IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : D : NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1986/Del/2023
Assessment Year: 2020-21

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| Denso (Thailand) Co. Ltd.,<br>369 Moo 3 Theparak Road,<br>Tambol Theparak Amphur Muang<br>Samutprakarn Province,<br>Thailand. | Vs | ACIT,<br>Circle 1(2)(2),<br>International Taxation,<br>New Delhi. |

PAN: AADCD5183D

(Appellant) (Respondent)

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| Assessee by | : Shri Vishal Kalra, Advocate; and<br>Ms Sumisha Murgai &<br>Shri Kashish Gupta, CAs |
| Revenue by | : Shri Vijay B. Vasanta, CIT-DR |
| Date of Hearing | : 18.04.2024 |
| Date of Pronouncement | : 31.05.2024 |

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the final assessment order dated 09.05.2023 of the Assessing Officer, Assistant Commissioner of Income Tax, Circle International Taxation, 1(2)(2), New Delhi, (hereinafter referred as the Ld. AO) passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), for AY 2020-21.

2. The facts in brief are that Appellant is a company incorporated under the laws of Thailand and a tax resident of Thailand for the captioned AY. Appellant has claimed that it acts as a regional service centre of the Denso Group for Asia and Oceania undertaking business administration, material engineering services, design and development services, testing and technical services of automotive components for the Group and during the year under consideration, the Appellant had earned INR 16,60,43,718, which, as per the claim of appellant is in the nature of Fees for Technical Services ('FTS') on account of services provided to its five Indian group companies. The claim of appellant is that the said receipts are non-taxable in absence of FTS clause in the India-Thailand Double Taxation Avoidance Agreement ('DTAA'/'Tax Treaty'). It was submitted by the appellant before AO that in absence of FTS clause, income can be treated as Business income, as the services are in nature of business activities of Appellant. Therefore, the receipts should not be considered as 'Other income' under Article 22 of DTAA. Further, in absence of permanent establishment ('PE') of appellant in India, business income is not liable to be taxed in India.

2.1 AO has accepted that the receipts from the services rendered by the Appellant are in the nature of FTS. ***Refer page 15 of the final assessment order.*** However, the AO was of view that in the absence of FTS clause in the tax treaty, income should fall under Article 22 (i.e. other income) of DTAA and accordingly should be taxed as FTS at 10% as per section 9(1)(vii) of the

Income-tax Act, 1961 ('Act'). Accordingly the assessment proceedings were concluded by the AO vide assessment order dated May 09, 2023, by concluding that total receipts of the appellant amounting to INR 16,60,43,718 is covered under clause 3 of Article 22 of the DTAA. Further, such receipts will be taxed at 10% as per section 5(2) read with section 9(1)(vii) of the Act.

3. The appellant is in appeal before this Tribunal, raising following grounds:-

> *"Appeal under section 253(1) of the Income-tax Act. 1961 (" the Act') against the assessment order dated May 09, 2023 (received on May 09, 2023) passed under section 143(3) read with section 144C(13) of the Act by the Assistant Commissioner of Income Tax, Circle International Tax - 1(2)(2). New Delhi ("Assessing Officer/ "AO") for Assessment Year ("AY") 2020-21, based on the directions received from the Dispute Resolution Panel (DRP ).*
>
> 1. *That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant at INR 6,01,48,473, in pursuance to the directions issued by the DRP, as against the Nil returned income.*
> 2. *That on the facts and circumstances of the case and in law, the assessment order dated May 8, 2023 passed by the AO under section 143(3) read with section 144C(13) of the Act is erroneous, bad in law as well as on facts and liable to be quashed.*
> 3. *That on the facts and circumstances of the case and in law, the AO/ DRP have erred in holding that the receipts amounting to INR 6,01,48,473 are taxable as fees for technical services ("FTS") as per the provisions of section 9(1)(vii) of the Act.*
> 4. *That on the facts and circumstances of the case and in law, the AO / DRP have erred in holding that the case of the Appellant falls within the ambit of clause 3 of Article 22 of the India- Thailand DTAA and accordingly, the receipts of the Appellant are taxable under section 9(1)(vii) of the Act.*

*5. That on the facts and circumstances of the case and in law, the AO / DRP have erred in not appreciating that in the absence of specific Article on FTS under the India -Thailand Double Taxation avoidance agreement ("DTAA"), the receipts earned by the Appellant in relation to provision of technical services is not taxable in India in view of the provisions of the Act read with the India-Thailand DTAA.*

*6. That on the facts and circumstances of the case and in law, the AO has erred in holding that the receipts earned by the Appellant from the provision of technical services are not in the nature of business income without appreciating the submissions and documents furnished in this regard. The DRP further erred in upholding the action of the AO.*

*7. Without prejudice to the ground of appeal no. 5, the receipts earned by the Appellant from provision of technical services is in the nature of business income and thus, not taxable in the absence of any Permanent Establishment ("PE") of the Appellant in India in terms of Article 7 of the India-Thailand DTAA.*

*8. That on the facts and circumstances of the case and in law, the AO has erred in levying interest under sections 234A and 234B of the Act.*

*9. That on the facts and circumstances of the case and in law, the AO has erred in initiating penalty proceedings under section 270A of the Act."*

4. Heard and perused the records. Ld. Counsel has submitted at outset that ground no.8 is consequential while ground no.9 is Premature.

4.1 As with regard to remaining grounds composite arguments were submitted by both sides primarily reasserting the cases of both side as coming up from the proceedings recorded below. After giving thoughtful consideration to the material before us and the submissions, we find that the AO in the assessment order has emphasized that DTAA never defines the chargeability of any income. Chargeability of any stream of income is always defined under the Act. Agreement can provide relief from the said chargeability, only if, it is dealt

in said DTAA. He further mentioned that DTAA never confers a right to tax any income, as right to tax and its chargeability is always derived from domestic Act. DTAA, as per the authority provided by parliament, can only serve limited four purposes as mentioned under section 90 of the Act. Accordingly the AO has held that in the absence of FTS clause in treaty, receipts of Appellant would be taxed under provisions of the Act in view of Article 22 of DTAA.

4.2 Ld. Counsel has countered the same by submitting that Section 90 of the Act provides an option to the Appellant to be governed under the provisions of the Act or the provisions of the double taxation convention entered into by India (with the country in which the other party is a resident), to the extent it is more beneficial to the taxpayer. Reliance in this regard is placed on the decision of special bench of Delhi Tribunal in case of ***Motorola Inc. vs. DCIT: [2005] 95 ITD 269 (DELHI)(SB)***, wherein the tribunal inter alia observed that,*"DTAA is only an alternate tax regime and not an exemption regime"* and, therefore, *"the burden is first on the Revenue to show that the assessee has a taxable income under the DTAA, and then the burden is on the assessee to show that its income is exempt under DTAA"*.

5. Ld. Counsel has stressed on the fact that since there is no taxability of FTS, under the treaty provisions, there cannot be any taxability under the provisions of the Income Tax Act either. He relied Article 3 of the India-Thailand DTAA, to submit that when a term is used in the DTAA but has not been defined therein, the meaning of the said term unless the context otherwise

requires shall have the meaning as defined under tax statute of the contracting state. The need of importing the meaning of the term from the tax statute arises only when a term is provided in the agreement but the meaning of the same has not been defined therein.

6. Ld. Counsel has emphasized most on the contention that the absence of the provision for FTS in the DTAA is not an omission but is a deliberate mutual agreement between the contracting states not to recognize/classify any income as FTS for taxation. He submitted that only the income which is not expressly dealt with in any of the Articles of the treaty is required to be taxed under Article 22. He submitted that in case the services are in the nature of business activities, taxability of the same shall be tested first under Article-7 in absence of FTS clause rather directly approaching to Article-22. The services under consideration are in the nature of business activities of the Appellant and in the absence of PE in India, receipts should not be taxed in India.

7. He has relied following judgments for the proposition that in the absence of FTS clause in the treaty, income would fall under Article-7 (in case the services are provided during the course of Business) and not under Article-22. Further, in absence of the PE in India, the said income would not be chargeable to tax in India:

- *Bangkok Glass Industry Co. Ltd. v. ACIT: [2013] 34 taxmann.com 77 (Madras)*

- *Solvay Asia Pacific (P.) Ltd. v. DCIT: [2024] 159 taxmann.com 90 (Delhi - Trib.)*
- *DCIT v. Michelin ROH Co. Ltd.: [2022] 138 taxmann.com 497 (Delhi - Trib.)*
- *ACIT v. IQOR India Services Pvt. Ltd.: ITA No.7592/Del/2019*
- *DCIT v. Campus Eai India Pvt. Ltd.: ITA No. 355/Del/2021*
- *Diamond Manufacturing Management and Consultancy Limited Mauritius v. ACIT: I.T.A. No.49/Viz/2022*
- *Paramina Earth Technologies Inc v. DCIT: [2020] 116 taxmann.com 347 (Visakhapatnam - Trib.)*
- *Zynga Game Networks India (P.) Ltd. v. ACIT: [2018] 97 taxmann.com 44 (Bangalore - Trib.)*
- *DCIT v. M/s. Kalpataru Power Transmission Ltd.: ITA No. 35/Ahd/2021*
- *DCIT v. IBM India (P.) Ltd.: [2018] 100 taxmann.com 230 (Bangalore - Trib.)*
- *ABB FZ-LLC v. ITO: [2016] 75 taxmann.com 83 (Bangalore - Trib.)*

8. It further comes up that before AO, Hon'ble Madras High Court in case of Bangkok Glass Industry Co. Ltd. v. ACIT (supra) was relied by the appellant, but same was distinguished by AO for which, Ld. Counsel has given a counter, by way of following submissions;

| AO's observation | Rebuttal |
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| Judgement relates to year 2013 i.e. before the year in which India-Thailand treaty was got amended. | No such amendment made in the India-Thailand treaty contrary to what was held by Hon'ble Madars High court in its order. Furthermore, the said judgement has not been overruled yet and applicable in the present case as well.<br>Jurisdictional Tribunal has also relied upon the said decision given by the court and ruled in favor of the Assessee in case DCIT v. Michelin |

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| | ROH Co. Ltd.: ITA 8010/Del/2019.Facts of the said case are similar to facts in present case of the Appellant. |
| As per new DTAA, effective from 2016, Article 22 got amended, and taxing rights of source state further strengthen with a non-obstante clause<br>Certain exceptions are discussed in new article 22(2) of new DTAA, but those exceptions do not include FTS and therefore, taxing such receipts under domestic law by invoking article 22 of DTAA is correct. | Non-inclusion of FTS in the exception given in Article 22 does not mean that the amount of FTS would be taxable as per the provisions of the Act.<br>Had it been an intention of the law to tax the FTS, it would be by way of insertion of FTS article in treaty likewise other tax treaty |
| Madras HC has further opined that such receipts be taxable as business receipts only if activities are out of normal course of business. However, it is evident that FTS is not the **primary business** of the Assessee company | Hon'ble Madras high court has **not emphasized that thereshould be primary business** of the Assessee in order to tax the same as business receipts. The court has held that to tax the receipts as business, services should be provided in the normal course of business.<br>In present case, the Appellant has rendered services in the normal course of business. |

9. We further find that AO has also observed that the services provided by the Appellant are not in the nature of its primary business activities based on web portal. Mere mentioning activities in memorandum of association, does not entail Appellant to claim said activity is part of its prime business. Appellant's own web-page portal, was relied to conclude that there that Appellant does not showcase itself in the business of providing FTS or any kind of technical services. AO observed that rendering FTS is not of business nature rather it is in

the nature of other income for Appellant. Taxability of any income is no-where dependent upon its accounting treatment given by the taxpayer. AO observed that mere mentioning activities in memorandum of association, does not entail Appellant to claim said activity is part of its primary business.

10. Ld. Counsel has countered this by submitting that the Appellant had filed copies of following documents before AO to substantiate that the services provided by the Appellant have been rendered in normal course of its business:

a) Copy of MOA (certified by the Department of Business Development, Ministry of Commerce) ***(available on Page 109 to 111 of the Paperbook)***;

b) Certificate outlining the nature of business activities of the Appellant issued by the Department of Business Development, Ministry of Commerce ***(available on Page 112 to 117 of the Paperbook);***

c) Copy of entrustment of service agreement entered by the Appellant with its Associated Enterprises ("AEs")***( available on Page 118 to 152 of the Paperbook)***; and

d) Copy of Invoices raised by the Appellant for provision of services***(available on Page 153 to 182 of the Paperbook).***

11. Ld. Counsel has submitted that there is direct nexus with the services in respect of which income has been earned by the Appellant from India and the business activities of the Appellant, therefore, FTS should be covered by Article 7 of the DTAA. Ld. Counsel has submitted that AO's contention that in order to consider receipts as business receipts said activity should be part of Appellant's primary business, is not supported by any judicial precedent and not justifiable under the law. In this regard it is submitted that the Hon'ble Madras high court

has also not emphasized that there should be primary business of the Assessee in order to tax the same as business receipts. The court has held that to tax the receipts as business, services should be provided in the normal course of business.

12. Ld. DR on the other hand, has defended the findings of the tax authorities below.

13. As we appreciate the material before us and the submissions raised, it comes up that there is no dispute on the part of the Revenue that the disputed income of Rs. 16,60,43,718/- by its nature and characteristics is accepted to be Fee for Technical Services (FTS) only. There is also no dispute to the fact, that with regard to FTS, there is no specific provision for chargeability of tax under the India-Thailand DTAA. As we appreciate the India-Thailand DTAA it comes up that Article 22 is a residuary Article which is incorporated to make taxable items of income which are not otherwise dealt in the DTAA. At the same time Article 7, lays down taxability of profits of an enterprise.

14. We will like to initiate the discussion keeping in mind the settled proposition of law, that where the business profits of the non-resident include items of income for which specific or separate provisions have been made in other articles of the tax treaty, then those provisions would apply to the items. However, in case it is found that those provisions are not applicable then the items of income would have to be considered in Article taxing business income. Reliance for this can be placed on **Paradigm Geophysical Pty. Ltd. [2008] 25**

**SOT 94. F**urther, that where there is no FTS clause available in the treaty with a country, then the income in question would be assessable as business income and it can be taxed in India only if there is a permanent establishment in India and the income is attributable to activities or functions performed by such permanent establishment. Reliance for same can be placed on reliance is placed on the Hon'ble Delhi Tribunal ruling in the case of **Bharti Airtel Ltd. [2016] 67 taxmann.com 223** and **GE Precision Healthcare LLC v. Assistant Commissioner of Income Tax, Circle- International Tax -1(3)(1), New Delhi, ITA No.404/Del/2023** Assessment Year: 2020-21 order dated 14.08.2023.

15. Thus, once the assessee raises a claim that the source of its revenue is out of "profits of an enterprise", under Artilce 7 of DTAA, then Article 22 would not be applicable. If at all AO wants to invoke any other provision of the Act or the DTAA, then the said activity, which gives rise to item of income should be examined to establish that same does not fall in any other Article and then only Article 22 may be invoked.

16. Here in the case in hand AO has invoked Article 22 of DTAA by making an allegation that FTS is not the primary business activity of the assessee and as there is no specific Article to cover FTS, residuary Article 22 can be invoked. This conclusion about FTS not being primary business is drawn on the basis of the assessee's web portal information. The first thing is that it is the Memorandum of Association of an assessee which is actually relevant to give a

finding about the nature and scope of the business activity which the enterprise can enter into and the web portal in no way is an evidence of the business activities of an assessee.

17. Then, in the case in hand, apart from several pieces of evidence about services being rendered in normal course of its business, as referred above in Para 10, Assessee has come up with a specific plea that it was providing application work services to Indian AEs, wherein the assessee, as part of its operations, does following:-

- Application works for Products including, but not limited to, design of Products for meeting local automotive vehicle market;
- Testing and evaluation of samples of Products, support of localization of parts and / or raw materials of Products;
- Coordination with the Company's or Group Company's customers relating, but not limited to, technical presentation to and supports with such customers for fixing technical specifications;
- Market research of automotive vehicles and parts thereof necessary for design of Products or review of technology trend;

18. Now Section 9 of the Act enumerates certain incomes to be deemed to accrue or arise in India and Section 9(1)(vii) of the Act provides under what conditions FTS income shall be considered to accrue or arise in India. Explanation 2 to Section 9(1)(vii) of the Act gives definition of FTS and which provides that any service falls within the definition of FTS are either be in the

nature of managerial services, technical services or consultancy services. Thus FTS is a species of income with specific definition and components. Thus where a DTAA does not make a reference for taxability of FTS, as separate item, then Article 22, which vests residuary powers, cannot be invoked. The intention of having residuary powers of taxing an income vested in any of the contracting state is to deal with those incomes which due to lack of regularity, continuity and frequency do not form part of regular business activity of the entity. The residuary provisions of Article 22 will not apply to items of income, which can be classified under other provisions of the tax treaty, but their taxability is subject to fulfillment of conditions mentioned therein. Thus we conclude the fee paid towards technical services can be brought under the item of business income, if there is no material to show that the same is not related to the business of the assessee. That onus lies on AO.

19. In the case in hand AO without examining the business activity of the assessee has drawn an interference on the basis of information available on web portal of the assessee. However, on a perusal of the documentary evidences filed and taking into consideration the nature of services provided by Assessee, we would concluded that the services provided by the assessee to the Indian AEs are in the nature of technical, managerial or consultancy, which, themselves together as FTS, do not fall in any Article of the DTAA, can very well be part of business income. Thus for the applicability of Article 7 assessee had brought on record the evidence which establish that FTS, actually is part of

business activity and assessee does not have a PE in India. So benefit of Article 7 is to be extended. AO had all the opportunities to examine the business activity and to give a conclusive finding as to what is primary business activity of assessee and why operations of the assessee in providing FTS, is not part of business income. That being not done, then by recourse to Article 22, FTS income could not have been brought to tax.

20. In light of the aforesaid, we are inclined to allow the Grounds raised by the Assessee. The appeal is allowed and the impugned addition quashed.

Order pronounced in the open court on 31.05.2024.

Sd/- Sd/-

(G.S. PANNU)
VICE PRESIDENT

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 31st May, 2024.

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi