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

BEFORE SH. SAKTIJIT DEY, JUDICIAL MEMBER
AND
SH. N. K. BILLAIYA, ACCOUNTANT MEMBER

ITA No.8112/Del/2019
Assessment Year: 2015-16

DCIT **Circle – 1 (2)** **New Delhi**	**Vs**	**Converteam Group** **6th Floor, Building No.7A, Standar Chartered Building, DLF Cyber City, Phase-III, Gurgaon** **PAN No.AAECC1864F**
(APPELLANT)		**(RESPONDENT)**

Appellant	Sh. Sanjay Kumar, Sr. DR
Respondent	Sh. Ravi Sharma, Advocate Sh. Rishabh Malhotra, AR

Date of hearing:	15/09/2022
Date of Pronouncement:	23/09/2022

ORDER

PER N.K. BILLAIYA, AM:

This appeal by the revenue is preferred against the order of the CIT(A)-42, Delhi dated 26.07.2019 for A.Y.2015-16.

2. The substantive grievance of the revenue read as under :-

1. Whether the Ld. CIT(A) has erred in fact and in law in

holding that the support services rendered by the assessee are excluded from the ambit of FTS since the "make available" clause under the India- France DTAA even after amendment notification So No. 650 (E). dated 10.07.2000?

2. *Whether the ld. CIT(A) has erred in law in applying the "make available" clause when the India- France DTAA does not include the same and the conduct of the parties by way of amendment notification SO No.650 (E). dated 10.07.2000 show that (i) there was no intention to change the scope and make it more restrictive and (ii) Protocol, ipso- facto cannot be given effect to, in absence of the notification?*

3. *Whether the Ld. CIT(A) has erred in law in not passing a speaking order and not discussing the main issue i.e. whether the provision of "most favoured nation" in protocol 7 of India-France DTAA shall become automatically applicable without a separate notification incorporating the beneficial provision of India. UK DTAA in the India-France DTAA particularly keeping in view that the decision in the case of Steria (India) Ltd. Vs. Commissioner of Income Tax [2016] (386 ITR 390) (Delhi HC), the fact of issue of notification So No. 650 (E), dated 10.07.2000 was not even argued and thus the decision of Hon'ble High Court in Steria India (supra) does not take into account full facts of the case ?*

4. *Whether the Ld. CIT(A) has erred in law in not providing the reasonable opportunity to the assessing officer to examine the additional evidence submitted by the assessee to the Ld. CIT(A) as referred by him in para 6.5 of his order dated 26.07.2019, which is in violation of the Rule 46A of the Income Tax Rules, 1962?*

5. *The appellant craves leave to add, modify, amend or alter any grounds of appeal at the time of, or before the hearing of the appeal.*

3. Representatives of both the sides were heard at length. Case record carefully perused. The relevant documentary evidences brought on record duly considered in the light of rule 18 (6) of the ITAT Rules.

4. Briefly stated the facts of the case are that the assessee company was incorporated on 16.07.2004 and is a tax resident of France. The assessee is engaged in the electrification business and the assessee is a part of GE Power Conversion.

5. During the year under consideration the assessee received charges for the management support services amounting to Rs.5,57,14,648/- from GE Power Conversion India Private Limited and Converteam EDC Private Limited. The said management charges was treated as non taxable in India by the assessee claiming it to be in accordance with Article 13 of the

India France Tax Treaty read with protocol to the tax treaty that prescribes the most favoured nation (MFN) clause which restricts the scope of taxation of fees for technical services (FTS) under the tax treaty.

6. During the assessment proceeding the assessee was asked to explain why the services in the nature of support services should not be treated as fees for technical services (FTS) and why the same should not be considered as taxable.

7. In its reply the assessee placed reliance on agreement with Indian entity and submitted that it has provided services in respect of routing corporate and public relations support, accounting and auditing support, health, safety, environmental and regulatory affairs support and legal support.

8. The assessee claimed benefit of the provisions of Article 13 of India UK DTAA read with Article 13 of India France DTAA. Reliance was also placed upon protocol -7 of the treaty according to which if the scope of taxability of FTS is restricted on account of agreement between India and other state which is a member of the OECD then such limited scope would apply to France treaty in the same manner.

9. The contention of the assessee were dismissed by the AO who was of the opinion that the nature of support services

provided by the assessee to Indian entities is not disputed and these are admittedly in the nature of FTS as per the provisions of the Act.

10. The AO further observed that the protocol could not be treated as forming part of the DTAA itself unless there is a notification issued by the Government to incorporate the less restrictive provisions of the other treaty available. Accordingly the AO treated the revenue amounting to Rs.55714648/- received on account of intermediary services taxable as FTS.

11. Assessee challenged the assessment before the CIT(A) and reiterated its contention that the management charges are not taxable in India.

12. After considering the facts and the submissions the CIT(A) directed the assessee to furnish supporting documentation/ electronic mails to substantiate the nature of services provided by the assessee.

13. The assessee furnished the information/documents required by the CIT(A) and the CIT(A) after examining the documents was convinced with the contention of the assessee and held that the amount received by the assessee during the year for provision of management support services shall not be taxable as FTS under the tax treaty since the make available test imported from India

UK tax treaty into the India France treaty had not been satisfied in this case.

14. The bone of contention is the importing of "make available" test from the India UK tax treaty read with the protocol. The main contention of the revenue is that protocol ipso facto cannot be given effect to in absence of the notification and this has been supported by the DR referring to Circular No.3/2022 dated 03.02.2022. The relevant part of the circular read as under :-

4.4 Requirement of notification under Section 90 of the Income-tax Act, 1961:

Further, it is a domestic requirement in India under sub-section (1) of section 90 of the Income-tax Act, 1961 that DTAA or amendment to DTAA are implemented after its notification in the Official Gazette. In the famous case of *Azadi Bachao Andolan (2004, 10 SCC)* as well, Hon'ble Supreme Court of India has observed that the DTAA provisions come into force on the date of issue of notification of such DTAA. Hon'ble Supreme Court also made it clear in the judgment that the beneficial provision of sub-section (2) of section 90 springs into operation once the notification is issued. The relevant extract of that judgment reads as under :

*"A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income-tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provisions of the Act". **The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under section 90 towards implementation of the terms of the DTAs** which would automatically override the provisions of the Income- tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC.....*

.....This Court is not concerned with the manner in which tax treaties are negotiated or enunciated; nor is it concerned with the wisdom of any particular treaty. Whether the Indo-Mauritius DTAC ought to have been enunciated in the present form, or in any other particular form, is none of our concern. Whether section 90 ought to have been placed on the statute book, is also not our concern. Section 90, which delegates powers to the Central Government, has not been challenged before us, and, therefore, we must proceed on the footing that the section is constitutionally valid. The challenge being only to the exercise of the power emanating from the section, ***we are of the view that section 90 enables the Central Government to enter into a DTAC with the foreign Government. When the requisite notification has been issued thereunder, the provisions of sub-section (2) of section 90 spring into operation*** *and an assessee who is covered by the provisions of the DTAC is entitled to seek benefits thereunder, even if the provisions of the DTAC are inconsistent with the provisions of Income-tax Act, 1961."* (emphasis supplied)

4.4.1 It may be noted that India has not issued any notification importing the benefit of treaties with Slovenia, Lithuania and Colombia to treaties with The Netherlands, France or the Swiss Confederation.

15. The coordinate Bench in the case of GRI Renewable Industries S.L. in ITA No.202/PUN/2021 has answered this quarrel as under :-

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 dt. 03-02-2022, cannot be invoked for the year under consideration, which is much prior to the CBDT circular of the year 2022.

14. 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.

16. Having said all that now the issue which needs specific mention is whether protocol to tax treaty is an integral part there

to with equal binding force with tax treaty.

17. In our understanding of the law the protocol to a tax treaty is an indispensable part of a tax treaty with the same binding force as the main clauses of the tax treaty. In our considered opinion the provisions of the tax treaty are, therefore, required to be read with the protocol and are subject to the provisions contained in such protocol without there being a need of a separate notification for enforcing the provisions of the protocol, this has been settled by the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of Steria (India) Ltd. 386 ITR 390. The relevant findings of the Hon'ble High Court read as under :-

6. It is not in dispute that another DTAA was entered into between India and United Kingdom ('UK') in which the scope and ambit of the term 'fees for technical services' was more restrictive than the India- France DTAA in two important aspects:

i. The India-France DTAA included fees for managerial services in "Fees for Technical Services", whereas, in contrast, the India-UK DTAA expressly excludes fees for managerial services from "Fees for Technical Services".

ii. The India-UK DTAA contained a - "make available" clause, for a service to constitute "technical service" i.e. that the provider of the service, must "make available" technical knowledge, experience, skill, know how or processes to the persons to whom the service is rendered, or must have developed and transferred a technical plan or technical design to the person to whom the service is rendered. In contrast, the India-France DTAA did not incorporate any such "make available" requirement or criterion and, therefore, ambit of the term "Fees for Technical Services" is much more restricted in the India-UK DTAA as compared to the India-France DTAA.

7. Before the AAR, the Petitioner contended that having regard to Clause

7 of the 'Protocol' the less restrictive definition of the expression 'fees for technical services' appearing in the Indo-UK DTAA, must be read as forming part of the India- France DTAA as well. The AAR, by the impugned order, disagreed with the Petitioner. It ruled that the Protocol could not be treated as forming part of the DTAA itself. It further held that restrictions imposed by the Protocol were only to limit the taxation at source for the specific items mentioned therein. The restriction was only on the rates. Further, the 'make available' clause found in the Indo-UK DTAA could not be read into the expression 'fee for technical services' occurring in the India-French DTAA unless there was a notification under Section 90 of the Act issued by the Central Government to incorporate the less restrictive provisions of the Indo-UK DTAA into the India-France DTAA. In other words, the plea of the Petitioner that Clause 7 of the Protocol did not require any separate notification and could straightway be operationalised was not accepted by the AAR.

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10. At the outset, the Court would liked to refer to the definition of 'fee for technical services' occurring in the DTAA between India and France which reads as under :-

which reads as under:

> "**ARTICLE 13-** ***Royalties and fees for technical services and payments for the use of equipment –***
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> **** **** ****
>
> (4) The term "fees for technical services" as used in this Article means payments of any kind t o 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, in consideration for services of a managerial, technical or consultancy nature"

11. The corresponding provision in the DTAA between the India and the UK reads as under:

> "**ARTICLE 13-** ***Royalties and fees for technical services-***
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> **** **** ****
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> 4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means repayments 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:
>
> (a) 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
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> (b) 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
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> (c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(a) of this Article;

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the private use of the individual or individuals making the payment; or

(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 15 (independent personal services) of this Contention"

12. At this juncture, it is necessary to refer to Clause 7 of the Protoc executed separately between India and France which forms part of t DTAA. Clause 7 thereof which is relevant for the present purposes reads under:

"At the time of proceeding to the signature of the Convention between France and India for the avoidance of double taxation with respect to taxes on income and on capital, the undersigned have agreed on the following provisions which shall form an integral part of the Convention.

.....

7. In respect of articles 11 (Dividends), 12 (Interest) and 13 (Royalties, fees for technical services and payments for

the use of equipment), if under any Convention, Agreement or Protocol signed after 1-9-1989 between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention Agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later."

13. What is immediately apparent on a plain reading of Clause 7 is that it applies in respect of three different kinds of payments i.e. dividend under Article 11, interest in Article 12 and Royalties, Fees for Technical Services and payments for use of equipments under Article 13. In respect of any of the above payments, if any convention agreement or protocol is signed between India and a OECD member State under which India limits its taxation at source on the above "to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items or income, the same rate or scope as provided for in that Convention, agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention, Agreement or Protocol enters into force, whichever enters into force later".

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18. The Court is, therefore, unable to agree with the conclusion of the AAR that the Clause 7 of the Protocol, which forms part of the DTAA between India and France, does not automatically become applicable and that there has to be a separate notification incorporating the beneficial provisions of

the DTAA between India and UK as forming part of the India-France DTAA.

18. A similar view was taken by the Hon'ble High Court of Delhi in the case of Galderma Pharma SA Vs. ITO in W.P. (C) 14206/2021 order dated 14.12.2021 and the judgment read as under :-

1. Present writ petition has been filed challenging the certificate dated 18th November, 2021 read with the impugned order passed by the Respondent directing Galderma India to deduct tax @ 10% on dividend income to be paid to the Petitioner for the relevant Financial Year. Petitioner also seeks a direction allowing Galderma India to pay dividend to the Petitioner for the relevant Financial Year after deducting tax @ 5% in terms of the Protocol to the DTAA between India and Switzerland at the time of payment of such dividend.

2. Learned Counsel for the Petitioner states that the impugned certificate dated 18th November, 2021 read with the Impugned Order communicating the reasons passed under Section 197 of the Act rejecting the Petitioner's request for lower withholding of tax @ 5%

on dividends proposed to be distributed by Galderma India to the Petitioner for Financial Year 2021-22 illegal and should be quashed.

3. Learned counsel for the Petitioner states that even though Article 10 of the India-Switzerland DTAA provides for withholding tax @10% on dividend paid by an Indian resident to a Swiss resident entity, the Petitioner claims lower tax rate of 5% provided in India-Columbia DTAA by relying on the MFN clause in para 5 of the protocol to the India-Switzerland DTAA which was signed between India and Switzerland on 30th August, 2010 and is effective from 27th December, 2011.

4. Learned Counsel for the Petitioner submits that this issue is already settled by this Court in ***Steria (India) Ltd. v. CIT [2016] 386 ITR 390 (Del)*** and ***Concentrix Services Netherlands B V v/s. Income Tax Officer TDS & Anr W.P.(C) 9051/2020*** and by the Karnataka High Court in ***Apollo Tyres Ltd. v. CIT [2018] 92 taxmann.com 166 (Karnataka)*** holding that the protocol signed by contracting states is an integral part of the DTAA and provides for automatic application of benefit agreed by India with a member of OECD and that no separate notification/amendment is needed to apply such protocol.

5. Issue notice.

6. Mr.Puneet Rai, learned counsel accepts notice on behalf of the respondent. He states that since no notification has been issued by the Government of India, the petitioner is not entitled to lower tax rate of 5% provided in India-Columbia DTAA, India-Lithuania DTAA and India-Slovenia DTAA.

7. He further reiterates that the Revenue has not accepted the decision of this Court in the cases of ***Concentrix Services Netherlands B.V. v. ITO (TDS)*** and ***Nestle SA v. Assessing Officer, Circle v. ACIT WP(C) 3243/2021*** and is in process of filing Special Leave Petitions before the Hon'ble Supreme Court.

8. Having heard learned counsels for the parties this Court finds that the issues raised in the present writ petition are no longer *res integra* as they are fully covered by the judgments of this Court in ***Concentrix Services Netherlands B.V.*** (Supra) as well as in ***Nestle SA*** (Supra). In ***Concentrix Services Netherlands B.V.*** (Supra) it has been held that no separate notification is required insofar as the applicability of the protocol is concerned and the same forms an integral part of the Convention.

9. It is well settled law that the Department cannot refuse to follow binding jurisdictional decision merely on the basis that the Department proposes to file an appeal. The Supreme Court in ***UOI v. Kamlakshi Finance Corpn Ltd. AIR 1992 SC 711: (1992) 1 SCC 648*** has held that order of higher appellate authorities should be followed 'unreservedly' and mere fact that decision is not acceptable to the Revenue cannot be a ground for not following the decision of higher authority.

10. Keeping in view the aforesaid, the impugned order and certificate are set aside and the respondent is directed to issue a certificate under Section 197 of the Act indicating therein, that the rate of tax, on dividend, as applicable qua the Petitioner is 5% in India-Switzerland DTAA as held in ***Nestle SA*** (Supra) which was also under the India-Switzerland DTAA. Writ petition is disposed of in the aforesaid directions.

19. It would be pertinent to refer to Article -13 of the India UK Tax Treaty which is as under :-

"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: -*

(a) 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

(b) 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

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design."

20. A perusal of the above Article show that the term FTS has a more restrictive scope in so far as the absence of the term "managerial" and further existence of the "make available" condition are embedded therein.

21. In our understanding under the India UK tax treaty for a payment to quality as FTS both the following conditions need to be cumulative satisfied :

(i) The services need to be "technical" or "consultancy" in nature.

(ii) The services need to make available technical knowledge,

experience, skill, know-how or processes, which enables the persons acquiring the services to apply the technology contained therein.

22. Considering the factual matrix of the case in hand in the light of the judicial decisions discussed here in above we do not find any error or infirmity in the findings of the CIT(A) which need interference.

23. In so far as the contention that the CIT(A) has admitted additional evidences in violation of rule 46 A of the Income Tax Rules 1962 is concerned we do not find any merit in this contention of the revenue because the CIT(A) invoking the powers conferred upon him u/s. 250 (4) of the Act called for certain information/ documents and based his findings on such information / documents. In our considered opinion in the light of section 254 (4) of the Act the CIT(A) is free to conduct the enquiry to dispose of the appeal as he deems fit. We, therefore, decline to interfere with the findings of the CIT(A). The appeal filed by the revenue is dismissed.

Order pronounced in the open court on 23.09.2022

Sd/-	Sd/-
(SAKTIJIT DEY)	**(N. K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

NEHA, Sr. Private Secretary
Date:- .09.2022