IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(IT)A No.989/Bang/2017
Assessment Year : 2016-17

M/s. Infosys BPO Limited Electronic City, Hosur Road, Bengaluru – 560 100. **PAN : AACCP 4478 N**	Vs.	The Deputy Commissioner of Income Tax, International Taxation, Circle 1(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri. Padam Chand Khincha, CA
Respondent by	:	Shri. K. R. Narayana, Addl. CIT(DR)(ITAT), Bengaluru

Date of hearing	:	25.08.2022
Date of Pronouncement	:	01.09.2022

O R D E R

Per N. V. Vasudevan, Vice President:

This is an appeal by the assessee against the order dated 28.02.2017 of CIT(A) - 12, Bengaluru, relating to Assessment Year 2016-17.

2. The assessee is a company engaged in the business of rendering BPO services. The assessee made payment of 2100 US$ to a non-resident viz., Stakeholder Centered Coaching (International Ltd.,)

hereinafter referred to as the 'non-resident'. The non-resident was a tax resident of Hongkong. It is body corporate registered in Hongkong. It is undisputed that there was no Treaty for avoidance of Double Taxation (DTAA) between India and Hongkong during the relevant period i.e., period relevant to Assessment Year 2015-16. The nature of payment made by the assessee to non-resident was fee, training for developing soft skills. The amount payable to non-resident was grossed up and Tax Deducted at Source (TDS) was paid on the grossed up amount. Under section 248 of the Income Tax Act, 1916 (hereinafter called 'the Act'), the assessee filed an appeal before the CIT(A) contending that the sum paid to the non-resident is not taxable in the hands of the non-resident in India and therefore the assessee should be given the refund of the TDS paid out of its pocket.

3. Since India does not have a DTAA with Hongkong, the question that arises for consideration is as to whether the payment by the assessee to the non-resident can be regarded as a fee for technical services (FTS) within the meaning of Explanation to section 9(1)(vii) of the Act. Under Sec.5 of the Act, income of a non-resident, if it accrues or arises in India, the same shall be taxable in India. Explanation- 2 to Sec.9(1)(vii) of the Act, defines what is "FTS" for the purpose of Sec.9(1)(vii) of the Act and it reads thus:

> I**ncome deemed to accrue or arise in India.**
>
> **9.** (1) The following incomes shall be deemed to accrue or arise in India :—

(i) to (vi).…….

(vii) income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) 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".

4. Since the assessee paid taxes on the amounts payable to the non-resident after grossing up and since the assessee has prayed for declaration that payments made to non-resident were not chargeable to tax under the Act, the assessee filed appeal u/s.248 of the Act directly before CIT(A) and hence there will be no order of the AO in such cases. The CIT(A) in the appeal filed by the assessee u/s.248 of the Act, was of the view that the payment in the form of training, fees fall within the ambit of definition of FTS under the Act and is taxable in India.

5. In this appeal before the Tribunal, the learned Counsel for the assessee filed before us a list of decisions wherein it has been held that payment for training services does not amount to FTS under the Act.

Payment for training services does not amount to Fees for technical services under the Income Tax Act, 1961

- Lloyds Register Industrial Services (India) (P.) Ltd v ACIT **[2010] 36** SOT 293 (Mum)
- Ershisanye Construction Group India (P.) Ltd v DCIT[2017] 84 taxmann.com 108 (Kolkata - Trib.)
- ACIT v PCI Ltd [2011] 12 taxmann.com 59 (Delhi-Trib)

Payment for training services does not amount to Fees for technical services under the India — USA DTAA

- DDIT v Tetra Pak India P Ltd [2019] 111 taxmann.com 205 (Pune — Trib)

- Renaissance Services BV v DDIT [2018] 94 taxmann.com 465 (Mumbai — Trib)

6. In addition to the above, learned Counsel for the assessee placed strong reliance on the decision of the Hon'ble Delhi High Court in the case of Director of Income Tax (International Taxation) Vs. Panalfa Autolectrick Ltd. [2014 49 taxmann.com 412 (Delhi). It was a case where the Court had to decide whether commission paid to a non-resident for procuring export order could be regarded as FTS. The Hon'ble Delhi High Court while rendering its decision that the payment could not be taxed as FTS has referred to OECD Report on e-commerce titled Tax Treaty Charaterization Issues arising from e-commerce, wherein the nature of FTS in the context of has been discussed. It was clarified by the learned Counsel for the assessee that in the present appeal, the training was provided by the non-resident through online. The paper book filed by the assessee contains quotation given by the non-resident. The nature of the service to be provided by the non-resident is described as "Leadership Growth Progress Review" mini survey. The Purchase order given by the assessee to the non-resident has the description of the service as "Fee, Training for Soft Skills" – Leadership Growth Progress Review Mini Survey. Admittedly the non-resident does not have a Permanent Establishment or any presence in India and is a tax resident of Hong Kong. The nature of remittance as described in Form No.15CB by the Chartered Accountant before effecting remittance has the following

description, viz., 'TRAIN-THE COACH CERTIFICATION WORKS". It is thus clear that the nature of services is impart training in developing leadership skills. The business of the Assessee is rendering BPO services and in rendering those services, the leadership skills imparted by the non-resident would not or cannot be used. It is in this context that the OECD Report on e-commerce titled Tax Treaty Charaterization Issues arising from e-commerce, wherein the nature of FTS in the context of has been discussed, becomes relevant.

7. The OECD commentary referred to by the Hon'ble Delhi High Court states as follows:

> "24. The OECD Report on e-commerce titled, Tax Treaty Characterization Issues arising from e-commerce: Report to Working Party No.1 of the OECD Committee on Fiscal Affairs dated 01st February 2001, has elucidated:-
>
> > "Technical services
> >
> > 39. For the Group, services are of technical nature when special skills or knowledge related to a technical field are required for the provision of such services. Whilst techniques related to applied science or craftsmanship would generally correspond to such special skills or knowledge, the provision of knowledge acquired in fields such as arts or human sciences would not. As an illustration, whilst the provisions of engineering services would be of a technical nature, the services of a psychologist would not.
> >
> > 40. **The fact that technology is used in providing a service is not indicative of whether the service is of a technical**

nature. Similarly, the delivery of a service via technological means does not make the service technical. This is especially important in the e-commerce environment as the technology underlying the internet is often used to provide services that are not, themselves, technical (e.g. offering on-line gambling services through the internet).

41. In that respect, it is crucial to determine at what point the special skill or knowledge is used. **Special skill or knowledge may be used in developing or creating inputs to a service business. The fee for the provision of a service will not be a technical fee, however, unless that special skill or knowledge is required when the service is provided to the customer.** For example, special skill or knowledge will be required to develop software and data used in a computer game that would subsequently be used in carrying on the business of allowing consumers to play this game on the internet for a fee. Similarly, special skill or knowledge is used to create a troubleshooting database that customers will pay to access over the Internet. In these examples, however, the relevant special skill or knowledge is not used when providing the service for which the fee is paid, i.e. allowing the consumer to play the computer game or consult the troubleshooting database.

42. Many categories of e-commerce transactions similarly involve the provision of the use of, or access to, data and software (see, for example, categories 7, 8, 9, 11, 13, 15, 16, 20 and 21 in annex 2). The service of making such data and software, or functionality of that data or software, available for a fee is not, however, a service of a technical nature. The fact that the development of the necessary data and software might itself require substantial technical skills is irrelevant as the service provided to the client is not the development of that data and software (which may well be done by someone other than the supplier) but rather the service of making the data and software available to that client. For example, the

mere provision of access to a troubleshooting database would not require more than having available such a database and the necessary software to access it. A payment relating to the provision of such access would not, therefore, relate to a service of a technical nature.

Managerial services

43. The Group considers that services of a managerial nature are services rendered in performing management functions. The Group did not attempt to give a definition of management for that purpose but noted that this term should receive its normal business meaning. **Thus, it would involve functions related to how a business is run as opposed to functions involved in carrying on that business. As an illustration, whilst the functions of hiring and training commercial agents would relate to management, the functions performed by these agents (i.e. selling) would not.**

44. The comments in paragraphs 40 to 42 above are also relevant for the purposes of distinguishing managerial services from the service of making data and software (even if related to management), or functionality of that data or software, available for a fee. The fact that this data and software could be used by the customer in performing management functions or that the development of the necessary data and software, and the management of the business of providing it to customers, might itself require substantial management expertise is irrelevant as the service provided to the client is neither managing the client‟s business, managing the supplier‟s business nor developing that data and software (which may well be done by someone other than the supplier) but rather making the software and data available to that client. The mere provision of access to such data and software does not require more than having available such a database and the necessary software. A

payment relating to the provision of such access would not, therefore, relate to a service of a managerial nature.

Consultancy services

45. For the Group, **"consultancy services" refer to services constituting in the provision of advice by someone, such as a professional, who has special qualifications allowing him to do so.** It was recognised that this type of services overlapped the categories of technical and managerial services to the extent that the latter types of services could well be provided by a consultant."

We broadly agree with the aforesaid observations. However, in the case of selling agents, we add a note of caution that taxability would depend upon the nature of the character of services rendered and in a given factual matrix, the services rendered may possibly fall in the category of consultancy services. Paragraphs 41 and 42 do not emanate for consideration in the present case, and effect thereof can be examined in an appropriate case [However, see Commissioner of Income Tax vs. Estel Communication P. Ltd. (2009) 318 ITR 185 (Del) and Skycell Communications Ltd. (supra)].

25. Thus, the technical services consists of services of technical nature, when special skills or knowledge relating to technical field are required for their provision, managerial services are rendered for performing management functions and consultancy services relate to provision of advice by someone having special qualification that allow him to do so. In the present case, the aforesaid requisites and required necessities are not satisfied. Indeed, technical, managerial and consultancy services may overlap and it would not be proper to view them in water tight compartments, but in the present case this issue or differentiation is again not relevant."

8. His submission was that the training in soft skills could not fall either within the term 'technical, managerial or consultancy services'. He pointed out that the services rendered by non-resident cannot be termed as consultancy service. **The fact that technology is used in providing a service is not indicative of whether the service is of a technical nature. Similarly, the delivery of a service via technological means does not make the service technical. Special skill or knowledge may be used in developing or creating inputs to a service business. The fee for the provision of a service will not be a technical fee, however, unless that special skill or knowledge is required when the service is provided to the customer. He submitted that the employees developing leadership skill through service provided by the non-resident do not use such knowledge when they provide BPO service to the customers of the Assessee and hence, the services rendered cannot be regarded as technical service. The service cannot be regarded as managerial service because the service rendered by the non-resident does not teach the employees of the Assessee how the business has to be run but relates only developing leadership skills and hence the service provided by the non-resident cannot be regarded as managerial services. It cannot be regarded as consultancy service also because provision of advice by someone, such as a professional, who has special qualifications allowing him to do so, would be consultancy service but imparting training in leadership skills cannot be said to be providing advice by a professional.**

9. Learned DR placed reliance on the following decisions and submitted that the services were in the nature of FTS and were rightly brought to tax by the CIT(A). In this regard, he referred to decisions where Tribunal has held that fees paid to non-residents for training services were held to be not taxable under DTAA. According to him, it is implicit in these decisions that the sum paid for providing training services is taxable under the Act, as otherwise, there was no occasion for tribunal to examine taxability under the DTAA, unless it is taxable under the Act. The decisions referred to by the learned DR, were as follows :

1. **Santhik AB. v. ACTT** on **(2021) 190 ITI)11(1(Pune)(Trib.) S. 9(1)(vii):Income deemed to accrue or arise in India - Fees for technical services — Management fees -Indian subsidiaries — Most favoured Nation (MFN) clause —Not taxable as fees for technical services — Training services -Matter remanded - DTAA- India- Sweden I Art. 10, 12(4)(b) I** Tribunal following the order passed in earlier assessment years held that management service fees received by assessee from its Indian subsidiaries was not to be taxed in its hands as FTS in India in view of Most Favoured Nation (MFN) clause added in tax treaty. Tribunal also held that leadership training provided by assessee to employees of an Indian company did not result in making available any technical knowledge, experience or skill etc. to said employees which could enable them to use it later on, thus, such training fee could not be considered as FTS for rendering consultancy or technical services. Matter remanded for re-adjudication. (AY. 2016 -17)

2. **EEE Sandvik AB v. Dy. CIT (2021)85 ITR 593 /187 ITD 638 / 210 TT3 1019/201 DTR 172 (Pune)(Trib) S. 9(1)(vii):Income deemed to accrue or arise in India - Fees for technical services Non-Resident —Leadership training provided to employees of group company — Training fees cannot be assessed as fees for technical services — As there is no permanent establishment in Income cannot be assessed - DTAA -India-Sweden Art, 5, 7, 12(b)1**

Tribunal held that the leadership training provided by the assessee did not result in making available any technical knowledge, experience or skill, to the employees of the Indian company, which could enable them to use it later on. The Assessing Officer was not justified in considering the training fee as a consideration for rendering consultancy or technical services within the meaning of article 12(4)(b) of the Double Taxation Avoidance Agreement between India and Portugal. On the facts since the Assessing Officer had himself. in the assessment order, accepted that the assessee did not have any permanent establishment in India. the amount of training fees would also escape tax net as it could not be taxed as "business profits" under article 7 in the absence of there being any permanent establishment in India in terms of article 5.(AY.2014-15)

3. **ACIT (IT) v. Starwood (M) International Inc. (2021)90 ITR 9 (SN)(Delhi) (Trib) & Westin Hotel Management LP** (2021)90 ITR. **9 (SN)(Delhi) (Trib)**

S. 9(1)(vii):Income deemed to accrue or arise in India - Fees for technical services Payments for services relating to Hotel Management- Not taxable as fees for technical services -DTAA India —USA I Art, 7, 12 J Held that the receipts of the assessee from various activities of hotel management ranging. inter alia, from ticketing, reservation, marketing, advertising, operation, administration, catering, network support services, portal services, imparting of skill sets through trainings, were not taxable as fees for technical

services within the meaning and scope of section 9 of the Act or article 12 of the Double Taxation Avoidance Agreement between India and the United States of America.(A Y. 2014-15)

10. We have carefully considered the rival submissions. At the outset, we may deal with the argument of the learned DR that the decisions cited by him, implicitly hold that training fees is taxable under the Act. We do not think that the argument has no any force, because when there is a DTAA between India and the country of which the payee is a tax resident, the taxability has to be analyzed only from the definition of FTS as per the relevant DTAA and the definition in the Act, because irrelevant. Therefore, the fact that the tribunal has examined the payment from the terms of the treaty defining FTS, it does not follow that the Tribunals have held that training fee is taxable under the Act.

11. We agree with the contention of the learned counsel for the assessee that the nature of service rendered by the non-resident in the present case is neither in the nature of technical, managerial or consultancy service as defined under the Act. In this regard, the submissions made and the nature of service rendered in the present case, clearly shows that the services rendered by non-resident cannot be termed as technical service for the mere reason that technology is used in providing service. The delivery of a service via technological means does not make the service technical. Special skill or knowledge

may be used in developing or creating inputs to a service business. The fee for the provision of a service will not be a technical fee, unless that special skill or knowledge is required when the service is provided to the customer. The employees developing leadership skill through service provided by the non-resident do not use such knowledge when they provide BPO service to the customers of the assessee and hence, the services rendered cannot be regarded as technical service. The service cannot be regarded as managerial service because the service rendered by the non-resident does not teach the employees of the assessee how the business has to be run but relates only developing leadership skills and hence the service provided by the non-resident cannot be regarded as managerial services. It cannot be regarded as consultancy service also because provision of advice by someone, such as a professional, who has special qualifications allowing him to do so, would be consultancy service but imparting training in leadership skills cannot be said to be providing advice by a professional.

12. In the decision cited by the learned counsel for the assessee in the case of Ershisanye Construction Group India (P) Ltd. (supra), the tribunal had to deal with taxability of training fee paid to non-resident, being a tax resident of Republic of China. The definition of FTS under the DTAA between India and China and under the Act was identical. The Tribunal dealt with the issue as follows:

“14. We have already set out the nature of services rendered by Hunan by referring to the Schedule to the Agreement for rendering training, in the earlier part of this order. The main purpose for which Hunan was employed was to train Chinese Engineers who were to visit India for carrying out the onshore services and construction of integrated steel plant in India, in English language, acquaint them with the Safety Standards which is to be followed by steel plants in India as per Indian law and to enable them to answe questions that may be asked before issue of Visa by Indian authorities.

15. The question whether training expenses would constitute FTS was considered by the Tribunal Mumbai in the case of Lloyds Register Industrial Services (India) Pvt.Ltd. (2010) 36 SOT 293 (Mumbai). The Mumbai Bench held that going by common sense training expenses cannot be called as "fee for technical services". The Mumbai Bench went on to hold that even highly qualified personnel might require training to carry out the job for which they are recruited and the person imparting training cannot be said to be rendering technical, managerial or consultancy service. It was held that such training was a continuous process because technology is changing very fast and one needs to keep touch with such technology and therefore, expenses incurred towards training cannot be termed as "fee for technical services". In the case of Cosmic Global Ltd., 48 taxmann.com 365 (Chennai.Trib), the question for consideration was as to whether an Assessee who got translation of the text from one language to another could be said to be rendering Technical service. The Chennai Bench of the Tribunal held that

■ The expression "technical services" has not been defined anywhere in the Act. However, "fees for technical services" has been defined in Explanation 2 to section 9(1)(vii). [Para 7]

■ In the present case, the assessee is getting the translation of the text from one language to another. The only requirement for

translation from one language to other is, the proficiency of the translators in both the languages, i.e. the language from which the text is to be translated, to the language in which it is to be translated. The translator is not contributing anything more to the text which is to be translated. He is not supposed to explain or elaborate the meaning of the text. Apart from the knowledge of the language, the translator is not expected to have the knowledge of applied science or the craft or the techniques in respect of the text which is to be translated.

■ A bare perusal of Explanation 2 to section 9(1)(vii), which explains "fees for technical service" and the dictionary meaning of the word "technical" makes it unambiguously clear that translation services rendered by the assessee are not technical services. Therefore, the payment made by the assessee to the non-resident translators would not fall within the scope of "fees for technical, managerial or consultancy service" as mentioned in Explanation 2 to section 9(1)(vii). The Commissioner (Appeals) has travelled beyond the definition of "fees for technical service" to bring the translation services within the compass of the term "fees for technical services". [Para 8]

■ Thus, the payments made by the assessee to non-residents on account of translation services do not attract the provisions of section 194J. The disallowance made under section 40(a)(i) is deleted. This ground of appeal of the assessee is allowed. [Para 9] .

We are of the view that the facts of the Assessee's case are identical to the facts of the case decided by the Chennai Bench of ITAT in as much as the imparting training in language was the main nature of service in both the cases. Therefore, considering the factual position and precedents cited above, the payment of Rs. 42,009,163/- cannot be said to be FTS and was therefore not chargeable to tax under the Act in the hands of Hunan and consequently does not require TDS to be deducted under section 195 of the Act. The said training expenses

disallowed by the AO U/s 40(a) (ia) of the Act, and confirmed by the ld.CIT(A), needs to be deleted. Accordingly, we delete the addition of Rs.4,20,09,163/-."

13. The decisions rendered as above, clearly support the plea of the assessee the sum paid to non-resident cannot be regarded as FTS within the meaning of Sec.9(1)(vii) of the Act and cannot be taxed in the hands of the non-resident in India. Consequently, the assessee would be entitled to grant of refund of taxes paid together with interest thereon as per law. In view of the above conclusion, the question of rate of tax to be deducted on payments made to non-resident in terms of Sec.206AA of the Act becomes academic and hence not adjudicated.

14. In the result, appeal by the assessee is allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(CHANDRA POOJARI)	**(N. V. VASUDEVAN)**
ACCOUNTANT MEMBER	**VICE PRESIDENT**

Bangalore,
Dated : 01.09.2022.
/NS/*

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.