IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आयकर अपील सं. / ITA Nos.171 & 3040/PUN/17
निर्धारण वर्ष / Assessment Years : 2012-13 & 2013-14

Piaggio & C.S.P.A., C/o. SRBC & Associates LLP, C-401, 4th Floor, Panchshil Tech Park, Yerawada, Pune – 411 006, Maharashtra PAN : AAFCP3921k	**Vs.**	DIT (International Taxation)-II, Pune
(Appellant)		(Respondent)

Appellant by	Shri R.R. Vora & Shri Rajendra Agiwal
Respondent by	Shri S.B. Prasad
Date of hearing	05-02-2019
Date of pronouncement	06-02-2019

आदेश / ORDER

PER R.S.SYAL, VP :

These two appeals by the assessee relate to assessment years 2012-13 and 2013-14. Since a common issue is raised in these appeals, we are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

A.Y. 2012-13 :

2. The only issue raised in the Memorandum of Appeal is against the rate of tax at which the amount received by the assessee as Royalty, should be charged to tax.

3. Succinctly, the facts of the case, are that the assessee is a company located in Italy, having several other group concerns around the globe. During the year under consideration, it received Royalty and Technical Fee for the services rendered for SAP implementation and Fees for TP Consultancy rendered in India to its Associated Enterprise (AE), namely, Piaggio Vehicles Pvt. Ltd., Baramati, India, which was offered for tax. The dispute in the instant appeal is on the rate of tax on the Royalty on three wheelers amounting to Rs.46,47,20,859/- received by the assessee from is Indian AE. The assessee offered such income to tax at 10.5060% u/s.115A of the Income-tax Act, 1961 (hereinafter also called as 'the Act') r.w.s. 195A. This was done on the basis of an agreement between the assessee and its AE in India, effective from 01-04-2008, which the assessee treated as covered u/s.115A(1)(b)(AA) of the Act. The AO considered the terms of the agreement dated 01-04-2008 and an earlier agreement

dated 26-03-1998. After so considering certain clauses of both the agreements, he came to hold that the second agreement was a mere renewal of the earlier agreement dated 26-03-1998. He invoked the provisions of section 115A(1)(b)(A) which, at the material time, provided rate of tax at 20% plus surcharge etc. on agreements entered after 31.5.1997 but before 1.6.2005. Since such rate was a little higher than the rate prescribed under the Double Taxation Avoidance Agreement (DTAA) between India and Italy at straight 20%, he applied such lower rate of straight 20% for taxation of Royalty income. The ld. CIT(A) upheld the assessment order on the point.

4. We have heard both the sides and gone through the relevant material on record. It is seen that there is no dispute on the nature of Royalty income amounting to Rs.46.47 crore received by the assessee on three wheelers. Further, there is no controversy on the taxability of this amount. The point of dispute is the rate at which such amount of income should be charged to tax. Section 115A(1)(b) of the Act provides that where the total income of : “a non-resident (not being a company), or a foreign company includes any income by way

of royalty or fees for technical service ….. the income-tax payable shall be….” at the rate of 10% under sub-clause (AA), : `if such royalty is received in pursuance of an agreement made on or after 1st day of June, 2005’. Sub-clause (A) provides that the income-tax shall be calculated on Royalty income at 20% where Royalty is received in pursuance of an agreement made after 31-05-1997 but before 01-06-2005. Whereas the case of the assessee is that it is covered under sub-clause (AA) of section 115A(1)(b), the Revenue has categorized the assessee as falling in sub-clause (A).

5. If the case really falls under sub-clause (A), then the rate of tax on Royalty income should be 20% plus surcharge etc. At this juncture, it is relevant to note that the DTAA between India and Italy provides for taxability of royalty income at the straight rate of 20%. In this regard, we find that sub-section (1) of section 90 of the Act provides that the Central Government may enter into an agreement with the Government of any other country for the granting of relief of tax in respect of income on which tax has been paid in two different tax jurisdictions. Sub-section (2) of section 90 unequivocally provides that where the Central Government

has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax or for avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, *'the provisions of this Act shall apply to the extent they are more beneficial to that assessee*'. Crux of sub-section (2) is that where a DTAA has been entered into with another country, then the provisions of the Act shall apply only if they are more beneficial to the assessee. In simple words, if there is a conflict between the provisions under the Act and the DTAA, the assessee will be subjected to the more beneficial provision out of the two. If the provision of the Act on a particular issue is more beneficial to the assessee *vis-a-vis* that in the DTAA, then such provision of the Act shall apply and *vice versa*. The Hon'ble Supreme Court in the case of *CIT v. P.V.A.L. Kulandagan Chettiar (2004) 267 ITR 654 (SC)* has held that the provisions of sections 4 and 5 are subject to the contrary provision, if any, in DTAA. Such provisions of a DTAA shall prevail over the Act and work as an exception to or modification of sections 4 and 5. Similar view has been taken by the Hon'ble Bombay High Court in *CIT v. Siemens Aktiongesellschaft (2009) 310 ITR*

320 (Bom.). In the light of the above discussion, it becomes vivid that if the provisions of the Treaty are more beneficial to the assessee *vis-a-vis* its counterpart in the Act, then the assessee shall be entitled to be ruled by the provisions of the Treaty.

6. Reverting to the present context, when we read the DTAA with Italy in conjunction with section 115A(1)(b)(A), it emerges that Royalty income in respect of agreements entered into after 31-05-1997 and before 01-06-2005 should be charged to tax at the straight rate of 20% (DTAA), as the same is more beneficial than the rate prescribed under the section which is 20% plus surcharge etc.

7. The controversy before us is as to whether the Agreement dated 01-04-2008 entered into with Piaggio Vehicles Pvt. Ltd., India, is an extension of the original agreement dated 26-03-1998 or a fresh agreement. This agreement was entered into on 01-04-2008 covering periods of the financial years 2008-09 onwards. In the earlier years also, the Revenue took a stand that the agreement dated 01-04-2008 was not a new agreement. The appeals of the assessee for the

A.Yrs. 2010-11 and 2011-12 came up for consideration before the Tribunal. Vide its order dated 21-03-2017 in ITA No.309/PUN/2015 etc., the Tribunal, after considering both the agreements threadbare has come to the conclusion that the agreement dated 01-04-2008 is independent and an altogether a new agreement *vis-à-vis* the earlier agreement of 1998. A copy of the order of the Tribunal has been placed on record. It is a common submission by both the sides that the facts and circumstances of the instant appeal are *mutatis mutandis* similar to those of the immediately preceding two assessment years, already considered by the Tribunal. Following the precedent, we hold that the agreement dated 01-04-2008 is a new one and hence, the case of the assessee is covered under sub-clause (AA) of section 115A(1)(b) of the Act. As such, the Royalty income of Rs.46.47 crore earned by the assessee from its Indian AE is chargeable to tax at 10.5060%. The impugned order is vacated to this extent.

8. The assessee has raised an additional ground as per which an amount of Rs.7,40,616/- out of total guarantee fee of Rs.25,39,810/-, not approved by the Reserve Bank of India

(RBI), should not be charged to tax in the hands of the assessee.

9. The factual matrix of this ground is that assessee stood guarantor for PVPL, its Indian entity and the guarantee fee was settled at Rs.25,39,810/-. The Indian entity filed an application with the RBI seeking permission for the remittance of the aforesaid amount of guarantee fee to the assessee. During the pendency of such application, the assessee, a resident of Italy, filed its return including guarantee fee of Rs.25.39 lakhs in its total income. The case of the assessee is that the RBI approved only a sum of Rs.17,99,194/- vide its sanction accorded after the filing of its return of income. Through this additional ground, it has been urged that the amount of Rs.7.40 lakh, which was not permitted by the RBI and actually not received by the assessee, should be reduced from the total income.

10. Having heard both the sides and gone through the material on record, we find that the additional ground so raised by the assessee involves a question of law for determining the correct amount of income chargeable to tax. The claim of the assessee is that the RBI accorded approval for a sum of

Rs.17.99 lakhs after the filing of return and conclusion of assessment and hence, necessary relief should be given. It goes without saying that, if a particular sum is not and cannot be lawfully received by the assessee, the same cannot be charged to tax. However, before allowing any such reduction in income, it is essential to verify that the full amount of Rs.25.39 lakh was offered for taxation at the first instance. Since the facts have not been examined by the authorities below, we are of the considered opinion that, it would be in the fitness of things if the AO is directed to verify the inclusion of Rs.25.39 lakh in the income of the assessee as guarantee fee; granting of approval by the RBI in respect of this amount only for Rs.17.99 lakh; and eventual receipt of lower sum of Rs.17.99 lakh. In case, it is found that the assessee included guarantee fee of Rs.25.39 lakhs in his total income and further the RBI did not accord approval for a sum of Rs.7.40 lakh, which was not received also, then the said sum of Rs.7.40 lakhs should be reduced from the total income of the assessee. Needless to say, the assessee will be accorded an opportunity of hearing in determining such issue.

11. Ground regarding charging of interest u/s 234B of the Act is consequential.

A.Y. 2013-14 :

12. The only issue raised in this appeal is against the rate at which the royalty income of at Rs.45,83,52,382/- earned by the assessee from its Indian Associated Enterprises, pursuant to an agreement dated 01-04-2008, should be charged to tax.

13. As against the assessee's claim of taxability of royalty income at the rate of 10.5060% u/s.115A(1)(b), the Revenue has charged such income at 20% under the DTAA. Both the sides are in agreement that the facts and circumstances of this appeal are *mutatis mutandis* similar to those of the preceding year. Following the view taken hereinabove, we hold that the royalty income earned by the assessee from its Indian Associated Enterprises, pursuant to an agreement dated 01-04-2008, should be charged to tax at 10.5060%.

14. Ground regarding charging of interest u/s 234B of the Act is consequential.

15. In the result, the appeal for the A.Y. 2013-14 is allowed and that for the A.Y. 2012-13 is partly allowed for statistical purposes.

Order pronounced in the Open Court on 06th February, 2019.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 06th February, 2019
सतीश

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u>:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT (Appeals)-13, Pune
4. The Pr.CIT-5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**ए**" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	05-02-2019	Sr.PS
2.	Draft placed before author	05-02-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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