the meaning of the word 'make available'. According to the aforesaid definition fees for technical service means payments of any kind to any person in consideration for services of technical nature if such services make available technical knowledge, experience, skill, know how or processes, which enables the person acquiring the service to apply technology contained therein. Though this provision is not contained in India Netherlands Treaty, by virtue of Protocol in the agreement. Clause (iv) (2) reads as under:-

"If after the signature of this convention under any Convention or Agreement between India and third State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."

14. Therefore the Clause in Singapore agreement which explicitly makes it clear the meaning of the word 'make available', the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available'-when the person who received service is enabled to apply the technology. The service provider in order to render technical services uses



technical knowledge, experience, skill, know how or processes. To attract the tax liability, that technical knowledge, experience, skill, know how or process which is used by service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know how, processes so as to render such technical Services. Once all such technology is made. available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know how or process to the recipient of the technical service, in view of the Clauses in the DTAA the liability, to tax is not attracted.

7.2. In the instant case, as stated earlier, we find that the assessee had merely granted only access to software and there is no transfer of technology by the assessee. Hence, we have no hesitation to hold that the services rendered by the assessee does not fall within the definition of FTS as per the Treaty. In any case, we find that the since assessee had merely granted access to software, it does not fall within the definition of FTS even as per the Act. In this regard, analogy could be drawn from the decision of Hon'ble Supreme Court the case of (CIT vs Kotak Securities Ltd reported in 383 ITR 1 (SC) wherein it was held that service made available by Bombay Stock Exchange [BSE Online Trading (BOLT) System] 'for which transaction charges are paid by members of BSE are common services that every member of Stock Exchange is necessarily required to avail of to carry out trading in securities in Stock Exchange such services do not amount to technical services provided by Stock Exchange, not being services specifically sought for by user or consumer and, therefore, no TDS would be deductible under section 194J on payments made for such services."

4. Although the questions proposed allude to the assessee not



selling standardized and non-customized software, it becomes pertinent to note that Mr. Bhatia failed to make good that contention and also did not invite our attention to any material which may have sustained that allegation. We are thus constrained to proceed on the basis that the software was standardized and off the shelf and accessible upon payment of a subscription fee.

5. The India-Netherlands **Double Taxation Avoidance Agreement**⁴ while speaking of ‘fee for technical services’ also embodies the ‘*make available*’ clause. We note that insofar as the aforesaid expression is concerned, we had in **SFDC Ireland Limited vs. Commissioner of Income Tax**⁵ observed as under: -

“34. The aforementioned observations of the Supreme Court were not only apt but also prophetic when viewed in the context of software driven platforms. However, while explaining what would constitute “technical services”, the Supreme Court in *Kotak Securities* had observed that it must be a service which is provided to cater to the special needs of the client. A self-automatized analytical or predictive software or platform which caters to the requirement of multifarious clients as opposed to one created with special attributes or characteristics tailored to the need of a particular client was stated to fall outside the ken of technical services. It was in the above context pertinently observed that a distinction must be acknowledged to exist between a “*service provided*” and a “*facility offered*”.

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38. As is manifest from the above, the Committee of Experts understood the word “technical” to entail the application of specialised knowledge, skill or art to a particular art, science, skill or expertise. Equally instructive in this context is the exemplar discussed in paras 90 and 91 and which reemphasized the existence of specialised rendering and solution providing as being key elements to answering the question of FTS. However, and insofar as we are concerned, the issue of technical service has to be examined on the anvil of not only a specially crafted and individualised rendition but additionally upon it being found that services of a technical character were provided. The Reseller Agreement may now

⁴ DTAA

⁵ 2024 SCC OnLine Del 1702



be tested on the aforementioned precepts.

39. In order for receipts of SFDC Ireland being characterized as FTS, one would have to discern and find the existence of an exclusive and special service of a technical character which was provided to the recipient. Not only would that service have to be unique and tailored to the requirements of the seeker, it must also be technical. Unless one finds the transfer of technological knowledge which is exclusive and specialised to the need of the recipient, it would clearly not fall within the scope of technical service. While in today's age it may not be appropriate to understand the word technical to be confined to industrial or applied sciences or for that matter the use of an instrument or facility, the test of exclusivity, individualization and specially crafted solutions would continue to govern.

40. As we read the terms of the Reseller Agreement, its stipulations do not appear to contemplate any technology transfer to SFDC India. The Indian entity appears to have been designated merely to act as the Reseller which would engage with and onboard customers within the territory for use of SFDC products. As is evident from the definition of SFDC Products, it speaks of customer relationship management offerings, applications, platforms, products and offerings exclusively for resale in the territory. The obligation of SFDC Ireland as per Section 4 of the Reseller Agreement was to provide SFDC products as notified from time to time. The price for those products was to be as per the stipulations contained in Exhibit A. The aforesaid clauses merely speak of the Reseller being accorded the right to sell SFDC products as distinct from what would constitute technical service.

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45. In any case the respondent has failed to allude to any material which would have lent credence to its conclusion that SFDC Ireland was not selling a *“standard off the shelf/non customized/electronically downloadable software”*. The respondent fails to found this conclusion on any stipulation of the contract or any other material that was gathered in the course of evaluation of the application of SFDC Ireland. The impugned order also fails to advert to any material to indicate that the supply of SFDC Products departed from a standard scope of services. Even before us, the respondents failed to allude to any material which may have even remotely established that the platform or for that matter the software was being customized or specially designed for a consumer and which constituted the basis of the consideration received.”

6. Insofar as the royalty question is concerned, the same also would merit being negated, bearing in mind the principles which were



elucidated by the Supreme Court in **Engineering Analysis Centre of Excellence Private Limited vs. Commissioner of Income Tax and Anr.** ⁶.

7. In view of the aforesaid, we find no merit in the instant appeal. No substantial question of law arises. Consequently, the appeal shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 18, 2024

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⁶ (2022) 3 SCC 321