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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.1427/Del/2015
Assessment Year: 2010-11
With
ITA No.975/Del/2016
Assessment year: 2011-12

Netafim Ltd., C/o- Netafim Irrigation India Pvt. Ltd., Plot No.268-270, 271B GIDC, Manjusar, Savli, Vadodara, Gujarat	**Vs.**	DCIT, Circle-2(2)(2), International Taxation, New Delhi
PAN :AADCN4087C		
(Appellant)		**(Respondent)**

Appellant by	Sh. Salil Kapoor, Advocate Ms. Ananya Kapoor, Advocate
Respondent by	Sh. Abhishek Kumar, Sr. DR

Date of hearing	25.11.2022
Date of pronouncement	20.02.2023

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeals at the instance of the assessee have challenged the final assessment orders passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (for short 'the Act') for the assessment years 2010-11 and 2011-12 in

pursuance to directions of learned Dispute Resolution Panel (DRP).

2. The core common issue arising for consideration in both the appeals is, whether the amounts received by the assessee from its Indian subsidiary for providing Information Technology (IT) and SAP support services is in the nature of Fees for Technical Services (FTS), hence, taxable in terms of Article 13 of Indian – Israel Double Taxation Avoidance Agreement (DTAA).

3. Briefly the facts are, the assessee is a non-resident corporate entity incorporated in Israel and a tax resident of Israel. In the previous year relevant to assessment years under dispute, the assessee had entered into various international transactions with its Indian subsidiary, Netafim Irrigation India Pvt. Ltd. (NIIPL), such as, sale of raw materials, sale of stores, consumables and packing materials, sale of traded goods, sale of equipment and provision of IT and SAP services. However, in the present appeals, we are concerned only with the taxability of the amounts received towards provision of IT and SAP services. In course of assessment proceeding, the assessee submitted that as per Article 13 of India – Israel DTAA, FTS means payments of any kind received as a consideration for services of a managerial, technical or

consultancy nature, including the provision of services by technical or other personal. However, he submitted, as per the protocol to India – Israel Treaty, if India enters into a DTAA with any other country after 01.01.1995 and in the said treaty the scope of FTS is more restricted, then the restricted terms of that treaty will apply to India – Israel DTAA. In this regard, the assessee submitted that as per India – Portugal and India – Canada DTAAs the definition of FTS is more restricted as it imposes 'make available' condition. He submitted, only when technical knowledge, skill, knowhow, etc. is made available to the recipient of service, the payments received will fall within the definition of FTS. The Assessing Officer, however, did not accept assessee's contention. He observed, since, Article 13 of India – Israel DTAA does not speak of any make available condition, it cannot be imported to the treaty. Accordingly, he proceeded to treat the amounts received towards provision of IT and SAP support services as FTS under Article 13 of the India – Israel DTAA. Accordingly, he added back the amounts of Rs.1,07,03,993/- and Rs.1,06,93,808/- in assessment years 2010-11 and 2011-12 respectively. Against the additions so made, the assessee raised objections before learned DRP. Though,

learned DRP accepted assessee's claim that as per protocol to India – Israel DTAA more restrictive definition of other DTAAs would apply and accordingly accepted that the make available condition provided in India – Portugal and India – Canada DTAAs would be applicable. However, learned DRP held that make available condition stands satisfied in case of the assessee. Accordingly, they upheld the additions.

4. Before us, learned counsel appearing for the assessee, while reiterating the stand taken before the departmental authorities, submitted that while rendering IT and SAP support services the assessee had not made available any technical knowledge, knowhow, skill etc. to NIIPL. Drawing our attention to agreement dated 1st April, 2009 entered with NIIPL learned counsel submitted, NIIPL did not have the requisite IT set up to operate and maintain IT related applications, including SAP. He submitted, Netafim Ltd. as a group has developed a common platform to provide IT related support to all its entities across the globe and accordingly allocation of IT and SAP charges reflects a mechanism of charging cost originally incurred by Netafim Ltd. for the benefits of any users on back to back basis. He submitted, the assessee acts as a cost centre and charges other subsidiaries

for use of SAP system that is maintained and supported globally from assessee's headquarters in Israel. He submitted, cost per user is determined according to and is comprised from the overall cost of each license, cost of maintenance, cost of SAP system and global infrastructure which is provided from data centre located in Israel. He submitted, while providing such support services, the assessee has not transferred any technical knowledge, know-how, skill etc. and services were provided outside India. Thus, he submitted, make available condition has not been satisfied. Therefore, the receipts cannot be treated as FTS. Without prejudice, he submitted, the payments received are in the nature of reimbursements on cost to cost basis without any profit element embedded therein. Therefore, it cannot be treated as FTS. In support of such contention, learned counsel relied upon the following decisions:

1. *Steria (India) Ltd. Vs. CIT (2016) 72 taxmann.com 1 (Del.)*
2. *SCA Hygiene Products AB Vs. DCIT, ITA No.7315/Mum/2018, dated 08.01.2021.*
3. *Exxon Mobil Company India (P.) Ltd. Vs. Addl.CIT, (2018) 92 taxmann.com 5 (Mumbai – Trib.)*
4. *Autotech Oyg. Vs. DDIT (2016) 76 taxmann.com 33 (Kol)*
5. *DDIT Vs. Bureau Veritas – India Division, ITA No.3377/2010, dated 28th September, 2011 (Bombay HC)*

5. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned DRP. Further, he submitted, the Most Favoured Nation (MFN) clause as per the Protocol to India – Israel DTAA for applying a more restrictive meaning to FTS as per a treaty between India and a third country cannot be made applicable unless a specific notification regarding applicability of MFN clause is issued by the Government. Thus, he submitted, there is no reason to interfere with the decision of learned DRP.

6. We have considered rival submissions and perused the materials on record. We have also applied our mind to judicial precedents cited at the bar. On perusal of the agreement between the assessee and NIIPL for provision of SAP and other IT services, it is noticed that the following services are envisaged:

i. Helpdesk, network , SAP basis and management,

ii. SAP infrastructure support,

iii. SAP licence maintenance,

iv. Application-based support.

7. As discussed elsewhere in the order, the assessee, being the parent company, has developed a common platform to provide the aforesaid services to all its group entities across the globe and

allocates cost incurred by it to other group entities as per the mechanism evolved by the assessee. The materials on record revealed that the assessee procures SAP licenses for group entities and the cost incurred on SAP licence is recharged to group entities, including NIIPL on cost to cost basis. The application/software procured, includes Oracle, DB Check Points, Video conference etc. SAP Software products help companies to manage their financials logistics, human resources and other business areas. The back-bone of SAP software offering is SAP Enterprise Resource Planning (ERP) system which offers application software for supporting complex business functionality. The SAP system consists of a number of fully integrated modules which covers various aspects of business management. By centralizing data management, SAP software provides multiple business functions. This helps companies to better manage complex business processes by providing to employees of different departments easy access to real time insight across the enterprise. As regards IT support services, the assessee provides services for implementing the SAP environment, providing additional design and configuration of SAP environment, application support and maintenance services,

enhancing with several upgrades the probability of virtual team meeting, hence, minimizing the travel cost.

8. Keeping in view the nature of services provided by the assessee it has to be determined whether the amounts received by the assessee are in the nature of FTS under Article 13 of India – Israel DTAA. At this juncture, we must observe, Article 13(3) of India – Israel DTAA, defines the term "FTS" to mean payments of any kind received as a consideration for services of managerial, technical or consultancy nature, including the provision of services by technical or other personal. However, it does not include payment for services mentioned in Article 16 of the Convention. The term "FTS" under Article 13 is very wide in its scope. However, Protocol to India – Israel DTAA with reference to Article 12 and 13 of the tax treaty provides that if under any convention or agreement between India or any third State, which came into force after 01.01.1995, India limits its rights on taxation at source or royalty or FTS or interest or dividend to a rate lower or a scope more restricted than the rate or scope provided for in this conventions, same rate or scope as provided for in that convention or agreement will also apply to India – Israel DTAA. Taking benefit of the Protocol to India – Israel DTAA,

the assessee has claimed that more restrictive meaning of FTS as provided under India – Portugal DTAA or India – Canada DTAA, where make available condition has to be satisfied, is to be applied to India – Israel DTAA for considering a particular payment, whether comes within the ambit of FTS or not. It is to be noted, though, the Assessing Officer has rejected applicability of make available condition of other treaties to India – Israel DTAA and proceeded to apply the more wide meaning of FTS under Article 13 of India – Israel DTAA, however, learned DRP, apparently has accepted assessee's claim of applicability of make available condition. Therefore, we need to examine, whether the make available condition as per the definition of FTS in India – Portugal DTAA would apply. Article 12 of India - Portugal DTAA defines FTS to mean technical or consultancy services and if such services make available technical knowledge, experience, skill, knowhow processes to the recipient enabling it to apply the technical content therein. Similarly, Article 12 of Indian – Canada DTAA defines FTS to mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services through the provision of services technical or other personal, if such services

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

9. Thus, keeping in perspective the definition of FTS under India – Portugal and India – Canada DTAAs, we have to examine, whether in course of rendering services the assessee had made available technical knowledge, experience, skill, know-how, process etc. enabling NIIPL to apply the technology contained therein independently without the aid and assistance of the assessee. It is evident, the assessee provides such services on a recurring basis in terms with the agreement. In fact, the departmental authorities have not disputed these facts. Thus, from the aforesaid facts, it can be seen that while rendering services to NIIPL the assessee had not made available technical knowledge, experience, skill knowhow etc. which could have enabled the recipient of such services to apply the technology independently without the aid and assistance of the assessee. Had it been a case of make available, there would have been no need for recipient of service to avail the services from the assessee on recurring basis. Moreover, when the assessee has made it clear that it has not made available any technical knowledge,

knowhow, skill etc. it is for the department to disprove such claim of the assessee through cogent material, because, once the assessee has taken certain position which is not acceptable to the department, then, the burden is on the department to demolish the position taken by the assessee through proper reasoning backed by cogent material. In the facts of the present appeal, except making general observation that the assessee has made available technical knowledge, knowhow, skill etc. the departmental authorities have not brought any material on record to prove such fact. The allegation of the departmental authorities that they are taking such position in absence of material/evidence furnished by the assessee to establish its claim, in our view, is not borne out from record. Not only the agreement mentions in detail the nature of services to be provided by the assessee, but the assessee has furnished various other material on record, including invoices raised for reimbursement of cost. Thus, in our view, the Revenue has failed in proving that the make available condition is satisfied. Therefore, applying the restricted meaning of FTS as per India – Portugal and India – Canada DTAAs, we hold that the amounts received by the assessee from providing SAP and IT support services are not in

the nature of FTS, hence, not taxable in India in absence of a Permanent Establishment (PE). At this stage, for the sake of completeness, we must observed, learned Departmental Representative has submitted that in absence of specific notification by the Government implementing the Protocol to India – Israel DTAA the restrictive meaning in other DTAAs cannot be applied to India – Israel DTAA. Though, the aforesaid contention of learned DR is unsustainable at the threshold considering the fact that learned DRP has given the benefit of Protocol to Indian – Israel DTAA, however, we deem it appropriate to address the issue.

9. In case of Steria (India) Ltd. Vs. CIT (supra), the Hon'ble Jurisdictional High Court, while dealing with similar contention raised by the Revenue, has held that once the DTAA itself has been notified and contains the Protocol there is no need for the Protocol itself to be separately notified or for the beneficial provisions in some other conventions between India and another country to be separately notified to form part of India – France DTAA. Thus, in view of the aforesaid observations of Hon'ble Jurisdictional High Court, we do not find merit in the submissions of learned Departmental Representative. Thus,

following the ratio laid down in the decisions cited before us, we decide the issue in favour of the assessee. Additions made in both the assessment years, as disputed before us, are deleted.

10. Grounds raised on levy of interest being consequential in nature, do not required adjudication. Before parting, we must observe, in assessment year 2011-12, the assessee has raised an additional ground challenging the validity of the assessment order. However, at the time of hearing, learned counsel for the assessee, on instructions, did not press the ground. Accordingly, ground is dismissed as not pressed.

11. In the result, both the appeals are partly allowed.

Order pronounced in the open court on 20th February, 2023

Sd/-	***Sd/-***
(DR. B.R.R. KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 20th February, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi