

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

**BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

**ITA No.783/DEL/2023
[Assessment Year: 2016-17]**

AKA AUSFUHRRKREDIT- GESELLSCHAFT MBH, Grosse Gallusstrasse 1-7- Frankfurt (MAIN)- DE60311	vs	The Assistant Commissioner of Income-tax, Central Circle-1(1)(1), Civic Centre, Minto Road, New Delhi-110002
PAN-AAICA5352N		
Appellant		Respondent

Appellant by	Sh. Danesh Bafna & Sh. Hardik Nirmal, CA
Respondent by	Sh. P. Praveen Siddharth -CIT-DR

Date of Hearing	15.01.2024
Date of Pronouncement	19.01.2024

ORDER

PER SAKTIJIT DEY, VP,

The captioned appeal has been filed by the assessee challenging the final assessment order dated 25.01.2023 passed under section 147 r.w.s 144 of the Income Tax Act, 1961 (hereinafter 'the Act'), pertaining to Assessment Year 2016-17.

2. At the outset, learned Counsel appearing for the assessee submitted that he would prefer to argue the appeal on merits

and the legal issues raised in ground no.1 and 2 may be kept open.

3. Learned Departmental Representative had no objection.

4. Considering the above, we proceed to deal with the merits of the issue arising in the appeal raised in ground No.3.

5. The short issue arising for consideration is whether the management fee/processing fee received by the assessee is in the nature of Fees for Technical Services (FTS) under provisions of section 9(1)(vii) of the Act as well under Article 12 of the India Germany Double Tax Avoidance Agreement (DTAA).

6. Briefly the facts are that the assessee is a non-resident banking company incorporated in Federal Republic of Germany and tax resident of Germany in course of its banking business. The assessee had advanced External Commercial Borrowing (ECB) Loan to certain Indian entities including M/s Filatex India Ltd. granted by HarmesDeckung Germany. As against the loan granted to M/s Filatex India Ltd., the assessee had received interest along with connected fees, such as, management/processing fee, documentation fee and commitment fee. Originally, the assessee did not file any return of income in

India. Subsequently, based on information received internally, indicating that as per 15CA data uploaded by M/s Filatex India Ltd., foreign remittance of Rs.87,34,375/- was remitted towards management/processing fee, on which no tax had been deducted at source, the Assessing Officer reopened the assessment in case of the assessee under section 147 of the Act. In response to notice under section 148 of the Act, the assessee furnished its reply stating that the interest along with various fees received in connection with loan granted are not taxable in India as they are exempt under Article 11(3)(b) of India Germany DTAA.

7. Though, the Assessing Officer agreed with assessee's claim with regard to the interest earned on loan and certain other fees, however, insofar as management/processing fee is concerned, he observed that it is not covered under the definition of interest received as provided under Article -11 of India Germany DTAA. Thus, ultimately, he held that the management/processing fee of Rs.87,34,375/- received from M/s Filatex India Ltd. is in the nature of FTS, hence, taxable in terms of Article 12 of the treaty as well as section 9(1)(vii) of the Act. Accordingly, he treated the

amount in dispute, as income of the assessee while framing the draft assessment order.

8. Being aggrieved with the draft assessment order, the assessee raised objections before learned Dispute Resolution Panel (in short DRP). However, without deciding the objections on merits, learned DRP directed the Assessing Officer to consider assessee's claim in the light of the case laws and pass a speaking order. Ultimately, the Assessing Officer passed the final assessment order repeating the observation made in the draft assessment order.

9. Before us, ld. Counsel appearing for the assessee reiterated the stand taken before learned DRP, whereas, learned Departmental Representative strongly relied upon the observations of the Assessing Officer.

10. We have considered rival submissions and perused the material available on record. We have also applied our mind to the decisions cited before us by learned counsel for the assessee. As discussed earlier, the bone of contention between the assessee and the Revenue is with regard to the nature and character of management/processing fee received by the

assessee on loan advanced to M/s Filatex India Ltd. It is evident, on 09th October, 2015, the assessee had entered into loan agreement with M/s Filatex India Ltd. to finance 85% out of total contract value of EURO 10,538,000.00, whereas, the balance 15% of the total contract value has to be discharged by the borrower in the form of down payment. As per the terms of the agreement, the loan granted is protected by Hermes Cover, meaning thereby, the loan is protected by Hermes acting jointly for and behalf of Federal Republic of Germany securing the repayment up to 95% of the loan granted and substantial part of the interest payable by the borrower pursuant to the provisions of the loan agreement. As per the terms of the agreement, the borrower shall pay interest on the loan at the rate of interest applicable to the loan from time to time, which shall be the rate per annum and which is the sum of the margin and the EURIBOR applicable in the interest determination date. Margin has been defined in the agreement to mean 1.55% per annum. It is the case of the assessee before us, since, the applicable EURIBOR rate on the interest determination date was zero, the margin up to 1.55% has been received by the assessee.

11. It is further observed, in terms of Article 8 of the loan agreement, the borrower shall pay commitment Fee @0.55%, non-refundable management fee @ 1.25% and non-refundable documentation fee, EUR 20,000/- flat. Undisputedly, the Assessing Officer is in agreement with the assessee that interest along with commitment fee and documentation fee are exempt under Article 11(3)(b) of the India Germany Tax Treaty. Whereas, he has held that management fee is not covered under the said provision. On reading of Article 11(3)(b) of the India Germany tax treaty, it is observed that interest paid to a resident of Federal Republic of Germany in consideration of loan granted by Hermes-Deckung shall be exempted from Indian Tax.

12. As per Article 11(4) of the treaty, interest has been defined to mean, income from debts claim of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profit, and in particular, income from Government securities and income from bonds or debentures, including premiums and prizes attached to such securities, bonds or debentures, except, penalty charges for late payment shall not be regarded as interest. It is further relevant to

observe, the term interest has been defined under section 2(28A) of the Act as under:-

(28A) "interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised ;

13. On careful reading of the above said provision, it is quite clear that the term "interest" includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised. Thus, even the definition of interest in the domestic law, in our view, covers all kinds of payment attached to the loan. In the fact of the present appeal, the Assessing Officer, no doubt, has accepted the claim of the assessee that interest along with other fees, such as, commitment fee, documentation fee attached to the loan granted are exempt under Article 11(3)(b) of the Act. After carefully examining the facts on record, we are of the considered opinion that even the management fee is of similar nature as commitment fee and documentation fee, as it is closely linked to the loan granted, hence cannot be distinguished from the documentation fee and commitment fee. Thus, in our view, management fee partakes the character of interest under section

2(28A) of the Act. Hence, would be exempt from taxation in India in terms of Article 11(3)(b) of the treaty. While coming to such conclusion, we find support from the decision of the Coordinate Bench in case of DCIT vs Sisecam Flat Glass India Ltd. in ITA No.2475/Kol/2019 dated 15.01.2021. Thus, in view of the aforesaid, we hold that the amount in dispute, being covered under Article 11(3)(b) of the India Germany DTAA is not taxable in India. Ground No.3 is allowed.

14. In view of our decision on merits, ground No.1 and 2 have become academic, hence, are kept open.

15. Ground No. 4 being consequential in nature and ground No.5 being premature at this stage, do not require adjudication.

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

Order pronounced in the open court on 19/01/2024.

Sd/-

**[B.R.R. KUMAR]
ACCOUNTANT MEMBER**

Sd/-

**[SAKTIJIT DEY]
VICE PRESIDENT**

Delhi; Dated: 19/01/2024.

Shekhar,

Copy forwarded to:

1. Appellant

2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi