

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI (THROUGH VIDEO CONFERENCING]**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 1358/DEL/2015 [A.Y 2011-12]

Magotteaux International SA
Rue A, Dumont, B-4051,
Vaux-Sous-Chevermont
Belgium

Vs.

The Dy. C.I.T
Circle - 3(2)
International Taxation
New Delhi

PAN: AAGCM 5959 D

(Applicant)

(Respondent)

Assessee By : Shri Vishal Kalra, Adv
Department By : Shri N.C. Swain, CIT- DR

Date of Hearing : 14.02.2022
Date of Pronouncement : 17.02.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 26.12.2014 framed under section 144C(13) r.w.s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to Assessment Year 2011-12.

2. The grievances of the assessee read as under:

1. That on the facts and circumstances of the case and in law, the order passed by the Assessing Officer ("AO") is bad in law as well as in facts.
2. That on the facts and circumstances of the case and in law, the AO/ Dispute Resolution Panel ("DRP") has erred in holding that the business support services provided/ rendered by the Appellant qualify as fees for technical services as per the India - Belgium tax treaty (read with India- Portugal tax treaty), since such services fall within the meaning of 'make available' under the tax treaty.
3. That the AO/ DRP did not discuss in detail as to how the business support services rendered by the Appellant from Belgium qualify the test of "make-available" under the tax treaty.
4. That on the facts and circumstances of the case and in law, the AO has erred in holding the entire income earned by the assessee as taxable in India, thereby denying the refund claimed.
5. That without prejudice to above, the AO has erroneously considered incorrect value of royalty while computing the tax demand.

6. That without any prejudice to above, while calculating the demand, the AO has erred in applying the surcharge and cess on the gross treaty rate on the consideration."
3. Representatives were heard at length. Case records carefully perused.
4. Briefly stated, the facts of the case are that the appellant is a tax resident of Belgium and is engaged in the business of providing operational consultancy and services to various group entities. In India, it has rendered such services to Magotteaux Industries Pvt Ltd [MIPL].
5. Return of income was filed declaring NIL income. In its Notes to the Computation of Income, it is stated that the assessee has entered into an agreement with MIPL for provision of business support services, such as, marketing, sales, finance, administration and other services. Such services are provided by the assessee from outside India.
6. During the course of scrutiny assessment proceedings, the Assessing Officer looked into the actual nature of remittances/receipts and found that it comprised of three streams of income, namely, royalty, fees for technical services and interest.

7. On a query raised by the Assessing Officer, the assessee gave a break-up of the income, which, it has all along claimed as absolutely exempt. The details given by the assessee are as under:

i)	Group Management Fees	Rs. 1,44,08,953/-
ii)	Royalty	Rs. 1,19,38,913/-
iii)	Interest on ECB	Rs. 38,07,451/-

8. The quarrel is in respect of group management fees of Rs. 1,44,08,953/-.

9. The Assessing Officer was of the opinion that this amount has been received by the assessee for rendering different services as per the provisions of service agreement with MIPL. On perusing the details of these services, the Assessing Officer was of the opinion that they are both managerial and consultancy services including the consultancies being in technical nature as well. Referring to Article 12 of the India Belgium DTAA, the Assessing Officer formed a belief that these services have been found taxable as FTS both under the treaty as well as under the provisions of section 9(1)(vii) of the Act.

10. Accordingly, the assessee was asked to show cause as to why the same should not be treated as FTS and why it should not be taxed in India.

11. In its reply, the assessee strongly contended that in accordance with Article 12 of the India-Belgium tax treaty, for any services to qualify as fees for technical services, such services need to be managerial, technical or consultancy, in nature. The Protocol to the India- Belgium tax treaty provides for taxation of FTS in accordance with the provisions of DTAA between India and a member of OECD entered into after 01.011990, where such provisions provide for a lower rate or restrictive scope of taxation on Royalties/FTS.

12. In view of this protocol, the assessee placed reliance on the restricted scope/rate mentioned as per the provisions of the India-Portugal tax treaty, according to which, the services provided by the assessee may qualify as technical services only where they make available technology, know-how, skills, processes, experience etc. to MIPL. It was brought to the notice of the Assessing Officer that the services rendered by the assessee do not make available technology, skill, know-how etc. to MIPL.

13. Dismissing the contention of the assessee, the Assessing Officer was of the firm belief that the services rendered by the assessee do make available knowledge, experience, know-how to the recipient and this is clearly visible when one examine the nature of the services rendered and the consequential benefits obtained by the recipient.

14. The Assessing Officer also dismissed the contention of the assessee that these services have been rendered from outside India drawing support from Explanation to section 9(1) of the Act. Accordingly, the Assessing Officer treated Rs. 1,44,08,953/- as FTS.

15. Objections were raised before the DRP but the same were of no avail.

16. Before us, the ld. counsel for the assessee reiterated what has been stated before the lower authorities. It is the say of the ld. counsel for the assessee that the DRP itself has accepted that the services provided by the assessee are in the nature of routine business support services which are not very complex in nature. The ld. counsel for the assessee drew our attention to the agreement

and referred to the services rendered by the assessee to MIPL and strongly contended that the same are routine in nature and do not make available knowledge, experience, knowhow to MIPL.

17. Per contra, the Id. DR strongly supported the assessment order and the order of the DRP and strongly contended that the services are definitely not routine services but are more technical services and, therefore, the findings of the Assessing Officer deserve to be confirmed.

18. We have given thoughtful consideration to the orders of the authorities below. We have carefully perused the Service Agreement. Among the services described in Article 2.4 of the General Terms, the parties subscribed exclusively to the following services:

N° 2 - Legal services

N° 3 - Human Resources Services

N° 4 - Controlling, Accounting, Reporting and Cash
Management services

N° 5 - Performance Management services

N° 6 - Quality Control, Safety and Environment services

N° 8 - Production Allocation services

N^o10 - Marketing services

N^o 11 - Global Sales Coordination services

N^o 12 - Procurement services

N^o 15 - New Projects and Industrialization services

19. A perusal of the afore-stated services clearly show that these are routine in nature and definitely do not make available experience, know-how to the recipient MIPL. In fact, the DRP itself has accepted at Para 6.2 of its order that as per the service agreement, the services provided by the assessee are in the nature of routine support services which are not very complex in nature.

20. Considering the protocol to the India Belgium Tax treaty, tax treaty between India and Portugal has to be considered for most favourable nation clause. Under the India Portugal Trade Tax Treaty, fees for included services is defined as consideration for rendering of any technical or consultancy services if such services are ancillary and subsidiary to the application or enjoyment of the right, property or information of which royalty payment, as defined under Article 12(b) is received or make available technical knowledge, experience, skill, know how or processes or consist of

the development and transfer of a technical plan or technical design which enables the person acquiring the services to apply the technology contained therein.

21. In our considered opinion, services received by MIPL do not make available technology, skill know how etc and such services cannot be considered to be in the nature of managerial, technical or consultancy in nature.

22. Considering the facts of the case in light of the service agreement, we are of the considered view that the business support services rendered by the assessee from Belgium do not qualify the test of make available under the tax treat. Therefore, we direct the Assessing Officer to delete the impugned addition. Ground Nos. 2,3 and 4 are accordingly allowed.

23. Next grievance relates to charging of surcharge and cess on the gross treaty rate.

24. We are of the considered view that when tax rate is prescribed under DTAA, education cess is not leviable. Our view is fortified by

the decision of the co-ordinate bench in the case of MFAR Hotels Ltd ITA No. 430 to 435/Cochin/2011, ITA No. 571/Kol/2013 which has been followed by this Tribunal in the case of JCDecaux SA 123 Taxmann 221 [Del-Trib]. Following the decision of the co-ordinate benches, we direct the Assessing Officer to apply DTAA rate without applying surcharge and cess. This ground is accordingly allowed.

25. In the result, the appeal of the assessee in ITA No. 1358/DEL/2015 is allowed.

The order is pronounced in the open court on 17.02.2022.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 17th February, 2022.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
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Date on which the approved draft comes to the Sr.PS/PS	
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