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

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 2400/Del/2022 : Asstt. Year : 2018-19

TPF Getinsa Euroestudios S.L., Unit-305, Suncity Business Tower, Golf Course Road, Sector-54, Gurgaon-122002	Vs	ACIT, International Taxation, Gurgaon, Haryana-122002
(APPELLANT)		**(RESPONDENT)**
PAN No. AAECG9819Q		

Assessee by : Sh. Gaurav Jain, Adv. &
Sh. Sudarshan Roy, Adv.
Revenue by : Sh. Anshuman Pattnaik, CIT DR

Date of Hearing: 14.03.2023		**Date of Pronouncement: 19.04.2023**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 23.08.2022 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. That the assessment order passed by the Ld. AO u/s 143(3) r.w.s 144C (13) of the IT Act, 1961 which is ex-facie illegal, perverse, and bad in law.

2. That the Ld. AO grossly erred on facts and in law in assessing income at Rs. 7,76,53,434/- against the returned income of Rs. 28,07,203/-.

3. That the Ld. AO/DRP grossly erred on facts and in law in making disallowance of Rs. 96,89,231/- on ad

hoc basis being 10% of certain expenses by holding that the appellant failed to substantiate its claim and the expenses remain unsubstantiated without appreciating the fact that all the documents/evidence were duly filed before the Ld. AO/DRP.

4. The Ld. AO grossly erred on facts and in law in making disallowance of Rs. 6,51,57,000/- (detailed below) u/s 40(a)(i) on account of the payments made to AEs by exceeding jurisdiction and not following the directions given by the Ld. DRP.

Name of AE	***Nature of Expenses***	***Amount (Rs.)***
Euroestudios India Pvt. Ltd.	*Professional Fee*	*2,01,34,000*
TPF Getinsa Euroestudios SL Spain	*Professional Fee*	*2,31,57,000*
TPF Getinsa Euroestudios SL Spain	*Salary to Expatriates*	*2,18,66,000*
Total		***6,51,57,000***

5. The Ld. AO grossly erred on facts and in law in making the disallowance of Rs. 6,51,57,000/- without providing an opportunity of being heard as directed by the Ld. DRP.

Without Prejudice

6. The Ld. AO grossly erred on facts and in law in making the disallowance of Rs. 6,51,57,000/- without considering the reply filed by the appellant on 30-08-2022 even though no opportunity of being heard was provided to the appellant.

7. The Ld. AO grossly erred on facts and in law in making the disallowance of Rs.2,01,34,000/- (included in the above stated disallowance of Rs. 6,51,57,000/-) on account of the professional fees paid to M/s Euroestudios India Pvt. Ltd. without appreciating the fact that the actual amount paid to M/s Euroestudios India Pvt. Ltd. is Rs. 1,86,33,632/- and not Rs. 2,01,34,000/- on which TDS was duly deducted and deposited by the appellant.

8. The Ld. AO grossly erred on facts and in law in making the disallowance of Rs.2,31,57,000/- (included in the above stated disallowance of Rs. 6,51,57,000/-) on account of the professional fees paid to M/s TPF Getinsa Euroestudios SL Spain without appreciating the fact that the impugned transaction did not, in any case, make available any technical knowledge to the appellant and hence, did not come under the purview of the definition of Fees for technical services (FTS), and therefore, did not warrant any tax deduction at source.

9. The Ld. AO grossly erred on facts and in law in making the disallowance of Rs.2,18,60,000/- (included in the above stated disallowance of Rs. 6,51,57,000/-) on account of the Salary of Expatriates paid to M/s TPF Getinsa Euroestudios SL Spain without appreciating the fact that the same was pure cost to cost reimbursement of the expenses incurred by TPF Spain and hence, did not warrant any tax deduction at source in accordance with the Management Support Service Agreement entered into between TPF Spain and the appellant.

10. The Ld. AO grossly erred on facts and in law I making the disallowance of Rs. 2,18,60,000/- (included in the above stated disallowance of Rs. 6,51,57,000/-) on account of the Salary of Expatriates paid to M/s TPF Getinsa Euroestudios SL Spain without appreciating the fact that the impugned transaction did not, in any case, make available any technical knowledge to the appellant and hence, did not come under the purview of the definition of Fees for technical services (FTS), and therefore, did not warrant any tax deduction at source."

3. The assessee filed return of income on 23.11.2018 declaring total income of Rs.28,07,203/- and claiming a refund of Rs.1,42,97,170/-. The case was selected for limited scrutiny and statutory notice u/s 143(2) of the Income Tax Act, 1961 was issued and duly served upon the assessee.

4. TPF Getinsa Eurostudios S.L. formerly known as Getinsa-Payma S.L is a company incorporated in Spain having a place of business in India. The company established project office in India. During the year under assessment, the Project Office of the Foreign Company was engaged in providing infrastructure consultancy services to National Highway Authority of India (NHAI).

Ad-hoc Disallowance @ 10%

5. The assessee is a Project Office of a foreign company set up in India to provide engineering consultancy services and incurred expenses like rent, professional fee, travelling and conveyance etc during the course of business. During the course of assessment proceedings, the AO raised queries with respect to details of aforesaid various expenses. The assessee had duly furnished the ledger account of all the expenses during the course of assessment proceedings. During the course of assessment proceedings, no specific query raised by AO to furnish vouchers. After receipt of the draft Assessment Order disallowing 10% of the expenses on ad-hoc basis, the evidences of expenses have been furnished before the ld. DRP under Rule 4 of the DRP Rules, 2009. The ld. DRP after calling the remand report confirmed the action of the AO.

6. We find that the assessee provided the project wise ledger of professional fees and copy of agreement along with major invoices from each professional service provider, which are annexed in the paper book, TDS were duly deducted on such payments, which is evident from the ledger account furnished supra, which were enough to substantiate that the expenses

incurred during the year were for business purposes only and no personal expenditure can be said to have been incurred. The ld. DRP confirmed expenses on account of insurance, however, we find that assessee furnished the ledger account along with major invoices, which are annexed in the paper book. The assessee being engaged in engaged in providing infrastructure consultancy services to National Highway Authority of India (NHAI) had to arrange the following insurances as per the conditions of RPF/Main Contract Agreement with NHAI:

"Employer's liability and workers ' compensation insurance in respect of the personnel of the members and of sub consultants in accordance with relevant provisions of applicable law, as well as, with respect to such personnel, any such life, health, personal accident, travel, household or other insurance as may be appropriate;

Professional liability insurance with a minimum coverage equal to total their individual contract values as per the agreement with the client;

Third party motor vehicle liability insurance as required under Motor Vehicles Act, 1988 in respect of motor vehicles operated in India by the Consultant or their Personnel or any Sub-consultants or their Personnel for the period of services; and

Third Party liability insurance, with adequate coverage, as specified by the client per year for the period of Services;"

7. The insurance expenses were entirely incurred to fulfill the contractual liability as per the agreement with NHAI.

8. With regard to the expenses on account rent, we find that the revenue argued that the premises were shared with other concerns and the cost was recovered in proportion to turnover of the concern, however, such allocation was not backed by any documentary evidence. It is submitted that the Foreign Head office of the assessee had a fully owned Indian Subsidiary Company by the name of Euroestudios India Pvt. Ltd. The Subsidiary shared the same office address along with assessee and had much lesser business compared to the Foreign Branch office, and there were no employees of the subsidiary. Since this address was used for communication purpose and at times for meetings by the Indian Subsidiary, the management had decided to share rent and maintenance cost vide Internal Memorandum of understanding (IMOU) and this sharing of rent was based on turnover and was recovered from the subsidiary each month through issuances of debit notes. The amount of rent recovered from subsidiary is verifiable from the audited financials at note no. 14 under "Other Income". During the year under consideration, the assessee recovered a total amount of Rs. 3,78,691/- from rent, maintenance and ancillary expenses from its Indian Subsidiary and returned the same as Other Income.

9. With regard to other expenses, the revenue held that there was no name of the assessee on the invoices furnished by the assessee. The assessee furnished the summary of "Other expenses" incurred during the year along with sample supporting invoices and the name of the assessee clearly mentioned in the invoices as 'Euroestudios SL', also in the Tax invoice furnished by the assessee PAN of the assessee was also

mentioned along with GSTIN. The name 'Euroestudios S.L.' appearing on the invoice, it is submitted that TPF Getinsa Euroestudios S.L., formerly known as Getinsa-Payma S.L. incorporated in Spain having place of business in India. The company, Getinsa-Payma S.L. was merged in April 2016 (FY 2016-17) with Euroestudios S.L. and the new name of the company was TPF Getinsa Euroestudios S.L., therefore, in few invoices submitted by the assessee before the AO, name appearing on the invoices was as 'Euroestudios S.L.

10. Hence, we hold that no disallowance of expenses on ad-hoc basis is called for. Reliance is placed on the decision of the Co-ordinate Bench of ITAT in the case of M/s. Cheminova India Ltd. versus ACIT 10(1) in ITA no. 5282/Mum/2014 wherein the ITAT categorically held that without pointing out specific defects in the documents furnished by the assessee, disallowance made on the ground that the assessee failed to furnish all the documentary evidence is not acceptable. The relevant extract of the decision of ITAT is hereby reproduced:

"15. We have heard the rival submissions on this issue and perused the record. We notice that the assessing officer has made ad-hoc disallowance out of manufacturing and other expenses on the reasoning that the assessee did not furnish all the evidences in support of their claim. At the time of hearing, the Ld. A.R. submitted that the assessee has furnished ledger account copies of all the expenses along with sample copies of invoices and vouchers in about 20 volumes of spiral binding. He further submitted that the assessing officer, during the course of remand proceedings, has examined those evidences mid did not ask for any further details. The Ld. A.R. also submitted that the evidences in support of expenses run into

several volumes and-if the AO had insisted on production of entire evidences, the assessee mould have made arrangements to transport all of them to the office of the AO.

16. In our view, there is merit in the submissions so made by the Ld. A.R. In case of companies, which are having large volume of transactions, it would he practically difficult to bring all the evidences in one go. Hence the ledger account copies are furnished to the tax authorities and normally they are verified on a test check basis. In the instant case, the assessee has furnished copies of invoices and vouchers on a sample basis and it is stated that the assessing officer did not find any defects therein after carrying out examination."

11. Hence, keeping in view the facts of the case and the judgments, the appeal of the assessee on this ground is allowed.

12. The details of disallowance u/s 40(a)(i) owing to defaulting deduction of tax u/s 195 are as under:

Professional Fee Payment-40(a)(i):

a. Professional Fee to Eurostudios India Private Limited

The assesses, during the year under review, had paid Professional Fee to Eurostudios India Private Limited amounting to Rs.1,86,33,632/- as against Rs.2,01,34,000/- as pointed out by the Assessing Officer. This difference was also pointed out during the scrutiny assessment proceedings and the Ledger relating to this expense along with supporting invoices were filed with the e-filing portal. The assessee had also deducted and deposited TDS on the entire expenditure and TDS return of the assessee was also filed to support the same. It was contended that these expenses were made vide agreement between the two entities which was provided.

b. <u>Professional Fee to TPF Gentinsa Eurostudios S.L. Spain amoutnign to Rs.2,31,56,815/-:</u>

The assessee, during the year under review, had paid Professional Fee to TPF Gentinsa Eurostudios S.L. Spain amounting to Rs.2,31,56,815/-. The ledger and corresponding invoices and evidence were already filed in the e-filing portal. The assessee had also deducted and deposited TDS u/s 195 on the entire expenditure and TDS returns of the assessee was also filed to support the same.

c. <u>Salary expenses of Expatriates to TPF Getinsa Eurostudios SL Spain, amounting to Rs.2,18,66,041/-:</u>

There were several foreign expatriates working in India, during the year under review. Most of these expats were residents and were providing services as per mutual agreements/Contract, arrangements. Since, they were residents in India, hence they were receiving salaries in India and were filing their Tax Returns in India. Hence, Tax TDS has already being deducted and deposited on their income earned in India, However, few expatriates, were providing services and were not residents in India. The AO held that even their salaries were subjected to provisions u/s 195.

d. <u>Bank Charges and other expenses void to TPF Getinsa Enrostudios SL Spain amounting to Rs.27,10,973/-:</u>

There were small payments made to the associate concern for sundry expenses. These were principally reimbursements of Travelling, hotel, fooding & lodging of foreign directors for their visits to Indian Project Office. Also the associate concern was reimbursed the Bank Charges which they bore on behalf of the Indian Project Office. No TDS was applicable on these expenses hence, TDS was neither deducted nor deposited on the same. On going through the expenses, we hold that no disallowance on this account is called for.

13. In nutshell, the assessee has objected to addition of Rs.6,78,67,973/-, disallowing the payments of professional fee/salary made by the assessee to its AEs treating the same as FTS, on which TDS u/s 195 has not been deducted by the assessee.

14. In the remand report sent to the ld. DRP, the Assessing Officer commented as under:

"a. Vide notice dated 06.05.2022, the assessee was asked to provide copy of agreement with Eurostudios India Pvt. Ltd., details of goods/services received from the said concern, details of professional services prefect wise and complete invoice received from the above concern. The assessee did not provide copy of contract with the said concern and no copy of invoice was produced though it was specifically requested to provide complete invoices from the above concern.

b. With respect to payment to M/s TPF Getinsa EuroStudios SL Spain, the assessee vide notice dated 06.05.2022, was requested to provide copies of MoU/Agreement, details of services received project wise etc. The internal MoU filed had no reference to MoUs signed with Segmental Consulting and Infrastructure Advisory Pvt. Ltd. and infrasys Consulting and Advisory Pvt. Ltd. on the basis of which invoices have been raised on the project office.

c. As regards, salary of expatriates paid to HO, the assessee filed copy of ledger account of expats salary and also submitted two invoices. A perusal of invoices revealed that no basis has been given for raising the invoice. No details have been provided as to how many hours/days were put in for work of PO. No log books or other records which could justify allocation of expats salary to Indian operations have been filed. Thus, in absence of any basis which

could be relied upon to compute cost of services rendered by expatriates for Indian PO, such expense cannot be allowed.

d. The assessee has not filed complete copies of invoices raised by Banks on the HO and corresponding invoice raised by HO on the Indian PO. The assessee merely filed two invoices. A perusal of such invoices reveal that one of the invoices was dated 31.03.2017 which does not pertain to FY 2017-18 and thus, not allowable expenditure for the year under consideration. In absence of complete documentary evidences, expenses on account of bank guarantee charges are not allowable."

15. Based on the remand report, the ld. DRP affirmed the order of the Assessing Officer.

16. Before us, the ld. AR furnished that ledger account alongwith invoices raised by Eurostudios clearly establishing nature of services and Form 16, establishing due compliance of TDS thereon. The actual amount paid to Eurostudios India Pvt. Ltd. was Rs. 1,86,33,632/- on which TDS was duly deducted and deposited by the assessee which the AO wrongly considered as Rs. 2,01,34,000/-.

17. Since, the provisions of TDS has been duly observed on the payment of Rs.1,86,33,632/-, no addition is called for on this account.

18. With regard to payment to TPF Getinsa Eurostudios S.L. Spain on account of professional fee expenses of Rs.2,31,57,000/-, the facts reveal the following:

- NHAI had awarded independent contracts jointly to TPF Spain and certain other Indian Service-providers i.e. Segmental Consulting and Infrastructure Advisory Pvt. Ltd. ("Segmental") and Infrasys Consulting Pvt. Ltd. ("Infrasys") with independent scope of services to be provided by each party / partner to the customer i.e. NHAI.

- In pursuance to the aforesaid contract awarded by NHAI to TPF Spain/head-office and other service-provider, head-office entered into an independent agreement with such Indian companies to further document the relevant roles and responsibilities / terms and conditions of scope of work and consideration of each party i.e. TPF/head-office and the other service-provider, which is annexed in paper book at pages 496-526.

- In terms of the aforesaid agreement, the fee to be received from NHAI was separately identified for the functions performed by both the parties. However, as per the terms of the Master Contract entered with NHAI, TPF Spain was to be considered as the lead member and was to provide insurances for each contract.

- The said aspect was noted in Clause -12 of the Agreement entered between TPF and India service-provider.

- In view of the aforesaid clause, since certain expenses/costs were incurred by TPF Spain for the entire contract, the same was to be reimbursed/compensated by other Indian service-provider / Segmental, at negotiated

percentage of fee received by the Indian Service Provider/Segmental from NHAI.

- The aforesaid management fee was paid by Segmental to the assessee, after due deduction of tax at source, which was in turn paid back on, as it is basis, to TPF Spain. The aforesaid receipts, aggregated to Rs. 2,30,88,569/-, which were credited to profit and loss account and included under the head of 'other income' at Note 14 of the audited financial statements, at page 17 of the paper book. The corresponding payment aggregating to Rs. 2,31,57,000/- (minor difference on account of currency exchange) was debited to the profit and loss account.

19. Since the aforesaid amount was only receipt from Indian service provider and further payment to head-office, whereby the entire receipts, received after deduction of tax at source, has been fully reflected as income on the receipt side, the forwarding payment to head-office deserved to be allowed as deduction. The nature of said payment is reflected by the MOUs between head-office and Indian service provider, like Segmental, attached at pages 496-526 of the paper book, as also invoices in relation to the same raised by head-office upon the assessee, seeking re-imbursement of the same. The entire receipt from Indian Service Provider, is included under the head other income / Management Fee at Note 14 of the audited financial statements. In view of the above, the disallowance of said expenditure, which is otherwise correspondingly included in other income, deserves to be allowed as deduction.

20. As regards TDS, the aforesaid management fee did not involve any provision of technical knowledge / knowhow of TPF Spain to Segmental much less to assessee, who was only collecting the said fee from Segmental for further remittances to Head Office/ TPF Spain. In view of these facts, the income in the nature of fee for technical services is not taxable in India if the same did not make available technical knowledge or know-how of such non-resident recipient, as per the provisions of Article-13 of INDO-SPAIN DTAA read with protocol thereof.

21. Thus, there was no default on part of the assessee in not deducting tax at source (TDS) on the aforesaid remittance.

22. In the result, the action of the revenue on the addition made on account of professional fee to Eurostudios India Pvt. Ltd. and professional fee to TPF Spain are liable to be deleted.

Regarding Salary to Expatriates of TPF Getinsa Eurostudios SL Spain amounting of Rs. 2,18,66,000

23. In this respect, it was submitted,

- That the assessee has been awarded engineering consultancy contracts by NHAI. For the purposes of execution of the said contracts, the assessee inter alia receives services from the head-office, i.e., TPF Getinsa Euroestudios SL Spain, wherever some specialist help/services is required from the head-office, in accordance with and terms of the agreement dated 19.04.2017 entered with head- office. In relation thereto, the head-office sends its employees on deputation, on

request of the assessee, who render engineering services to NHAI.

- Akin to the action of disallowance of payment to Eurostudios discussed supra, the captioned amount of Rs.2,18,66,000/- was also disallowed, in the draft assessment order, for want of details of said expenditure and requirement of TDS, which were otherwise part of assessment record.

- In the proceedings before DRP, the assessee furnished evidences, including additional evidences, like, agreement with Head-office, nature of engineering services, name of engineers, ledger account, invoices raised by head-office, etc.

- The DRP sent the matter to the AO for remand report. In the remand proceedings, the assessing officer raised certain further queries, which were replied by the assessee alongwith the details required. In the remand report, the assessing officer, without correctly appreciating the documents submitted, reiterated request for disallowance attributing failure on the assessee to furnish complete documentation, which was contrary to record.

- The DRP in its order accepted the remand report of the assessing officer, that the assessee should have furnished the complete details and directed the AO to take decision on the basis of evidences on record.

- The AO, in the final assessment order made the disallowance, including for want of TDS, which has been challenged in the present appeal.

24. The ld. AR argued that pursuant to the agreement dated 29th April, 2017 with the head-office, the head- office had agreed to provide management/engineering services to the assessee, which were mainly required for execution of contracts entered by the assessee with NHAI in relation to engineering consultancy services. In pursuance of the agreement, as and when services were required, the head-office provided services either off-shore or through deputation of employees, for which re-imbursement on the basis of actual cost to company of relevant employees, in accordance with the aforesaid service agreement, was sought from the assessee. The invoice so raised contained all the details of the employee, nature of service rendered, and the project against which service was rendered, which was backed by the details of time spent by the relevant employee available in the intranet of the head office.

25. The ld. AR argued that the aforesaid expenditure did not warrant any tax deduction at source, since the deployment of expat did not make available any technical knowledge to the assessee and hence do not come under the purview of the definition of Fees for technical services (FTS) as per the provisions of Article 13 of the India - Spain Double Taxation Avoidance Agreement (DTAA) read with the MFN clause.

26. It was argued that TPF Spain is a resident of Spain and can have benefit of the provisions of India-Spain DTAA, Article 13 of the India - Spain DTAA, which deals with payment of fees for

technical services (FTS). As per the said Article, if the payment made fulfils the definition of FTS, then TDS at the relevant rate would be required to be withheld by the Assessee.

27. The said Article defines the term "FTS" as follows:-

"The term "fees for technical services" as used in this Article means payments of any kind to any person other than payments to an employee of the person making the payments and to any individual for independent personal services mentioned in Article 15 (Independent Personal Services), in consideration for the services of a technical or consultancy nature, including the provision of services of technical or other personnel."

28. The arguments of the ld. AR in writing are as under:

"1) It is pertinent to refer to the protocol of the India - Spain DTAA which also forms part of the DTAA. The relevant extract from the protocol is reproduced herein below for your goodself's ready reference -

"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 1-1-1990, 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."

m) Your goodself would humbly appreciate that the India-Spain DTAA contains a Most-Favoured Nation (MFN) clause, which forms an integral part of the DTAA and essentially states that if India enters into any other DTAA with any OECD member country and agrees on either a restricting scope of Article 13 or a lower rate of taxation with the other OECD member country then the same scope or rate of tax shall be imported into the India-Spain DTAA.

n) It is humbly submitted that India, inter alia, has entered into DTAAs with the following OECD member countries, which provide a restrictive scope of definition of FTS –

- *United Kingdom;*
- *Portuguese Republic (Portugal);*

o) As per the provisions of paragraph 4 of Article 13 of the India - UK DTAA, the term FTS means as follows –

"For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or

are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article 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."

p) Therefore, as per the aforesaid provisions, unless any technical knowledge / experience, etc. is not made available to the recipient of the services, the technical / consultancy services cannot come under the purview of FTS and thus, cannot be made taxable in India.

q) In the instant case of the Appellant, it is respectfully submitted that TPF Spain has rendered services in the nature of engineering services, beneficiary of which was the customer, i.e., NHAI, which in no manner can be said as making available technical or consultancy knowledge to the Appellant so as to enable it to apply the said knowledge independently in its business. It is submitted that in order to come under the ambit of FTS as per the definition of Article 13 of India - UK DTAA, the provision of services should enable the recipient to make use of the technical knowledge, etc. by itself i.e. without taking help from the provider of the services. This is not the case in the instant case. Therefore, the current services could not be considered as FTS and thus, the same is not taxable in India in the hands of TPF Spain. Considering the reasons mentioned above, no withholding of tax is warranted in the instant case.

15. Reliance is placed on the following decisions, where the legal position with respect to the test/condition of 'make available' has been settled:

- *DIT vs. Guy Carpenter & Co. Ltd.: 346 ITR 504 (Del.)*
- *CIT vs. DeBeers India Minerals (P.) Ltd.: 346 ITR 467 (Kar.)*

16. Reliance in particular, is placed on the decision of the Hon'ble Mumbai Bench of the tribunal in the case of Buro Happold Limited versus DCIT, ITA no. 1296/Mum./2017 wherein, the Hon'ble Tribunal in view of the India-UK DTAA held that technical design/ drawing/ plans which are project specific and cannot be utilized by the recipient in future cannot be said to have made available any technical knowledge / experience / skill / knowhow or processes. The relevant extract of the said decision is mentioned hereunder:

"19. Undisputedly, in the present case, the amount received by the assessee, which has been treated as fees for technical services is towards supply of technical drawings/designs/plans. On a careful reading of Article-13(4)(c) of the India-UK tax treaty it becomes clear that the words "or consists of the development and transfer of a

technical plan or technical design", appearing in the second limb has to be read in conjunction with "make available technical knowledge, experience, skill, knowhow or processes". The reasoning of the Assessing Officer that the second limb of Article- 13(4)(c) of the India-UK tax treaty has to be read independently, in our view, cannot be the correct interpretation o f the said Article. As per the rule of ejusdem generis, the words "or consists of the development and transfer of a technical plan or technical design" will take colour from "make available technical knowledge, experience, skill, knowhow or processes".

20. Having held so, now it is necessary to examine whether by supply of technical, designs, drawing, plans, the assessee has made available technical knowledge, experience, skill, knowhow or processes. As per the settled principle of law, technology is considered to have been made available when the recipient of such technology is competent and authorized to apply the technology contained therein independently as an owner without depending upon the service provider. The recipient of technology should be able to make use of technical knowledge, experience, skill, knowhow or processes by himself in his business or for his own benefit and without recourse to the service provider in future and for this purpose a transmission of the technical knowledge, experience, skill, knowhow or processes, from the service provider to the service recipient is necessary. In other words, the technical knowledge, experience, skill, knowhow or processes, must remain with the service recipient even after rendering of the services has come to an end. The sendee recipient must be at liberty to use the technical knowledge, experience, skill, knowhow or processes in his own right Undisputedly, in the present case, as revealed from the material on record, the technical desigti/drazvings/plans supplied by the assessee to the Indian entity are project specific, hence, cannot be used by the Indian entity in any other project in future. Therefore, the claim o f the assessee that it has not made available any technical knowledge, experience, skill, knowhow or processes while developing and supplying the technical drawings/designs/plans has to be accepted. If the Department is of the view that through development and supply of technical designs/drawings/plans the assessee has made available

technical knowledge, experience, skill, knowhow or processes, it is for the Department to establish such fact through proper evidence. The assessee certainly cannot be asked to prove the negative. It is worth mentioning, while deciding a dispute of identical nature concerning fees for technical services as per India-USA tax treaty under which definition offess for included services as per Article-12(4)(b) is identically worded like Article 13(4)(c) of the India-UK tax treaty, the Tribunal, Pune Bench, in Gera Developments Pvt. Ltd. v/s DCIT, [2016] 160 ITD 439 (Pune), has held that mere passing off project specific architectural, drawings and designs with measurements does not amount to making available technical knowledge, experience, skill, knowhow or processes. The Tribunal held that unless there is transfer of technical expertise skill or knowledge along with drawings and designs and if the assessee cannot independently use the drawings and designs in any manner whatsoever for commercial purpose, the payment received cannot be treated as fees for technical sendees. Though, we have taken note of other decisions cited by the learned Authorized Representative we do not intend to deliberate further on them. As regards the decisions cited by the learned Departmental Representative, we find them to factually distinguishable, hence, not applicable to the present appeal. In any case of the matter, the Department has failed to establish on record that through development and supply of technical designs / drawings /plans the assessee has made available technical knowledge, experience, skill, knowhow or processes to the sendee recipient so as to bring the amount received within the meaning of fees for technical services under Article-13(4) (c) of the India-UK Tax Treaty. Therefore, in our considered opinion, the amount received by the assessee has to be treated as business profit and in the absence of a PE in India, it cannot be brought to tax in India."
[Emphasis supplied]

r) As regards import of beneficial provisions of other by virtue of presence of MFN clause, reliance is placed on the following decisions:

s) In this regard, attention of your honours is invited to the decision of Hon'ble Delhi Bench of ITAT in the case of M/s. Walter Kluwer Financial

Services Belgium NV versus DCIT; ITA no. 8267/Del/2019 wherein the Hon'ble Bench has imported the meaning of FTS as provided under Article 13(4)(c) of India-UK tax treaty while interpreting the meaning provided under India-Belgium Tax Treaty and held as under:

"12. Therefore, the only other aspect which remains to be seen is whether 50% of the amount received can be treated as FTS under India - UK DTAA. Firstly, we have held that the nature of sendees provided by the assessee do not give any impression that they are not in the nature of managerial services. Even, assuming that part of such services are in the nature of consultancy sendees, as held by learned Commissioner (Appeals), it has to be seen whether it qualifies as FTS under India-UK DTAA, under which, the meaning of FTS is more restrictive than what is provided under India-Belgium tax treaty. As discussed earlier, Article 13(4)(c) of India-UK tax treaty says that if in course of rendering services the service provider makes available technical, knowledge, experience, skill, knowhow, or processes etc then it can be regards as FTS. The expression 'make available' has not been defined either under the treaty provisions or under the Act. However, the expression 'make available' has been judicially interpreted in various decisions. As per the ratio laid down 'make available' would mean imparting of technical knowledge, skill, knowhow, etc. which enables the recipient of service to apply such technical knowledge, experience, skill, knowhow etc. independently in exclusion of the owner of such technical knowledge, experience, skill, knowhow etc. In the facts of the present appeal, admittedly, except some general observations of the Departmental Authorities that the assessee has made available technical knowledge, skill, experience, knowhow, etc. there is no material on record to demonstrate such fact. Therefore, in our view, the make available condition of Article 13(42) (c) of India-UK tax treaty has not been satisfied. In any case of the matter, attribution of 50% of the receipts to the alleged consultancy services is purely on estimate and without any reasonable basis. In view of the aforesaid, we are inclined to delete the addition sustained by learned Commissioner (Appeals)."

[Emphasis supplied]

t) Reference can be made to a judgment of Hon'ble ITAT Pune Bench in the case of GRI Renewable Industries S.L. v. ACIT(IT) [2022] 140 taxmann.com 448 (Pune - Trib.) dated 15.02.2022 wherein it was held that the provisions of Article 12 of India - Portugal DTAA can be imported into the provisions of Article 13 of India - Spain DTAA read with the protocol contained in India-Spain DTAA for applying the lower rate of tax deduction. Relevant extract from the ruling is as follows –

"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.

u) It is also submitted that recently the Central Board of Direct Taxes (CBDT) has issued a 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. For the purposes of giving benefit under the MFN clause, one of the conditions in the said circular 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 under section 90 of the Act.

v) In this regard, reference can be made to the aforesaid ruling of the Hon'ble Pune Bench (supra) which also took cognizance of the said circular and essentially held that –

It is a trite law that a circular issued by the CBDT is binding on the Assessing Officer and not on the Assessee or the Tribunal or other appellate authorities;

Circular cannot operate retrospectively to the transactions taking: place in any period anterior to its issuance.

For your goodself s ready reference, relevant extracts of the ruling are as follows –

"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 v. Hero Cycles (P.) Ltd. [1997] 94 Taxman 271/228 ITR 463 (SC) as reiterated in CCE v. Ratan Melting & Wire Industries 2008 taxmann, com 1649 (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 dated 03.02.2022, cannot be invoked for the year under consideration, which is much prior to the CBDT circular of the year 2022."

It has been held likewise in the decision passed by Hon'ble Delhi ITAI in the case of DCIT v Converteam Group [TS-779-ITAT-2022(DEL)].

Therefore, the aforesaid decision of the Hon'ble ITAT expounds the current legal position and clearly states that the impugned circular is not binding the periods anterior to the date of issuance and the application of MFN clause in a tax treaty is automatic.

To the same effect, reference can be made to the following decisions of Hon'ble High Courts and Tribunals wherein similar finding is given and it has been held that the MFN clause (for FTS, Royalty, Dividend, etc.) forms an integral part of the DTAA and has an automatic application –

- *Steria India Ltd. v DCIT[2016] 72 taxmann.com 1 (Delhi HC);*
- *Concentrix Services Netherlands B.V. v ITO[2021] 434 ITR 516 (Delhi HC);*
- *Optum Global Solutions International B.V. v. DCIT[2021] 434 ITR 516 (Delhi HC);*
- *Flipkart Internet R Ltd. v DCIT [2022] 139 taxmann.com 595 (Karnataka HC);*
- *Perfetti Van Melle ICT & BV v. ACIT [2022] 138 taxmann.com 337 (Delhi - Trib.);*
- *Soregam SA v. DCIT [2019] 101 taxmann.com 94 (Delhi - Trib.);*
- *DDIT v. Bajaj Allianz General Insurance Co. Ltd.[2015] 55 taxmann.com 305 (Pune*
- *Trib.);*
- *DCIT v. Ford India Ltd. [2017] 78 taxmann.com 5 (Chennai - Trib.);*
- *Rajinder Kumar Aggarwal (HUF) v. DCIT [2021] 131 taxmann.com 252 (Delhi -Trib.);*
- *Magotteaux International SA [TS-91-ITAT-2022(Del)];*

Therefore, considering the judicial decisions and the contentions raised herein above by the Appellant, there was no requirement to deduct the tax at source in the instant case."

29. Further, the ld. AR argued that the AO made addition on account of the salary of Expatriates paid to M/s. TPF Getinsa

Eurostudios SL Spain without appreciating the fact that the same was pure cost to cost reimbursement of the expenses incurred by TPF Spain and hence, did not warrant any tax deduction at source in accordance with the Management Support Services Agreement entered into between TPF Spain and the Assessee.

30. The ld. DR relied on the orders of the ld. DRP.

31. We have gone through the orders of the Revenue and the order of the ld. DRP on the issue of salary expenses to expatriates and circular no. 3/2022 of CBDT dated 03.02.2022. In this case, the AO made addition of Rs. 2,18,66,000/- on account of the salary of Expatriates paid to M/s. TPF Getinsa Eurostudios SL Spain and the same was pure cost to cost reimbursement of the expenses incurred by TPF Spain and hence, did not warrant any tax deduction at source. As per agreement dated 19.04.2017 between TPF Spain and the assessee, TPF Spain provides the services such as Planning of projects, institutional capacity building, feasibility studies, detailed designs of the project, construction supervision and comprehensive project management in relation to Civil Construction and Engineering work in India. In consideration to the aforesaid services, as evident from Article 4 of the agreement, TPF Spain invoices the internal costs as well as reimbursable costs (i.e. the salary costs of the expats deployed in India) on a cost to cost basis without any profit element.

32. Therefore, in the instant case, it can be said that TPF Spain has incurred costs on behalf of the assessee in terms of the salary of the expatriates for assisting the Assessee in

executing services to NHAI. The assessee had only reimbursed actual cost of such employees on the basis of time spent and time cost of such employees, which was incurred by head-office. No markup has been charged by TPF Spain and there is no profit element in the said costs. Also, the provision of the act seeks to levy income tax in respect of the 'income' of every person. The term 'income' has been exhaustively defined to include various types of gains, profits, accretion, value addition, etc. It is submitted that in absence of any profit -related element, a receipt cannot be classified as income in the hands of recipient of the money. In this scenario, any reimbursement cannot be treated as income, and therefore, cannot be subject to Income-tax.

33. The Hon'ble High court of Karnataka in the case of Flipkart Internet P. Ltd v DCIT [2022] 139 taxmann.com 595 (Karnataka HC) held that the assessee would be eligible for Nil tax deduction certificate under section 195(2) of the Act with respect to payments of salaries of the deputed expatriate employees which were in the nature of "pure reimbursements".

34. Reliance is being placed on the judgment of Hon'ble Supreme Court in the case of DIT vs. A.P. Moller Maersk A S 293 CTR 1 (SC) wherein the Hon'ble Court while analyzing the taxability of pro-rata IT costs recharged to Indian agents by a foreign shipping company, held that once the character of the payment was found to be in the nature of reimbursement of expenses, it could not be charged to tax in India. In this case, the foreign shipping company had furnished its calculation of

total costs and their pro-rata division among the agents which was done without any mark-up.

35. Therefore, considering the aforementioned judicial precedents in the extant cases, we hold that no withholding of tax is warranted from the payments of Rs.2,18,66,000/-. The appeal of the assessee on this ground is allowed.

36. In the result, the appeal of the assessee on all the grounds is allowed.

Order Pronounced in the Open Court on 19/04/2023.

Sd/-	Sd/-
(Yogesh Kumar US)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 19/04/2023
Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR