

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “D”: NEW DELHI**

BEFORE

**SHRI G.S. PANNU, HON’BLE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 820/Del/2022
Asstt. Year: 2017-18

Infobip Limited 5 th Floor, 35-38, New Bridge Street, London, United Kingdom, EC4V 6BW, United Kingdom, United Kingdom PAN AADC18265M	Vs.	Assistant Commissioner of Income Tax, Circle Int. Tax. 2 (1)(1) Delhi.
(Appellant)		(Respondent)

Assessee by:	Ms. Bhavya Bansal, CA
Department by:	Shri Vizay Vasanta, CIT- DR
Date of Hearing:	24.04.2023
Date of pronouncement:	26.05.2023

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order dated 28.02.2022 of the Ld. Assessing Officer (“AO”) passed under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (the “Act”) pertaining to Assessment Year (“AY”) 2017-18.

2. The assessee has raised the following grounds of appeal:-

“1. Ground No. 1 The Assessment Order passed by the Ld. AO pursuant to the direction of the Hon’ble DRP under section 143(3) r.w.s. 144C of the

Income Tax Act, 1961 is erroneous and bad in law and in facts (Separately Enclosed).

2. *Ground No. 2 The Ld. AO on the facts and in the circumstances of the case has erred in characterizing the fees amounting to INR 83,04,370 for the services rendered outside India in the nature of fees for technical services as per the provisions of Article 13(4)(c) of India-UK DTAA.*

3. *Ground No. 3 The Ld. AO on the facts and in the circumstance of the case has failed to appreciate that the services rendered by the appellant are pre-dominantly 'managerial' in nature and that the term 'managerial' has specifically been excluded from the purview of the definition of FTS under Article 13 of the India-UK DTAA.*

4. *Ground No. 4 The Ld. AO on the facts and in the circumstances of the case has erred in law and facts in holding that the payments received by the Appellant from AE are taxable as fees for technical services, without considering the fact that the services do not make available technical knowledge, experience, skill, etc.*

5. *Ground No. 5 The Ld. AO on the facts and in the circumstances of the case has failed to appreciate that the services rendered by the appellant do not "make available" any technical knowledge, experience, skill, know-how or processes, based on the incorrect understanding of the nature of the services provided by the appellant.*

6. *Ground No. 6 The Ld. AO on the facts and in the circumstances of the case has erred in holding that the advice on financial support, sales, legal and technical support services are all capable of being put to use by the AE on its own in promoting the business of the AB and employees of the AE are in a position to and are actually expected to use the knowledge gained, in the business of the AE based on mere conjectures and surmises.*

7. *Ground No. 7 The Ld. AO has grossly erred in not acting upon the decisions of Hon'ble DRP with respect to the case laws relied upon by the Assessee.*

8. *Ground No. 8 The Hon'ble DRP and the Ld. AO has erred in facts and in law by initiating penalty proceedings u/s 270A of the Act mechanically for under-reporting and misreporting without recording any adequate satisfaction for such initiation."*

3. Briefly stated, the facts are that the assessee, Infobip Ltd., is a foreign company incorporated under the laws of England and Wales with a registered office in London, United Kingdom (UK). The assessee provides solutions in the communication and messaging space, offering a cloud based delivery model that helps organisations drive growth globally. The assessee contracts with global customers for the provision of such SMS

messaging solutions by cloud-based technology. For the AY 2017-18, the assessee filed its return on 17.11.2017 declaring total income of Rs. 34,65,980/- and claiming Nil refund. The assessee's case was selected for scrutiny and statutory notices were issued and served upon the assessee. In response thereto the assessee filed various details which were examined and placed on record by the Ld. AO.

3.1 During the relevant AY the assessee provided services to its Associated Enterprise (**"AE"**), namely bSmart Tech Pvt. Ltd. (**"BTPL"**) under the Business Cooperation Agreement (**"Agreement"**) dated 25.03.2014. The assessee rendered centralised services to BTPL which were in the nature of Financial Support Services, Technical Support Services, Sales Support Services and Legal Support Services based out from London, UK. The consideration received for providing services to BTPL was not offered to tax by the assessee. The assessee's case was referred to the Ld. Transfer Pricing Officer (**"TPO"**) under section 92CA of the Act for computation of Arm's Length Price, however no adverse inference was drawn by the Ld. TPO. During the assessment proceedings, the assessee was show caused as to why the total consideration received by it for management support services amounting to Rs. 83,04,370/- during the relevant AY should not be held as fees for technical services (FTS) under section 9(i)(vii) of the Act and Article 13 of the India-UK DTAA and added to its income. The reply filed by the assessee was considered by the Ld. AO but not found tenable. He proposed an addition of Rs. 83,04,370/- to the total income of the assessee on account of FTS for the reason that the services provided by the assessee make available technical knowledge, skill, experience, know-how, etc. and will fall within the purview of FTS under Article 13(4)(c) of the India-UK DTAA.

4. The assessee challenged the draft assessment order before the Ld. Dispute Resolution Panel (**"DRP"**) who vide its order dated 09.02.2022 confirmed the addition of Rs. 83,04,370/- rejecting the objections raised by the assessee. The Ld. AO thereafter passed the final assessment order dated

28.02.2022 under section 143(3) r.w.s 144C(13) of the Act pursuant to the directions of the Ld. DRP by recording the following observations and findings:-

“6. With regard to the above services there is no doubt that such services are made available in the context of the DTAA between India and UK. It is seen that the advice and assistance rendered by the assessee to its Indian AE are not transient in nature and are capable of being used by the applicant on its own. Advice on finance support, sales, legal and technical support services are all capable of being put to use by the AE on its own. The services are enduring and they help in promoting the business of the AE. The employees of the AE are in a position to and are actually expected to use the knowledge gained, in the business of the AE. Thus, knowledge and know-how are made available to the AE. Hence, on an understanding of the overall effect of the services agreement, it has to be held that the managerial and consultancy services are made available by the assessee to its AE.

7. Thus, on a true construction of the agreement between Infobip Limited and Bsmart Tech Pvt. Ltd, it has to be held that the assessee is rendering managerial and consultancy services to the applicant. These technical services are taxable under paragraph 4 of Article 13 of the DTAA. They are taxable even if one were to invoke the concept of make available for making the payments for such services taxable. Thus, the technical services provided are taxable in terms of Article 13.4 of the DTAA between India and UK.

8. Reliance is place on the following case laws to support the arguments:

□ The term 'make available' came under the examination by the AAR in its ruling in the case of Shell India Markets Pvt. Ltd. (order dated 12.1.2012 in AAR No. 833 of 2009). In this case, the foreign company provided industry specific expertise to the assessee which was applied in running business. This way the assessee's employees would be equipped to carry on that business/ service on their own without reference to the service provider, when the service agreement comes to an end. It has been stated that it was not a pre-requisite for the applicability of "make available" clause that the right to continue the practice put into effect and adopted under the service agreement on its expiry should be conveyed specifically. It was found that while describing the services, the term 'advise/advice' has been used repeatedly and the services are themselves called 'support services'. This itself indicates that while providing General BSS, foreign company works closely with the employees of the assessee and supports/advises them. Thus, General BSS were made available to the assessee. It was held that the services were clearly made available to the assessee.

□ In the case of Areva T&D Ltd (order dated 7.2.2012 in AAR No 876 of 2010), the AAR has held that the IT sharing services 'made available' technical knowledge, expertise to the assessee, resulting in such services being characterized as FTS and therefore, subject to Indian withholding tax.

□ In the case of *Mersen India Pvt. Ltd.* [2012] 20 taxmann.com 475 (AAR - New Delhi), the facts of the case were that the Assessee, an Indian Company, entered into a service agreement with a French Company. In terms of service agreement, French Company has undertaken to provide assessee with services in nature of assistance, professional and administrative consultation and training. Various clauses of service agreement contain provisions for services which relate to overall management and direction, marketing and managing accounts and financial operations of assessee. It is also apparent that advice and assistance provided by French Company on business strategy, on general management, on marketing and commercial matters, on financial control and accounting matters, and on purchase and sales, environment and safety and giving of training to optimize sales techniques to employees of assessee, are all capable of being put to use by assessee in future on its own and, thus, consultancy services are also made available to assessee. Under these facts, the AAR held that the payments by assessee to French company towards advisory services is 'fees for technical services' and, therefore, assessee is required to deduct tax at source under section 195(1) while making payments for aforesaid services. Thus, the term "make available" is not limited to services of technical nature but also includes the consultancy services."

□ The term 'make available' came under the examination by the AAR in its ruling in the case of *Shell India Markets Pvt. Ltd.* (order dated 12.1.2012 in AAR No. 833 of 2009). In this case, the foreign company provided industry specific expertise to the assessee which was applied in running business. This way the assessee's employees would be equipped to carry on that business/ service on their own without reference of the service provider, when the service agreement comes to an end. It has been stated that it was not a per-requisite for applicability of "make available" clause that the right to continue the practice put into effect and adopted under the service agreement on its expiry should be conveyed specifically. It was found that while describing the services, the term 'advise/advice' has been used repeatedly and the services are themselves called 'support services'. This itself indicates that while providing General BSS, foreign company works closely with the employees of the assessee and supports/advises them. Thus, General BSS were made available to the assessee. It was held that the services were clearly made available to the assessee.

9. Placing reliance on the above rulings and in view of the aforesaid discussion, it is evident that the services provided by Infobip Pvt Ltd. make available technical knowledge, skill, experience, know-how etc. and will fall within the purview of FTS under Article 13(4)(c) of India-UK tax treaty. The assessee has also itself accepted that the services provided by it are covered as FTS under section 9(i)(vii) of the IT Act, 1961.

10. In view of the above, addition of Rs 83,04,370/- is proposed to be made to the total income of the assessee for the subject year on account of Fee for Technical Service. As the assessee has under reported and misreported income by not offering the receipts as FTS while filing the return of income,

therefore, I propose to consider it a fit case for initiation of penalty proceedings u/s 270A of the Act.”

5. Aggrieved, the assessee is before the Tribunal challenging the addition of Rs. 83,04,370/- made by the Ld. AO and all the grounds of appeal relate thereto.

6. Ground No. 1 is general in nature. Ground No. 2 relates to addition of Rs. 83,04,370/- to the income of the assessee on account of services rendered by the assessee to its AE in India i.e. BTPL held to be FTS under the provisions of Article 13(4)(c) of the India-UK DTAA. Ground No. 3 to 7 are arguments in support of ground No. 2. Ground No. 8 relates to initiation of penalty proceedings under section 270A of the Act which is premature and do not require adjudication at this stage.

7. The Ld. AR submitted that the services rendered by the assessee are managerial in nature and took us through the detailed description of the services rendered by the assessee under the terms of the Agreement between the assessee and BTPL. He submitted that the services provided by the assessee are in the nature of financial and sales support, legal support and technical support services which are managerial services and thus outside the scope of FTS clause of Article 13(4) of India-UK DTAA.

7.1 The Ld. AR further submitted that even if the services are considered to be in the nature of FTS under the Act, the same would not be considered as FTS under the provisions of India-UK DTAA as the ‘make available’ clause is not satisfied. The services are not of enduring nature and BTPL is not in a position to apply and use the technical knowledge on their own without the support of the assessee. These services are continuously provided year after year on a regular basis and there is no change in the nature of services rendered by the assessee. The Ld. AR took us through the sample copies of e-mail correspondence between the assessee and its AE i.e BTPL for the provision of services to show that the services offered by the assessee are simple review of legal contracts and that no transfer of technical knowledge,

skills, experience, know-how etc. is made from the assessee to BTPL while rendering these services.

7.2 The Ld. AR relied on the following cases in support of his contention that mere rendering of service is not considered as make available unless the assessee is able to use the technical knowledge by himself in his business:-

- i) De Beers India Minerals (P) Ltd. vs CIT 208 Taxmann.406
- ii) Raymond Ltd. vs CIT 80 TTJ 120 [Mum ITAT]
- iii) DIT v. Guy Carpenter & Co. Ltd.[2012] 20 taxmann.com
807/207 Taxman 121/346 ITR 504 (Delhi)
- iv) ADIT Vs. Rolls Royce Industrial Power India Ltd. ITA No.
1599(Del) 2011
- v) Aircom International Ltd. (AAR No. 883 of 2012]
- vi) Intertek Testing Services India (P.) Ltd. In re [2008] 175 Taxman
375/307 ITR 418(AAR)
- vii) Dy. DIT (International Taxation) v. Scientific Atlanta Inc. [2009]
33 SOT 220 (Mum.)

8. The Ld. DR relied on the order of the Ld. AO/DRP and submitted that undoubtedly there is a component of technical consultancy involved in the provision of services by the assessee to BTPL. Drawing our attention to e-mail correspondence placed on page 115 and 118 of the Paper Book he submitted that the client of BTPL is actively involved and therefore it leads to make available clause being satisfied.

9. We have heard the Ld. Representative of the parties and perused the material on record. It is an undisputed fact that the assessee is a tax resident of UK and therefore has opted to be governed by the provisions of India-UK DTAA being more beneficial to it under the provisions of section 90 of the Act.

9.1 Article 13(4) of the India-UK DTAA defines the term “Fees for Technical Services” to mean-

“payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provisions of services of technical or other personnel) which:

(a)....

(b).....

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

9.2 Clause 3.1 of the Agreement (copy at pages 87-91 of the Paper Book) states that:-

“Service provider (Infobip) shall perform the Services including but not limited to the:

- a) Finance support services;*
- b) Technical support services;*
- c) Sales support services; and*
- d) Legal support services”*

9.3 The assessee had provided detailed explanation along with documentary proof before the Ld. AO outlining the mode and examples of provision of the above services by the assessee to BTPL which is stated below:-

“1. Financial and Sales Support services: *The Finance and Sales Support team of the assessee based in UK maintains the records of invoices raised by BTPL on its customers for the provision of bulk SMS services in the system and keep tracks of payments received against the invoices raised. The Finance and Sales Support team of the assessee on the receipt of payment in the account of BTPL, activates the offer of provision of bulk SMS services as requested by the customer of BTPL. The Finance and Sales Support team of the assessee sends timely reminder emails to the sales managers of BTPL to follow up with its customers for outstanding dues.*

Further, the Finance and Sales Support team maintains the records of Payroll details of the employees and reimbursement claims of the employees of BTPL.

2. **Legal Support services:** *The Legal team of the assessee based in UK provides legal inputs on the agreement to be entered for the provision of bulk SMS services by BTPL to its customers. The Legal team reviews the draft agreement between BTPL and its customer and provides suggestion if any changes are required in the draft agreement on email to BTPL.*

3. **Technical Support services:** *The Technical Support team of the assessee based in UK provides technical support services to BTPL and its customers. The technical support team of the assessee attends to the queries/request lodged on company portal or sent via email and provides resolution on email or on Skype.”*

9.4 The service recipient i.e. BTPL is in the business of sales, marketing and product development of mobile technology services on the basis of SMS. It is thus evident from the above explanation of services that the nature of services rendered by the assessee to BTPL comprises of maintaining records of invoices, reminders to BTPL for collecting outstanding dues, reviewing legal agreement, providing technical support to customers of BTPL. The team of the assessee based in London, UK processes/addresses/advises the requests received for the services covered in the Agreement from BTPL and executes/delivers the resolution on an e-mail to BTPL. The assessee has produced sample copies of e-mail correspondence between the assessee and BTPL for the provision of services which are placed at pages 114-134 of the Paper Book. Perusal of the same reveals that services offered by the assessee involve review of legal contracts/agreements for BTPL to be entered with its clients. These services are provided by the assessee year after year on continuous basis which shows that the assessee cannot perform these services on its own without recourse to the assessee.

9.5 It is amply clear from the above facts that the services provided by the assessee includes administrative services, accounting services, legal services and other support services that are ancillary to the functioning of corporate management function of BTPL. These services are thus essentially in the nature of managerial services which are in our considered view outside the scope of the meaning of FTS under Article 13(4) of the India-UK DTAA. As submitted by the Ld. AR to which we agree that even if the above services are considered to the FTS being technical, managerial and consultancy

services as per the provisions of section 9(1)(vii) of the Act, these services will not fall within the meaning of FTS under Article 13(4) of the India-UK DTAA as the services provided by the assessee to BTPL does not make available any technical knowledge/experience, skill, know-how or processes or consist of the development and transfer of technical plan or technical design enabling BTPL to apply technology contained therein. Although the services rendered by the assessee to BTPL could be characterised as technical services in the nature of advisory and consultancy, the same could not be considered as being made available to BTPL. These services are continuously rendered by the assessee to BTPL and BTPL has to again and again go back to the assessee for provision of these services. BTPL is in no way able to apply and use the technical knowledge provided by the assessee on its own in its business. A mere provision of service may require technical knowledge by service provider but that would not per se mean that such technical knowledge has been made available to the service recipient. Therefore, the assistance, support or advice provided by the assessee to BTPL shall not per se be considered to make technology available since the assessee did not make available any technical knowledge, experience or skill to BTPL by way of rendering the above support services to BTPL. In our view, Article 13(4) of the India-UK DTAA does not apply to the assessee's case and hence the consideration could not be included in FTS.

9.6 There are plethora of judicial precedents where the courts have tested the expression "make available" in the context of "fees for technical services" viz-a-viz the nature of services rendered by the assessee. We have considered the decisions (supra) relied upon by the assessee. The sum and substance of all these decisions are that mere rendering of services is not considered as 'make available' unless the person utilising the services is able to make use of technical knowledge etc. by himself in his business or for his own benefit and without recourse to the performer of services in future. In order to attract Article on FTS, it additionally requires that the service provider should also make his technical knowledge, experience, skill, know-how etc. known to the recipient of service so as to equip him to,

independently perform the technical function himself in future without help of the service provider. There should be transfer of technical knowledge, skills, experience from the person rendering the service to the persons utilising the same. Payment of consideration would be regarded as FTS only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.

9.7 In Outotec India P Ltd. Vs CIT (2015) 41 ITR (Trib) 449 (Delhi), Delhi Bench of the Tribunal pointed out that the expression “make available” in the context of ‘fees for technical services’ contemplates that the technical services should be of such a nature, that the payer comes to possess the technical knowledge so provided which enables it to utilize the same thenceforward. If the services are consumed without leaving anything tangible with the payer for use in future, it will not be ‘make available’ of the technical services notwithstanding the fact that its benefit flowed directly to the payer.

9.8 In Mahindra and Mahindra Ltd. vs. Dy CIT (2009) 313 ITR (AT) 263 (Mumbai) (SB) it has been held that where the payer only obtained the benefit from the services, but did not get any technical knowledge experience or skill in its possession for future use, it cannot be said that technical know-how was made available.

10. On the facts and in the circumstances of the case, and in the light of the decisions (supra) we are of the view that the services rendered by the assessee to BTPL do not satisfy “make available” clause as envisaged under Article 13(4)(c) of the India-UK DTAA to fall within the scope of FTS. Hence, the fees amounting to Rs. 83,04,370/- for the services rendered by the assessee from outside India to BTPL are not in the nature of FTS as per the provisions of Article 13(4)(c) of India-UK DTAA. Accordingly, we decide Ground No. 2 to 7 in favour of the assessee.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 26th May, 2023.

**sd/-
(G.S. PANNU)
PRESIDENT**

**sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER**

Dated: 26/05/2023

Veena

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3. CIT
4. CIT (A)
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ASSISTANT REGISTRAR
ITAT, New Delhi

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