IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B' NEW DELHI.
BEFORE SMT. DIVA SINGH AND SHRI K.G. BANSAL

I.T.A. No.5604(Del)/2010
Assessment year: 2007-08

CSC Technology Singapore Pte. Ltd., (Earlier known as CSC Computer Sciences Pte. Ltd.), Singapore PAN: AABCC9132B	Vs.	Assistant Director of Income tax, Circle 1(1), International Taxation, New Delhi.
(Applicant)		(Respondent)

Appellant by : Shri S.K. Aggarwal, C.A.
Respondent by: Shri S.K. Chand, Sr. DR.

Date of Hearing: 24.01.2012
Date of Pronouncement: 17.02.2012.

ORDER

PER K.G. BANSAL : A.M

The assessee has taken up 9 grounds in the appeal. Ground no. 1 has seven sub-grounds; ground no. 2 has three sub-grounds; ground nos. 3 and 4 have two sub-grounds each and ground no. 5 has three sub-grounds. However, the ld. counsel for the assessee explained that the main issues are regarding the system of accounting and assessment of reimbursement of expenses by the AO. Therefore, while admitting that the grounds are narrative and argumentative in nature and, therefore, not in accordance with ITAT Rules, it is pleaded that the appeal may be decided

on the basis of submissions made in the course of hearing. He will also raise material grounds of fact and arguments in the course of hearing. These may be considered and the appeal may be decided accordingly.

2. He furnished background facts in brief that the assessee-company is based in Singapore and it has no presence in India. Its income consists of receipts from licensing of software to four customers in India. One of the customers is CSC India Pvt. Ltd., which is its hundred per cent subsidiary company. Other three customers are unrelated to the assessee. Two main questions arise in the appeal-(i) whether, the royalty/ Fees for Technical Services ('FTS' for short) is to be taxed on the basis of the gross amount, and (ii) whether, reimbursement of certain expenses are to be included in the receipts for the purpose of the levy of tax? There are other minor ground regarding chargeability of interest u/s 234B, liability to pay sur-charge and reconciliation of the receipts.

2.1 Coming to facts, it is submitted that SAP software is internally used by all the group companies. This software is procured from an unrelated party. The expenditure incurred for the use of the license by the group companies is shared by them on the basis of the extent of user.

The whole of the payment is made by the head office. This expenditure pertains to the business of the group companies including the Indian subsidiary company. Therefore, the expenditure is reimbursed on the basis of the bills raised by the head office. This amount is not included in the receipts.

2.2 All the group companies also use remote access facilities provided by an unrelated party. In respect of the user, remote access charges ("RAS" charges) are paid by the head office. These expenses are also spread over the user-group companies on the basis of actual user. They reimburse the expenses to head office on the basis of bills raised by it. These amounts are also not includible in the receipts.

2.3 The assessee also incurs travel expenses in respect of employees of the head office who came to India for helping the work of the Indian subsidiary company. The expenses are in relation to air-tickets, hotel bills, taxi charges etc. The Indian company has reimbursed these expenses to the head office on cost to cost basis. These amounts are also not includible in the receipts.

2.4 The case of the ld. counsel is that all these reimbursements have been received in the immediately following year. The questions to be decided in connection with these reimbursements are –(i) whether any element of profit is involved in reimbursements; and (ii) if yes, whether the amounts are taxable in this or the next year? In general, the case of the ld. counsel is that no element of profit is involved in the reimbursements. Therefore, nothing is taxable either in this or in the succeeding year. In this connection, our attention has been drawn towards the provision contained in section 5(2), under which two types of income derived from whatever source are subject to tax in the case of a non-resident person – (a) which is received or deemed to be received in India in such year by or on behalf of such person; or (b) accrues or arises or is deem to accrue or arise in India during such year. Our attention has also been drawn towards the provision contained in Article 12 of the Doublke Taxation Avoidance Agreement between India and Singapore (DTAA) which permits taxation of royalty/FTS on payment basis.

2.5 Our attention has been drawn to page no. 51 of the paper book, which furnishes the details of the reimbursements in a tabular form as under:-

S.No.	Invoice No.	Invoice date	Addition (USD)	Addition (INR)	CSC India 3CEB reference	Nature of expense/remarks
1	SIC)706037	20.6.2007	9835	428,708	Sl. No. 39-Cost allocation	Ground 1-SAP License maintenance charges
2	SIC0608031	25.08.2006	3904	175,479	Sl.-43 Reimbursement of expense	Ground 1-Travel expense reimbursements
3	2006/10-475	27.10.2006	98	4,458	-do-	Ground 1-Travel expenses reimbursement
4	2006/11-295	22.11.2006	116	5,218	-do-	Ground 1-RAS charges reimbursement
5	SIC0701028	23.1.2007	16328	695,427	-do-	Ground 1-Travel expense reimbursements
6	SIC0703003W	16.3.2007	7448	197,756	-do-	Ground 1-Travel expense reimbursements
	Ground 1 total			**1,507,046**		
7	SIC0604012	26.4.2006	2249	100,902	-do-	Ground 2-Travel expense reimbursements
8	SIC0605035	26.5.2006	4319	194,738	-do-	Ground 2-Travel expense reimbursements
	Ground 2 Total			**295,640**		
9	SIC0604024 TDS amount	28.4.2006	46,223	208,401	Sl. No. 3 Technical services provided	Ground 3-Labour cross charge
	Ground 3 Total			**208,401**		
10	SIC0606015	26.6.2006	Refer remarks	41,369	Sl. No. 1-part of sale of software	Ground 4-Difference between the amount as per Form 3CEB issued

						by CSC India and amount as per TDS certificate received by CSC Singapore.
	Ground 4 Total			41,369		

These details have been supported by placing the bills raised for reimbursements.

2.6 The AO has mentioned in the assessment order that the assessee has offered to tax all sums received from India as royalty/FTS under the DTAA. However, there are certain amounts from CSC India Pvt. Ltd. which have not been offered for taxation, not in any year till date. By way of example, it is stated that the amount for grant of software license as per form no. 3CEB of CSC India Pvt. Ltd. and as per assessee's statement is Rs. 62,22,779/-, however, the assessee has offered to tax a sum of Rs. 61,81,410/-. It is further mentioned that the assessee has probably accounted for the amount net of tax deducted at source, but the difference may be due to some other reason also. CSC India Pvt. Ltd. had claimed deduction of Rs. 62,22,779/-. There is a difference of Rs. 41,369/- on this account. There are payments by CSC India Ltd., which pertain to this year, however, the income has been deferred to the next

year. The accounting for of the income is pending in some cases for two to three years from the date of the transaction. This may be due to fault in the recording of the transactions in the books by the assessee. The difference in the amounts claimed by CSC India Pvt. Ltd. and offered to tax by the assessee has been included in the income of the assessee. On this basis, the income of this year had been enhanced Rs. 39,28,072/-.

2.7 The findings of the ld. DRP-I, New Delhi are contained in paragraph no. 2.1 of the directions. It is mentioned that an addition of Rs. 39,28,072/- has been proposed in the draft order dated 30.12.2009. It was observed that the assessee has not offered to tax all sums received from India as royalty/FTS. These differences aggregate to Rs. 39,28,072/-, the details of which are as under:-

Sl. No.	Invoice No.	Invoice date	Addition (USD)	Addition (INR)
1	SIC0706037	20.06.2007	9835	428708
2	SIC0608031	25.08.2006	3904	175479
3	2006/10-475	27.10.2006	98	4458
4	2006/11-295	22.11.2006	116	5218
5	SIC0701028	23.01.2007	16328	695427
6	SIC0703003W	16.03.2007	7448	197756
	Ground 1 Total			**1507046**
7	SIC0604012	26.04.2006	2249	100902
8	SIC0605035	26.05.2006	4319	194738
	Ground 2 Total			**295640**
9	SIC0604024	28.04.2006	46223	2084017

	Ground 3 Total			**2084017**
10	SIC0606015	26.06.2006	Refer remarks	41369
	Total			**41369**
	Grand Total			**3928072**

2.8 The case of the ld. counsel is that royalty/FTS are taxable on receipt basis as provided under the DTAA. Therefore, what is not received from India has not been included in the total income. The assessee is not required to maintain India-accounts as it has no presence in India. It has followed cash system of accounting as in past. Therefore, it is argued that no addition can be made to the total income on the ground of discrepancies mentioned above.

3. In reply, the ld. senior DR submitted that two main questions are involved in this case-whether, reimbursement of expenses in respect of SAP licenses, RAS charges and traveling etc. are liable to be included in the receipts as royalties/FTS, and (ii) whether, royalty is taxable in the year of accrual or in the year of receipt?

3.1 He referred to page no. 5 of the return of income where it is mentioned that the assessee is liable to maintain accounts as per section 44AA, but is not liable to get the accounts audited u/s 44AB. It is

further mentioned that the assessee has been following cash system of accounting. Since the assessee is liable to maintain accounts, the provision contained in section 145 of the Act is applicable to the assessee. Under this provision, an assessee can maintain books either on mercantile basis or cash basis. However, the Companies Act mandates that a company shall maintain account of mercantile basis. In the light of these provisions, the ld. DRP has held that the income of the assessee is taxable on accrual basis. The assessee has been receiving revenues from its wholly owned subsidiary company also. Therefore, cash system of accounting may lead to perpetual postponement and the recognition of revenues received at least from the subsidiary. Therefore, it is argued that on the facts, the assessee ought to have followed mercantile system of accounting.

3.2 Coming to taxation of the amounts reimbursed by the Indian subsidiary company, it is submitted that the assessee-company has been arranging the use of SAP licenses and connectivity services for the group concerns from unrelated parties. A reference has been made to the sample bill raised by the assessee on the Indian subsidiary for USD 9835 regarding Asia SAP Licence maintenance for the period January to March,

2007, placed in the paper book on page 143. A similar bill of USD 97.76 in respect of RAS charges has been placed in the paper book on page no. 155. These transactions are not at arm's length as they have taken place between related parties. There is no written agreement between the Indian subsidiary and the assessee companies in this matter. There is no evidence that these services were required by the Indian company for its business. The assessee has also not furnished the basis on which expenses have been allocated amongst various group concerns. It is argued that if the services have been procured from unrelated parties for the benefit of the Indian subsidiary, the payment for which is made on the basis of the cost incurred by the assessee company, there may be no tax angle as the assessee has no presence in India. However, the same is not true in respect of reimbursement of traveling expenses. The expenses have been incurred in relation to earning of the royalty/FTS. Such receipts are taxable on gross basis. If the payer is allowed for deduction of expenses incurred for earning royalty/FTS, the principle of taxation on gross basis provided in Article 12 of the DTAA is violated. In this connection, references are made to page nos. 5 and 6 of the technical services agreement entered into between the assessee-company and the Indian subsidiary. Under the head "fees", it is provided that in consideration of

performance of services by the assessee company under this agreement, the Indian subsidiary company agrees to pay all costs, plus a mark-up of 8%. However, under the scheme of taxation of royalty/FTS under the DTAA, the fee is taxable on gross basis. Therefore, the cost incurred on earning the fee cannot be passed on to the Indian company. Accordingly, it is argued that at least reimbursement of traveling expenses has to be included in the fees paid by the Indian company to the assessee-company for the purpose of taxation under Article 12 of the DTAA.

3.3 It is also submitted that there are some minor issues. Ground no. 5.1 is in respect of an amount of Rs. 41,369/-, which has been held to be taxable in the hands of the assessee. It was submitted before the ld. DRP that the amount represents loss incurred on account of fluctuation in rate of exchange and it does not represent the amount realized by the assessee. It is argued that it is a matter of detail, which may be left to the AO for verification.

3.4 It is also argued that at the time of estimating the income liable to advance-tax, the assessee was in knowledge of the fact that the payer had not deducted tax at source. It is for the assessee to estimate the income

liable to tax and compute tax payable thereon. In spite of the knowledge that tax had not been deducted, the assessee did not pay any tax. Therefore, interest is chargeable u/s 234B.

3.5 It is also submitted that the provision contained in the DTAA do not govern the Finance Act. The levy of surcharge is authorized by the Finance Act and not by the Income Tax Act. Therefore, the assessee is liable to pay surcharge.

4. In the rejoinder reply, the ld. counsel reiterated that none of the amounts reimbursed to it is liable to be taxed in India. Further, the assessee has been following cash system of account, therefore, the receipts are not taxable on accrual basis. The provisions contained in the Companies Act are applicable to only those companies which are registered in India. The assessee is not registered in India and it has no presence in India. Therefore, its income should be taxed on the basis of consistent method of accounting followed by it. The assessee is also not liable to pay interest u/s 234B of the Act.

5. We have considered the facts of the case and submissions made before us. The assessee is a company incorporated under the laws of Singapore. It has no branch office in India. To put it differently, it has no permanent establishment (PE) in India. It is liable to maintain accounts by dint of provisions contained in section 44AA. However, it is claimed that the accounts are not liable to be audited u/s 44AB, the reason for which has not been explained. The receipts of the assessee exceeds Rs. 40.00 lakh. Therefore, on a prima facie basis, it can be concluded that its accounts in respect of Indian receipts are liable to be audited u/s 44AB. Although it has been stated that it is liable to maintain accounts u/s 44AA, it has no where been asserted or shown that the accounts have been maintained.

6. The first question is-whether, revenues received by way of royalty/FTS are liable to be taxed on accrual basis or receipt basis? In paragraph no. 2, the AO has mentioned that the assessee has offered to tax all sums received from India as royalty/FTS. However, it has not offered certain sums for taxation in this year and not even till date. Some examples have been mentioned. It is also noted that the Indian subsidiary has claimed deduction in respect of certain amounts but the assessee-

company has not offered such amounts for taxation. The ld. DRP has recorded a finding that the assessee is required to maintain accounts on mercantile basis as it is a company. The case of the ld. counsel is that the assessee is not required to maintain India-specific accounts as it has no PE in India. This submission is contrary to the representation made in the return of income that it is obliged to maintain accounts u/s 44AA. In this connection, we have already held that in so far as the provisions of the Act are concerned, the assessee is obliged to maintain India-specific accounts and to get them audited under sections 44AA and 44AB respectively. Being a company, the accounts are expected to be maintained on mercantile basis in so far as the provisions of Income Tax Act are read along side the provisions of the Companies Act. However, it is also the case of the assessee that it is covered under the DTAA. A number of cases have arisen in which this matter had been considered and decided. Therefore, we may discuss the cases on which rival parties have placed reliance.

6.1 In the case of Deputy CIT Vs. Uhde Gmbh. (1996) 54 TTJ 355 (Bom.), the only ground before the Tribunal was that the ld. CIT(Appeals) was in error in directing the AO to tax the income on various projects on

receipt basis as against accrual basis and further erred in directing that provisions of section 145 were not applicable for determining the total income of the assessee. It is mentioned that there cannot be any dispute that where there is a conflict between the DTAA and the domestic law relating to taxation of income arising in the Contracting State, the former has to prevail. In earlier years, FTS was not taxed at all in India as it did not have a PE in India. The fees were in the nature of industrial and commercial profits. The income of this nature became liable to be taxed in India because of new treaty entered into between India and the Federal Republic of Germany. Paragraph no. 2 of Article VIIIA provides that FTS could be taxed in the Contracting State in which they arose and according to the law of that State. Although under section 5(2)(b) of the Act, applicable in the case of a non-resident person, income which accrues or arises or is deemed to accrue or arise in India is taxable, the specific provision of Article VIIIA provides for taxation of only those sums which have been paid to him. This means that the liability arises only when the sum is received and it is not taxable on accrual basis.

6.2 In the case of National Organic Chemical Industries Ltd. Vs. Dy. CIT, (2005) 96 TTJ 765 (Bom.), it is mentioned that the remittance made

by the assessee is liable to be taxed in India as FTS under Article 13 of Indo-French DTAA. The remittance in question was payment in respect of invoice no. 08-25181, dated 25.05.1996. In terms of provisions of Article 12 of Indo-Swiss Tax Treaty, twin conditions of accrual and payment are to be satisfied for the purpose of taxation. Thus, even if FTS has accrued or has arisen, but the same is not paid, the taxability under Article 12 in the source country does not come into play.

6.3 As against aforesaid case, the ld. senior DR relied on the decision of Madras High Court in the case of CIT Vs. Standard Triumph Motor Co. Ltd., (1979) 119 ITR 573. The question before the Court was-whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that royalty amounts should be assessed on cash basis for assessment years 1967-68 to 1969-70 if the books and balance-sheet of such receipts are found to be maintained on cash basis and in directing fresh assessment on such basis? The court mentioned that it must be remembered that section 145 is only a machinery provision and it cannot control the charging section so as to make the latter otiose. Therefore, section 145(1) should not be permitted to apply in such circumstances as those which arise from the facts of the case. It is

immaterial whether the assessee is keeping accounts on a regular basis by following cash method. Even in this situation he is liable to be assessed u/s 5(2)(b). To hold otherwise would be to take the income outside the purview of taxation under the Act, though such income had accrued in India to a non-resident.

6.4 After considering the facts of the case and precedents relied upon by the rival parties, we find that the ld. senior DR has primarily relied upon the provision contained in section 5(2). The decision in the case of Standard Triumph Motors Co. Ltd. (supra) also deals with harmonious interpretation of the provisions contained in sections 145 and 5(2). The decision and the submissions do not take into account the provisions of the DTAA as probably none existed at that time. These have been considered by the Tribunal in the case of Uhde Gmbh. and National Organic Chemical Industries Ltd. (supra). It has been mentioned that in case of conflict between the provisions of the DTAA and Act, the provisions contained in the treaty shall prevail. Consequently, it has been held that the taxation of royalty/FTS is on receipt basis. In other words, the amount which has accrued as income to a foreign company cannot be taxed in the source country, being India in this case, unless the amount

has been received by the foreign company. It is also the case of the ld. senior DR that such an interpretation can lead to deferment of payment of tax for some time or for indefinite time. We have considered this matter also. This issue has to be decided on the basis of conduct of the two parties, which are associated enterprises (AEs) in this case. It is no doubt true that the provision may be used as a device to defer the tax for any length of time by mutual understanding of the parties. However, to come to such a conclusion in a particular case, the conduct of the parties has to be seen and thereafter a conclusion has to be arrived at that deferment of payment was a device used for the purpose of delaying the payment of tax. No such finding has been recorded in this case. Such is also not the case of ld. senior D.R. Therefore, even if there is force in the argument that the interpretation may lead to delay in payment of tax, it will be useful only in such cases where the AO makes out a case that the delay was with a view to defer the payment of tax. In absence of such a finding by the AO, it is held that the argument is not applicable to the facts of this case. Accordingly, it is held that royalty and FTS are taxable on payment basis and not on accrual basis.

7. This brings us to the second question regarding taxation of reimbursements. We have seen that reimbursement in respect of SAP licence and RAS charges are for the use of the licence belonging to a third party and getting the connectivity. Neither the AO nor the ld. senior DR has been able to make out a case that the expenditure has been incurred in connection with earning of royalty/FTS. It could be argued that the assessee-company should have charged reasonable margin from the Indian subsidiary. However, income, if any, would be in the nature of business income. The assessee does not have a PE in India. Therefore, such income is not liable to be taxed in India. Accordingly, it is held that reimbursements of SAP licence and RAS charges are not taxable in India.

7.1 However, the position of reimbursement of traveling expenses is quite different. These expenses have been incurred in connection with technical services agreement. Therefore, the expenditure has been incurred for earning royalty/FTS. In spite of the fact that the agreement provides inter-alia for adequate level of support and posting its personnel, the expenses for which will be reimbursed, the fact remains that the expenditure has been incurred for earning the royalty/FTS. The

expenditure is that of the assessee and not that of the Indian subsidiary company. Article 12 provides for taxation of royalty/FTS in the source country on gross basis at a concessional rate of tax. This means that the expenditure incurred for earning royalty/FTS is not deductible in computing gross royalties or gross FTS received by the assessee company. The assessee has found that taxation under the Income Tax Act, 1961 is not more beneficial to it. Therefore, the receipts have been offered for taxation under Article 12 of the DTAA. It is clear from the language that this article taxes royalty/FTS on gross basis and does not permit deduction of expenses. Therefore, it is held that the alleged reimbursement of expenses for traveling or the expenses of the assessee-company are its expenses, liable to be included in its gross receipts. Although the decision in the case of CIT & Another Vs. Halliburton Offshore Services Inc. (2008) 300 ITR 268 (Uttrakhand) was rendered under section 44BB, yet, it deals with the amounts received by the assessee in India on account of provision of services and facilities in connection with, or supply of plant and machinery on hire, used or to be used, in the prospecting for, or extraction or production of, mineral oils. It has been held that the reimbursements will have to be included in the receipts for arriving at the presumptive income, being 10% of the receipts. This decision does

support our aforesaid conclusion that gross receipts will include reimbursement of expenditure incurred by the assessee for the purpose of computing gross receipts. It is held accordingly.

7.2 In a nutshell, it is held that royalties and FTS are taxable on payment basis, and reimbursement of traveling expenses will have to be included in the gross receipts for the purpose of taxation.

8. We now turn our contention to the minor issues. The first issue is- whether, the assessee is liable to pay surcharge? In this connection, the ld. counsel referred to the rate of 10% under the DTAA, applicable on gross receipts by way of royalty/FTS. Thereafter, he referred to the provision contained in section 90(2), which inter-alia provides that the tax shall be levied in accordance with the DTAA, and the provisions of the Act will be applicable in so far as they are more beneficial to the assessee. He also referred to Board circular no. 734 dated 24.01.1996 issued in connection with rates of taxes applicable under DTAA between India and the UAE. In paragraph no. 3, it is clarified that in respect of payment to be made to the non-resident Indian at the UAE, tax at source must be deducted as under:-

5% of the gross amount of dividends if the beneficial owner is a company which owns at least 10% of the shares of the company paying the dividends, and

15% of the gross amount of dividends in all other cases. The rates for tax deduction at source have also been mentioned in respect of payment of interest and royalties. The circular does not mention anything about surcharge. The case of the ld. counsel is that the assessee is required to pay tax prescribed under Article 12 and no surcharge is payable.

8.1 In reply, the ld. senior DR submits that the rates are prescribed under the Finance Act and not the Income-tax Act. Section 90(2) of the Act does not contemplate treaty override over the Finance Act. Therefore, the assessee is liable to pay surcharge.

8.2 We have considered the submissions of the rival parties. We find that circular no. 734 does not mention anything about surcharge for the purpose of deduction of tax at source from payments by way of dividends, interest and royalties. What is good for the TDS is also good

for the taxation. Therefore, it is held that the assessee is not liable to pay surcharge.

9. The second question is-whether, the assessee is liable to pay interest u/s 234B. The case of the assessee is that all its receipts are subject to tax deduction at source u/s 195 of the Act therefore, it is not liable to pay interest u/s 234B. In this connection, reliance has been placed on the decision of Hon'ble Delhi High Court in the case of Director of Income-tax Vs. Ericsson AB and vice-versa and Another in ITA Nos. 504, 507, 508, 511 and 397 of 2007 dated 23.12.2011, a copy of which has been placed before us. On the other hand, the case of the ld. senior DR is that at the time of estimating income liable for advance-tax, the assessee was aware that its subsidiary company has not deducted tax at source from the payments. Therefore, the assessee ought to have paid the tax. Having considered submissions from both the sides, we find that the issue is no longer res-integra as it stands covered by the judgments in the case of Ericsson AB (supra) and DIT Vs. Jacqbs Civil Incorporated and Another, (2011) 330 ITR 578 (Del). Respectfully following these decisions, it is held that the assessee is not liable to pay interest u/s 234B. It may incidentally be mentioned that the revenue has recourse to the payer for

charging interest for failure to deduct tax at source from the payment by way of royalty/FTS.

10. Finally, in the reconciliation of the amount received by the assessee, there is a difference of an amount of Rs. 41,369/-. The case of the ld. counsel is that it is due to fluctuation in the rate of foreign exchange. Both the parties submit that this matter may be restored to the file of the AO for proper verification. Accordingly, the matter is restored to the file of the AO for reconciling the amount and deciding the gross amount of royalty/FTS liable for taxation in this year on payment basis.

11. In the result, the appeal is partly allowed as indicated in the order.

Sd/- sd/-

(Diva Singh) (K.G. Bansal)
Judicial Member Accountant Member

SP Satia

Copy of the order forwarded to:-

CSC Technology Singapore Ptd. Ltd., Singapore.

Assistant DIT (E), Circle- 1(1), International Taxation, New Delhi.

CIT(A)

CIT,

The D.R., ITAT, New Delhi. Assistant Registrar.