IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER AND SHRI GEORGE MATHAN, JUDICIAL MEMBER

I.T.A. No. 2137/Mds/2010
(Assessment Year : 2007-08)

M/s Organisation Development Pte Ltd., C/o R. Venkatakrishnan & Associates, Chartered Accountants, 1/4, 4th Main Road, R.A.Puram, Chennai - 600 028.	v.	The Deputy Director of Income Tax (International Taxation), Chennai - 600 034.
PAN : AABCO1288L (Appellant)		(Respondent)

Appellant by : Shri Vikram Vijayaraghavan, Advocate
Respondent by : Shri K.E.B. Rengarajan, Junior Standing Counsel

Date of Hearing : 30.01.2012
Date of Pronouncement : 09.02.2012

O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

In this appeal filed by the assessee, its grievance is that A.O. treated lumpsum payment received on sale of software as royalty under Article 12 of Double Taxation Agreement (DTA) between India and Singapore. As per the assessee, the amounts received were

business profits in view of Article 7 DTT between India and Singapore. Further, as per assessee, the Assessing Officer treated Balance Score Card (BSC) project as a tool provided by the assessee to its clients, which gave rise to technical services fee when it ought not have been considered so, there being no technical services rendered.

2. Facts apropos are that assessee, a foreign company located in Singapore, was giving services to various clients all over the world for development of BSC project. During the relevant previous year, assessee had rendered services to companies located in India also. Assessee furnished copies of agreements entered with three of its clients in India, namely, M/s Adani Wilmar Ltd., M/s PMC Projects Pvt. Ltd. and M/s Mundra Port and Special Economic Zone Ltd, to the Assessing Officer. Incidentally, assessee had filed return for impugned assessment year declaring NIL income and claiming refund of tax deducted at source on the payments received from the Indian clients. Assessing Officer was of the opinion that the services for development of BSC, which was a business management tool, could be divided into two segments – one part being professional fees received by the assessee and second being lumpsum amount received for sale of relevant software. According to A.O., receipts

were for technical services insofar as it related to professional fees. With regard to lumpsum amounts received for software, the A.O. considered it to be royalty. Assessee's argument before A.O. was that these were all business profits of the assessee and in view of Article 7 of DTA between India and Singapore, such business profits were not taxable in India. Assessing Officer made an analysis of the invoices raised by the assessee on the above mentioned three clients and the data as per the agreements with these clients and after considering the replies of the assessee, came to following conclusions:-

(i) The lumpsum payment received by the assessee from its clients for the software designed for BSC was covered by the definition of "royalty" under Section 9(1) of Income-tax Act, 1961 (in short 'the Act').

(ii) Professional charges received by the assessee have to be considered as royalty as per clauses (i) and (ii) of Explanation (2) to sub-section (vi) of Section 9(1) of the Act. Alternatively, the payments could also be considered as fee for technical services falling under Section (9)(1)(vii) of the Act.

(iii) Since assessee could legitimately claim the benefit of Section 90(2) of the Act, it became necessary to look into the relevant DTA with regard to treatment of royalty and fees for technical services. The Balance Score Card designed on licensed software given by the assessee to its clients was nothing but an equipment. Therefore, lumpsum consideration on professional charges could be considered as payments received as consideration for the right to use of any industrial, commercial or scientific equipment or alternatively, could be considered as fees for services being ancillary and subsidiary to the

application or enjoyment of right to use an industrial, commercial or scientific equipment.

(iv) Though the assessee rely on the decision of Mckinsey A Co. Inc. (Philippines) v. ADIT (International Taxation) 284 ITR(AT) 227 of Mumbai Bench of this Tribunal, the terms "technical" and "consultancy" could not determine the taxability and the term "technical"could not be confined only to technology related to engineering, professional and consultancy services.

(v) Though the assessee argue that it did not have any permanent establishment in India, Explanation to sub-section (2) to Section 9 of the Act inserted by Finance Act, 2010 with retrospective effect from 1.6.1976 obviated the requirement for a non-resident to have a residence or place of business or business connection in India for taxing its income arising on account of interest, royalty and fee for technical services.

(vi) Article 7 of DTA could not be applied since the nature of payments received by the assessee were clearly in the nature of royalty and fees for technical services.

He, therefore, proposed that the total invoice amount of ₹ 2,07,86,482/- was to be considered as royalty and fees for technical services and tax has to be levied on the assessee accordingly.

3. Against the draft assessment so proposed, assessee moved before the Dispute Resolution Panel (DRP) in terms of Section 144C of the Act. Argument of the assessee was that supply of software and consultancy services were interdependent insofar as development of BSC was concerned. According to assessee, the A.O. fell in error in treating them separately. As per the assessee, software developed for the purpose of Balance Score Card was a packaged software which the clients could download from internet.

Again, as per the assessee, the lump sum payments received from such software could not be treated as "equipment royalty" because user had no domain or control over such software to suit its business needs. As per the assessee, the same software was being supplied to different clients and assessee never parted with possession or control over the rights in such software. The payments received, therefore, could not be considered as equipment royalty. Reliance was placed on the decisions of Hon'ble Apex Court in the case of Bharat Sanchar Nigam Limited and Others v. UOI & Others (282 ITR 273) and Tata Consultancy Services v. State of Andhra Pradesh (271 ITR 401) and that of Bangalore Bench of this Tribunal in the case of Samsung Electronics Co. Ltd v. ITO [276 ITR (AT) 1]. However, DRP was not appreciative. According to it, decision of Hon'ble Apex Court in the case of Bharat Sanchar Nigam Limited (supra) was in relation to sale of goods and insofar as decision of Bangalore Bench of this Tribunal was concerned, it rested on the facts of that case only.

4. Insofar as the treatment of the amounts received as fees for technical services was concerned, argument of the assessee before DRP was that BSC was not a tool but only a management system and such system could be used even without software. Further as

per assessee, Article 12 of DTA clearly specified that if a payment was to be considered as fee for technical services, such services should make available technical knowledge, experience, skill, know-how or process which enabled the person acquiring the services to apply the technology contained therein. As per the assessee, it was not making available any technical knowledge which could be used by its client and hence the receipts would not fall within the definition of "fee for technical services". However, DRP was not impressed on this line of reasoning as well. According to it, assessee was providing consultancy services to its client-organizations and such services were of managerial or technical in nature. Assessee had through its Principal Consultant Shri V. Ramakrishnan, made available technical knowledge, experience and skill possessed by the assessee to such clients, who in turn, used such skills to apply the knowledge contained therein for its business purposes.

5. Thus, the DRP rejected both the contentions of the assessee with regard to lump sum payment relatable to the software and professional fee relatable to services rendered by the assesseeto its clients. Assessing Officer accordingly passed the assessment order in conformity with the directions of the DRP.

6. Now before us, learned A.R. strongly assailing the order of the authorities below, submitted that Balance Score Card was a management tool in which presentation of financial and non-financial measures were continually made and compared with certain target value within a simple concise report in such a manner that would help the management to effectively focus on areas where performance deviated from expectations. In other words, according to him, Balance Score Card was a trigger which called for improved performance and kept the management on alert, on deficiencies in meeting targets. Relying on the agreement entered by the assessee with one of its clients, namely, M/s Adani Wilmar Limited (placed at pages 1-2 of paper-book), learned A.R. submitted that there was a licensed software and the team from assessee-company was only helping the client to implement such licensed software. According to him, the Assessing Officer fell in error when he considered the software as something unconnected to the process of developing Balance Score Card. Learned A.R. submitted that such a software was only a tool used in the development of Balance Score Card. Lower authorities fell in error, according to him, in splitting into the receipts from clients to price for software and fee for management consultancy. There was no royalty since there was no equipment

which was in the domain of the client at any time. The software was downloaded by the clients. Such software was not customized to suit any particular clients and hence there was no question of any royalty. The sale only resulted in business income. Insofar as claim of the A.O. that assessee had made available technical knowledge to its clients, learned A.R. pointed out that the technical knowledge was never made available to the clients. Only the output of the consultancy was available to the clients and methodology of developing the Balance Score Card as well as technical knowledge related thereto always remained with assessee. As per learned A.R., the assessee was only getting business income from such transactions and in view of Article 7 of DTA between India and Singapore, business income could not be taxed in India unless assessee was having a P.E. in India. Particular reliance was placed on the decision of Authority for Advance Rulings in the case of InterTek Testing Services India (Pvt) Ltd. [307 ITR 418 (AAR)], Bharti AXA General Insurance, In.re (AAR No.845 of 2009 dated 6th August, 2010) and Ernst & Young, In.re (AAR No.820 of 2009 dated 19th March, 2010) for his argument that assessee had not made available any technical knowledge, experience, skill, know-how or process to its clients. According to him, technical knowledge could be

considered as made available only when the person acquiring the technology could apply such technology. The fact that rendering of the service required technical input by the person providing the service would not per se mean that technical knowledge, skill, etc. was made available to the person receiving the service. For these contentions, reliance was also placed on Memorandum of Understanding dated 15th May, 1989 between Government of India and U.S. Government with regard to Double Taxation Treaty which inter alia explain the terms used in such treaty including "fees for technical services". Relying on the Mutual Non-Disclosure Agreement between assessee and its client M/s Adani Wilmar Limited (copy placed at paper-books pages 7-10), learned A.R. submitted that the intellectual property always vested with the assessee only.

7. Per contra, learned D.R. submitted that the invoices raised by the assessee on its clients, placed in its paper-book pages 23-34, clearly demonstrated that there were two limbs for the payment received by the assessee - one for supply of software and the other for professional service. According to him, technical services were made available to its clients. Placing reliance on the payment terms which appear on page 1 of paper-book in the agreement between the

assessee and M/s Adani Wilmar Limited, learned D.R. submitted that the software was to be supplied for a fee of S$ 171,025. Such software which was downloaded from the designated site was for the stages of development of BSC and deployment and implementation of BSC. Therefore, according to him, the whole of the amount received by the assessee was either royalty or technical service fees and these were clearly taxable in accordance with DTT between India and Singapore. Assessee could not say that these were business income for the simple reason that only where the amounts could not be correctly classified, could it be considered as business income. The question of P.E. or business connection arose only if it was business income, and hence this was not relevant here, according to learned D.R.

8. In reply, learned A.R. submitted that there were 11 steps for the development of Balance Score Card as mentioned in paper-book pages 16-19. According to him, software became relevant only in the 11th step and there was no question of any royalty arising to the assessee on such software. According to him, assessee had not made available any technical services and Assessing Officer fell in error in not recognizing that definition of “technical services fee” as

per DTA between India and Singapore was different from the definition of "technical services" under Section 9(1)(vii) of the Act.

9. We have perused the orders and heard the rival submissions. The issue boils down to classification of the nature of receipts of the assessee, on account of services rendered by it in developing Balance Score Card system for its clients. For the development of such Balance Score Card system, clients were required to download from the sites designated by the assessee a licensed software. Agreements entered by the assessee with the three clients are typically similar. For easy appreciation, one such agreement as appearing on pages 1-2 of paper-book, is reproduced hereunder:-

> "Dear Sirs,
>
> We thank you for selecting us to assist you in the development of a balanced scorecard (BSC) for development on April 1, 2007 subject to you making available the required data and inputs in time. We outline the broad framework around which we will be happy to see you starting December 2006.
>
> Our Principal Consultant, Mr. V. Ramakrishnan, will be leading a team of our associates to help implement the Licensed Software to help develop the balanced scorecard over the time outlined in our proposal to complete development of the BSC. Several of our associates will be visiting the site. More will assist us in the back office in analysis and collation.
>
> We would require you and your colleagues to treat as confidential the IPR and formats we will be sharing with you. We would hope

your staff are suitably bound in restricting the use of this information, for purposes other than for the benefit of your firm and are obliged to do so by your current standing orders. A separate NDA securing our mutual interests can be entered into as we move forward, should you see necessary.

The software will be downloaded from the designated site in two phases; the development of phase of BSC and deployment and implementation phase of BSC. The fee of S$ 171,025 is a lump sum payable for the software for development of the BSC by end March 207, deployment and implementation support for a period of 18 (eighteen months starting April 1, 2007) Of this sum of S$ 171,025 the sum of S$ 112,500 will be for the development phase of the project; the balance will be spread out over 18 months.

For any additional work over and above the contracted time the daily rate will be S$ 8750 per day per consultant, and will be undertaken, subject to your approval before incurring the additional effort. The schedule and fee in case of extension of the contract will have to reviewed and mutually accepted before start of the next phase.

Travel for the principal consultant and associates required to be on site for your work outside of Singapore and within Singapore & India will be to your account per the usual norms (Business class Airfare, Appropriate Lodgings, Boarding Costs and Sundry expenses if any). Miscellaneous expenses for communication etc. will be to your account as and when they arise and will be billed under separate heads- once a quarter. Travel time is to our account.

Payment for the first phase of development – THE PROJECT – by end March will be in three installments, 50% in January 2007, 25% in February 2007 and balance 25% in March 2007 against invoices. The payment for second phase of deployment & implementation will be paid in 18 equal installments.

We would request you to pay us within seven working days of the date of the invoice; we request you advise us the payment details by email. The TDS & service tax for the BSC development will be

borne by you. All bank charges incurred at your end will be to your account, any transaction charges incurred by us at our end will be borne by us. We will advise the bank details in our invoice.

As a mark of acceptance we request you to sign and date both pages of this two page document and return one copy of this document to us.

We look forward to a mutually rewarding partnership and would request full payment should you decide to stop using our services midway."

10. What is clear from the above agreement is that assessee had sent its Principal Consultant Shri V. Ramakrishnan with a team for helping its clients in implementing a licensed software, which was required to develop the Balance Score Card for such clients. The clients were required to make lump sum payments for downloading such software from the designated sites and such software was to be used in various phases of developing the Balance Score Card system. Balance Score Card is a strategic performance management tool first developed by one Art Schneiderman in 1987, but, has thereafter undergone a number of revisions by various researchers. Balance Score Card system has evolved over time and has been modified to address the deficiencies in the first models and third generation Balance Score Card system presently used is based on a destination statement created at the beginning of the Score Card designing process. The success of Balance Score Card system

depend on the type of measures adopted and the target value fixed for each such measures or in other words, the dash board developed should ideally be a break-up of long term goals and strategies to manageable measurement points which can be continually updated. As mentioned by learned A.R., a properly designed Balance Score Card can alert a manager on the areas where performance deviated from expected levels, and trigger improved performance. So, the most important step in evolving a Balance Score Card system is identifying the measures that are to be used and a study by a trained expert is required for such identification based on the destination statements. The measures will vary from organization to organization, since any two organizations rarely has same destination statements. We cannot say that the clients of the assessee were having the same destination statements. Each will have its own goals and different strategies to reach such goals. The measures will also be different. A team, which is evolving a Balance Score Card system necessarily has to identify the measures that are relatable to the entity under study. We cannot say that this is a type of service which can be used by any organization by application of an off the shelf software. The software might be helpful in development of the phases of the Balance Score Card as well as functioning thereafter.

But, considerable skill will be required in identifying the measures and fixing the targets for each such measure for a decisive meaningful Balance Score Card for different areas. So, we are in full agreement with the observation of learned A.R. that the software is only a part of the total process of development of Balance Score Card. No doubt, the fee payable by the assessee has been linked to the downloading of the software but, this by itself will not be sufficient to come to a conclusion that the software was an equipment by itself which would earn the assessee any royalty. In our opinion, the whole process could not have been divided into two just on the basis of a clause contained in the agreement, as one for royalty relatable to the software and the other for fees for technical services.

11. Now the question remaining is whether the amount received can be deemed as fees for technical services. As mentioned by Authority for Advance Rulings in the case of Bharti AXA General Insurance, In.re (supra), the provisions in a Treaty with regard to the definition of the term “fees for technical services” is much different from the definition as given under Section 9(1)(vii) of the Act. Assessee, no doubt, is justified in falling back on Section 90(2) of the Act for insisting that Article of the Treaty being more beneficial should be applied and this view is well supported by Hon’ble Apex Court in

the case of Union of India v. Azadi Bachao Andolan (263 ITR 706). "Fees for technical services", as defined in DTT between India and Singapore, is reproduced hereunder:-

> "The term "fees for technical services" as used In this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through 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, which enables the person acquiring the services to apply the technology contained therein; or
> (c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.
>
> For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person."

12. As already mentioned by us, the software used by the assessee cannot be considered independent, but, only as a part of the service rendered by the assessee to its clients with regard to the development of BSC. By means of the Balance Score Card system developed by the assessee, the clients were getting an advantage which went much beyond the period of agreement between the

assessee and its clients. The Balance Score Card definitely enabled the clients to acquire the skills necessary for implementing their business strategies more effectively and this is definitely a long term objective. Assessee had definitely made available technical knowledge and skill which enabled its clients to acquire the knowledge for using Balance Score Card system for their business purposes for meeting their long term targets and the benefits ran well into the future. No doubt, all technical and consultancy services cannot fall within the scope of definition of "fees for technical services" as defined under the DTT, and this has been clearly held by AAR in the case of Bharti Axa General Insurance, In.re (supra) as well as in the case of Ernst & Young, In.re (supra) and also in the case of InterTek Testing Services India (Pvt) Ltd. (supra). To fit into the terminology "the technical knowledge, skill, etc." shall remain with the person receiving the services even after the particular contract comes into end. There is no case for the assessee that Balance Score Card became useless or was not meant for the use of the business needs of its clients after the tenure of the agreement it had with such clients. The Balance Score Card prepared for each client and system of filling data in such Balance Score Card on a continual basis, based on different types of measures adopted which again

depended on the needs of each client and their functions can be considered as tools designed for exclusive use of such clients and the use of such a management tool would continue with such clients. Necessarily the technical knowledge and skill for use imbibed by the assessee remained with such clients. Thus, we are of the opinion that the fees received for designing of the management tool called Balance Score Card will definitely fall within the definition of "fees for technical services" as given under sub-clause (iv) of Article 12 of DTT between India and Singapore. No doubt, both the A.O. as well as DRP fell in error in treating the software independently and considering a part of the amounts received by the assessee as royalty. As already held by us, and also accepted by the learned A.R., the software was only a part of the tool of management consultancy and was never to be considered as independent divorced of the total system. Thus, we are of the opinion that the whole of the amount received by the assessee was nothing but fees for technical services and the amount was definitely taxable under the DTT. Insofar as argument of the assessee that the amount ought have been considered as business income, since the receipts could clearly be identified as fee for consultancy services, the question of treating it as business income under Article 7 will not arise. In this

regard, learned D.R. had rightly noted that Article 7.7 of DTT excluded from the scope of Article 7 items of income dealt with by other Articles of the Treaty. Therefore, we are of the opinion that the A.O. was justified in treating the amount received by the assessee from its clients as income taxable in India in accordance with DTT between India and Singapore. No interference is required.

13. In the result, appeal filed by the assessee stands dismissed.

The order was pronounced in the Court on 9th February, 2012.

sd/-	sd/-
(George Mathan)	(Abraham P. George)
Judicial Member	Accountant Member

Chennai,
Dated the 9th February, 2012.

Kri.

Copy to:
(1) Appellant
(2) Respondent
(3) Secretary, DRP, Chennai
(4) ADIT, International Taxation, Chennai-34.
(5) D.R.
(6) Guard file