

I.T.A No.218/2014
C/W I.T.A NO.220/2014
I.T.A NO.222/2014
I.T.A NO.224/2014

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF JANUARY 2023

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MR. JUSTICE T.G. SHIVASHANKARE GOWDA

I.T.A NO.218 OF 2014

C/W

I.T.A NO.220 OF 2014

I.T.A NO.222 OF 2014

I.T.A NO.224 OF 2014

IN I.T.A NO.218 OF 2014

BETWEEN:

1. THE DIRECTOR OF INCOME-TAX
INTERNATIONAL TAXATION
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BANGALORE.
2. THE DY. DIRECTOR OF INCOME-TAX
(INTERNATION TAXATION)
CIRCLE-1(1)
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BANGALORE.APPELLANTS

(BY SHRI. K.V. ARAVIND, STANDING COUNSEL)

AND:

IBM INDIA PRIVATE LIMITED
NO.12, SUBRAMANYA ARCADE
BANNERGHATTA MAIN ROAD
BANGALORE-560 093 ...RESPONDENT

(BY SHRI. T. SURYANARAYANA, SENIOR ADVOCATE FOR
SMT. TANMAYEE RAJKUMAR, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED: 24/01/2014 PASSED IN ITA NO.491/BANG/2013, FOR THE ASSESSMENT YEAR 2008-2009, PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN AND ETC.

IN I.T.A NO.220 OF 2014

BETWEEN:

1. THE DIRECTOR OF INCOME-TAX
INTERNATIONAL TAXATION
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BANGALORE.
2. THE DY. DIRECTOR OF INCOME-TAX
(INTERNATIONAL TAXATION)
CIRCLE-1(1)
RASHTROTHANA BHAVAN
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BANGALORE.APPELLANTS

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IBM INDIA PRIVATE LIMITED
NO.12, SUBRAMANYA ARCADE
BANNERGHATTA MAIN ROAD
BANGALORE - 560 093. ...RESPONDENT

(BY SHRI. T. SURYANARAYANA, SENIOR ADVOCATE FOR
SMT. TANMAYEE RAJKUMAR, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF THE INCOME TAX ACT, 1961 ARISING OUT OF ORDER DATED: 24/01/2014 PASSED IN ITA No.493/BANG/2013, FOR THE ASSESSMENT YEAR 2009-2010, PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN AND ETC.

IN I.T.A NO. 222 OF 2014

BETWEEN:

1. THE DIRECTOR OF INCOME-TAX
INTERNATIONAL TAXATION
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BANGALORE.

2. THE DY. DIRECTOR OF INCOME-TAX
(INTERNATIONAL TAXATION)
CIRCLE-1(1)
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BANGALORE.APPELLANTS

(BY SHRI. K.V. ARAVIND, STANDING COUNSEL)

AND:

IBM INDIA PRIVATE LIMITED
NO.12, SUBRAMANYA ARCADE
BANNERGHATTA MAIN ROAD
BANGALORE - 560 093.RESPONDENT

(BY SHRI. T. SURYANARAYANA, SENIOR ADVOCATE FOR
SMT. TANMAYEE RAJKUMAR, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF THE
INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:
24/01/2014 PASSED IN ITA No.495/BANG/2013, FOR THE
ASSESSMENT YEAR 2010-2011, PRAYING TO FORMULATE
THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN
AND ETC.

IN I.T.A NO. 224 OF 2014

BETWEEN:

1. THE DIRECTOR OF INCOME-TAX
INTERNATIONAL TAXATION
RASHTROTHANA BHAVAN

NRUPATHUNGA ROAD
BANGALORE.

2. THE DY. DIRECTOR OF INCOME-TAX
(INTERNATIONAL TAXATION)
CIRCLE-1(1)
RASHTROTHANA BHAVAN
NRUPATHUNGA ROAD
BANGALORE.APPELLANTS

(BY SHRI. K.V. ARAVIND, STANDING COUNSEL)

AND:

IBM INDIA PRIVATE LIMITED
NO.12, SUBRAMANYA ARCADE
BANNERGHATTA MAIN ROAD
BANGALORE - 560 093.RESPONDENT

(BY SHRI. T. SURYANARAYANA, SENIOR ADVOCATE FOR
SMT. TANMAYEE RAJKUMAR, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF THE
INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:
24/01/2014 PASSED IN ITA No.497/BANG/2013, FOR THE
ASSESSMENT YEAR 2011-2012, PRAYING TO FORMULATE
THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN
AND ETC.

THESE ITAs, HAVING BEEN HEARD AND RESERVED
FOR JUDGMENT ON 07-11-2022 COMING ON FOR
PRONOUNCEMENT OF JUDGMENT, THIS DAY,
P.S. DINESH KUMAR J., PRONOUNCED THE FOLLOWING:-

JUDGMENT

These appeals by the Revenue, directed against common order passed by the ITAT¹ dated January 24, 2014 in ITA No. 491/Bang/2013 and connected cases have been admitted to consider following questions of law:

1. *Whether on the facts and in the circumstance of the case, and in law the Tribunal was correct in holding that payroll services rendered by IBM Philippines to the assessee is not Technical Services but constitute business profits and hence Section 195 of the Act is not attracted?*
2. *Whether on the facts and in the circumstance of the case, and in law the Tribunal was correct in holding that IBM Philippines has rendered services to the assessee in the course of business carried on by it and hence payment received is business profits in the hands of the IBM Philippines and the same is not taxable in India as the recipient company has no permanent establishment in India?*
3. *Whether on the facts and in the circumstance of the case, and in law the Tribunal was correct in holding that the DTAA between India and*

¹ Income Tax Appellate Tribunal.

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Philippines does not define Fee for Technical Services and hence the definition of Fee for Technical Services under the Income Tax Act cannot be applied in view of Section 90 of the Act?

4. *Whether on the facts and in the circumstance of the case, and in law the Tribunal was correct in holding that the Assessing Officer was not in levy of interest under Section 201(1) of the Act?*

2. Briefly stated the facts of the case are, Assessee is a company engaged in the business of information technology services. IBM USA had entered into a global arrangement with Procter and Gamble, USA ('P&G USA' for short) for rendering payroll related services to P&G USA. In terms of a companion agreement, IBM India had entered into an agreement with P&G India. The services to be rendered by IBM India to P&G India was outsourced to IBM Philippines. In addition, IBM India had also outsourced certain human resource services to IBM Philippines for the project.

3. In his order dated September 14, 2012 the Assessing Officer has recorded that the Assessee had made payments to IBM Business Services, Philippines for payroll services without deducting tax at source. The AO² concluded that in respect of payments made towards FTS³ TDS ought to have been deducted under Section 195 of the Income Tax Act, 1961 (the Act for short). Assessee was treated as 'assessee in default' under Section 201 of the Act. The CIT(A)⁴ confirmed AO's order. Assessee challenged the said order before the ITAT⁵. By the impugned order, the ITAT has allowed the appeal holding that the payments made by the assessee were not chargeable to tax under the India-Philippines DTAA⁶ and hence, no tax was

² Assessing Officer

³ Fees for Technical Services

⁴ Commissioners of Income Tax (Appeals)
vide order dated February 2, 2013.

⁵ Income Tax Appellant Tribunal.

⁶ Double Taxation Avoidance Agreement

required to be deducted. Hence, this appeal by the Revenue.

4. Shri. K.V Aravind, Learned Senior Standing Counsel for the Revenue, assailing the impugned order submitted that:

- the service rendered by IBM Philippines falls under the category of managerial and consultancy services. Data management is also one of the services rendered and it would fall in the category of 'technical services'.
- that ITAT has erroneously construed that services rendered by IBM Philippines is in the course of business and the payment received is business profit in the hands of IBM Philippines;
- the ITAT has proceeded to hold that FTS is not defined under DTAA. However, the

definition of FTS cannot be applied in view of Section 90 of the Act;

- the ITAT has failed to consider that the services rendered by IBM Philippines are technical in nature as per Explanation 2 to Section 9(1)(vii) of the Act and therefore, the income is deemed to accrue in India under Section 5(2)(b) of the Act;

5. In substance, Revenue's case is, the payments made to IBM Philippines is for technical services and cannot be treated as business profits.

6. Opposing the appeal, Shri. Suryanarayana, Learned Senior Advocate for Assessee submitted that:

- in terms of the companion agreement, IBM India has entered into an agreement with P&G India and IBM India has outsourced the

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services to be rendered by IBM Philippines.

IBM Philippines was not rendering any technical service to IBM India. For the services rendered to P&G India on behalf of the assessee, assessee was paying the service charges to IBM Philippines. Therefore, it was 'income earned' in the hands of IBM Philippines;

- as per Section 90(2) of the Act, the provisions of the Act or DTAA whichever is more beneficial to the assessee has to be applied. In support of his contention, he relied upon *Union Of India v. Azadi Bachao Andolan*⁷.

7. With the above submissions he prayed for dismissal of these appeals.

8. We have carefully considered rival contentions and perused the records.

⁷ [2003] 132 Taxman 373 (SC)

9. Undisputed facts of the case are, assessee has entered into an agreement with P&G India to render certain services. It has outsourced the said assignment to IBM Philippines. Assessee pays to the IBM Philippines from out of the amount which it receives from P&G India. As far as IBM Philippines is concerned, it works like a sub-contractor under IBM India. It earns profit by rendering service to P&G India. It does not provide any technical service to the assessee. Further, IBM Philippines does not have a permanent establishment (PE) in India. Therefore, the income in the hands of IBM Philippines from the assessee is a business income.

10. We may record that Revenue's case is also that the transactions between the assessee and IBM Philippines were performed in the 'course of its business'. As per Article 7 of India-Philippines

DTAA, IBM Philippines would be chargeable to tax in Philippines.

11. The first and second substantial questions are, whether ITAT was correct in holding that pay roll services rendered by IBM Philippines to the assessee is not technical service. It is not in dispute that under the companion agreement, IBM India Pvt. Ltd., has entered into an agreement with P&G India. The said work has been outsourced to IBM Philippines. IBM Philippines is carrying out the work described in the agreement between IBM India and P&G India. Hence, IBM Philippines was not rendering any technical service and therefore, the income in the hands of IBM Philippines is a business income.

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12. The third question is, whether ITAT was right in holding that DTAA does not define FTS. This question does not arise for consideration because, as recorded in para 7.3.9 of impugned order, Revenue has taken a specific contention that FTS was absent under the India-Philippines Treaty. Further, it is also not in dispute that under the agreement, IBM Philippines was rendering service in the field of payroll, data management etc., in connection with the work/assignment described in the agreement between IBM India and P&G India.

13. The ITAT has, in our considered view rightly recorded in para 8.1.3 of its order that as per Article 7(1) of Indian Philippines DTAA, the business profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent

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establishment situated therein. Admittedly, there is no permanent establishment of IBM Philippines in India. As per Article 23 of DTAA, the business profit of IBM Philippines shall be taxable in that State only. Further, the CIT(A) has also held that the transactions between the assessee and IBM Philippines were in the course of its business and the same has not been disputed by the Revenue. (See: para 8.1.4)

14. Hence, the payments received by IBM Philippines shall not be liable for TDS under Section 195 of the IT Act. Therefore, assessee cannot be deemed as an 'assessee in default'.

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15. In view of the above, these appeals must fail. Hence, the following:

ORDER

- (a) Appeals are ***dismissed***.
- (b) The questions of law are answered in favour of the assessee and against the Revenue.

No costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

SPS