INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI SAKTIJIT DEY, HON'BLE VICE PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA Nos. 969 & 1614/Del/2023
(Assessment Years: 2019-20 & 2020-21)

DCIT, Circle-3(1)(1), International Taxation, New Delhi (Appellant) **PAN: AAFCT7998A**	Vs.	Transkor Global Pte Ltd, 116 Pek Chuan Building Lavender Street Cecil court, Singapore (Respondent)

Assessee by :	Shri Rajeev Ahuja, Adv
Revenue by:	Shri Sanjay Kumar, Sr. DR
Date of Hearing	05/07/2024
Date of pronouncement	03/10/2024

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.1614/Del/2023 for AY 2020-21, arises out of the order of the Commissioner of Income Tax (Appeals)-43, New Delhi [hereinafter referred to as 'ld. CIT(A)', in short] in Appeal No. 10667/2019-20 dated 27.03.2023 against the order of assessment passed u/s 143(3) r.w.s. 144(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 28.11.2022 by the Assessing Officer, DCIT, Circle-3(1)(1), International Taxation, New Delhi (hereinafter referred to as 'ld. AO').

2. Identical issues are involved in all these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.

3. The only identical issue to be decided in this appeal as to whether the ld CIT(A) was justified in holding the receipt of the assessee as business income instead of fee for technical services (FTS) as held by the ld AO in the facts and circumstances of the instant case.

4. We have heard the rival submissions and perused the material available on record. The assessee company is a body corporate incorporated and registered in the Republic of Singapore and is governed by the Laws of Singapore. The assessee is engaged in the business of providing technical non-invasive inspection and integrity assessment/scanning of off-shore pipelines under the sea or surface. The company has developed a system of non-invasive survey of pipeline inspection and its integrity called as Magnetic Tomography Method (MTM) technology. This technology is used for inspection and integrity assessment of Oil and Gas pipelines. The assessee is a Non-Resident Company having no permanent place of business in India in terms of the provisions of the Income Tax Act, 1961. It was submitted that since the assessee is a tax resident of Singapore, it would be entitled for beneficial provisions of Double Taxation Avoidance Agreement ("DTAA") entered between Govt. of India and Singapore. For the A.Y 2019-20 the assessee has filed its return of income u/s 139(4) of the Act declaring total income of Rs. Nil on 03.03.2020.

5. The assessee furnished a tax residency certificate stating that it is a tax resident of Singapore within the meaning of Article 4 of India-Singapore DTAA. The assessee submitted that it had no permanent office of business in India and in support of it, it had furnished Form 10F. It also furnished the global audited financial statements before the ld AO.

6. The assessee during the year under consideration received the following payments towards the services rendered in India:-

Sl No.	*Particulars*	*Amount*
1.	*Reliance Industries Ltd*	*64,08,000/-*
2.	*Gail India Ltd*	*7,41,76,654/-*
3.	*Indraprastha Gas Ltd*	*92,51,673/-*
	Total	*8,98,36,327/-*

7. The assessee submitted that the aforesaid receipts are taxable in home country i.e. Singapore and accordingly had declared Nil Income in its Indian Tax Return and claimed the refund of ₹90,70,600/-. The assessee also submitted that the receipts from the aforesaid 3 parties does not fall under the definition of "fee for technical services" (FTS) and assessee does not have any permanent establishment in India. Accordingly, it was pleaded that the entire receipts are taxable only in Singapore and not in India. The assessee also submitted that as per Article 12 (4)(b) of the India-Singapore Treaty, the services rendered does not make available technical knowledge, experience, skill, know-how or processes which enables the person acquiring services to apply the technology contained thereon. Hence, even if the amounts received are considered as FTS, it does not fulfill the make available clause provided in the India-Singapore Treaty. The assessee also clarified that the services rendered by assessee company in India are technical non-invasive inspection and integrity assessment/ scanning offshore pipelines under the sea or surface. The ld AO further disregarded the aforesaid contentions and proceeded to treat the entire receipts as taxable as 'other income' @ 40% plus surcharge plus education cess. It was submitted that the ld AO had not granted the benefit of beneficial provision of DTAA between India and Singapore. Further, it was submitted that the assessee had applied for Nil Withholding tax certificate u/s 197 of the Act from the Income Tax Department and the same was granted to the assessee on 23.07.2021 directing withholding @4% tax from the receipts of the assessee company from Indian entities, which strengthened the

contention of the assessee that amounts received from Indian companies are not taxable in India.

8. The ld CIT(A) sought for a remand report from the ld AO on all the aforesaid contentions of the assessee. The remand report was submitted by the ld AO on 21.12.2022, wherein the ld AO clarified that assessee was treated as tax resident of Singapore within the meaning of Article 4 of India-Singapore treaty and accordingly, the receipts earned by the assessee were taxed as 'other income' as per Article 23 of DTAA. The assessee filed rejoinder to the remand report before the ld CIT(A). The ld CIT(A) observed that one of the main reasons for the conclusion drawn by the ld AO was non-compliance of the notice by the assessee, which prompted the ld AO to tax the receipts based on figures reflected in Form 26AS without ascertaining the nature of receipts thereon. The ld CIT(A) also observed that assessee had duly furnished Form 15CA and 15CB before the ld AO which establishes the nature of receipts. This was not verified by the ld AO, but the ld CIT(A) observed that the ld AO having admitted the fact that the assessee is a tax resident of Singapore within the meaning of Article 4 of India-Singapore treaty, ought to have granted the beneficial provision provided in the treaty. The ld CIT(A) also took cognizance of the fact that the assessee had indeed furnished Form 10F confirming the fact that it does not have any permanent establishment in India. This fact has not been controverted by the ld AO in the remand report. The ld CIT(A) observed that the ld AO had treated the receipts earned by the assessee as 'other income' in terms of Article 23 of India-Singapore Treaty. The ld CIT(A) categorically observed that the services rendered by the assessee are technical in nature and hence, it apparently falls within the ambit of "fee for technical services" (FTS). But the same does not satisfy the 'make available clause' provided in Article 12(4)(b) of India- Singapore Treaty. Hence, the nature of services having determined to be technical services, the same fall

within the ambit of Article 12 and accordingly Article 23 would be come into operation at all. The ld CIT(A) held that since the receipt is not FTS as per Article 12(4)(b) of the treaty, the receipts fall under Article 7 of DTAA and liable to be considered as business income. It is not in dispute that the assessee does not have permanent establishment in India. Hence the business income cannot be taxed in India. With these observations, relief was granted to the assessee by the ld CIT(A).

9. The ld DR before us could not controvert the aforesaid factual findings recorded by the ld CIT(A). Further, he placed reliance on Section 90(1)(b) of the Act which was introduced in the statute from 01.04.2021 stating that assessee in the instant case had engaged in treaty shopping arrangements. We find that this was never the case of the ld AO. The law is very well settled that the ld DR cannot improve the case of the revenue before the Tribunal by stating new facts or new allegations. Hence the reliance placed by the ld DR on section 90 (1)(b) of the Act would not be applicable to the facts of the instant case. Further, we find that the said provision is applicable only from assessment year 2021-22 onwards and cannot be made applicable for the year under consideration. Further, we find that the grounds raised by the revenue only talk about the taxability of receipts as FTS as per Explanation 2 to Section 9(1)(vii) of the Act as stated supra. The ld AO had not taxed the receipt as FTS, instead had taxed the same as 'other income' in terms of Article 23 of the treaty. Hence, the grounds per se deserve to be dismissed as not emanating from the orders of the lower authorities. Accordingly, we do not find any infirmity in the order of the ld CIT(A) in granting relief to the assessee. Hence, grounds raised by the revenue are dismissed for assessment year 2019-20.

10. We find in AY 2020-21, the ld AO had taxed similar receipt as fee for technical services. The ld AO even queried the assessee on Limitation of Benefit (LOB) clause provided in the treaty. In response thereto, the

assessee replied that LOB clause is applicable only for income determined in the nature of capital gains and not applicable for FTS. The ld CIT(A) had observed that the assessee does not have permanent establishment in India in assessment year 2020-21 also. The assessee continues to be a tax resident of Singapore and had filed its income tax return in Singapore. He observed that the facts prevailing in assessment year 2020-21 are similar to assessment year 2019-20, except that during the year, the assessee had entrusted the part of the work to the employees hired/ employed or sub-contracted from the above company based out in Russia. The assessee clarified that the Russian shareholder is a full-time employee with Singapore. We find that the ld CIT(A) had granted relief to the assessee for AY 2020-21 on the same footings in assessment year 2019-20 that receipts could be FTS, but the same does not satisfy the 'make available clause' provided in Article 12(4)(b) of India-Singapore Treaty and hence, the receipts could be considered as only business income and since it is proved beyond reasonable doubt that the assessee does not have any permanent establishment in India during the year under consideration, the same cannot be taxed in India. None of these factual findings could be controverted by the revenue before us. Hence, we do not find any infirmity in the order of the ld CIT(A) in granting relief to the assessee.

11. In the result, the appeals of the revenue are dismissed.

Order pronounced in the open court on 03/10/2024.

-Sd/-	-Sd/-
(SAKTIJIT DEY)	**(M. BALAGANESH)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated: 03/10/2024
A K Keot

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1. Applicant
2. Respondent

3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi