THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 23.04.2012

+ **ITA No. 202/2012**

DIRECTOR OF INCOME TAX ... Appellant

versus

GUY CARPENTER & CO. LTD. ... Respondent

Advocates who appeared in this case:
For the Appellant : Mr Sanjeev Sabharwal, Sr. Standing Counsel
For the Respondent : Counsel for the respondent.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE V.K. JAIN

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. The Revenue is in appeal before us being aggrieved by the order dated 30.09.2011 passed in ITA No. 2443/Del/2011 pertaining to the assessment year 2006-07. The Revenue has proposed that the following questions are substantial question of law which ought to be considered by us:-

> "1. Whether payments received by the assessee in consideration of services rendered to insurance Co. in India in the process of re-insurance of the risk placed by Indian Insurance Co. with international re-insuracne companies is amounted to "fees for technical services" within the meaning of the same under the DTAA between India and U.K?

2. Whether learned ITAT erred in holding that the payment received by the assessee from Indian Insurance Co. in the process of reinsurance risk placed by Indian Insurance Co. with International reinsurance companies is not taxable in India as “fees for technical services”?

3. Whether nature of reinsurance brokerage/commission which is assessable as fees for Technical Services within the meaning of section 9(1)(vii) of the Act and/or Article 13 of the India United Kingdom (U.K.) Double Tax Avoidance Agreement (DTAA)?

4. Whether the services provided by the assessee are consultancy in nature and the payments fall within the definition of fees for technical services within the meaning of Sec. 9 (1) (vii) of the Act?”

2. At the outset we would like to state that none of the above questions, according to us, are substantial question of law and the only issues which arise are factual in nature which has already been determined by the Income Tax Appellate Tribunal, being the final fact finding authority insofar as the scheme under the Income Tax Act, 1961 (hereinafter referred to as ‘the said Act’) is concerned. Unless and until some perversity in a finding of fact returned by the Tribunal is pointed out, there is no scope for interference by this court under section 260A of the said Act. The reasons for us arriving at this conclusion are indicated below.

3. Before the Tribunal the issue which arose for consideration was whether the nature of reinsurance brokerage/commission which was paid by Insurance Companies operating in India to the assessee was assessable as

'fees for technical services' within the meaning of section 9 (1) (vii) of the said Act read with article 13 of the India-United Kingdom (U.K.) Double Tax Avoidance Agreement (hereinafter referred to as the 'DTAA'). The assessee company had filed its return of income in respect of the said assessment year showing its taxable income at Nil. The case was picked up for scrutiny and a notice under section 143 (2) of the said Act was issued. Thereafter, regular assessment proceedings ensued. The Assessing Officer had noticed that the assessee had received commission from several insurance companies operating in India such as the New India Assurance Co. Ltd., Tata AIG General Ins. Co. Ltd., General Insurance Corp. of India, Agriculture Ins. Co. of India Ltd., HDFC CHUBB General Ins. Co. Ltd., IFFCO Tokio General Ins. Co. Ltd., and Oriental Insurance Company Ltd.

4. The Assessing Officer required the assessee to submit a copy of the agreement with New India Assurance Co. Ltd. The agreement was entered in conjunction with J.B. Boda Reinsurance Brokers Pvt. Ltd. and M.B. Boda and Alsford Page and Gems Ltd. The type of insurance was 'catastrophic excess of loss'. In the case of New India Assurance Co. Ltd., the reinsurers were Hannover Ruckversicherung AG, CCR, Lloyd's Underwriter Syndicate, Swiss Re and Wurttembergische London. In response to the Assessing Officer's query with regard to the process by which clients were selected, the assessee submitted the following information, pertaining to, New India Assurance Co. Ltd:-

"Key Steps

(a) Originating insurer in India (New India) contacts JB Boda/MB Boda for placing identified risks/ class of risks with international reinsurers.

(b) JB Boda contacts one or more international firms of reinsurance brokers outside India requesting for proposals from international reinsurers/syndicates.

(c) International reinsurance brokers like Guy Carpenter contact other primary brokers and various syndicates in the Lloyds market for competitive proposals.

(d) Based on the various offers received JB Boda presents the various options to New India which makes the final decisions. Based on the decisions made by New India the policy terms are agreed and the risk is placed with the Lloyds market. Further, as per normal industry practice the reinsurance premium net of brokerage of 10% as per the policy contract is remitted to Guy Carpenter for onward transmission to the reinsurers in the Lloyds market.

(e) Separately the intermediation fee (brokerage) is remitted by New India to JB Boda, Guy Carpenter and other Indian and overseas intermediaries based on a mutually agreed ratio which accounts for their relative contribution in the reinsurance process. Typically however, the Indian and overseas reinsurance intermediaries would share the total brokerage income equally. It may however, be noted that in any reinsurance transaction more than one insurance intermediary may be involved at the India and overseas level. For e.g. in the illustrative transaction the Indian brokers involved were JB Boda and MB Boda and international brokers involved are Guy Carpenter & Alsford Page and Gems Ltd."

5. It was also made clear by the assessee that there were occasional business visits by two or three persons from the assessee company to India to maintain general business awareness and to reinforce business contacts/ relationship in India for 15 calendar days in a year which according to them did not meet the time threshold provided in Article 5(2)(k) of the India U.K. tax treaty. The Assessing Officer also collected certain information from the website of the assessee company.

6. According to the Assessing Officer the receipts of commission by the assessee from the said insurance companies operating in India amounted to "fees for technical services" as defined under section 9 (1) (vii) of the said Act and also under article 13(4)(c) of DTAA. In the course of the assessment proceedings, the Assessing Officer had also issued a notice under section 133(6) to New India Assurance Company Ltd. to provide certain information with regard to the nature of the transaction between New India Assurance Company Ltd. and the assessee. The following information was submitted by New India Assurance Company Ltd.:-

> "(1) "Officials from Guy Carpenter visit our office occasionally. Normally they visit us alongwith Foreign Insurers/Reinsurers who are transacting business with us through Guy Carpenter.

(2) They do not make any presentations during the meetings but the proposals for reinsurance is done through the broker (Guy Carpenter) who places business with the reinsurer for the ceding company. These proposals are sent through post/mail.

(3) Accounts are received through the broker and the related correspondence is done only with the broker. The correspondence/accounts for the last six month would be very voluminous and it will take us some time to extract the information.

(4) The proposal presentations from Brokers/ Reinsurers always help in better understanding the nature of business, international market, trends and the impact of global phenomena.

(5) Normally the payments are done from our Foreign Currency bank account in London/New York if the payments are done directly to Guy Carpenter. If the business is co-broked by JB Boda payment is done to J.B. Boda."

However, despite the above information, as pointed out above, the Assessing Officer came to the conclusion that the nature of payment received by the assessee came within the definition of fees for technical services as defined under the said Act as also under article 13(4)(c) of the DTAA.

7. The Commissioner of Income Tax (Appeals) also concurred with the view taken by the Assessing Officer. Being aggrieved thereby, the assessee

preferred an appeal before the Income Tax Appellate Tribunal which ultimately decided in favour of the assessee by virtue of the impugned order.

8. Before we go on to examine the findings of the Tribunal it would be pertinent to refer to article 13 of the DTAA to the extent it is relevant:-

> "ARTICLE 13- Royalties and fees for technical services-
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> 1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
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> 2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed:
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> (a) In the case of royalties within paragraph 3 (a) of this Articles, and fees for technical services within paragraphs 4 (a) and (c) of this Article,-
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> (i) during the first five years for which this Convention has effect;
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> (aa) 15% of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first mentioned Contracting State or a political sub-division of that State, and

(bb) 20% of the gross amount of such royalties or fees for technical services in all other cases; and

(ii) during subsequent years, 15% of the gross amount of such royalties or fees for technical services; and

(b) in the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article, 10% of the gross amount of such royalties and fees for technical services.

(3) xxxx

(4) For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

(a) are ancillary and subsidiary to the application of enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

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

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricable and essentially linked, to the sale of property, other than property described in paragraph 3 (a) of this Article;

(b) For services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;

(c) For teaching in or by educational institutions;

(d) For services for the private use of the individual or individuals making the payment; or

(e) To an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 15 (Independent personal services) of this Convention.

(6) xxxxxx
(7) xxxxxx
(8) xxxxxxx
(9) xxxxxxx"

9. A plain reading of Article 13(4)(c) of the DTAA indicates that 'fees for technical services' would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which, inter alia, "makes available" technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. According to the Tribunal this "make available" condition has not been satisfied inasmuch as no technical knowledge, experience, skill, know-how, processes, have been made available by the assessee to the insurance companies operating in India. It also does not consist of the development and transfer of any technical plan or technical design.

10. The Tribunal examined the evidence available on record in order to return a finding on the issue as to whether the payments received by the assessee from the insurance companies operating in India would fall within the expression 'fees for technical services' as appearing in article 13(4)(c) of the DTAA read with section 9(1)(vii) of the said Act. While doing so the Tribunal, inter alia, found that the assessee company was an international reinsurance intermediary (broker) and was a tax resident of United Kingdom. Further, that it was a recognized broker by the financial services

authority of United Kingdom. It was also an admitted position that the assessee did not maintain any office in India and that it had a referral relationship with J.B. Boda reinsurance (Broker) Pvt. Ltd of Mumbai and that J.B. Boda was duly licenced by the Insurance Regulatory & Development Authority to transact reinsurance business in India.

11. The Tribunal also observed as under:-

> "27. In the illustrative transaction, New India Insurance Co. Ltd. in India has entered into an agreement to reinsure on an Excess Loss basis the catastrophe risk arising from its primary insurance cover in conjunction with J.B. Boda and Alsford Page and gems Ltd. (the reinsurance brokers). The terms of the agreement specifies that the assessee in conjunction with J.B. Boda are recognized as intermediary, through whom all communications relating to this agreement shall pass. The terms of the agreement further provides that the assessee will provide all the details of agreed endorsements to the reinsurers by e-mail or facsimile and shall submit the slip policy to XIS (Lloyd's processing market) for signing. The assessee will act as a claim administrator and will submit claims advices to relevant market systems. For the services rendered, the assessee along with the other reinsurance brokers acting as an intermediary in the reinsurance process for New India Assurance Co. will be entitled to 10% brokerage. From the role played by the assessee in the reinsurance process as discussed above, it is evident to us that the assessee was rendering only intermediary services while acting as an intermediary/facilitator in getting the reinsurance cover for New India Insurance Co. There exists no material or basis on the basis of which, it would be said that the assessee was rendering any kind of technical/consultancy service within the meaning of Article 13 of Indo-UK treaty. The consideration received by the assessee acting as an intermediary in the

> reinsurance process cannot, by any stretch of imagination, be qualified as a consideration received for rendering any financial analysis related consultancy services, rating agency advisory services, risk based capital analysis etc. as alleged by the A.O."

The Tribunal also noted the process by which the transaction takes place. It has been pointed out that the originating insurer in India would contact J.B. Boda/ M.B. Boda for placing identified risks/ class of risks with international reinsurers. J.B. Boda, in turn, would contact one or more international firm(s) of reinsurance broker(s) like the assessee for competitive proposals from the international reinsurer. Then, the international reinsurance brokers like the assessee would contact other primary brokers and various syndicates in the Lloyds market for competitive proposals. Based on the various offers or proposals given by the international reinsurance brokers, like the assessee, to J.B. Boda, the latter would present various options to the originating insurer in India, which would take a final decision in the matter. Based on the decision of the originating insurer in India, the policy terms would then be agreed upon and the risk would be placed with the international reinsurer. It was also pointed out that as per the normal industry practice, the reinsurance premium net of brokerage of 10% as per the policy contract is remitted to

the assessee, i.e., reinsurance brokers, for onward transmission to international reinsurers. The intermediation fee which is another word for brokerage is paid separately by the originating insurance in India to J.B. Boda, the international reinsurance brokers like the assessee and other intermediaries, based on a mutually agreed ratio which accounts for their relative contribution in the reinsurance process.

12. Based on this manner of transacting, the Tribunal came to a conclusion that the payment received by the assessee could not be regarded as 'fees for technical services'. Further, more, the Tribunal also held that such receipts would not amount to fees for technical services as the "make available" clause contained in article 13(4)(c) had not been satisfied in the facts and circumstances of the present case.

13. In our view, the Tribunal has arrived at these conclusions purely on assessing the factual matrix of the case at hand. The findings are in the nature of factual findings and, therefore, according to us, no substantial question of law arises for our consideration, particularly, because the learned counsel for the Revenue was unable to point out any perversity in the recording of such findings. As such no substantial question of law

arises for our consideration. The appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

V.K. JAIN, J

APRIL 23, 2012
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