IN THE INCOME TAX APPELLATE TRIBUNAL PUNE BENCH, 'C' PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

□□□□ □□□□ □□./ ITA No.202/PUN/2021
□□□□□□□ / Assessment Year : 2016-17

GRI Renewable Industries S.L., (Formerly Known as Gonvarri Eolica S.L., 12th Floor, Planta 11-12, Calle del Ombu, 3, Madrid, Spain PAN : AAFCG4517Q	Vs.	ACIT (IT), Circle-1, Pune
Appellant		Respondent

Assessee by	Shri Siddhesh Chaugule
Revenue by	Shri Shivraj B More
Date of hearing	14-02-2022
Date of pronouncement	15-02-2022

□□□□/ ORDER

PER R.S. SYAL, VP :

This appeal by the assessee is directed against the final Assessment order dated 26-03-2021 passed by the Assessing Officer (AO) u/s.143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2016-17.

2. The first issue raised in this appeal is against applying the tax rate as per section 115A of the Act instead of the tax rate as per the DTAA between India and Spain (hereinafter also called 'the DTAA') read with the Protocol thereof.

3. Pithily put, the factual panorama of the case is that the assessee is a foreign company incorporated in Spain. The return was filed declaring total income of Rs.2,88,38,464/-, comprising of receipt of Rs.2,25,29,742/- from M/s. Shrenik Industries Pvt. Ltd. towards providing technical support, financial support and advice, legal support, commercial support etc., and Rs.63,08,722/- received towards SAP software and implementation of process model. The assessee declared the above amounts as 'fees for technical services' and 'royalties' respectively, claiming them as covered under Article 13 of the DTAA. Relying on the Protocol to the DTAA having Most Favoured Nation (MFN) clause along with Article 12 of the Double Taxation Avoidance Agreement between India and Portugal (Portuguese DTAA), the assessee claimed that the above gross receipts of 'royalties' and 'fees for technical services' were taxable @10% instead of 20% as provided in the DTAA. The AO did not dispute the amount or the nature of income offered by the assessee. He, however, held that the tax rate of 10% applied by the assessee under Portuguese DTAA could not be applied because section 90(1) specifically requires the issuance of necessary Notification by the Government of India. In order to import an MFN clause from another DTAA having lower rate of tax or narrower scope of

definition of certain clause, it is necessary that such importing of clause must be notified. In the absence of any notification of the MFN clause from the Portuguese DTAA, the AO held that the benefit of the relevant Article of the Portuguese DTAA was not available to the assessee in terms of the Protocol and hence, the 'fees for technical services' and 'royalty' was chargeable to tax at 10% plus applicable Surcharge and Education Cess in terms of section 115A of the Act, which was more beneficial *vis-à-vis* 20% rate of tax provided in the DTAA. No succor was provided by the Dispute Resolution Panel. In the final assessment order, the AO taxed the amount of 'fees for technical Services' and 'royalty' at 10% plus applicable Surcharge and Education cess u/s.115A of the Act as against 20% straight rate in the DTAA. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

4. We have heard the rival submissions and scanned the relevant material on record. It is amply borne out from the facts recorded above that there is no dispute on the quantum, nature or taxability of the amount of 'fees for technical services' or 'royalty' of the assessee. The core of controversy is only anent to the rate of tax to be applied on such income. Section 115A of the Act, dealing with tax on 'royalty' and 'fees for technical services' etc. in the case of

foreign companies, provides through clause (b) of sub-section (1) that where the total income of a non-resident (not being a company) or a foreign company includes income by way of 'royalty' or 'fees for technical services' etc., the amount of income-tax shall be calculated @10%. It goes without saying that such rate of tax is liable to be loaded with the applicable Surcharge and Education cess. Section 90 of the Act provides that where the Central Government has entered into an Agreement with the Government of any country outside India for granting relief in respect of income on which tax is payable both in India and the other country, then, in relation to the assessee to whom such Agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to that assessee. To put simply, if the provisions of the concerned DTAA are more beneficial to the assessee *vis-a-vis* their counterparts under the Act, then the assessee can choose to be governed by the beneficial provisions contained in the DTAA.

5. The assessee is a resident of Spain and the DTAA between India and Spain was notified in 1995. Article 13 of the DTAA contains provisions relating to 'royalties' and 'fees for technical services', whose relevant part runs as under: -

`1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed :

(i) in the case of royalties relating to the payments for the use of, or the right to use, industrial, commercial or scientific equipment, 10% of the gross amount of the royalties;

(ii) in the case of fees for technical services and other royalties, 20% of the gross amount of fees for technical services or royalties.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematographic films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.

4. …..’

6. Para 1 of Article 13 provides that ‘royalties’ and ‘fees for technical services’ arising in India and paid to resident of Spain may be taxed in Spain. Para 2 states that such ‘royalties’ or ‘fees for technical services’ may also be taxed in India. It is undisputed that insofar as the copyright royalty under consideration is concerned, the same is liable to tax at the rate of 20% as per para 13(2)(ii) of the DTAA. In the same manner, fees for technical services also attracts

tax rate of 20% as per the DTAA. Going with Article 13 of the DTAA, it is clear that the rate of tax in case of 'fees for technical services' and `other royalties' as received by the assessee, is 20%.

7. At this stage, it is relevant to take note of the Protocol to the DTAA, which provides vide para 7, as follows :

> '7. The competent authorities shall initiate the appropriate procedures to review the provisions of Article 13 (Royalties and fees for technical services) after a period of five years from the date of its entry into force. *However, if under any Convention or Agreement between India and a third State which is a Member of the OECD, which enters, into force after 1st January, 1990, India limits its taxation at source on royalties or fees for technical services to a rate lower* or a scope more restricted *than the rate or scope provided for in this Convention* on the said items of incomes, *the same rate* or scope *as provided for in that Convention or Agreement on the said items of income shall also apply under this convention* with effect from the date on which the present Convention comes into force or the relevant Indian Convention or Agreement, whichever enters into force later.'

8. A cursory glance at the above para unfolds that if under any convention between India and a third State which is a Member of the OECD, entered into force after 01-01-1990, India limits its taxation for 'royalties' or 'fees for technical services' "*to a rate lower*" or "*scope more restricted*" than the rate or scope as set out in the DTAA, such beneficial rate or scope shall also apply under this Convention. Thus, the MFN clause contained in the above para 7 of the Protocol manifests that if India has entered into a Convention after 01-01-1990 with a third country which is a Member of the

OECD and under such Convention it has, *inter alia,* agreed for a lower rate of taxation *vis-à-vis* that provided in the DTAA with Spain, such lower rate of tax will apply under the DTAA with Spain. India entered into a DTAA with Portuguese Republic vide Notification dated 16-06-2000. Article 12 of the DTAA with Portugal, which is an OECD member country and fulfils all other conditions as prescribed in the Protocol, provides that the 'royalties' and 'fees for technical services' shall, in the circumstances as are obtaining in the extant case, be taxed at 10% of the gross amount. Taking assistance of 10% tax rate as provided in Article 12 of the Portuguese DTAA, the assessee claimed that the tax rate of 20% as provided under Article 13 of the DTAA between India and Spain shall not apply and it will be governed by the reduced rate of taxation of 10% as per Article 12 of the Portuguese DTAA. The Revenue jettisoned the applicability of India and Portugal DTAA on the ground that the import of MFN clause from the Portuguese DTAA was not notified and hence the Protocol under the DTAA between India and Spain would have no application.

9. At this juncture, it is relevant to note that the Agreement entered into between India and Spain was signed by both the countries on 08-02-1993, which entered into force on 12-01-1995

and was notified on 21-04-1995. The Protocol was appended and made a part of the Agreement between India and Spain, *inter alia,* providing for the MFN clause *qua* 'royalties' and 'fees for technical services' under para 7. Such Protocol was also signed by both the Governments on the same date, namely, 08-02-1993. The opening part of the Protocol states that: `At the moment of signing the Convention between the Government of the Republic of India and the Government of the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on Income and on Capital, the undersigned have agreed upon the following provisions which *shall be an integral part of the Convention.*' It is overt from the opening part of the Protocol, duly signed by the competent authorities of both the countries along with and on the same date on which the main Agreement or Convention was signed, that the Protocol has been treated as "*an integral part of the Convention*". Once the Agreement between India and Spain was notified on 21-04-1995, the Protocol, which is an integral part of the Agreement, also got automatically notified along with the Agreement. In such a scenario, it is difficult to comprehend the need for any separate notification for the import of the MFN clause.

10. It would be prudent to take cognizance of the CBDT Circular No.3/2022 dated 03-02-2022 providing clarification and laying down certain pre-requisites for deriving the benefit of the MFN clause in the Protocol to India's DTAAs with certain countries. The CBDT has summed up its opinion in para 5 of the Circular, reading as under:-

> "5. In view of the above, it is hereby clarified that the applicability of the MFN clause and benefit of the lower rate or restricted scope of source taxation rights in relation to certain items of income (such as dividends, interest income, royalties, Fees for Technical Services, etc.) provided in India's DTAAs with the third States will be available to the first (OECD) State only when all the following conditions are met:
>
> (i) The second treaty (with the third State) is entered into after the signature/ Entry into Force (depending upon the language of the MFN clause) of the treaty between India and the first State;
>
> (ii) The second treaty is entered into between India and a State which is a member of the OECD at the time of signing the treaty with it;
>
> (iii) India limits its taxing rights in the second treaty in relation to rate or scope of taxation in respect of the relevant items of income; and
>
> (iv) *A separate notification has been issued by India, importing the benefits of the second treaty into the treaty with the first State, as required by the provisions of sub-section (1) of Section 90 of the Income Tax Act, 1961.*
>
> If all the conditions enumerated in Paragraph 5(i) to (iv) are satisfied, then the lower rate or restricted scope in the treaty with the third State is imported into the treaty with an OECD State having MFN clause from the date as per the provisions of

> the MFN clause in the DTAA, after following the due procedure under the Indian tax law.”

11. A look at the above para deciphers that the benefit of a lower rate of taxation or restricted scope of source taxation rights, as contained in the MFN clause with reference to ‘royalty’ and ‘fees for technical services’ etc. provided in the India’s DTAAs with second State, can be availed under the DTAA with the first State only when the four conditions are fulfilled. There is no dispute that conditions enshrined under points (i) to (iii) are fulfilled in the instant case. The condition under point (iv) states that a separate notification should be issued by India importing the benefit of the second treaty into treaty with the first State as required u/s 90(1) of the Act. Thus, it becomes ostensible that the CBDT has mandated the issuance of a separate notification for importing the benefits of a treaty with second State into the treaty with the first State by relying on provisions of sub-section (1) of Section 90 of the Income Act, 1961. Let us examine the prescription of section 90(1) of the Act which has been invoked as a shield for stipulating the fourth requirement. This section provides that: `The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,— (a) for the granting of relief in respect of—

(i) income on which have been paid both income-tax under this Act

and income-tax in that country or specified territory, as the case may be, or…….and may, *by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.*' In our opinion, the Circular specifying the need for a separate notification for importing the beneficial treatment from another Agreement as a corollary of section 90(1) of the Act, overlooks the plain language of the section seen in juxtaposition to the language of the Protocol, which treats the MFN clause an integral part of the Agreement. What is amply borne out from the language of section 90(1) is that a notification may be made *for implementing the agreement* that the Central Government has entered into with the Government of any country outside India for the granting the relief. Reference to the expression `*make such provisions as may be necessary*' for the purpose of notification in the Official Gazette, is to adopt the manner of notifying as may be necessary *for implementing the agreement* and not that the notification is to be issued piecemeal and in a truncated manner. On notifying the Agreement or Convention, all its integral parts, get automatically notified. As such, there remains no need to again notify the individual limbs of the Agreement so as to make them operational one by one.

12. It is trite law that a circular issued by the CBDT is binding on the AO and not on the assessee or the Tribunal or other appellate authorities. It has been held so authoritatively in *CIT Vs. Hero Cycles Pvt. Ltd. (1997) 228 ITR 463 (SC)* as reiterated in *CCE Vs. M/s. Ratan Melting and Wire Industries (2008) 220 CTR 98 (SC). Ex consequenti*, the Circular transgressing the boundaries of section 90(1) of the Act, cannot bind the Tribunal.

13. Notwithstanding the above, it can be seen that the CBDT has panned out a fresh requirement of separate notification to be issued for India importing the benefits of the DTAA from second State to the DTAA with the first State by virtue of its Circular, relying on such requirement as supposedly contained in section 90(1) of the Act. In our considered opinion, the requirement contained in the CBDT circular No.03/2022 cannot primarily be applied to the period anterior to the date of its issuance as it is in the nature of an additional detrimental stipulation mandated for taking benefit conferred by the DTAA. It is a settled legal position that a piece of legislation which imposes a new obligation or attaches a new disability is considered prospective unless the legislative intent is clearly to give it a retrospective effect. We are confronted with a circular, much less an amendment to the enactment, which attaches a

new disability of a separate notification for importing the benefits of an Agreement with the second State into the treaty with first State. Obviously, such a Circular cannot operate retrospectively to the transactions taking place in any period anterior to its issuance. In view of the foregoing discussion, we are satisfied that the requirement of a separate notification for implementing the MFN clause, as per the recent CBDT circular dt. 03-02-2022, cannot be invoked for the year under consideration, which is much prior to the CBDT circular of the year 2022.

14. To summarize, the DTAA between India and Spain, having the Protocol containing the MFN clause as its integral part, was duly notified on 21-04-1995, after having entered into force on 12-01-1995. On such notification of the DTAA, the Protocol containing the MFN clause triggering the importing of any other DTAA fulfilling the requisite requirements, including the Portuguese DTAA, got automatically notified *pro tanto*, in terms of section 90(1) of the Act leaving no room for any separate notification for the importation. The sequitur is that that the authorities below were not justified in denying the benefit of the straight rate of tax at 10% as per the DTAA read with Portuguese DTAA and also additionally charging Surcharge and Education cess.

15. The next ground raised is about taxing Rs.35,67,719/- as income from royalty or fees for technical services, which the assessee claimed to have received as reimbursement and hence not includible in its gross revenue for taxability.

16. Tersely stated, the facts of this ground are that the assessee claimed a sum of Rs.35,67,719/- as reimbursement on cost-to-cost basis and did not include the same in the total revenues for the purpose of offering income for taxation. The AO called upon the assessee to furnish complete evidence like all invoices, agreements, ledger extracts and etc. in support of recovery/reimbursement of the expenses. In the absence of any response coming from the side of the assessee, the AO treated this amount as a part and parcel of 'fees for technical services/royalties' and thus applied tax rate of 10% plus applicable surcharge and education cess thereon. The assessee filed certain evidence before the Dispute Resolution Panel in support of its contention that the amount was in the nature of reimbursement of certain expenses by contending that the draft assessment order was notified on 20-12-2019 and the assessee's submission on reimbursement with relevant evidence filed on 19-12-2019, remained unconsidered. The DRP called for the comments of the AO, who raised objection to the assessee's contention. The DRP repelled the

assessee's claim of exclusion of the amount of Rs.35,67,716/- from gross revenue. It further held that the in the scheme of taxation u/s.115A of the Act, all the receipts shown on gross basis are considered and hence, the assessee's stand on reducing certain costs was not acceptable. As such, no succor was allowed by the DRP, which culminated into the addition by the AO in the final order.

17. We have heard both the sides and gone through the relevant material on record. It is seen that the assessee offered its income from 'royalties' and 'fees for technical services' on gross basis,

albeit at the concessional rate of tax. The assessee claimed that a sum of Rs.35.67 lakh was received as reimbursement of expenses which was not liable to be included in the gross receipts. Primarily, we find that the basic details about the nature of expenses etc. are not forthcoming. It is not known as to whether such expenses claimed to be reimbursed were in furtherance of the rendering of 'fees for technical services' or *de hors* the same. The assessee has not placed on record invoices raised to the Indian parties towards 'fees for technical services/royalties' to demonstrate if such amounts claimed as reimbursement were part of 'royalties/fees for technical services'. Even the claim of reimbursement without any mark-up has not been properly established before the Tribunal. In the absence of such

relevant details, it is difficult to conclude as to whether the amount claimed as reimbursement should form part of total revenue base for applying concessional rate of tax.

18. We accentuate that there is an inherent difference between the scheme of taxation of an item of income *por una parte* u/s 115A of the Act or under the concerned Article of the DTAA and *por otra parte* under the normal provisions of the Act or the Articles of the DTAA providing for taxation at normal rate. In the former case, revenue or gross receipt itself is charged to tax though at a concessional rate of 10% etc., in the latter, it is the income embedded in the revenue or gross receipt which is charged to tax at normal rate. Any reimbursement in the latter case cannot be charged to tax because of the absence of any element of income therein, which is *sine qua non* for the chargeability in such a situation. However, in the former case which proceeds with taxation of the gross receipts/revenue at a concessional rate of tax, reimbursement of costs that have contributed to the earning of the revenue have to be necessarily included. In all cases of taxation of revenue or gross basis, a fundamental question which needs to be asked is whether a particular cost has contributed to the earning of the revenue. If the answer is in affirmative, then its corresponding receipt needs to be

included in the revenue for applying the concessional rate of tax irrespective of the nomenclature given to the parties as reimbursement or revenue. Thus in all cases of concessional taxation on gross receipt or revenue basis, splitting of total receipt into reimbursement or revenue, remains neutral to its chargeability. Both such cases, invariably warrant inclusion of the receipt in the revenue base for taxation so long as the receipt is relatable to costs incurred contributing to the earning of the revenue. An assessee cannot be permitted to opt for concessional rate of taxation on gross receipt basis and then claim that some part of the receipts should be left out by describing it as reimbursement. It is patently an absurd proposition.

19. In view of the fact that necessary details for determining the above issues are not available on record, we set aside the impugned order on this score and remit the matter to the file of the AO for deciding the point on the touchstone of the discussion made *supra*. Needless to say, the assessee will be allowed a reasonable opportunity of hearing.

20. Ground No.3 is about the short TDS credit of Rs.47,68,155/-. The claim of the assessee is that the AO did not grant benefit of the

TDS. The AO is directed to verify the facts and allow necessary TDS credit as per law.

21. The next ground about levy of interest is consequential and disposed off accordingly.

22. In the result, the appeal is partly allowed.

Order pronounced in the Open Court on 15th February, 2022.

Sd/-	Sd/-
(PARTHA SARATHI CHAUDHURY)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणेPune; ि दनांकDated : 15th February, 2022
सतीश

आदेशकी ि तिलिप अ ेि षत/Copy of the Order is forwarded to:

1. अपीलाथ / The Appellant;
2. थ / The respondent
3. The CIT (DRP-3) Mumbai-1, CIT (DRP-3) Mumbai-2, CIT (DRP-3) Mumbai-3,
4. DR, ITAT, 'C' Bench, Pune
5. गाडफाईल / Guard file.

आदेशानुसार/BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अिधकरण ,पुणे/ITAT, Pune

		Date	
1.	Draft dictated on	14-02-2022	Sr.PS
2.	Draft placed before author	15-02-2022	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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