

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No.7963/Del./2019
(ASSESSMENT YEAR : 2015-16)**

**ITA No.7964/Del./2019
(ASSESSMENT YEAR : 2016-17)**

**ITA No.119/Del./2021
(ASSESSMENT YEAR : 2017-18)**

**ITA No.822/Del./2022
(ASSESSMENT YEAR : 2018-19)**

Inteva Products Netherlands BV,
Plot No.PAPA-33,
Chakan MIDC Phase-IV,
Tal Khed,
Pune – 410 501 (Maharashtra).

vs. ACIT,
Circle International Tax 2(1)(1),
New Delhi.

(PAN : AADCI5208G)

(APPELLANT)

(RESPONDENT)

**ASSESSEE BY : Shri K.M. Gupta, Advocate
Shri Rishabh Malhotra, Advocate
REVENUE BY : Shri Mahesh Shah, CIT DR**

Date of Hearing : 20.02.2023
Date of Order : 02.03.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

These appeals by the assessee are directed against the respective orders of the Assessing Officer passed under section 143(3) r.w.s. 144C

of the Income-tax Act, 1961 (for short 'the Act') pursuant to the directions of the Dispute Resolution Panel (DRP).

2. Since the issues are common & connected and all the appeals were heard together, these are disposed off by this common order for the sake of convenience.

3. Since the grounds are common we are referring to grounds for AY 2018-19 as under :-

“Ground 1

On the facts and circumstances of the case and in law, the Ld. AO pursuant to the directions of the Hon'ble Dispute Resolution Panel (Hon'ble DRP) erred in treating the receipt of fees for business support services of INR 11,85,39,571 as Fees for technical services C'FTS') as per Article 12 of the tax treaty between India and Netherlands without appreciating that the services are managerial in nature and hence do not fall within the definition of FTS.

It is prayed that the addition made by the Ld. AO should be deleted.

Ground 2

Without prejudice to ground 1, on the facts and circumstances of the case and in law, the Ld. AO pursuant to the directions of the Hon'ble DRP erred in treating the fees for business support services of INR 11,85,39,571 FTS as per Article 12 of the tax treaty between India and Netherlands without appreciating that the services rendered by the appellant do not make available technical knowledge to the recipient and hence cannot be taxed in India.

It is prayed that the addition made by the Ld. AO should be deleted.

Ground 3

Without prejudice to ground 1 and 2, on the facts and circumstances of the case and in law, the Ld. AO has erred in levying surcharge and education cess on income chargeable to tax under the tax treaty between India and Netherlands.

It is prayed that the said levy by the Ld. AO should be deleted.

Ground 4

On the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270(A) of the Act on the adjustment made in the final assessment order.”

4. Although assessee has raised various grounds, ld. Counsel for the assessee stated that assessee is pressing only one ground that on the facts and circumstances of the case and in law, the ld. AO pursuant to the directions of DRP erred in treating the receipts of fees for business support services of Rs.11,85,39,571/- as Fees for Technical Services (FTS) as per Article 12 of the tax treaty between India and Netherlands without appreciating that the services are managerial in nature and hence do not fall within the definition of FTS.

5. At the outset, in this case, ld. Counsel for the assessee pleaded that the issue is squarely covered by the decision of ITAT in the assessee's

own case in ITA No.7545/Del/2017 for AY 2014-15 vide order dated 31.01.2023.

6. Ld. DR for the Revenue submitted that the said order is distinguishable and the order of the authorities below should be sustained. He referred to the agreement and pointed that there are features in the agreement which support the Revenue stand.

7. Brief stated facts of the case are that assessee is a company incorporated in Netherlands and is a tax resident of Netherlands. For the AY 2018-19, assessee filed return of income on 27.11.2018 showing income of Rs.48,50,157/-. During the course of assessment, AO observed that assessee has received income of Rs.48,50,157/- on account of interest on ECB and income tax refund and assessee also received Rs.11,85,39,571/- on account of business support services from Inteva India. AO further noted that assessee in the return offered the revenue earned only on account of interest. The amount received for business support services was not offered as income on the plea that it is in the nature of business profit and in absence of Permanent Establishment (PE) in India, it is not chargeable to tax. The AO was not convinced. After elaborate discussion, he concluded that the payment of Rs.11,85,39,571/- received by the assessee from foreign company on account of business

support services is held to be taxable as FTS taxable @ 10% plus surcharge and education cess and added to the total income of the assessee.

8. DRP upon assessee's objections rejected the same. In this regard, emphasis was given on earlier direction issued by the DRP for Assessment Year 2014-15 and considering the background of the case, grounds of objection for AY 2018-19 were also rejected.

9. Against this order, assessee is in appeal before us. We have heard both the parties and perused the records.

10. We note that identical issue was subject matter of consideration of the ITAT in assessee's own case in ITA No.7545/Del/2017 for Assessment Year 2014-15. The Tribunal vide order dated 31.01.2023 had held that the payment received cannot be treated as FTS under Article 12 (5) of India Netherlands DTAA and the addition made is to be deleted.

We may gainfully refer to the order of ITAT in this regard as under:-

“3. Briefly the facts are that the assessee is a non-resident corporate entity incorporated in Netherland and tax-resident of Netherland. For the assessment year under dispute, the assessee filed its return of income on 31.03.2016 declaring income of Rs.47,05,135.

4. In course of assessment proceeding, the Assessing Officer noticed that in the year under consideration, assessee had provided business support services to its Indian group entity and received payment of Rs.1,49,02,771. However, the

amount received was not offered as income on the plea that it is in the nature of business profit and in absence of a Permanent Establishment (PE) in India, it is not chargeable to tax.

5. After considering the submissions of the assessee, the Assessing Officer was not convinced. He observed that the payment received by the assessee will qualify as FTS, both under Section 9(1)(vii) of the Act as well as under Indian-Netherlands DTAA as they are in the active of management and consultancy services. Accordingly, he brought to tax the amount at the hands of the assessee. Against the draft assessment order, assessee raised objections before DRP. However, learned DRP rejected the objection.

6. Before us, learned counsel appearing for the assessee submitted that the services rendered are in the nature of managerial services and not technical or consultancy services.

7. Drawing our attention to Article-12(5) of Indian-Netherlands DTAA, learned counsel submitted, the definition of FTS does not include managerial services. Therefore, he submitted, it cannot be treated as FTS under the DTAA.

8. Without prejudice, he submitted, even assuming that services rendered are in the nature of consultancy services, however, the make available condition has not been satisfied.

9. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned DRP.

10. We have considered rival submission and perused the material available on record.

11. As could be seen from the draft assessment order, the Assessing Officer has very clearly and categorically mentioned that assessee's employees never visited India for rendering any kind of services. Whatever services rendered, were through mail/correspondences/reports etc. From the facts available on

record, it is noticed, the services rendered by the assessee are as under:

- i) Engineering Services (Application Engineering and Technical Support/CAD/CAM Design);
- ii) Financial Administration Services, including Treasury;
- iii) HR Services, including benefits and related services;
- iv) Environmental Health and Safety;
- v) IT Services;
- vi) Management Services;
- vii) Marketing Services;
- viii) Legal Services;
- ix) Tax Services;
- x) Supply Chain Management Services, including purchasing logistics and procurement; &
- xi) Quality Management Services. 1

12. From the nature of services rendered, it is very much evident that they are mostly in the nature of managerial services. Reading of Article-12 (5) of India-Netherlands DTAA reveals that it does not include managerial services within FTS. Therefore, the payment received by the assessee cannot be treated as FTS under India-Netherlands DTAA. Even, assuming for the sake of argument that payment received for certain kind of services is in the nature of FTS, however, the make available condition needs to be satisfied. Neither the Assessing Officer nor learned DRP have established on record that by rendering the services, the assessee has made available technical knowledge, know-how, skill etc. to the recipient of services, which would have enabled the recipient of such services to

utilize it independently without the aid and assistance of the assessee. Thus, in our view, the make available condition is not satisfied. Therefore, the payment received cannot be treated as FTS under Article-12(5) of India Netherlands DTAA. Hence, we are inclined to delete the addition made by the Assessing Officer.”

It is not the case that aforesaid order of ITAT has been reversed by Hon’ble jurisdictional High Court. Hence, we are not persuaded by Id. DR arguments to distinguish with the same.

11. Since facts in the present case are identical to the aforesaid and no distinguishable feature has been pointed out, hence following the precedent we direct that the payment received in this case cannot be treated as FTS under Article 12 (5) of India Netherlands DTAA. Hence, this ground of assessee stands allowed.

12. Our above order applies *mutatis mutandis* to all the years under appeal.

13. In the result, all the appeals filed by the assessee stand partly allowed.

Order pronounced in the open court on this 2nd day of March, 2023.

**Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER**

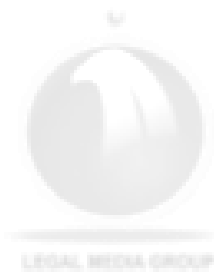
**sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

**Dated the 2nd day of March, 2023
TS**

Copy forwarded to:

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

AR, ITAT
NEW DELHI.



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