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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITAT/79/2022
IA No.GA/2/2022

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION & TRANSFER PRICING)
VS
M/S. THE TIMKEN COMPANY

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 4th January, 2023

Appearance :
Mr. Tilak Mitra, Adv.
Mr. Soumen Bhatttacharjee, Adv.
...for the appellant.

Mr. J.P. Khaitan, Sr. Adv.
Mr. Avra Mazumder, Adv.
Mr. Binayak Gupta, Adv.
Mr. Suman Bhowmik, Adv.
Mr. Samrat Das, Adv.
...for the respondent.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act, in brevity) is directed against the order dated 19th February, 2020 passed by the Income Tax Appellate Tribunal Kolkata, 'C' Bench, Kolkata in ITA No.1276/Kol/2018 for the Assessment Year 2010-11.

The revenue has raised the following substantial questions of law for consideration :

(a) *Whether the Learned Tribunal has committed substantial error in law in deleting the addition made by the Assessing Officer by not taking note of the Ruling which is binding pronounced by Authority of Advance Ruling (AAR) which inter alia held that consideration for the various services was taxable in hands of Timken USA both under the Income Tax Act, 1961 as fees for Technical Services (FTS)/Fees for Included Services (FIS) under Article 12 of the Indo-USA Treaty (Convention between the Government of United States of America and Government of Republic of India for the Avoidance of Double Taxation ?*

(b) *Whether the Learned Tribunal has committed substantial error in law in not accepting that as per Section 245S read with Section 245N, a ruling of Authority of Advance Ruling is binding not only on the applicant but also in respect of the transaction in relation to which the ruling has been sought. In this case the transaction is between Timken India and Timken USA and as per Section 245S the transaction was liable to be taxed in India and not merely to deduct TDS by Timken India ?*

(c) *Whether the Learned Tribunal has committed substantial error in law in not appreciating that sub para "a" of paragraph 4 of the Article 12 of Double Taxation Avoidance Argument (DTAA) between India and USA (Convention between the Government of USA and Government of Republic of India for the Avoidance of Double Taxation) is taxable as "Included Services" looking into the overall arrangement and collaboration between Timken India*

and Timken USA for providing the services relating to technical knowledge experience, skill, know-how, process etc. ?

(d) Whether the Learned Tribunal has committed substantial error in law and on facts in allowing relief to the assessee amounting to Rs.8,04,92,313/- on account of the Charge Back receipts ?

Though the appellant/revenue have raised four substantial questions of law, the same can be grouped into three categories. Question nos.(a) and (b) deal with the effect of the ruling rendered by the Authority of Advance Ruling (AAR). Question no.(c) deals with the services provided by the assessee to Timken India Limited (TIL) and substantial question of law no.(d) deals with the services provided by the third party.

On the first two substantial questions of law, we find that the Tribunal had taken note of its earlier decisions for the assessment years 2002-03 to 2007-08 and dismissed the appeal filed by the revenue upholding the order passed by the Commissioner of Income Tax (Appeals)-22, Kolkata dated 28th March, 2018. Though the revenue had preferred appeals as against the said order passed by the Tribunal for the assessment years 2002-03 to 2007-08, those appeals were withdrawn on the ground of low tax effect. Therefore, we are required to consider as to whether the factual finding rendered

by the Tribunal is just and proper and, whether the provisions of Article 12 of the Indo-US Treaty was properly interpreted in the facts and circumstances of the case. The assessee entered into an agreement with TIL dated 2nd August, 2000 for providing services such as management services, management information services, information resources, system development etc. The services were to be provided through its own employees either at the recipients' facility and place of business on a temporary or expatriate assignment, or by a shorter visit etc. The compensation payable by the recipient was mentioned in Section 1.2 of the said agreement which reads as follows:

> *"**Section 1.2** Compensation Recipient shall pay Provider for all services and materials provided pursuant to this agreement, upon receipt of an invoice from Provider. Provider shall provide invoices to Recipient listing the services that Provider has provided to Recipient and/or which Provider has obtained from third parties on behalf of Recipient, during each calendar month. Each invoice shall be submitted no later than the fifteenth (15th) day following the end of each calendar month. Each invoice shall identify the compensation that is due to Provider to compensate it for all costs of providing such services. Only costs, without any mark-up shall be invoiced."*

The question which came up for consideration before the CIT(A) was interpreting the terms and conditions of this agreement. The contention of the revenue is that the fee

received is for included services as provided in Article 12 of the Indo-US Treaty and, therefore, liable to tax in India. It is important to note that in terms of paragraph 4(b) of Article 12 of the Indo-US Treaty, the scope of Article 12 was explained by pointing out that generally speaking technology will be considered made available when the person acquiring the services is unable to apply the technology. The fact that the provision of service may require technical input by the person providing the service does not *par se* mean that technical knowledge, skill etc. are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not par se be considered to make the technology available. This aspect was considered by the CIT(A) and it was found that by virtue of the said agreement there is no transfer of a technical plan or technical design and what was transferred through the agreement was commercial information. Furthermore, upon analysis of the agreement it was found that the agreement is purely advisory services and such advisory services cannot be treated as fees for included services under Article 12(4)(b) of the Indo-US Treaty since there is no technology which is made available. The Tribunal upon reconsideration of the factual position found that the clauses in the agreement would clearly show that the nature of services is advisory in nature and nothing has been made available to TIL by the assessee.

After referring to Example no.7 given in the MoU between India and US on DTAA it was held that consideration for advisory services rendered cannot be treated as fees for included services under Article 12(4)(b) of the Treaty. That apart it is not in dispute that the assessee does not have any permanent establishment in India and, income so arising to them in India cannot be taxed under Article 7 as 'business profits' either.

The assessee and the TIL had filed a writ petition before this Court challenging the vires of Section 44D(b) of the Act. The Hon'ble Court while framing the issue for consideration by its judgment reported in (2016)4 TMI 592 Cal held that the issue pertains to machinery of presumptive tax provided for in the provision and the contention of the petitioners that apparent shutting out of an assessee's option to claim deduction from the gross income in respect of matters covered by the provisions is unreasonable and as such, falls foul of Article 14 of the Constitution. In the decision rendered in the said writ petition, the Court also examined the binding nature of the ruling given by the AAR and the following paragraphs would be relevant:

> "***24.*** *Before coming to the key question as to whether the foreign company in this case would be entitled to claim that its deemed income on account of fees for technical services may not be any taxable income at all, the preliminary ground urged by the Union as to the propriety of the present petition needs to be*

addressed. There can be no doubt that by virtue of Section 245S of the Act, the advance ruling pronounced by the Authority on December 6, 2004 is binding on the Indian company as the Indian company had sought such ruling. Simultaneously, the ruling is binding on the relevant principal commissioner or commissioner, and the income tax authorities subordinate to him, in respect of the Indian company and the relevant transaction. However, nothing more needs to be read in the ruling than the answers to the questions rendered therein. It will be evident from the five questions set out in the ruling that all of them pertained to the Indian company and its obligation while remitting payment under the agreement of August 2, 2000 to the foreign company.

***25**. Apart from the fact that the opinion of the Authority is not binding on the foreign company, the opinion has to be confined to the obligation of the Indian company, notwithstanding such opinion having dwelt on the dictum in A. Sanyasi Rao and finding the same to be in applicable to the matter before it. The foreign company is one of the petitioners herein and the primary contention – that the foreign company should be entitled to claim deductions from the payment from the payment that it is entitled to on account of technical services under the agreement of August 2, 2000 – cannot be seen to be covered by the opinion of December 6, 2004 rendered by the Authority on Advance Rulings. Even if the name of the Indian company is deleted as a co-petitioner, the foreign company would be entitled to maintain a petition under Article 226 of the Constitution to complain of taxing provision being unreasonable or ultra vires the Constitution."*

The above decision has attained finality as the revenue had not carried the matter in appeal. This aspect was also noted by the learned Tribunal but in its view, as having come to a factual conclusion that the assessee is rendering only advisory service and it cannot be treated as included services under Article 12(4)(b) and held that the contention of the assessee with regard to the binding nature of the ruling of the AAR has become academic.

In our considered view, the agreement between the parties had been properly interpreted by the CIT(A) and on re-examination, the Tribunal also concurred with the CIT(A). Thus, we find no different view is possible than the interpretation given by the CIT(A) as approved by the Tribunal. Therefore, the order passed by the learned Tribunal is affirmed on this aspect and, accordingly, substantial questions of law nos.(a) and (b)are answered against the revenue.

With regard to the substantial questions of law nos.(c) and (d) are concerned, the only difference being that one of the questions pertains to services rendered by the assessee and the other is service rendered by third party.

Once again going back to the agreement between the parties dated 2nd August, 2000, in Section 1.2 (quoted above), it has been clearly mentioned that each invoice shall be submitted no later than 15th day following the end of each calendar month; each invoice shall identify the compensation

that is due to provider to compensate it for all costs for providing such services; only costs without any mark-up shall be invoiced. This aspect was rightly taken note of by the CIT(A) as well as the Tribunal and the issue was decided in favour of the assessee. So far as the services rendered by the third parties, on facts, the CIT(A) and the Tribunal had found that the actuals billed by the third parties were paid by the assessee in USA and were later on reimbursed by TIL to the assessee in India and, therefore, there was no basis for the assessing officer to conclude that the payments of reimbursement were in the nature of fees for technical services. To be noted that the assessee is not the ultimate beneficiary of the sum in question nor did it render any service to TIL. Further, there was no evidence which was brought on record to show that the technical skill, knowledge etc. were made available to TIL by the assessee. Furthermore, the Transfer Pricing Officer (TPO) scrutinised the details of reimbursements while examining the international transaction of reimbursement by TIL to the assessee under Section 92 of the Act and found that the assessee made no profit on such reimbursements and that the reimbursements were at Arm's Length.

Thus, the finding having been rendered after thorough examination of the factual position as well as the terms and conditions of the agreement qua Article 12(4)(b) of the Indo-US

Treaty, we find no ground to take a different view. Consequently, the substantial question of law nos.(c) and (d) are also answered against the revenue.

In the result, the appeal filed by the revenue (ITAT/79/2022) fails and is dismissed.

Consequently, the application for stay (IA No.GA/2/2022) also stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

S.Nath/S.Pal/S.Das/As.