IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI

BEFORESHRI ABY T. VARKEY, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 2495/MUM/2022(A.Y: 2019-20)

Kraft Foods Group Brands LLC 1 PPG, Place Suite 3400 Pittsburgh, Pennsylvania United States - 999999 **PAN: AAGCK6478F**	*v.*	ACIT (International Taxation) – 3(1)(2) 16th Floor, Air India Building Nariman Point, Mumbai – 400 021
(Appellant)		**(Respondent)**

Assessee Represented by	:	**Shri M.P. Lohia**
Department Represented by	:	**Shri Anil Sant**
Date of Conclusion of Hearing	:	**24.07.2023**
Date of Pronouncement	:	**27.09.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against final Assessment Order and directions of the Dispute Resolution Panel of Learned Commissioner of Income Tax (DRP-1), Mumbai-2 [hereinafter in short "Ld.DRP"] dated 07.06.2022 for the A.Y.2019-20 passed u/s. 144C(5) of Income-tax Act, 1961 (in short "Act").

2. Aggrieved with the final Assessment Order passed by the Assessing Officer, assessee has filed the appeal before us raising following grounds in its appeal: -

*"**General Objection***

1. erred in assessing total income of the Appellant at INR 11,74,88,824 as against INR 3,63,32,800 as per the Return of Income (ROI);

Final assessment order barred by limitation

2. erred in not appreciating that the time limit prescribed under section 153 is the outer time limit for passing the final assessment order and hence, the final assessment order dated 29 July 2022 is time barred and liable to be quashed,

Notice under section 143(2) is without jurisdiction and bad in law

3. erred in carrying out assessment proceedings initiated by National e-Assessment Centre (now known as National Faceless Assessment Centre) by issuance of notice under section 143(2) of the Act which was without jurisdiction and accordingly, the assessment be treated as bad in law and be quashed,

Addition of Tax Deducted at Source (TDS) of INR 10,260 on royalty income and TDS of INR 93.45.429 on support service income

4. erred in adding TDS of INR 10,260 to the returned royalty income of INR 96,715 on the ground that net royalty income was offered to tax (ie., gross income less TDS);

5. erred in adding TDS of INR 93,45,429 to the returned support service income of INR 3,62,36,081 on the ground that net support service income was offered to tax (ie, gross income less TDS):

6. erred in making the above additions on the basis of initial incorrect submission filed by the Appellant which was subsequently withdrawn during assessment proceedings along with supporting evidence as reflected in Form 26AS:

7. should have appreciated that addition of INR 10,250 representing TDS on royalty income and INR 93,45,429

representing TDS support service income would lead to double taxation as same isalready considered in the returned income,

Taxability of receipts of INR 7,18,00,340 as Fees for Technical/ Included Services ('FTS/FIS') under the Income Tax Act, 1961 (the Act) and Double Taxation Avoidance Agreement between India and The United States of America ("DTAA")

8. erred in making an addition of alleged receipt of INR 7,18,00,340 as FTS under section 9(1)(vii) ofthe Act and Article 12 of the DTAA:

9. erred in making addition of alleged receipts of INR 7,18,00,340 without appreciating that the aforesaid amount is towards allocation of cost wherein no services have been made available to the Indian group entity ie., HIPL thereby not being taxable as per Article 12 of DTAA:

10. erred in ignoring that such receipts are reimbursement of cost allocation arrangements without any mark-up and hence such reimbursements can neither be taxed under the Act nor under the DTAA:

11. should have appreciated that the receipts under consideration represent managerial services' and ought to have held that in the absence of 'managerial services' under Article 12 of India-USA DTAA, said receipts cannot be taxable as per provisions of DTAA

12 without prejudice to the above, erred in not appreciating that the receipts in dispute is of INR5,18,61,854 as against INR 7,18,00,340 alleged by the AO

Levy of interest under section 234B

13. erred in levying interest under section 234B of the Income Tax Act, 1961 of INR 13,89,600 initiation of penalty proceedings under section 270A of the Act

14 erred in wanting to initiate penalty proceedings under section 270A of the Act without appreciating that the Appellant has not under-reported income"

3. At the outset, Ld. AR of the assessee submitted that Ground No. 1 is general and Ground Nos. 2 and 3 are not pressed, accordingly, these three grounds are dismissed as such.

4. With regard to Ground Nos. 4 to 7 Ld. AR of the assessee brought to our notice relevant facts, the assessee offered to tax revenue of ₹.3,63,32,796/- received from Heinz India Pvt. Ltd., [Heinz India, now known as Zydus Wellness Products Limited']. The Heinz India has deducted TDS of ₹.93,55,689/- and accordingly, assessee has claimed credit of the same which resulted in refund of ₹.55,01,510/-. Ld. AR of the assessee submitted that in one of the submissions dated 15.09.2021 the assessee inadvertently submitted before the Assessing Officer that the assessee has declared the net amount as their gross income [i.e., net amount of ₹.3,63,32,796/-] while filing return of income and requested the Assessing Officer to consider the gross amount of ₹.4,56,88,485/-, thereby requesting to consider the differential amount of ₹.93,55,689/- while computing the total income. However, subsequently vide submission dated 20.09.2021 the assessee has withdrawn the above submissions and submitted that ₹.3,63,32,796/- is the gross amount not the net amount as declared in the return of income. However, the Assessing Officer rejected the same and

proceeded to make the additions as per the earlier submissions made by the assessee.

5. Aggrieved, assessee filed objection before Ld. DRP and after considering the submissions of the assessee, Ld. DRP gave its findings by directing the Assessing Officer to verify Form 26AS and bring to tax correct amount of income on receipts in question of gross basis. In case it is proper, the proposed addition may be deleted.

6. Ld. AR of the assessee submitted that even after the clear direction of Ld. DRP, the Assessing Officer proceeded to sustain the addition with the observation that Form 26AS captures the transactions on which TDS was deducted. In the present case, an amount of ₹.10,260/- as royalty income and ₹.93,45,429/- as support services income has not been offered to income which has not suffered TDS and therefore it does not appear in Form 26AS. Accordingly, he sustained the additions made in the draft Assessment Order.

7. Ld. AR submitted that the Assessing Officer has violated the directions of the Ld. DRP and further, he brought to our notice Form 26AS and submitted that the gross income and the TDS income offered

by the assessee in its return of income are matching. Hence there is no concealment of income.

8. On the other hand, Ld. DR submitted that assessee may have to get the certificate from Payee to substantiate its claim. He supported the findings of the assessing officer.

9. Considered the rival submissions and material placed on record, we observe from the record submitted before us that the income declared by the assessee in its return of income and the gross income declared in Form 26AS are matching. With the information submitted in return of income and also TDS deducted and credit availed by the assessee are also matching with the Form 26AS. This issue was considered by the Ld. DRP and remitted this issue back to the file of the Assessing Officer to verify the claim of the assessee against the information contained in Form 26AS. However, Assessing Officer has verified and confirmed that the informations are matching with the Form 26AS. However, he proceeded to confirm the addition by observing that the differential amount was not offered to income by the assessee without bringing on record the reasons to reach such conclusion. It clearly shows that Assessing Officer has not followed the direction of the

Ld. DRP and has not clearly brought on record his findings contradicting to the submissions made by the assessee. In absence of such reasons we are inclined to delete the additions proposed by the Assessing Officer. From the action of the Assessing Officer it clearly shows that Assessing Officer has no inclination to follow the directions of the Ld.DRP and went on sustaining his own findings and moreover he has not brought on record any material to demonstrate how the assessee has concealed the additional revenue and also it is a factual matter, the AO has to bring on record the mismatch in the revenue declared by the assessee and information contained in the form 26AS or any other material in support of his findings. With the above observations we are inclined to allow the grounds raised by the assessee and direct the AO to delete the proposed additions.

10. With regard to Ground Nos. 8 to 12 the relevant facts are, assessee is a company incorporated in USA and a tax resident of USA having its registered office at Pittsburg, Pennsylvania, USA. It does not have any branch office or employees in India. The control and management of assessee's affairs are situated entirely in USA. Therefore, assessee is a non-resident of India for direct tax purposes. Accordingly, it claimed DTAA benefit between India and USA and filed

tax residency certificate issued by the USA Tax Authorities. During the year, assessee offered to tax revenue of ₹.3,63,32,796/- received from Heinz India Private Limited ("Heinz India" Now known as Zydus Wellness Products Limited) and also taken credit of TDS of ₹.93,55,689/-.

11. Assessing Officer observed that assessee had offered royalty income and income from support services and also received ₹.7,18,00,340/- by observing that assessee has received ₹.11,74,88,824/- from Heinz India as under: -

Acknowledgement number	Amount (INR)	TDS (INR)	TDS Rate	Country	Return FY	Remitter PAN	Remitter Name
395849071271218	4,60,13,552	0	0	India	2018	AAACH0667E	HIPL
411566291230119	3,98,35,309	0	0	India	2018	AAACH0667E	HIPL
411676841230119	3,16,39,962	33,24,094	10	India	2018	AAACH0667E	HIPL

12. However, assessee has submitted that assessee has received ₹.8,81,94,650/- from Heinz India which includes royalty for trade mark of ₹.96,715, support services income ₹.3,62,36,081/- and cost allocation [recovery of expenses] of ₹.5,18,61,854/-. It was submitted by the assessee that the royalty and support services income are declared in its return of income as taxable income and the cost allocation recovery is claimed as nontaxable. Further, it was submitted before the Assessing Officer that the actual funds received by the assessee is ₹.8,81,94,650/- which is also declared in Form 26AS.

13. With regard to the cost allocation arrangement of ₹.5.18 crores are claimed as non-chargeable to tax, it was submitted that the same are reimbursement without any mark-up, in this regard, assessee has submitted an agreement entered by the assessee and Heinz India dated 04.01.2016 and they brought to the notice of the Assessing Officer Article 5 and specifically brought to the notice Article 5(2)(d) that the parties agreed the mark-up of 0% share applied to cost of performing support services under this agreement and further, they submitted that Section 90(2) of the Act provides the option to non-resident to be governed under the provisions of tax or the provisions of applicable tax treaty whichever is more beneficial. The assessee by relying on the following case law submitted that the reimbursement of expenditure is not taxable under the Income-tax Act.

i. *CIT v Siemens Aktiongesellschaft (220 CTR 425) Bombay High Court (Bom)*

ii. *CIT v Industrial Engineering Products Pvt Ltd (202 ITR 1014) (Del-HC)*

iii. *CIT v Dunlop Rubber Co Ltd (142 ITR 493) (Kol.)*

iv. *Mahindra & Mahindra v DCIT (ITA No. 85 8597/Mum/2010) (Mum.)*

v. *ADIT v Antwerp Diamond Bank Inv (ITA No. 7347/Mum/2007) (Mum.)*

vi. *A.P.Moller Maersk v DCIT (ITA No. 8703, 8704/Mum/2010) (Mum.)*

vii. *DECTA, In re (237 ITR 190) (AAR)*

14. Further, it submitted that the reimbursement of expenditure will also not attract Article 12(4) and submitted that the relevant receipt of reimbursement of expenditure will not fall under ancillary and subsidiary to the application or enjoyment of the right etc., and also it does not come under the provisions of make available clause.

15. After considering the submissions of the assessee, Assessing Officer rejected the same and observed that assessee has not provided any documentary evidences regarding the claim of classification of income under support services and reimbursement towards cost allocation arrangement. The assessee has relied on services agreement entered between assessee and Heinz India for reimbursement towards cost allocation arrangement where there is no mention of details i.e., Global rewards for employee, Legal and Corporate affairs, Global Leadership Convention, Internal Audit, Information Technology Costs. The Assessing Officer rejected the claim of the assessee that assessee has received ₹.8,81,94,650/- and proceeded to make the addition based on the money received from Heinz India as submitted by the assessee in their letter dated 15.09.2021. The Assessing Officer distinguished the case laws submitted by the assessee in his order and relying on the service agreement entered by the assessee, he held that the claim of

the assessee is that reimbursement on expenditure is not taxable as there is no profit element involved in it. Assessing Officer by analyzing the definition of FTS u/s. 9(1)(vii) and Article 12 of India– USA Tax Treaty and also by relying on the case of Bovis Lend Lease (india) Pvt. Ltd., *v.* ITO [2010] 127 TTJ 25 (Bangalore), CSC Technology Singapore Pte. Singapore *v.* ADIT (ITAT Delhi and Ashok Leyland Ltd., *v.* DCIT [2008] 119 TTJ 416 (Chennai) and held that the amount of ₹.7,18,00,340/- (₹.11,74,88,824 – ₹.4,56,88,485/-) should be considered as FTS under Section 9(1)(vii) and Article 12 of the tax treaty and distinguished the submissions made by the assessee with regard to the ancillary and subsidiary services and also make available technical knowledge are not existed or not provided by the assessee. He came to the conclusion that the service charges collected by the assessee to provide management, internal audit, communication human resource, finance and treasury, data processing and information technology, food safety and quality control, supply chain and manufacturing business development and other related areas included but not limited to the services described under Article 3. These services are technical in nature and falls under make-available clause as discussed by him in his order and treated the amount of ₹.7,18,00,340/- as taxable income under the Income Tax Act as well as India – USA Tax Treaty.

16. Aggrieved with the above order assessee preferred an objection before the Ld. DRP and filed detailed submissions before him. After considering the detailed submissions Ld. DRP sustained the additions made by the Assessing Officer by observing as under: -:

> *"11.1 Submissions of the assessee are carefully considered. It is noted that the assessee entered into a Service Agreement with Heinz India (Pvt) Ltd. (HIPL) under which it provided Support Services in lieu of Service Fee which has been offered for taxation as Fee for Technical Service (FTS), being taxable under the Act, and the relevant DTAA. It has also claimed that it had received an amount of INR 5,18,61,854 (INR 7,18,00,339 as per the AO) as cost reimbursement. Claiming that the same had been received without markup, the assessee didn't offer the same for taxation.*
>
> *11.2 The AO has analysed the Service agreement in the draft order and pointed out that. (i) there is only one agreement between the assessee and HIPL, and it is about the Service Fee; (ii) there is no reference to the cost allocation in the agreement: (iii)As the FTS is taxable on gross basis, both under the ACT and the DTAA, the same is liable to taxed, irrespective of whether there was any markup or not.*
>
> *11.3 The submissions of the assessee are considered in this background. The assessee has described the transaction in question, claimed to be a mere reimbursement on account- of cost allocation, in following terms:*
>
> > *1. Payments recovered by KFG was for support in the areas of human resources, strategic planning and marketing, finance, and information systems to achieve consistency of approach and economies of scale for the affiliates across the globe.*
> >
> > *2. Support was provided to carry day to day business operations. Thus, there are no personnel being deputed to HIPL by KFG for providing assistance to HIPL.*
> >
> > *3. In the instant case, no such consultancy has been provided by KFG to HIPL. The same is merely support in carrying out day to day business operations.*

> *4. In this instant case, no special skill or knowledge in relation to technical field was required by KFG for rendering services to HIPL.*
>
> *5. In the instant case, there is no mark up on cost allocation arrangements. The same qualify as reimbursements.*
>
> *6. HIPL on conservative basis deducted TDS while making payment towards cost allocation which are pure reimbursements.*

11.4 However, the panel notes that in the relevant Agreement, there is no mention of any such services as, human resources, strategic planning and marketing, finance, and information systems in the context of cost allocation. The Agreement states that

> *"Whereas all affiliates have a continuing need for Support Services in the areas of general management, internal audit, communications, human resources, finance and treasury, data processing and information technology, food safety and quality control, supply chain and manufacturing, business development, legal and other related areas"*

11.5 The above clearly indicates that all the services to be rendered by the assessee were in the nature of Support Services, and there was no reference to any cost allocation on cost to cost basis in the Agreement. Further, section 1.5 defines Service Fees as the net fee payable for the provision of Support Services. Section 1.9 defines Cost Centres as the cost centres with the assessee responsible for the provision of Support Services to affiliates.

11.6 As can be seen from section 1.9, even cost centres are defined in the context of Support Services only. There is no activity performed by the assessee which would not be related to the Support Services. Article 2 which deals with rendition of services only lists Support Services, and Special Services (which are beyond the subject matter of the Agreement in question). It has no reference to any other activity for which the assessee might have been reimbursed. Further, Article 5, section 5.2 (d)states that:

The parties agree that a mark-up of 0% shall be applied to the cost of performing Support Services under this Agreement.

11.7 The above clearly brings out the factual situation which is to bifurcate the receipts on account of provision of Support Service: one the cost without any mark up, and the other the remaining amount, presumably the profit element. By claiming the cost

element as a mere reimbursement, the aim was to reduce the tax liability as the taxability of FTS is on gross receipt basis.

11.8 It is clear from the above that the expenses relate to certain technical services provided by the assessee to HIPL. What the assessee is trying to pass on as innocuous reimbursements are in fact incidental expenses incurred by the assessee in order to enable itself to provide certain technical services to HIPL. It is not disputed by the assessee that these services are taxable as FTS in the hands of the assessee under section 9(1)(vii). however, by bifurcating the receipts as reimbursement of expenses and other receipts, the assessee is attempting to circumvent the provisions of the Act/DTAA which provide for taxation of FTS on gross basis.

11.9 It is beyond dispute that as per the scheme of the Act, and the DTAA, the royalty and FTS are taxable on gross basis, irrespective of the fact whether any profits were actually earned on the transfer. Under the circumstances, for a receipt under the head royalty or FTS to be taxable in India, it is sufficient to ascertain that transaction resulted in accrual of income in India.

11.10 The decision of the Hon'ble Supreme Court in the case of GE India Technology CHCen. (P.) Ltd. Vs CIT (327 ITR 456) is relevant here to counter the argument of the assessee that mere reimbursement cannot be taxed in India. The context of the decision is the "taxability in India' as in whether the income in question is accrued or arisen in India. In the present case, the services are rendered in India and therefore, there is no dispute that the income did accrue in India. The para 11 and 12 of the decision directly demolish the line of argument taken by the assessee:

> *"11. Before concluding we may clarify that in the present case on facts the ITO (TDS) had taken the view that since the sale of the concerned software, included a license to use the same, the payment made by appellant(s) to foreign Suppliers constituted "royalty" which was deemed to accrue or arise in India and, therefore, TAS was liable to be deducted under Section 195(1) of the Act. The said finding of the ITO (TDS) was upheld by the CIT (A). However, in second appeal, the ITAT held that such sum paid by the appellant(s) to the foreign software Supplier was not a "royalty" and that the same did not give rise to any income taxable in India and, therefore, the appellant(s) was not liable to deduct TAS. However, the High Court did not go into the merits of the case and it went straight to conclude that the moment there is remittance an obligation to deduct TAS arises, which view stands hereby overruled.*

> *12. Since the High Court did not go into the merits of the case on the question of payment of royalty, we hereby set aside the impugned judgments of the High Court and remit these cases to the High Court for de novo consideration of the cases on merits. The question which the High Court will answer is whether on facts and circumstances of the case the ITAT was justified in holding that the amount(s) paid by the appellant(s) to the foreign software Suppliers was not "royalty" and that the same did not give rise to any income taxable in India and, therefore, the appellant(s) was not liable to deduct any tax at source?*

11.11 As can be seen from the above, the decision of the apex court in the case of GE India Technology Cen. (P.) Ltd. (supra) clearly espouses the view that if a receipt is characterized as royalty (or FTS), and the same did give rise to an income taxable in India by virtue of having been accrued in India, then it is taxable in India, notwithstanding whether it contains any profit element or not.

11.12 In the case of CSC Technology Singapore Pte. Ltd. v ADIT, [2012] 19 taxmann.com 123 (Delhi) the assessee, a foreign company, rendered services to Indian Companies. The assessee had offered to tax all sums received from India as royalty/FTS under the DTAA. However, there are certain amounts from an Indian company, which was not been offered for taxation. The assessee claimed that the assessee had incurred travel expenses in respect of employees of the head office who came to India for helping the work of the Indian subsidiary company. The expenses were in relation to air-tickets, hotel bills, taxi charges etc. The Indian company had reimbursed these expenses to the head office on cost to cost basis. These amounts were reimbursements and there was no element of profit was involved in the reimbursements. Therefore, the same was not taxable and was also not included in the receipts. The Hon'ble ITAT held that "these expenses have been incurred in connection with technical services agreement. Therefore, the expenditure has been incurred for earning royalty/FTS. In spite of the fact that the agreement provides inter-alia for adequate level of support and posting its personnel, the expenses for which will be reimbursed, the fact remains that the expenditure has been incurred for earning the royalty/FTS. The expenditure is that of the assessee and not that of the Indian subsidiary company. Article 12 provides for taxation of royalty/FTS in the source country on gross basis at a concessional rate of tax. This means that the expenditure incurred for earning royalty/FTS is not deductible in computing gross royalties or gross FTS received by the assessee company......... It is clear from the language that this article taxes royalty/FTS on gross basis and does not permit

deduction of expenses. Therefore, it is held that the alleged reimbursement of expenses for traveling or the expenses of the assessee-company are its expenses, liable to be included in its gross receipts."

11.13 In the present case, instead of offering the entire receipts for taxation as FTS, the assessee is seeking to bifurcate them by separating a part thereof to be paid to third parties. It must be noted that if the contention of the assessee is accepted, it would amount to taxing the FTS on 'net' basis, instead of 'gross' basis, as prescribed by the statute. The assessee cannot be allowed to deduct all or any of the expenses it might have incurred, including third party payments, from the gross receipts for technical services it rendered.

11.14 As such, the panel holds that the amount of reimbursement of expenses is not eligible to be deducted from the gross amount received by the assessee and offered for taxation as FTS, and must be taxed as FTS on gross basis.

In view of the above discussion, Ground of Objection No. 6, 8 and 9 are rejected."

17. At the time of hearing Ld. AR of the assessee submitted as under:-

"During the captained AY, KFG vide submission dated 6 August 2021 (refer page 67-70), 15 September 2021 (refer page 155-156), 20 September 2021 (refer page 159-165) and 27 September 2021 (refer page 183-185) provided the learned AO with all the necessary information about taxability of receipts from HIPL.

At the outset, KFG submits that following are the receipts from HIPL during the captioned year:

Sr No	***Particulars***	***Amount (INR)***	***Taxability position***
1	*Royalty for licensing of trademark*	*96,715*	*Taxable*
2.	*Support service income*	*3,62,36,081*	*Taxable*
3.	*Cost allocation*	*5,18,61,854*	*Non-taxable*
4.	*Total*	*8,81,94,650*	*Xx*

The above total receipts are also appearing in Form 26AS (refer page 179-182). However, the learned AO vide Para 7.3.1 (refer page 37) of the draft assessment order dated 29 September 2021, as observed that KFG has received INR 11,74,88,824 from HIPL.

The learned AO has allegedly considered INR 7,18,00,339 as taxable under the Act/ India-USA DTAA as FTS/FIS.

The assessee humbly submits that basis the receipts tabulated above, INR 3,62,36,081 have been offered to tax. Further, receipts from cost allocation arrangements of INR 5,18,61,854 are not chargeable to tax since the same are reimbursements without any mark-up.

Refer page 168-177, whereby Article 5 of the agreement dated 4 January 2016 makes it amply clear there shall be no mark-up on such cost allocation arrangements.

- *Refer relevant pages of the DRP Application filed dated 29 October 2021 with the Hon'ble Members of DRP-1, Mumbai*

<u>Assessee’s contentions:</u>

In addition, invoice of USD 12,04,511 has been raised on HIPL (refer page 178). Such invoice is towards receipts of USD 4,95,435 (i.e. INR 3,62,36,081) towards support services (offered to tax) and USD 7,09,076 (INR 5,18,61,854) towards reimbursement of cost allocation arrangements.

Section 90(2) of the Act provides an option to a non-resident to be governed under the provisions of the Act or the provisions of the applicable tax treaty, whichever is more beneficial. This view is supported by the Hon'ble Supreme Court ruling in the case of UOI vs AzadiBachaoAndolan (263 ITR 706) and the Andhra Pradesh High Court in the case of CIT vs Visakhapatnam Port Trust (144 ITR 146) and also by CBDT Circular No. 333 dated 2 April 1982.

KFG being a company incorporated in USA and a tax resident of USA, is entitled to avail the benefits of the India-USA DTAA.

<u>Taxability under the Act</u>

The above receipts of KFG merely represents reimbursement of the costs incurred by and on behalf of HIPL.

KFG wishes to submit that it is pertinent to examine whether the term 'reimbursement' could be considered as income under the Act. The term 'reimbursement' has not been defined under the Act and hence, should partake the meaning assigned to it in common parlance. The term reimbursement has been defined in Law Lexicon to mean "to pay back, to make restoration, to repay that expended, to indemnify or make whole." Accordingly, payments

which are made towards meeting the actual expenses incurred on behalf of the payer would qualify as reimbursements.

The allocation of actual costs which is charged by KFG as a participant to the Agreement merely represents a reimbursement of those costs incurred by and on behalf of HIPL. The same can be evidenced from the service agreement above, that there is 0% markup.

Thus, such recovery of expenses would not constitute income of KFG and hence is not taxable.

Refer relevant pages of the DRP Application filed dated 29 October 2021 with the Hon'ble Members of DRP-1

Assessee's contentions:

Reliance is placed on following judgments:

- *CIT vs Siemens Aktiongesellschaft (220 CTR 425 (Bom.))*
- *CIT vs Industrial Engineering Products Pvt Ltd [202 ITR 1014 (Del HC)]*
- *Mahindra & Mahindra vs DCIT [ITA No. 8597/Mum/2010 (Mum.)] ADIT vs Antwerp Diamond Bank Inv [ITA No. 7347/Mum/2007 (Mum.)]*
- *A. P. Moller Maersk vs DCIT [ITA No. 8703, 8704/Mum/2010 (Mum.)]*
- *CIT vs Dunlop Rubber Co Ltd [142 ITR 493 (Kol.)]*

The broad principles which emerge from the above judicial precedents are as follows:

Where expenses have been incurred by a person at the behest of or on behalf of or for the benefit of another person, and the same were merely reimbursed to the first mentioned person (in which case, by effecting the reimbursement, the expenses were correctly borne by the other person), such reimbursements are mere recoupment of expenses and would not constitute income of the first mentioned person.

If the reimbursements made to the person incurring the expenses on behest of or on behalf of or for the benefit of another person, also includes profit element over and above the actual costs incurred by the first mentioned persons, such excess could be

taxable as the income of the first mentioned person. However, where reimbursement of expenses is made at actuals, the reimbursement would not constitute income of the first mentioned person.

Assessee's contention:

In the present case, the expenses incurred by KFG and reimbursed by HIPL are mere recoupment of expenses and would not constitute income of KFG. KFG merely allocates the costs and does not charge any mark-up.

In view of the above, it is submitted that having regard to the aforesaid facts of the present case and the principles emerging from various judicial precedents stated above, since KFG has received payments from HIPL towards cost allocation arrangements which are reimbursements and do not contain income element embedded in it, payments made by HIPL should not be chargeable to tax in India as income under the provisions of the Act.

While reimbursements received are not taxable under the Act itself, nonetheless taxability under the DTAA is discussed below:

Taxability under the DTAA

Article 12(4) of the treaty defines the term FIS, which reads as under:

> *"4. For purposes of this Article, fees for included services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of 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, or consist of the*
>
> *development and transfer of a technical plan or technical design."*

Assessee's contentions:

Further, Article 12(3)(a) of the DTAA pertains to payments of any kind received as a consideration for the use of, or the right to use,

any copyright or a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; and Article 12(3)(b) pertain to payments of any kind received as consideration payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

It is submitted that the payments recovered by KFG was for support in the areas of human resources, strategic planning and marketing, finance, and information systems to achieve consistency of approach and economies of scale for the affiliates across the globe. Therefore, it cannot be said to be ancillary or subsidiary to the application or enjoyment of Technology and Trademark license agreement executed between KFG and HIPL. Accordingly, the amounts received by KFG cannot be characterized as FIS under Article 12(4)(a) of the DTAA.

As per clause (c) of Article 12(4) of the DTAA, FIS also covers consideration for the rendering of any technical or consultancy services, provided such services make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

In the light of above definition and judicial pronouncements of various Courts, for any payment to qualify as FIS under the DTAA, the following criteria are essential:

> *a) The services need to be of technical or consultancy nature; and*
>
> *b) The services need to make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.*

Assessee's contentions:

The term 'make available' has not been defined in the Treaty. However, the Memorandum of Understanding (MOU) executed

between India and USA provides a detailed commentary explaining the meaning of the term 'make available' at length.

As per the MOU, a 'technical service' is one that requires an expertise in a technology and a 'consultancy service' is a service which is of an advisory nature. A 'technical or consultancy service' is taxable only if the services 'make available' technical knowledge, experience, skill, know-how, or processes, or consist of development and transfer of a technical plan or technical design.

The MOU states that generally technology is 'made available' when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc are made available to the person purchasing the service. Similarly, the use of a product, which embodies technology, is not per se considered to make the technology available.

Further, the MOU has set out illustrative services that either 'make available' technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design. In a nutshell, the illustrations in the MOU suggest as follows:

The payments for training provided by experts of non-resident company to Indian engineers in manufacturing of products qualifies as FIS as the services 'make available' technical knowledge, skill, and processes to the Indian company.

Wherein non-resident manufacturer fabricates a product in its plant for a fee, though it is performing a technical service, no technical knowledge, skill, etc are 'made available' to the Indian company, nor there is any development and transfer of a technical plant or design. Hence, the fees would not be treated as FIS.

Payments for transfer of a technical plan (e.g. computer programme) developed by non-resident company would qualify as FIS.

<u>Assessee's contentions:</u>

The services of a non-resident company to modify formula and train the employees of Indian company in applying the formulas could be regarded technical knowledge 'made available' and the payments would be regarded as FIS as the technical knowledge is made available to the Indian company.

The payments for the computer simulation of markets done by non-resident company would not be FIS as only commercial information is transferred and it does not 'make available' technical services within the meaning of Article 12(4)(b).

In view of the above, by contrast, if no technical knowledge, etc is 'made available' to a purchaser, any fees generated would not be FIS under Article 12(4) of the Treaty. Typically, services rendered may not make available any technical knowledge, skill, know-how or processes if the service provider is able to demonstrate that:

> *such services do not enable the service recipient to apply the technology (if any) contained therein.*
>
> *such services also do not contemplate development or transfer of a technical plan or technical design; and*
>
> *the payment to the service provider is for service simpliciter and not for making available any technical knowledge, experience, etc.*

Accordingly, the service recipient should be able to make use of such technical knowledge, skill, etc by himself inhis business or for his own benefit without recourse to the service provider in the future.

The aforesaid principle has also been upheld in the following judicial precedents:

Assessee's contentions:

- *Guy Carpenter & Co Ltd vs ADIT (2012) ITA No 202/2012 (Del_HC)*
- *CIT vs De Beers India Minerals (P) Ltd (2012) 346 ITR 467 (Kar_HC)*
- *National Organic Chemical Industries Ltd vs DCIT (2005) 96 TTJ 765 (Mum.) ADIT vs WSN Global Services (P) Ltd (2011) 10 Taxmann 254 (Mum.)*
- *Wockhardt Ltd vs ACIT (2011) 10 Taxmann 208 (Mum.)*
- *Raymond Ltd. vs DCIT (2003) 86 ITD 791 (Mum.)*
- *ACIT vs Paradigm Geophysical Pvt. Ltd. (2008) 117 TTJ 812 (Del_T)*

- *ACIT vs Viceroy Hotels Ltd (2011) 11 Taxmann 216] (Hyd.)*
- *Sandvik Australia Pty. Ltd. vs Deputy Director of Income-tax (International Taxation)*

In the present case, based upon the facts and description of the services as mentioned above, no technology is made available by KFG to HIPL while arranging support services.

Accordingly, it is submitted that KFG does not "make available" any technical knowledge, skill, etc. to HIPL, nor does it develop and transfer any technical plan, design, etc. Therefore, the payments recovered by KFG towards support services provided cannot be said to be covered within the meaning of FIS under the DTAA. Hence, such reimbursements should not be taxable in India under the DTAA

In addition to above, the definition of FIS under the India-USA DTAA includes only technical and consultancy services within its ambit. The word managerial is not included in the definition and hence, managerial services are outside the ambit of FIS.

Meaning of 'managerial' is "of or relating to a manager or to the functions, responsibilities, or position of management". Thus, it signifies service for management of affairs or services rendered in performing management functions. Hence, it can be inferred that managerial services essentially involves controlling, directing or administering the business.

If the services are treated as technical, consultancy and managerial in nature, i.e. as a mixed bag of services without distinguishing between the nature of the services, nor appreciating the intent of the services, the definition of FTS/FIS under the Act and the DTAA would become redundant. Further, in the DTAA, the countries have entered into negotiations and dropped the term 'managerial' services to specifically exclude the same. However, if difference between the services is ignored, such language of the DTAA would also be rendered redundant.

Hence, considering the above argument, KFG wishes to submits that where managerial services are excluded under the India-USA DTAA, such services cannot be subject to tax under the DTAA.

Conclusion:

In view of above, KFG wishes to conclude that:

Reimbursements received by KFG towards cost allocation are not taxable in India both under the Act and the DTAA.

The learned AO has completely ignored the factual submission of KFG and allegedly considered INR7,18,00,339 as FTS/FIS thereby ignoring the actual receipts INR 5,18,61,854.

Receipts from HIPL is INR 8,81,94,650 which is as per Form 26AS. However, the learned AO has completely ignored the said fact."

18. On the other hand, Ld. DR relied on Para No. 7 of the draft Assessment Order and Para No. 11 of the Ld. DRP order and he vehemently argued and supported the findings of the lower authorities.

19. Considered the rival submissions and material placed on record, First, let us discuss the difference of amount declared by the assessee in its return of income and addition made by the Assessing Officer. With regard to receipt of cost allocation of ₹.5,18,61,854/-, the above said amount is also properly declared in Form 26AS by Heinz India and assessee also filed a copy of the Form 26AS before us. It shows that assessee has actually received ₹.8,81,94,650/- which consist of Royalty payment of ₹.96,715/-, Support Service payment of ₹.3,62,36,081/- and Claim of Cost allocation of ₹.518,61,854/-. However, we observe that Assessing Officer has proceeded to make the addition of ₹.7,18,00,340/- towards Cost allocation by grossing up the income without there being any evidences on record. Therefore, based on the information

submitted before us in Form – 26AS, it clearly shows that assessee has actually received ₹.5,18,61,854/- from Heinz India towards cost allocation and this receipts were declared by the assessee as reimbursement. Therefore, we are inclined to accept the submissions of the assessee that it has actually received only ₹.518,61,854/- and we direct Assessing Officer to consider only the amount declared in Form-26AS.

20. Coming to the next issue of treating the above said receipt as part of support services income or not, we observe from the record that assessee has raised consolidate invoice of USD 12,04,511 under Invoice No. U025-71 dated 12.12.2018. We observe that assessee has entered into trademark license agreement dated 01.10.2016 and service agreement dated 04.01.2016 in order to provide support services in the areas of general management, internal audit, communications, human resources, finance and treasury, data processing and information technology, food safety and quality control, supply chain and manufacturing, business development, legal and other related areas. In the same agreement the assessee and Affiliates i.e., Heinz India agreed to compensate for various services offered by the assessee. In the above agreement, in Article 1, at section 1.8, the definition of Support

Services are given and it clearly means any activities performed by the assessee in the areas of general management, internal audit, communications, human resources, finance and treasury, data processing and information technology, food safety and quality control, supply chain and manufacturing, business development, legal and other related areas including but not limited to the services described in Article 3 and provided to recipient on a commercial basis. Further, it defined the relevant cost center in the section 1.9 to mean the cost centre within the company responsible for the provision of support services to Affiliates. From the above, the assessee has clearly defined the term of support services and it illustrated the various services in the Article 3 but it clearly defined it to be not limited to the services as mentioned in Article 3, it means the definition of various services illustrated in the article are not exhaustive.

21. Next in Article 5 the assessee agreed to share the cost that are subject to allocation under this agreement shall be computed in accordance with the provisions of the clause i.e., Section 5.2 and the same is reproduced below: -

> a) *For each relevant cost center, a cost accounting method consistent with GAAP and the Company's accounting policies will be used to identify all direct and indirect costs including but not limited to any and all compensation costs,*

depreciation of equipment, expenses paid to third parties, and overhead expenses.

b) For each relevant cost center, the aggregate amount of such costs shall not include costs which are related to the provision of Special Services and stewardship activities.

c) An Allocation Factor shall be determined for each relevant cost center based on reasonable estimates provided by the relevant cost center related to the Support Services performed during the Accounting Period. The expenses attributed to Recipient under this Agreement shall be the sum of the amounts determined for each relevant cost center.

d) The parties agree that a mark-up of 0% shall be applied to costs of performing Support Services under this Agreement unless a different mark-up is required under U.S. transfer pricing rules based on the nature of the Support Services performed."

22. From the above, it is clear that the assessee has entered the above agreement to provide support services by providing each category of support services from its different cost centers and by identifying all direct and indirect cost of each as cost centre incurred to provide support services other than for providing special services and stewardship services. The above costs provided for support services are determined based on allocation factor determined for each relevant cost centers during the relevant accounting period. Accordingly, assessee has received support service charges of ₹.8,80,97,935/- out of which assessee has declared ₹.3,62,36,081/- as taxable income and declared the same in its return of income and other portion of ₹.5,18,61,854/-

towards receipt of cost allocation [recovery of expenses] and claimed the same as not taxable. It is important to note that the assessee has raised one single invoice for all the cost incurred by different cost centers and based on the above agreement, the assessee has to determine cost of each allocable cost by adopting allocation factor. The assessee did not file the above details before any tax authorities. Further we observe that the assessee has to provide support services to its affiliates through the respective cost centers for various services as illustrated in the Article 3 and it is not exhaustive definition. Therefore, as per the terms of agreement, the services provided by the assessee are only support services.

23. We discussed in the above para that the assessee has not submitted any supporting evidences before the tax authorities and we also observe that as per the Section 5.2 of Article 5 of the agreement, relating to share of cost, this is agreed between them that the relevant cost center, a cost accounting method will be adopted to identify all direct and indirect costs and all compensation costs, depreciation of equipment, expenses paid to third parties and overhead expenses.

24. Further, it was agreed between them that an allocation factor shall be determined for each relevant cost center related to the support services performed during the accounting period and further clause (d) of section 5.2 describes that a mark-up of 0% shall be applied to costs of performing support services under this agreement unless a different mark-up is required under U.S. transfer pricing rules based on the nature of the Support Services performed. It clearly shows that the assessee will provide support services with 0% mark up on the costs of performing the various support services under this agreement unless a different mark up is required under US transfer pricing rules. It also shows that it is merely an initial commitment, unless the US TP rules applicable. The assessee has not brought on record the relevant assessment made under the US TP rules and also not bothered to submit any details of cost allocation by the respective cost centers and relevant cost factors for allocation. It is relevant to note that the support service charges are determined only by adopting the allocation of cost of respective cost centers, no other method was prescribed. Therefore, all the cost claimed by the assessee is only towards support services.

25. From the above, it is very clear that, assessee will allocate the various cost to different cost centers by adopting suitable factors for

each relevant cost centre based on the reasonable estimates provided by the relevant cost centers to the various support services performed by the assessee. However, we observe that no such allocation or cost centre wise allocation of cost were submitted before any authority. In our considered view, the assessee has entered into a support services agreement to provide support services through the various cost centers but failed to submit any details or proper factors or allocations basis to classify the various support service charges provided/collected from the various affiliates, in particular Heinz India.

26. From the record what we observe that assessee has collected consolidated support service charges and offered to tax a portion of say i.e., about 41% and rest as reimbursement of allocated costs. The assessee merely relying on clause (d) of section 5.2 of the support services agreement to claim that various expenses towards Global rewards for employee, Legal and Corporate affairs, Global Leadership Convention, Internal Audit, Information Technology Costs are reimbursement of expenditure without submitting any supporting evidences. Merely because the clause (d) on section 5.2 declares that the parties agreed that a mark-up of 0% shall be applied to cost of perform support services under this agreement does not mean anything

unless and until a proper supporting documents are submitted before the authorities below by explaining how the costs are incurred on behalf of affiliates and how it is to be considered as reimbursement. How the various expenses claimed by the assessee are allocated to Heinz India and on what basis? In absence of the above, one cannot presume that these are reimbursement. First the assessee has to prove that these are falling under the category of reimbursement and then only they can claim the same as exempt under income tax or under treaty.

27. In our considered view, the cost claimed by the assessee ie., Global rewards for employee, Legal and Corporate affairs, Global Leadership Convention, Internal Audit, Information Technology Costs are within the various categories of services illustrated in the Article 3 and remember that this list is not exhaustive as per section 1.8 of the Article 1 of the agreement. Further we observe that even the section 6.1, clearly explains that the annual invoiced amount will be determined by reference to the company's actual cost incurred prior to the preparation of the cost allocation exercise. This shows that the charges for support services are only determined based on the respective cost centers allocation of cost.

28. We are in agreement with the submissions of the Ld.AR that reimbursement of expenditure is not taxable. Since there is no profit element embedded in such expenses which are incurred on behalf of other person. However, in the given case there is no supporting evidences to appreciate that assessee has recovered the above said expenses from the other party i.e., Heinz India that it has incurred various expenditure on behalf of them.

29. Since the various costs were recovered from Heinz India without clarity based on the document submitted by them as well as the support services agreement does give clarity what are the services offered by the assessee for actual support services and recovery of cost incurred on behalf of Heinz India. Therefore, the charges recovered by the assessee and also the invoice raised by the assessee clearly shows that assessee has recovered support services charges from the affiliate i.e., Heinz India. Merely because there is a general clause in Article 5, it does not give clarity on what are the support services which is taxable and which are all the expenses recovered by the assessee from the affiliates under cost allocation. In absence as well as non-submission of any documents in support of allocation and the basis of allocation, we are inclined to agree with the findings of tax authorities. Without the classification of

various allocation of costs and basis, how assessee claims certain costs are towards support services and rest as allocation of cost recovery, we cannot proceed to adjudicate on the selective claim of the assessee that all the cost recovery by the assessee are only towards reimbursement. The first hurdle is to prove that these are actual reimbursement and the claim of the exemption under Income Tax or Treaty comes next. The assessee has miserably failed in proving the same and the fact is that they have claimed the cost on adhoc basis without proper allocation as per support service agreement. It is also fact on record that the assessee has provided services to its affiliates in India partly claims them as chargeable to tax and balance not chargeable without any basis. The collection of charges shows that it collected on gross basis or on certain basis without adopting proper method of accounting as agreed in the agreement. When there is no basis of allocation or actual cost incurred for affiliates, it shows that the claim of the assessee is gross and there is no document to support this claim. Therefore, we are inclined to accept the findings of tax authorities. Accordingly, grounds raised by the assessee in Ground Nos. 8 to 12 are dismissed.

30. Ground No. 13 is consequential and Ground no. 14 is premature, therefore, these grounds are not adjudicated at this stage.

31. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 27th September, 2023

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai / Dated 27/09/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum