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

BEFORE SHRI G.S. PANNU, PRESIDENET AND
SHRI SAKTIJIT DEY, VICE-PRESIDENT

ITA No.567/Del/2022
Assessment Year: 2018-19

Bain & Company, Inc. 131, Dartmouth Street, Dartmouth Street Boston, Massachusetts, USA, Foreign United States, C/o Bain and Company India Pvt. Ltd., 20th Floor, Building No.10, Tower C, DLF Cyber City, Phase-II, Gurgaon, India, 122 002	**Vs.**	Deputy/ACIT, International Tax, Gurgaon, Haryana
PAN :AAECB9564H		
(Applicant)		**(Respondent)**

Assessee by	S/Shri Himanshu Sinha, Bhuwan Dhoopar & Parash Bishwal, Advs.
Respondent by	Shri Vizay B. Vasanta, Sr. DR

Date of hearing	18.05.2023
Date of pronouncement	29.08.2023

ORDER

This is an appeal by the assessee, challenging the final assessment order dated 31.01.2022 passed under Section 143(3) read with section 144C(13) of the Income-Tax Act,1961 pertaining to

assessment year 1989-90, in pursuance to the directions of the learned Dispute Resolution Panel (DRP).

2. Ground no.1 being a general ground, does not require adjudication.

3. In ground no. 2, assessee has challenged the taxability of an amount of Rs.5,24,00,942 as Fee for Included Service (FIS) under Article 12 of India-USA Double Taxation Avoidance Agreement (DTAA).

4. Briefly, the facts are, assessee is a non-resident corporate entity and a tax resident of USA. As stated by the Assessing Officer, the assessee is engaged in the business of providing consultancy services to global clients based in the USA or having USA operations. The assessee also provides support services to other group entities for which it is remunerated at arm's length basis.

5. For the assessment year under dispute, assessee filed its return of income on 29.11.2018 declaring income of Rs.5,22,26,919.

6. In course of assessment proceedings, the Assessing Officer observed that as per the return of income, assessee has offered to tax royalty income of Rs.5,00,33,409 received from Bain and Company

India Pvt. Ltd. (Bain India) and interest on income-tax refund amounting to Rs.21,93,510. However, he observed that an amount of Rs.5,24,00,942 received from its Indian affiliate towards provisions of consultancy services was not offered to tax on the plea that they are not in the nature of FIS. After examining the nature and scope of services, the Assessing Officer observed that as per Article 12(4) of India-US Tax Treaty, the amount received for providing managerial, technical or consultancy services, can be regarded as FIS. Thus, he held that since the fee received by the assessee is from consultancy services, it has to be treated as FIS under Article 12(4) of the Tax Treaty. While coming to such conclusion, he further held that the assessee had made available technical knowhow, knowledge, skill etc. relating to such services to the service recipient. On the basis of aforesaid reasoning, the Assessing Officer treated the amount of Rs.5,24,00,942 as the income of the assessee and added back to the income declared. Accordingly, he proposed the draft assessment order. Though, the assessee objected to the draft assessment order before learned DRP, however, the objections were overruled.

7. Before us, learned counsel appearing for the assessee submitted that the assessee had entered into a Consulting Services Agreement with the affiliate on Ist April, 2010. He submitted, under the terms of the agreement, the assessee provides professional management consulting services, clients engagement including market research, strategic research etc. He submitted, as per the terms of the agreement, either the assessee can itself provide such services or can also outsource some of the work to freelance consultants and agents. In this context, he drew our attention to the agreement. Proceeding further, he submitted, the assessee is a global business consulting organization, which provides consulting services to a variety of business sectors including automotive, consumer products, retail, services, etc. in various areas such as supply chain management, corporate strategy, corporate renewal etc. As evident from the CSA, similar consulting services like supply chain management, data collection, market research and liaising with clients were provided to Bain India during the relevant financial year.

8. Drawing our attention to the definition of FIS under Article 12(4) of the Tax Treaty and the definition of Fee for Technical

Services (FTS) under Section 9(1)(vii) of the Act, learned counsel for the assessee submitted, the definition of FIS under the Tax Treaty is restricted in comparison to the Act as the treaty provisions provide for fulfillment of make available condition. He submitted, in the first place, the services provided by the assessee are basic business advisory services, hence, not technical in nature. In this context, he drew our attention to the Memorandum of Understanding to the tax treaty. He submitted, only those consultancy services, can be covered under FIS, which are technical in nature. Thus, he submitted, non-technical consultancy services are not covered under Article 12(4)(b) of the Tax Treaty. In support of such contention, he relied upon the following decisions:

i) DCIT vs. Boston Scientific Group Pte Ltd. (2005) 94 ITD 31;
ii) ACIT vs. Viceroy Hotels Ltd. [2011] 11 taxman.com 2016 (Hyd.); &
iii) DDIT vs. preroy A.G.. [2010] 39 SOT 10 (Mumbai).

9. Without prejudice to the aforesaid submissions, learned counsel submitted, even, assuming that the services provided are in the nature of consultancy services, however, while providing such services, the

assessee had not made available any technical knowledge, skill etc. to the services recipient. Therefore, the conditions of Article 12(4)(b) of the Tax Treaty are not satisfied. Referring to the Memorandum of Understanding to the Tax Treaty, he submitted, technology is made available when the person acquiring the service is enabled to apply the technology independently without the aid and assistance of the service provider. Further, he submitted, the mere fact that the provision of service may require technical input by the service provider, does not per se mean that technology, skill etc. are made available to the service recipients.

10. In this context, he also drew our attention to Example 7 of the Memorandum of Understanding to the Tax Treaty. He submitted, though, the assessee assists the Indian affiliate on various projects, there is no transfer of technical knowledge that will enable the Indian affiliate to apply on its own. He submitted, it is rather impossible to transfer any technology, as the specific market information provided during rendition of services is frequently subject to change. He submitted, as a service provider, assessee provided services and solution to the Indian affiliate on the specific facts of each client.

Neither the clients nor the Indian affiliate gets enabled or acquires any technical knowhow in the course of rendition service to undertake that service by itself given the unique set of facts in each consulting project. He submitted, the assessee had been rendering consulting services to the Indian affiliate since the year 2010, which itself proves that no technology had been made available to the Indian affiliate as it has remained dependant to the assessee for such services. Thus, he submitted, the amount received cannot be treated as FIS under the Tax Treaty. In support of such contention, learned counsel relied upon the following decisions:

- DCIT vs. Boston Consulting Group (2005) 94 ITD 31;
- McKinsey & Co., Inc (Philippines) v. ACIT[2006] 99 ITD 549 (Mumbai);
- Everest Global Inc. (P) Ltd. v. ACIT [2022] 143 taxman.com 176 (Delhi-Trib.);
- US Technology Resources (P) Ltd. v. CIT [2017] 97 taxman.com 642 (Kerala);
- Mark Biosciences Ltd. v ITO [2017] 18 taxmann.com 275 (Ahmedabad-Trib);
- DCIT v. Marriot International Design & Construction Services [2022] 139 taxmann.com 494 (Mumbai-Trib);
- Sobic Innovative Plastics US, LLC v. DDIT, [2020] 119 taxmann.com 398 (Delhi-Trib.);
- Burro Happold Ltd. v. DCIT, [2019] 103 taxman.com 344 (Mumbai-Trib);
- C.B.S.E. Ltd. v. DCIT [2005] 275 ITR (AT) 15;
- Raymond Ltd. v. DCIT, 86 ITD 791

11. Further, he submitted, the decisions relied upon by the Assessing Officer are distinguishable on facts, hence, not applicable.

12. Strongly relying upon the observations of the Assessing Officer and learned DRP the learned Departmental Representative submitted, as per the terms of the agreement, the nature of services provided by the assessee are technical or consultancy services, hence, covered under the definition of FIS under Article 12(4)(b) of the Tax Treaty. He further submitted, while rendering such services, assessee has also made available the technical knowledge, skill etc. to its affiliate. Thus, he submitted, the receipts squarely fall within the ambit of Article 12(4)(b) of the Tax Treaty. In support of such contentions, he relied upon various decisions referred to by the Assessing Officer and learned DRP.

13. We have considered rival submissions in the light of decisions relied upon and perused the material available on record. Upon analyzing the consulting service agreement between the assessee and Bain India, it is observed that the consulting services provided by the assessee are as under:

> "The nature of services performed by the Parties would vary for each project/case based on specific project requirements. The Parties will provide Professional management consulting services to each other from time to time upon request, including without limitation market research, strategic research and planning, data collection, liaising with clients, in each case as may be arranged and agreed to in any given instance and from time to time between Bain India and Company or the applicable Subsidiary, as applicable."

14. As could be seen from the nature of services provided by the assessee are in relation to market research, strategic research and planning, data collection, client engagement etc. Article 12(4) of India-USA DATA defines FIS as under:

> "Article 12(4) of the DTAA defines 'Fee for included Services' as under:
>
> "Article 12-ROALTIES AND FEES FOR INCLUDED SERVICES
>
> 4. For purposes of this Article, "fee for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services: (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
> (b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of the development and transfer of a technical plan or technical design."

15. As per Article 12(4), FIS includes any payment received towards rendering technical or consultancy services. In the facts of the present appeal, admittedly, the departmental authorities have categorically held that the receipts are covered under Article 12(4)(b). Thus to qualify under Article 12(4)(b) of the Tax Treaty, the following two conditions are to be fulfilled:

i) The services rendered must be technical or consultancy services;
ii) Rendering of such services result in making available technical knowledge, expertise, skill, knowhow or processes etc.

16. So firstly it has to be seen whether the services rendered are of the nature of technical or consultancy. To understand the true import of the expression of technical or consultancy, it is necessary to refer to the Memorandum of Understanding to the Tax Treaty. As per the Memorandum of Understanding, Article 12 includes only certain technical and consultancy services. Technical services would mean, services requiring expertise in a technology. Whereas, consultancy services would mean advisory services. The categories of technical and consultancy services are to some extent overlapping, because, a consultancy service could also be a technical services. However, the

category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it. The nature of services provided under the agreement, such as, client engagement, market research, strategic research and planning etc., in our view, certainly, do not fall under the category of technical services.

17. Further, even assuming that they fall under the category of consultancy services, however, the most crucial condition to be satisfied to qualify as FIS under Article 12(4)(b) is the make available condition. In the facts of the present appeal, the departmental authorities have not brought any material on record to demonstrate that while rendering services, the assessee had made available technical knowledge, expertise, skill, knowhow etc. to Bain India to apply such technology, knowhow etc. independently without the aid and assistance of the assessee. The fact that Bain India is still dependent on the assessee for such services is established from the fact that since the year 2010, the assessee had been providing such services to Bain India on year to year basis. Had assessee made available the technical knowledge, knowhow skill etc. to Bain India,

there would not have been any occasion for the assessee to provide such services on year to year basis as the making available or transfer of such technical knowledge, knowhow, skill etc. would have enabled Bain India to apply them on its own without requiring the assessee to continue with providing them.

18. It is further relevant to observe, as per Example 7 of the Memorandum of Understanding to India-USA DTAA, a receipt cannot be treated as FTS merely because the service provider while providing consultancy services has used substantial technical skill and expertise. Because, while providing such services, the American Company is not making available to the Indian Company, any technical expertise, knowledge or skill etc. but is merely transferring commercial information to the Indian Company by utilizing technical skill. Thus, keeping in perspective the aforesaid factors as well as the ratio laid down in the judiciary precedents cited before us, we have no hesitation in holding that the receipts in dispute are not in the nature of FIS under Article 12(4)(b) of India-USA DTAA. We order accordingly.

19. In ground no.3, the assessee has challenged the addition of Rs.10,98,97,261 as FIS under Article 12(4)(b) of Indian-US DTAA.

20. Briefly, the facts are, in course of assessment proceedings, the Assessing Officer noticed that in the year under consideration, the assessee has received an amount of Rs.10,98,97,261 from Bain India towards reimbursement of client related expenses under a cost reimbursement agreement. After calling for the necessary details and examining them, the Assessing Officer concluded that the nature of receipts is FIS under Article 12(4)(b) of the Tax Treaty. Accordingly, he added it to the income of the assessee. Though, the assessee raised objections against such addition, however, learned DRP did not interfere.

21. Reiterating the stand taken before the departmental authorities, learned counsel submitted that the receipts are in the nature of reimbursement of actual cost without any mark up. He submitted, the amount represents third party cost incurred by the assessee for procuring services of market/industries research on behalf of Bain India and reimbursements are on cost to cost basis. He submitted, the services provided by the third party to the assessee are industry

research services which included services and cost pertaining to calls with subject matter and industries research incurred for and behalf of the clients. There is no technical skill or knowhow employed in industries research services. He, thus, submitted, the conditions of section 12(4)(b) of the Tax Treaty are not satisfied. More so, when the assessee is providing such services under cost reimbursement agreement since 2010. He submitted, while deciding the issue relating to the nature and character of very same receipts and whether it requires withholding of tax in case of Bain India, the Tribunal in ITA No. 2845/Del/2016 dated 10th November 2021 has held that receipts being in the nature of cost to cost reimbursement for marketing and other services rendered by third party, is not taxable in India. Therefore, withholding of tax is not required. Thus, he submitted, the decision of the Tribunal squarely covers the issue in favour of the assessee.

22. Learned Departmental Representative relied upon the observations of the Assessing Officer and learned DRP.

23. We have considered rival submissions and perused the material on record.

24. It is observed, while considering the issue relating to the nature and character of identical receipts and whether it requires withholding of tax, the Tribunal in case of the payer i.e. Bain India in assessment year 2009-10, in the order referred to above, has held that the payment cannot be treated either as FIS under Article 12(4)(b) of the Tax Treaty or royalty. Therefore, it was held by the Tribunal that there was no requirement on the part of the payer i.e. Bain India to withhold tax.

25. In our considered opinion, the controversy stands resolved by the aforesaid decision of the Tribunal. Therefore, we hold that the receipts are not in the nature of FIS under Article 12(4)(b) of the Tax Treaty. We order accordingly.

26. Ground no. 4 and 5 being consequential in nature, do not require adjudication.

27. In the result, the appeal is allowed as indicated above.

Order pronounced in the open court on 29 .08.2023.

Sd/-	**Sd/-**
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**VICE-PRESIDENT**

Dated: 29th August, 2023
Mohan Lal

Copy forwarded to:

1. Applicant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi