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

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)
AND
SHRI RAJESH KUMAR (ACCOUNTANT MEMBER)

I.T.A. No.5804/Mum/2018
(Assessment year 2015-16)

| | | |
|---|---|---|
| DCIT, Cir.6(3)(1), Mumbai | vs | M/s Forum Homes Pvt Ltd<br>102, Tower-B, 1st Floor<br>Peninsula Business Park, Ganpatrao<br>Kadam Marg, Lower Parel (W)<br>Mumbai-400 013<br>PAN : AACCF1005F |
| **APPELLANT** | | **RESPONDENT** |

| | |
|---|---|
| Appellant by | Shri N Padmnabhan, Sr.DR |
| Respondent by | Shri Nitesh Joshi, AR |

| | |
|---|---|
| Date of hearing | 08-09-2021 |
| Date of pronouncement | 04-10-2021 |

**O R D E R**

**Per Saktijit Dey (JM):**

This is an appeal by the revenue against order dated 20-07-2018 of learned Commissioner of Income Tax (Appeals)-12, Mumbai for the assessment year 2015-16. The effective grounds raised by the revenue read, as under:-

> *"1. On the facts and circumstances of case and in law, the Ld. CJT(A) was justified in deleting the disallowances of consultancy fees and architect fees of Ps. 3,66,17,075/- made by the AO without appreciating that the three entities in Singapore provided design consultancy services for the residential project being developed by the assesses and that the services included supply of necessary designs and drawings in the nature of architectural, structural & MEP designs &*

*drawings, thereby making available technical knowledge, experience, skill & knowhow or processes, which fall within the ambit of "fees for technical services" as per Income Tax Act as well as DTAA. "*

*"2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the disallowance of consultancy fees and architect fees of Rs. 3,66,17,07s/- made by the AO without appreciating that even if the cost is not debited to the P & L Account, it is a cost incurred during the year and provisions of section 40(a)(ia) are applicable."*

3. Material facts relevant for deciding ground 1 briefly are, the assessee is a resident company engaged in the business of real estate. The assessee had undertaken development of a residential project at Bandra Kurla Complex (BKC), named 'Serendipity'. As stated, the construction work of the said project was continuing as on 31-03-2015. In connection with the construction/development of the said project, the assessee had availed certain services from some non-resident entities located at Singapore. During the year under consideration, the assessee had remitted an aggregate amount of Rs.3,66,17,075/- to the concerned non-resident entities towards consultancy and architect's fee. In course of the assessment proceedings, the aforesaid payment made by the assessee to the non-resident entities came to the notice of the assessing officer. Therefore, he called upon the assessee to furnish the details of the fees paid, the nature of services provided and whether any tax has been deducted at source. In reply, the assessee furnished necessary details. After perusing the details furnished by the assessee, the assessing officer was of the view that the payments made by the assessee are in the nature of fees for technical services (FTS) as per section 9(1)(vii) of the Income Tax Act, 1961. Therefore, he called upon the assessee to explain why the payment made to the non-resident entities should not be disallowed under section 40(a)(i) of the Act for alleged failure to deduct tax at source.

4. In submissions made before the assessing officer, the assessee objected to the proposed disallowance. It was submitted by the assessee that, since, the non-resident entities are resident of Singapore, the provisions of India-Singapore Double Taxation Avoidance Agreement (DTAA), being more beneficial, would be applicable. It was submitted, as per Article 12(4) of the tax treaty, unless, in course of providing any managerial/technical or consultancy services, technical knowledge, experience, skill, know-how or processes are made available to the recipient of such service, so as to, enable him to apply the technology independently, it cannot be termed as FTS under the tax treaty. The assessing officer, however, was not convinced with the submissions of the assessee. Referring to certain terms contained in the agreements between the parties, the assessing officer held that in course of providing services to the assessee, the non-resident entities have made available technical knowledge, experience, skill, know-how or process which enabled the assessee in making design, construction and design making process utilized for the purpose of business. Thus, he held that the fee paid to the non-resident entities will not only qualify as FTS under section 9(1)(vii) of the Income-tax Act, but also under Article 12(4) of the DTAA. Thus, due to failure of the assessee to deduct tax at source on the payments made, the assessing officer disallowed the amount of Rs.3,66,70,075/- under section 40(a)(i) of the Act.

5. Assessee contested the aforesaid disallowance before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record and in the light of judicial precedents cited before him, learned Commissioner (Appeals) concluded that the fees paid to the non-resident entities would not qualify as FTS under the tax treaty, as, no

technical knowledge, experience, skill, know-how or process enabling the assessee to apply the technicality contained therein independently was made available. Accordingly, he deleted the disallowance made under section 40(a)(i) of the Act.

6. Strongly relying upon the observations of the assessing officer, learned departmental representative submitted, the non-resident entities have provided technical/consultancy services which enabled the assessee to apply them in its business. Thus, he submitted, not only the fees paid comes within the purview of FTS under section 9(1)(vii) of the Act, but also under Article 12(4) of the tax treaty as the services provided by the non residents made available technical knowledge, skill, know-how, process to the assessee to utilize in its business. Therefore, he submitted, the disallowance made by the assessing officer should be restored.

7. Drawing our attention to various observations of learned Commissioner (Appeals) in the appellate order, learned counsel for the assessee submitted, the non-resident entities provided various drawings/designs relating to the housing project. He submitted, while rendering such services, the non-resident entities have not made available any technical knowledge, skill, know-how, process, etc. to the assessee. Therefore, the fees cannot be considered as FTS. Further, in support of his contention, the learned counsel for the assessee relied upon the following decisions:-

1. Gera Developments (P) Ltd vs DCIT(International Taxation)-1, Pune (2016) 72 taxmann.com 238 (Pune-Trib)

2. ITO vs M/s Bengal NRI Complex Ltd –ITA No.1290/Kol/2014 & ITA No.1088/Kol/2014

3. CIT vs Dee Beers India Minerals (P) Ltd (2012) 21 taxmann.com 214 (Kar)

8. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. Undisputedly, the assessee, at the relevant point of time, was developing a residential project at BKC. In connection with the development of such project, the assessee had availed certain technical/consultancy services from three non-resident entities located in Singapore. For availing such services, the assessee has paid certain amount to the non-resident entities. The short issue arising for consideration before us is, whether the payment made by the non-resident entities can be termed as FTS under Article 12(4) of India Singapore Tax Treaty. For better appreciation, Article 12(4) of the tax treaty is reproduced hereunder:-

> *"4. "The term fees for technical services as used in this Article means payments of any kind to any person in consideration for services of* a *managerial, technical or consultancy nature (including the provision of such services through technical or other personnel)* ***if such services:***
> *(a) are ancillary.....*
> *(b)* ***make available*** *technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services* ***to apply the technology contained therein ; or***
> *(c) consist of the development and transfer of a technical plan or technical design,* ***but excludes any service that does not enable the person acquiring the service to apply the technology contained therein."***

9. A reading of Article 12(4) of the tax treaty would make it clear that payment made to a resident of one of the contracting state can be regarded as FTS, if, in course of providing managerial/technical or consultancy services, technical knowledge, experience, skill, know-how or processes is made available which enables the person acquiring such services to apply the technology contained therein. It further provides, if the services consist of development and transfer of a technical plan or technical design, but excludes any services that does not enable the person acquiring the service to apply the technology

contained therein would not qualify as FTS. In the facts of the present appeal, the payments made and the nature of services rendered are as under:-

| Sr.No. | Name of the party | Country | Amount (Rs.) | Nature of services |
|---|---|---|---|---|
| 1 | Arc Studio Architecture + Urbanism Pte Ltd | Singapore | 2,85,35,269/- | Architectural drawing / design in relation to BKC project. |
| 2 | Web Structures Pte Ltd | Singapore | 68,57,342/- | GFC drawing / design in relation to BKC project |
| 3 | RMR Engineers Pte Ltd | Singapore | 12,24,464/- | MEP drawing / design in relation to BKC project |
| | **Total** | | **3,66,17,075/-** | |

10. Thus, as could be seen, the scope of work is limited to various types of drawings and designs for the residential project being developed at BKC. On further verification of facts on record, it is evident that insofar as Arc Studio Architecture + Urbanism Pte Ltd is concerned, it will provide an illustrative site/roof plan showing all the components of the project, general landscape, recommendation and overall infrastructure elements, such as**,** entry driveways and service circulation, Diagram showing each of the major public at 1:200 scale, image board to describe the architectural character of the project etc. The scope of work also requires the entity to prepare schematic design drawings, approved by the client, in case of minor adjustment. The terms of the agreement make it clear that the design, drawing, rendering, model, specification, electronic files including database and spreadsheets and other derivation that are part of the

project will remain the intellectual property of the service provider and are intended for use solely with respect to the project. It further restrains the assessee from utilizing such intellectual property for any other project or for addition to the subject project or for completion of the project by any other entity. Similar is the scope of work and terms and conditions in respect of Web Structures Pte Ltd, another non-resident entity.

11. Thus, from the nature of services provided by the non-resident entities and the terms and conditions under which it was provided, it is clear that whatever services were provided are project specific and cannot be used for any other project by the assessee. Further, while providing such services neither any technical knowledge, skill, etc is made available to the assessee for utilizing them in future, independently nor any developed drawing or design have been provided to the assessee which can be applied by the assessee independently. Thus, it is very much clear, the conditions of Article 12(4) of the tax treaty are not fulfilled.

12. Though, the assessing officer has generally observed that in course of providing services to the assessee, the non-resident entities have made available technical knowledge, know-how, processes to the assessee. However, no substantive material has been brought on record by him to back such conclusion. Even, before us, learned departmental representative has not brought any material to demonstrate that conditions of Article 12(4) have been fulfilled in the facts of the present case. In view of the aforesaid we do not find any valid reasons to interfere with the decision of learned Commissioner (Appeals). Accordingly, we uphold the order of learned Commissioner (Appeals) on the issue by dismissing ground raised.

13. In view of our decision in ground 1, ground 2 has become academic, insofar as, the present appeal is concerned. Hence, we refrain from adjudicating the ground.

14. In the result, appeal is allowed to the extent indicated above.

Order pronounced on 05/10/2021.

Sd/- sd/-

| (RAJESH KUMAR) | (SAKTIJIT DEY) |
|---|---|
| ACCOUNTANT MEMBER | JUDICIAL MEMBER |

Mumbai, Dt : 05/10/2021
Pavanan
Copy to :

1. Appellant
2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
6. Guard File

/True copy/ By Order

Asstt. Registrar, ITAT, Mumbai