



IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA no.3816/Mum./2017
(Assessment Year : 2012-13)

Dy. Commissioner of Income Tax (I.T)
Circle-2(2)(2), Mumbai

..... Appellant

v/s

Hyva Holding B.V.
Plot no.EL-215, Kalyan Mahape Road
MIDC, Navi Mumbai 400 701
PAN - AAAC2786P

..... Respondent

Revenue by : Shri Nishant Somaiya
Assessee by : Shri Dhanesh Bafna and
Ms. Hirali Desai

Date of Hearing - 31.01.2019

Date of Order - 30.04.2019

ORDER

PER SAKTIJIT DEY. J.M.

The aforesaid appeal has been filed by the Revenue challenging the order dated 1st February 2017, passed by the learned Commissioner (Appeals)-56, Mumbai, pertaining to the assessment year 2012-13.

2. The Revenue has filed the present appeal being aggrieved with the decision of learned Commissioner (Appeals) in holding that the amount of ₹ 2,07,63,486, received by the assessee from rendering services in India is not in the nature of fees for technical services.

3. Brief facts are, the assessee is a company incorporated in Netherland. The assessee has entered into an agreement with its Indian subsidiary Hyva India Pvt. Ltd. (HIPL) for rendering certain services. During the year under consideration, the assessee received an amount of ₹ 2,07,63,486, from HIPL for rendering services under the agreement. The assessee filed its return of income for the impugned assessment year on 29th March 2014, declaring nil income. In the course of assessment proceedings, the Assessing Officer, after perusing the service agreement and other material on record called upon the assessee to explain why the amount received from HIPL should not be treated as fees for technical services or royalty and brought to tax in India. In response, the assessee filed detailed submissions explaining the reason why the amount received cannot be treated as either fees for technical services or royalty under India–Netherland Double Taxation Avoidance Agreement (DTAA). In sum and substance, the assessee submitted that since the services rendered by the assessee is in the nature of managerial services and the definition of fees for technical services under India–Netherland Tax

Treaty does not envisage managerial service, the amount received from HIPL cannot be brought to tax in India. Without prejudice, it was further submitted that since the assessee while rendering services has not made available any technical knowledge, experience, knowhow, skill, etc., the payment received cannot be treated as fees for technical services. Further, the assessee also submitted that the amount received cannot also be treated as royalty under the treaty provisions. The Assessing Officer, however, did not find merit in the submissions of the assessee. On analyzing the terms of the service agreement, the Assessing Officer was of the view that the services provided by the assessee are all inclusive comprising of managerial, technical and consultancy services. Thus, he held that it comes within the definition of fees for technical services under the provisions of India–Netherland Tax Treaty. Further, he observed, while rendering such services, the assessee has made available technical knowledge, experience, knowhow, skill, etc., to HIPL as it is involved in capacity building of HIPL. Thus, ultimately, he concluded that the payment received by the assessee from HIPL is in the nature of fees for technical services under Article–12 of India–Netherland Tax Treaty, hence, has to be taxed on gross basis @ 10%, as provided under the treaty. Accordingly, he brought to tax the amount of ₹ 2,07,63,486, at the hands of the assessee. Being aggrieved with the aforesaid decision of the Assessing

Officer, the assessee preferred appeal before the first appellate authority.

4. After considering the submissions made by the assessee in the light of the decisions cited before him, learned Commissioner (Appeals) concluded that the services rendered by the assessee being in the nature of managerial services cannot be treated as fees for technical services under the India–Netherland Tax Treaty, since, the Tax Treaty covers only technical and consultancy services. Further, he held that by providing core expertise, supporting one's Group Company to grow, expand and achieve business independence does not lead to making available any technical knowledge, experience, knowhow, skill, etc., as the services rendered would not enable HIPL in its own right to apply it for all its future needs. Thus, ultimately, he concluded that the amount received by the assessee from HIPL is not in the nature of fees for technical services, hence, not taxable in India. Accordingly, he deleted the addition made by the Assessing Officer.

5. The learned Departmental Representative submitted, the Assessing Officer after examining in detail the services rendered by the assessee under the service agreement has recorded a finding that the services rendered are all inclusive comprising of managerial, technical and consultancy services. Drawing our attention to the nature of services provided by the assessee under the agreement as mentioned

in the appendix-1 to the agreement, he submitted, though, in the agreement the services rendered has been termed as management services, however, the nature of services rendered would reveal that it is not only confined to managerial services but also extend to technical and consultancy services. He submitted, the invoices raised by the assessee also do not describe in detail the services rendered by the assessee. He submitted, without properly examining and analyzing the facts including the nature of services rendered under the service agreement it cannot be said that services rendered are purely in the nature of managerial services, hence, the amount received is not fees for technical services. Thus, he submitted, the issue may be restored back to the Assessing Officer for examining the nature of service rendered by the assessee.

6. The learned Authorised Representative drawing our attention to the service agreement between the assessee and HIPL and the amendment agreement dated 1st April 2010, copy of which is placed in the paper book, submitted that the nature of services provided under the agreement is purely managerial. He submitted, the nature of services listed in the agreement clearly reveal that they are in the nature of managerial services. He submitted, though, the Assessing Officer has treated the amount received by the assessee as fees for technical services, however, under Article-12.5 of India-Netherland

Tax Treaty would mean payment of any kind to any person in consideration for rendering any technical or consultancy services. Further, he submitted, even assuming that the services rendered by the assessee are in the nature of technical or consultancy services, however, by rendering such services the assessee does not make available any technical knowledge, expertise, skills, knowhow, hence, it cannot be treated as fees for technical services. He submitted, the very fact that the assessee has not transferred / made available any technical knowledge or expertise or skill to HIPL, is evident from the fact that it has not received any royalty. Thus, he submitted, the amount received by the assessee cannot be treated as fees for technical services. In support of such contention, the learned Authorised Representative relied upon the following decisions:—

- i) *Exxon Mobil Co. India Pvt. Ltd. v/s ACIT, [2018] 92 taxmann.com 5 (Mum.);*
- ii) *AAR v/s Invensys Systems Inc., In re., [2009] 183 Taxman 81 (AAR);*
- iii) *AAR v/s Ernst & Young Pvt. Ltd., In re., [2010] 189 Taxman 409 (AAR);*
- iv) *AAR v/s Bharati AXA General Insurance Co. Ltd., In re., [2010] 194 Taxman 1 (AAR);*
- v) *Outotec Oyj v/s DDIT, [2016] 76 taxmann.com 33 (Kol.);*
- vi) *DCIT v/s Sun Pharmaceutical Laboratories Ltd., [2018] 96 taxmann.com 105 (Ahd. Trib.); and*
- vii) *Steria (India) Ltd. v/s CIT, [2016] 72 taxmann.com 1 (Del.).*

7. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. In our view, two issues arise before us to resolve the dispute between the parties. Firstly, whether the services rendered by the assessee to HIPL under the management service agreement is purely managerial in nature so as to take it out of the purview of fees for technical services as defined under Article-12(5) of the India-Netherland Tax Treaty. Secondly, even assuming that the services rendered by the assessee is not purely managerial but has the trappings of technical and consultancy services as well, whether in the absence of satisfaction of the make available clause the fees received can be treated as fees for technical services.

8. On a perusal of the management service agreement between the assessee and HIPL placed in the paper book, though, it is noticed that the nature of service to be rendered under the agreement have been termed as management services, however, some of the services enlisted in Appendix-1 to the management agreement such as information technology, R&D, strategic purchasing service may have trappings of technical or consultancy services. However, the core activity of the assessee under the service agreement appears to be in the nature of managerial services. Article-12(5) of the India-Netherland Tax Treaty defines fees for technical services as under:-

"Payment of any kind to any person in consideration for rendering of any technical or consultancy including through the provisions of service of technical or other person) if such services;

(a) are ancillary and subsidiary to the application or enjoyment of the right property or information for which the payment described in Para-4 of this article is received; or

(b) make available technical knowledge, experience, skill, knowhow or process or consist of development and transfer of a technical plan or technical design."

9. Thus, as could be seen from the aforesaid definition of fees for technical services under the tax treaty, managerial service is not included under the definition of fees for technical services. Therefore, though some services rendered by the assessee may have the trappings of technical or consultancy service, however, the core activity of the assessee under the agreement is, providing managerial services. That being the case, the amount received by the assessee from HIPL cannot be treated as fees for technical services under Article-12(5) of the India-Netherland Tax Treaty. More so, when the Assessing Officer has not demonstrated what amount can be attributed towards technical or consultancy service.

10. Even assuming that the service rendered by the assessee is in the nature of technical or consultancy service, the important aspect which needs to be looked into is, while rendering such service whether the assessee has made available any technical knowledge, experience,

skill, etc. to HIPL for enabling it to utilize such technology, skill, expertise, etc. independently in future. The expression 'make available' has been subjected to judicial interpretation time and again. The judicial view on this aspect is, the expression 'make available' not only would mean that recipient of the service is in a position to derive an enduring benefit out of utilization of the knowledge or knowhow on his own in future without aid of the service provider, but such technical knowledge, experience, knowhow, skill, etc., must remain with the recipient even after expiry of the contract. It has further been held that the technology will be considered to have been made available when the person acquiring the service is able to apply the technology independently. Therefore, to come within the purview of fees for technical services under Article-15(5) of the India-Netherland Tax Treaty, rendering of services and making available of technical knowledge, experience, knowhow, skill, etc., have to take place simultaneously. The judicial precedents cited before us clearly express this view. In the facts of the present appeal, the Assessing Officer has failed to demonstrate through any material brought on record that while rendering services to HIPL, the assessee has made available any technical knowledge, experience, knowhow, skill, etc., enabling HIPL to apply such technology independently. Rather the facts on record if considered vis-a-vis the service agreement would clearly reveal that while rendering services, the assessee has not made available any

technical knowledge, experience, knowhow, skill, etc., to HIPL for its independent use. In view of the aforesaid, we do not find any infirmity in the order of the learned Commissioner (Appeals) in holding that the amount received by the assessee from HIPL is not in the nature of fees for technical services, hence, deleting the addition made by the Assessing Officer. Ground raised is dismissed.

11. In the result, appeal is dismissed.

Order pronounced in the open Court on 30.04.2019

Sd
N.K. PRADHAN /-
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 30.04.2019

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai