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

**BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT**
**AND**
**DR. BRR KUMAR, ACCOUNTANT MEMBER**

**ITA Nos. 1839 & 1840/Del/2022**
**Assessment Years: 2018-19 & 2019-20**

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| SoftwareONE Pte. Ltd.,<br>233, Mountbatten Road,<br>02 08 09 10, Singapore<br>**PAN: AAPCS9237H**<br>(Appellant) | Versus | ACIT, Circle 3(1)(2),<br>International Taxation,<br>Delhi.<br><br>(Respondent) |

Assessee by : Ms. Ananya Kapoor, Adv.
Revenue by : Sh. Vizay B. Vasanta, CIT-DR

Date of hearing : 20.09.2023
Date of pronouncement: 25.09.2023

**ORDER**

Captioned appeals have been filed by the assessee, challenging the final assessment orders passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961, pertaining to assessment years 2018-19 and 2019-20, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. The only common dispute arising in these appeals relates to taxability of the amount received from sale of software as fees for

technical services (FTS) under Article 12(4) of India-Singapore Double Taxation Avoidance Agreement (DTAA).

3. Briefly, the facts relating to the issue are, the assessee is a non-resident corporate entity incorporated under the laws of Singapore and tax resident of Singapore. The assessee is basically a distributor of software. It also earns income from support services. In the assessment years under dispute, the assessee has earned income from sale of software as well as from provision of support services. The receipts from provision of support services were offered to tax in India as FTS. However, the receipts from sale of software were not offered to tax on the plea that it is not in the nature of royalty. In course of assessment proceedings, the Assessing Officer called upon the assessee to furnish various details relating to the receipts from sale of software. After examining the details furnished by the assessee and gathering information from website, the Assessing Officer was of the view that the receipts from sale of software in reality are receipts from technical services, hence, would qualify as FTS, both under the provisions of the Act as well as under Article 12(4)(b) of India-Singapore DTAA. In this context, the

Assessing Officer further alleged that the assessee did not furnish copies of relevant contracts, under which sales were made to Indian customers and merely furnished sample copies of invoices. Thus, ultimately, the Assessing Officer came to a conclusion that the sale of software also involves services of technical nature and receipts would qualify as FTS both under the Act and Article 12 of India-Singapore DTAA and accordingly, he brought the receipts to tax by framing draft assessment order. Against the draft assessment order, the assessee raised objections before learned DRP. While disposing of the objections of the assessee, learned DRP held that receipts from sale of software are not taxable in India. Whereas, the receipts from provisions of technical services is taxable in India. Accordingly, learned DRP directed the Assessing Officer to verify the materials on record and tax the receipts of the assessee. In final assessment order, out of the total receipts shown to be from sale of software, the Assessing Officer treated an amount of Rs.3,55,14,034/- as FTS in assessment year 2018-19 and an amount of Rs.4,20,17,820/- in assessment year 2019-20 as receipts from technical services, hence, in the nature of FTS.

4. Before us, learned counsel appearing for the assessee submitted that in the immediately preceding assessment year, i.e., 2017-18, while considering the taxability of identical nature of receipts, the Assessing Officer had held that they are in the nature of royalty both under the provisions of the Act as well as India-Singapore DTAA. She submitted, while deciding assessee's appeal, learned first appellate authority deleted the addition by following the decision of the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT(2021) 125 taxmann.com 42(SC) and the Tribunal upheld the decision of the first appellate authority. She submitted, though, the nature and character of receipts are identical in the impugned assessment years, however, being conscious of the fact that such receipts are not taxable as royalty income, the Assessing Officer re-characterised them as FTS under the Act as well as under India-Singapore DTAA. She submitted, there being no change in the factual position in the impugned assessment years, the re-characterisation of receipts as FTS is illegal and unsustainable. Thus, she submitted, the addition should be deleted.

5. Without prejudice, she submitted, even assuming that the services rendered are of technical nature, however, unless while rendering services, the assessee makes available technical know-how, skill etc. to the service recipient, it will not be regarded as FTS under the treaty provision. Thus, she submitted that the addition should be deleted.

6. Strongly relying upon the observations of the Assessing Officer and learned DRP, learned Departmental Representative submitted, some of the invoices raised by the assessee on Indian customers reveals that it includes service component. Therefore, part of the receipts relates to provision of technical services, hence, taxable as FTS.

7. We have considered rival submissions and perused materials on record. We have also applied our mind to the decision relied upon. As discussed earlier in the order, in assessment year 2018-19, the assessee had received income in India from two steams, i.e., income from support services and income from sale of software. Whereas, in assessment year 2019-20, the only source of income in India to the assessee is from sale of software.

8. So far as receipts from support services, undisputedly, the assessee has offered it to tax in India by treating them as FTS, whereas, the receipts from sale of software were not offered to tax in India, pleading that they are not in the nature of royalty and are business profits, which, in absence of PE in India, are not taxable. However, the Assessing Officer has re-characterised a part of the receipts from sale of software to be in the nature of FTS in the draft assessment order and brought it to tax in India.

9. From the facts and materials on record, it is evident that the assessee purchased software products from third party vendors like Microsoft, Adobe etc. and distributes them to customers in India. In some instances, software products procured from third party vendors also include software maintenance, upgrades etc. However, such maintenance or upgrades are the responsibilities of the vendor and not the assessee. Pertinently, while considering the taxability of identical nature of receipts in assessee's own case in assessment year 2017-18, the Assessing Officer had treated it as royalty both under the provisions of the Act as well as under treaty provision. However, following the decision of Hon'ble Supreme Court in case of

Engineering Analysis Centre of Excellence Pvt. Ltd. (supra), learned first appellate authority held that the receipts are not in the nature of royalty. The decision of the first appellate authority was upheld by the Tribunal while deciding Revenue's appeal in ITA No. 103/Del/2022 in order dated 26.12.2022. After carefully going through the draft assessment order, we have not found any difference in the factual position brought on record by the Assessing Officer from assessment year 2017-18. However, without any valid or cogent reason, the Assessing Officer has re-characterised the receipts as FTS.

10. Of course, while disposing of assessee's objections, learned DRP has clearly directed that the receipts from sale of software cannot be brought to tax in India and only service component can be treated as FTS. Interestingly, in the final assessment order, while implementing the directions of learned DRP, the Assessing Officer has treated part of the receipts from sale of software as FTS. However, on what basis, he bifurcated the receipts between the sale of products and provision of services is not forthcoming. The Assessing Officer has absolutely not made any discussion about the factual aspect of the issue and the evidences examined by him to

come to such conclusion. Though, learned Departmental Representative has tried to make out a case before us that certain invoices of the assessee include service component, however, no such fact has been established on record.

11. On the contrary, on verification of copies of invoices placed in the paper book, we are convinced that they are only in respect of sale of software and do not contain any element of service. Thus, in our view, even a part of the receipts cannot fall within the ambit of FTS.

12. Even, assuming for arguments' sake that a part of the receipts from sale of software also involves service element, hence, to be treated as FTS, however, the issue, which arises for consideration is whether such receipts can be treated as FTS under Article 12(4)(b) of India-Singapore DTAA in absence of fulfilment of make available condition. On a reading of assessment order, we do not find any material brought on record by the Assessing Officer to establish that during rendition of services, the assessee has made available technical know-how, skill etc. to the service recipient so as to enable him to apply technical knowledge, know-how, skill etc in future independently, without the aid and assistance of the assessee. In

fact, in the final assessment orders, the Assessing Officer has not made any discussion, under which limb of article 12(4) of India-Singapore DTAA, he has taxed a part of the receipts. In view of the aforesaid, we hold that the additions made by the Assessing Officer are unsustainable. Accordingly, we direct him to delete them.

13. In the result, appeals are allowed as indicated above.

Order pronounced in the open court on 25/09/2023.

| Sd/- | Sd/- |
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| **(DR. BRR KUMAR)** | **(SAKTIJIT DEY)** |
| **ACCOUNTANT MEMBER** | **VICE-PRESIDENT** |

Dated:25.09.2023
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