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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 25.05.2023

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Judgment Pronounced on: 12.07.2023

+ **ITA 306/2023**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL
TAXATION -3 Appellant

Through: Mr Ruchir Bhatia, Sr. Standing
Counsel.

versus

SPRINGER NATURE CUSTOMER SERVICES CENTRE GMBH
(EARLIER KNOWN AS SPRINGER CUSTOMERS CENTRE
GMBH)..... Respondent

Through: Mr Himanshu Sinha with Mr Bhuwan
Dhoopar, Advocates.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.:

Prefatory Facts

1. This appeal is directed against the order dated 14.10.2022 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"] concerning Assessment Year (AY) 2013-14. *Via* the impugned order, the Tribunal has partly allowed the appeal preferred by the respondent/assessee.

2. To adjudicate the appeal, it would be relevant to notice the following broad facts:

3. The respondent/assessee had filed its return of income (ROI) for the relevant AY, i.e., AY 2013-14, on 31.03.2015. *Via* the said ROI, the

respondent/assessee declared its income as „nil“, which was initially processed under Section 143(1) of the Income Tax Act, 1961 [in short, “Act”].

3.1 The ROI was, however, picked up for scrutiny and accordingly, notice dated 20.08.2015, issued under Section 143(2) of the Act, was served on the respondent/assessee.

4. The Assessing Officer (AO), *via* order dated 04.05.2016, passed under Section 143(3) read with Section 144C(3)(a) of the Act, made three additions to the income of the respondent/assessee.

4.1 The first addition concerned an amount equivalent to Rs. 24,84,114 paid to the respondent/assessee by an Indian entity, namely, Springer India Pvt. Ltd. (in short, “SIPL”), against a Commissionaire Agreement. This addition consisted of two components.

4.2 The first component constituted a commission fee, amounting to Rs.22,89,835. This payment, it appears, had been classified in the Form 3CEB report filed by SIPL as “production and editorial charges”. The respondent/assessee’s stand before the statutory authorities was that although this payment had been inadvertently classified as production and editorial charges, it was nothing but commission received against services rendered.

4.3 The second component of the aforementioned (first) addition was an amount equivalent to Rs. 1,94,279, which, as per the Form 3CEB report

filed by SIPL, was categorized as “service charges” for the sale of "Indian journals in printed form”.

4.4 The second addition made by the AO was an amount equivalent to Rs.16,67,83,110. This amount represented the subscription fees received by the respondent/assessee against e-journals from two Indian entities, namely, Informatics Publishing Private Ltd. and ZS Associates.

4.5 The third addition is an amount equivalent to Rs. 2,62,85,504. This amount was collected by the respondent/assessee from third-party customers located in India, against the sale of online journals and/or books, on behalf of SIPL. In the Form 3CEB report of SIPL, the said amount has been categorized as “gross proceeds from sale by AE (Associate Enterprise) of Indian journal in printed form”.

4.6 The AO treated the aforementioned three additions as royalty, and to this end, invoked the provisions of Section 9(1)(vi) of the Act and Article 12 of the India-Germany Double Taxation Avoidance Agreement (in short, “DTAA”).

5. Since the respondent/assessee was dissatisfied with the additions made, it preferred an appeal with the Commissioner of Income Tax (Appeals) [in short, “CIT(A)”]. The CIT(A), *via* order dated 22.01.2019, partly allowed the appeal. The CIT(A) deleted the second component of the first addition, i.e., the amount equivalent to Rs. 1,94,279, which had been categorized as “service charges” for the sale of "Indian journals in printed form”. Meanwhile, the CIT(A) categorized the first component of the first addition, i.e., Rs. 22,89,835, as a fee for technical services [in short, “FTS”],

instead of a royalty. The CIT(A), accordingly, took recourse to the provisions of Section 9(1)(vii) of the Act and Article 12(4) of the DTAA.

5.1 Insofar as the second and third additions were concerned, the CIT(A) confirmed the same, i.e., both with regard to the amount, as well as the treatment accorded to them by the AO. In other words, these amounts were treated as royalty, by the CIT(A) as well.

5.2 It is this decision which led to the respondent/assessee preferring an appeal with the Tribunal.

6. The Tribunal, *via* the impugned order dated 14.10.2022, deleted the first component of the first addition, which, as noted above, was confirmed by the CIT(A). In this regard, the Tribunal relied upon a decision of its coordinate bench dated 23.08.2022, passed in ITA Nos. 434 and 3826/DEL/2019 in the matter of *Springer Verlag GmbH v DCIT*. This decision of the Tribunal concerned AY 2014-15 and AY 2015-16.

6.1 Insofar as the second addition is concerned, the Tribunal allowed the objection raised by the respondent/assessee, that the subscription fee could not be treated as royalty. Insofar as this aspect was concerned, the Tribunal followed the decision of the Supreme Court rendered in *Engineering Analysis Center of Excellence (P.) Ltd. v CIT*, [2021] 432 ITR 471 (SC).

7. It is against this backdrop that the appellant/revenue has preferred the instant appeal.

Submissions of Counsel

8. Arguments in support of the appeal, on behalf of the appellant/revenue, were advanced by Mr. Ruchir Bhatia, learned Senior Standing Counsel, while Mr. Himanshu Sinha made submissions on behalf of the respondent/assessee.

9. Broadly, the arguments advanced by Mr. Bhatia can be paraphrased as follows:

9.1 The addition of Rs. 22,89,835/- sustained by the CIT(A) as FTS was tenable, having regard to the terms of the Commissionaire Agreement. The services such as promotion, sale and distribution of products globally could be categorised as consultancy services. Likewise, services such as order handling, inventory management, debtor management and subscription management could be categorised as managerial services.

9.2 The services provided by the respondent/assessee were thus "wide and distinct". Therefore, the decision of the coordinate bench of this Court rendered in *DIT v. Panalfa Autoelektrik Ltd.*, [2014] 227 taxmann.com 351 (Delhi) would have no applicability, as the service provided by the non-resident entity, in that case, concerned merely procurement of export orders.

9.3 Under the Commissionaire Agreement, both managerial and consultancy services, as also technical services, involve human intervention. [See *CIT v Kotak Securities Ltd.*, [2016] 383 ITR 1(SC)]. The services provided by the respondent/assessee under the Commissionaire Agreement, which include order handling, inventory management, debtor management and subscription management, involve human effort and hence took the

colour of a managerial and so-called consultancy service. Similarly, marketing and sale services also involve an element of managerial function.

9.4 In sum, the services provided would qualify as FTS, as they were in the nature of managerial, technical, and so-called consultancy services, as defined under Article 12 of the DTAA and Section 9 of the Act.

10. Insofar as the second addition is concerned, which was services provided by the respondent/assessee to its affiliate publishers, Mr. Bhatia argued they would also be chargeable to tax as FTS, since the ambit and the scope of the service provided was similar to those provided under the Commissionaire Agreement.

10.1 Without prejudice to the aforesaid contention, Mr Bhatia argued that the second addition, in the alternative, would constitute royalty, as concluded both by the AO, as well as the CIT(A). Since the Tribunal has deleted the addition by relying upon the judgment of the Supreme Court rendered in *Engineering Analysis*, the final decision on this aspect would depend upon the review petition preferred by the appellant/revenue in the said case, which is presently pending adjudication with the Supreme Court.

11. In support of his submission as to what would constitute managerial, technical or consultancy service, Mr Bhatia relied upon the following judgments/orders, in addition to those referred to above:

- i) ***GVK Industries Ltd. v. Income Tax Officer***, [2015] 371 ITR 453 (SC)
- ii) ***In re: Wallace Pharmaceuticals P. Ltd.***, [2005] 278 ITR 97 (AAR)

iii) *Device Driven (India) (P.) Ltd. v. CIT*, [2021] 126 taxmann.com 25 (Kerala)

12. Mr Himanshu Sinha, on the other hand, while resisting the admission of the appeal, adverted to the following:

12.1 The respondent/assessee, which is a German company, was part of Springer Science + Business Media Group [in short, "The Springer Group"] during the period under consideration. The Springer Group was engaged in the business of publishing books, and academic journals, in the field of natural sciences, technology and medicine.

12.2 As part of the Springer Group's business model, the respondent/assessee functioned as a non-exclusive sales representative globally, except in the Americas, of the Springer Group's affiliated publisher entities, which included SIPL. The Commissionaire Agreement executed between the respondent/assessee and SIPL captured the functions performed by the respondent/assessee as part of the Springer Group.

12.3 Accordingly, the respondent/assessee, pursuant to its appointment as a Commissionaire, promoted, sold and distributed, print and electronic books and journals published by SIPL. Besides this, under the very same Commissionaire Agreement, the respondent/assessee provided sales and marketing services, customer services, order handling, delivery invoicing, debtor and subscription management, and processing of return copies, amongst other services. Resultantly, the respondent/assessee collected subscription and other revenue/fees from the sale of electronic books and journals to third-party customers, which it ultimately paid to SIPL, *albeit*

after retaining its commission, as agreed under the Commissionaire Agreement.

12.4 For the aforesaid payments to be construed as FTS, one would have to conclude that the payments were received for rendering managerial, consultancy or technical services. The CIT(A) has not indicated the head under which the services rendered by the respondent/assessee would fall. According to Mr Sinha, the services rendered are not managerial, consultative, or even technical.

13. For a service to qualify as managerial, it must bear an element of management. The service provider must manage the business of the recipient of service by formulating policy, and/or exercising control and supervision of the personnel. A service rendered with human intervention must partake the character and role of a manager. Mr Sinha argued that merely providing support *qua* business operations involving sales, audit or finance cannot be treated as managerial services, either within the meaning of the Act, or the DTAA.

13.1 Thus, to construe a service as managerial service, it must have the following broad attributes:

- (i) It should involve control, organisation, issuance of direction and administration of the affairs of the service recipient.
- (ii) There should be independent application of mind and/or thought process concerning the work at hand.

13.2 In support of the aforesaid plea, Mr Sinha placed reliance on the following judgments:

- (i) *DIT v. Panalfa Autoelektrik Ltd.*
- (ii) *UPS SCS (Asia) Limited*, ITA No. 2426/Mum/2010 dated 22.02.2012.
- (iii) *R. Dalmia v. CIT*, [1977] 106 ITR 895 (SC)
- (iv) *Jeans Knit (P.) Ltd. v. DCIT*, (2012) 23 taxmann.com 393 (Bangalore ITAT), confirmed by Karnataka High Court in [2020] 428 ITR 285.

13.3 For a service to be construed as a technical service, it should involve the application of some special skill or knowledge concerning the technical field.

13.4 Consultancy service involves offering advice, or extending advisory services by a professional, although there could be an overlap between technical and consultancy services. In some cases, consultancy services may involve entering a technical field. There are also cases where consultancy services involve rendering advice, with or without expertise in technology.

13.5 Mr Sinha argued that the remit of the respondent/assessee was to further sales and to promote and distribute books published by SIPL, in electronic form or otherwise. Besides this, the respondent/assessee also rendered support services for business operations. Thus, none of the services offered by the respondent/assessee involved an element of technical expertise or advice. Therefore, the services rendered by the respondent/assessee could not be characterised as FTS under the DTAA, or the Act.

13.6 Further, Mr Sinha submitted that the Tribunal rightly relied upon its decision in the *Springer Verlagh* case, wherein the following decisions and principles, articulated therein by this Court and other Courts, were examined, and addition made by the CIT(A) in that case were deleted:

- (i) *DIT v. Panalfa Autoelektrik Ltd.*
- (ii) *CIT v. Group Ism (P.) Ltd.* [2015] 57 taxmann.com 450 (Del)
- (iii) *Evolv Clothing Co. (P.) Ltd. v. ACIT* [2018] 94 taxmann.com 449 (Mad)
- (iv) *Skycell Communications Ltd. and Anr. v. DCIT* [2001] 251 ITR 53 (Mad)

Reasoning and Analysis

14. Having heard the learned counsel for the parties and perused the record, as is obvious upon perusal of the prefatory facts noted above, the appellant/revenue was aggrieved by the two (2) additions deleted by the Tribunal *via* the impugned order.

15. Insofar as the first deleted addition is concerned, the CIT(A) sustained one of the two components, which consisted of commission received by the respondent/assessee, by treating the same as FTS, instead of royalty. To that extent, the CIT(A) veered away from the Assessment Order.

15.1 The Tribunal reversed the conclusion arrived at by the CIT(A) in this regard. The amount involved was Rs. 22,89,835. Undoubtedly, for this addition to be sustained as FTS, the services rendered by the respondent/assessee would have to fall under one or more of the following

categories, i.e., managerial, technical or consultancy services. This is evident upon a plain reading of the provisions of Section 9(1) (vii)(b) read with explanation 2 of the Act and Article 12(4) of the DTAA.

15.2 Section 9 creates a deeming fiction as regards income accruing or arising in India, which, *inter alia*, involves FTS paid by a person who is a resident. Explanation 2 appended to the said provision defines FTS to mean any consideration, (including any lumpsum consideration), for rendering any managerial, technical or consultancy services, but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head “salaries”.

15.3 Article 12(4) defines FTS as follows:

“ The term “fees for technical services” as used in this Article means payment of any amount in consideration for the services of managerial, technical or consultancy nature, including the provision of services by technical or other personnel, but does not include payment for services mentioned in Article 15 of this Agreement.”

15.4 Therefore, for the consideration received by the respondent/assessee against services rendered as per the Commissionaire Agreement to be construed as FTS, the services would have to fall under one or more categories mentioned above, i.e., managerial, technical or consultancy services.

16. Admittedly, even according to the appellant/revenue, the respondent/assessee, under the Commissionaire Agreement, was required to

promote, sell and distribute books and journals published by SIPL in print and electronic form. Besides this, something which is not disputed by the appellant/revenue, the following services were rendered by the respondent/assessee:

- (i) Global sales and marketing services
- (ii) Customer services
- (iii) Order-handling
- (iv) Address maintenance
- (v) Stock keeping and inventory management
- (vi) Invoicing
- (vii) Delivery (physical as well as online)
- (viii) Debtor management services
- (ix) Subscription management
- (x) Return copies processing

17. For rendering the aforementioned services, the respondent/assessee was paid a commission, at the rate of 9.9%, on the net revenue amount of "any and all" sales commissioned through the intermediary of the respondent/assessee. (See Article 4a¹ of the Commissionaire Agreement).

¹ Article 4. Commission

18. Furthermore, the respondent/assessee was empowered to retain the commission when transferring the revenue to SIPL, or *via* any other payment of commission agreed upon between SIPL and itself.

19. Importantly, the title in the publications remained with SIPL, which the respondent/assessee could assign “property/licenses” to third parties, *albeit* on behalf of SIPL.

20. There is nothing in the Commissionaire Agreement which is suggestive of the fact that the respondent/assessee was required to discover, develop, or define/evaluate the goals that SIPL had to reach, or even frame policies that led to these goals, or supervise or execute or change policies that were already adopted. The respondent/assessee was not performing, as it were, executive or supervisory functions. All that the respondent/assessee was obliged to do was render support to business operations.

20.1 The array of obligations as adverted to in Article 1² and 3³ of the Commissionaire Agreement cannot be construed as managerial services.

(a) Subject to full and complete compliance by Commissionaire of its obligations as set forth in this Agreement, Publisher shall pay Commissionaire a commission of 9.9 percent on the net revenue amount of any and all sales commissioned through the intermediary of Commissionaire. Such commission should be regarded as the consolidated compensation for the services rendered by the Commissionaire on behalf of the Publisher as mentioned in article 3 of this Agreement and the credit risk assumed by the Commissionaire according to article 5 of this Agreement.

² Article 1. Appointment and Authorization of Commissionaire Agency

Commissionaire is hereby appointed on a non-exclusive basis as the sales representative on a global basis with the exclusion of the Americas (hereinafter referred to as Rest of World, “**ROW**”) to promote, sell and distribute the Publisher’s products (amongst others but not limited to print books and journals, online books and journals, eBooks, Online Journal Archive, Online Book Archive and licenses hereinafter referred to as “**the Products**”) and to fulfil the needs and requirements of the customers for Publisher’s Products there.

21. Technical services are generally connected with applied and industrial sciences or craftsmanship, involving special skills or knowledge, excluding fields such as art, or human sciences.

21.1 Likewise, consultancy services involve rendering professional advice or service in a specialised field.

22. Once again, there is no reference to any special skill or knowledge that the respondent/assessee personnel brought to bear in rendering the services encapsulated in the Commissionaire Agreement. Promotion, sale, or

The Publisher retains the right to make sales directly to its customers.

Commissionaire will act as distributor of Publisher and will therefore act in its own name but for the risk and account of the Publisher, Prices for the Products will be determined by the Publisher.

³ Article 3. Scope of the Commissionaire's basic responsibilities

Commissionaire shall perform (either itself or by means of delegation to related or non-related party) the following services as may be required by Publisher, in accordance with the highest standards of the industry and in accordance with the Publisher's Terms and Conditions:

- (a) Customer services
- (b) Order handling
- (c) Address maintenance
- (d) Stock-keeping and inventory management
- (e) Invoicing
- (f) Delivery (Physical as well as online access)
- (g) Debtor management services (e.g.. collect outstanding invoices)
- (h) Subscriptions management
- (i) Return copies processing

Commissionaire shall arrange for global sales and marketing services. The allocation of the global sales & marketing costs incurred by the commissionaire shall be paid out of the gross commission mentioned in Article 4a.

distribution of SIPL's publications, or rendering support services of the nature referred to in Article 3 of the Commissionaire Agreement, although involving human intervention, do not, in our view, fall in the category of technical and/or consultancy services. There were no special skills or knowledge that the respondent/assessee's personnel were required to possess to render the services that were contemplated under the Commissionaire Agreement. The respondent/assessee also did not render any professional advice, or service concerning a specialised field. As indicated above, for a service to be categorised as a technical service, it had to be concerned with applied science, i.e., using scientific knowledge for practical applications, or industrial science concerning, relating to or derived from industry.

23. Therefore, the contention of Mr Bhatia that on account of there being human intervention, the services rendered by the respondent/assessee should be considered as technical services, is a submission, which according to us, is completely misconceived.

24. Given this position, we are not inclined to interfere with the decision arrived at by the Tribunal concerning the deletion of the addition made amounting to Rs.22,89,835, on account of commission received by the respondent/assessee. The CIT(A)'s conclusion that the said amount received by the respondent/assessee had attributes of FTS was, in our view, erroneous.

24.1 The attributes of what constitutes FTS has been dealt with extensively by the coordinate bench decision of this Court in *DIT v. Panalfa Autoelektrik Ltd.* In this judgment, the coordinate bench has dealt with the

order of the Authority for Advance Ruling (AAR) rendered in *Wallace Pharmaceuticals (P.) Ltd.* The attempt of Mr Bhatia to distinguish the judgment in *DIT v. Panalfa Autoelektrik Ltd.* must fail, as it misses the true ratio of the judgment.

25. This brings us to the second addition. We must note that in the course of arguments, Mr Bhatia had indicated that the addition of Rs. 16,67,83,110/- received by the respondent/assessee as a subscription fee for e-journals from its affiliates, could not be treated as royalty, given the judgment of the Supreme Court rendered in *Engineering Analysis*. However, in the written submissions, for the first time, contrary to the submission, an argument has been advanced that the subscription fee should be treated as FTS, and in the alternative, as royalty.

25.1 We are of the opinion, the submission that subscription fee should be treated as FTS cannot be accepted, as this was not the stand of the appellant/revenue before the Tribunal. This is a flip-flop which the respondent/assessee would do well to abjure.

25.2 Furthermore, in our opinion, the subscription amount cannot be treated as royalty, having regard to the fact that there is nothing on record to suggest that the respondent/assessee has granted the right in respect of copyright to the concerned subscribers of the e-journals. All that the respondent/assessee did was to sell the copyrighted publication to the concerned entities, without conferring any copyright in the said material.

25.3 The Tribunal, in our view, rightly deleted the addition made under this head, given the judgment rendered by the Supreme Court in the case of *Engineering Analysis*.

26. Thus, for the foregoing reasons, we are of the view that no substantial question of law arises for our consideration. The issues raised stand covered by the judgments referred to hereinabove.

27. The appeal is, accordingly, closed.

**(RAJIV SHAKDHER)
JUDGE**

**(GIRISH KATHPALIA)
JUDGE**

JULY 12, 2023

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