

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

**Before Dr. B. R. R. Kumar, Accountant Member  
Sh. Saktijit Dey, Judicial Member**

**ITA No. 2006/Del/2022: Asstt. Year: 2019-20**

TSYS Card Tech Ltd, Fulford Moor House, Fulford Road York YO10 4EY, United Kingdom, UK,	Vs	DCIT, Circle-3(1)(1), International Taxation, New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AADCT5168J</b>		

**Assessee by : Sh. Kamal Sawhney, Adv  
Shri Arun Bhadauria, Adv  
Shri Prashnat Meharchandani, Adv**

**Revenue by : Sh. Gangadhar Panda, CIT-DR**

<b>Date of Hearing: 07.11.2022</b>	<b>Date of Pronouncement: 24.01.2023</b>
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**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the assessee against the order of the Id. AO dated 28.06.2022.

2. The assessee has raised the following grounds of appeal:-

- "1. *On the facts and circumstances of the case and in law, the final assessment order passed by the Ld. AO is bad-in-law and liable to be quashed.*
2. *On the facts and circumstances of the case and in law, the Ld. AO has grossly erred in passing the final assessment order without considering the material available on record and is bad in law and void ab initio since it has been passed without giving sufficient opportunity to the appellant.*
3. *On the facts and circumstances of the case and in law, the Ld. AO has grossly erred in passing the final*

*assessment order without giving the cognizance to the directions passed by the Ld. DRP and accordingly, the final assessment order is bad in law.*

4. *On the facts and in the circumstances of the case and in law, Ld. AO has erred in alleging that receipts in the nature of software license fee amounting to Rs 5,21,17,082 is taxable as Fees for Technical Services (FTS') as per the Act and also as per the provisions of India-UK Double Taxation Avoidance Agreement (DTAA ).*

- 4.1 *In doing so, the Ld. AO has erred in not following the directions of Ld. DRP, wherein it was directed to exclude the receipts related to software license fee amounting to Rs 5,21,17,082. As per directions of the Ld. DRP, such receipts will constitute business income under Article 7 of the India-UK DTAA and will not be taxable in India because undisputedly, Appellant does not have any PE in India.*

5. *On the facts and in the circumstances of the case and in law, Ld. AO/ DRP has erred in alleging that receipts from provision of other related services amounting to Rs 12,01,30,877 is taxable as FTS as per the Act read with India- UK DTAA.*

6. *On the facts and in the circumstances of the case and in law, Ld. AO has erred in proposing to tax the receipts amounting to Rs 7,24,821 as FTS as per the Act read with the India-UK DTAA, as the same is in the nature of reimbursement which does not involve any income element and hence not chargeable to tax in India in the hands of the appellant.*

- 6.1 *On the facts and circumstances of the case and in law, the Ld. AO has erred in not following the directions of Ld. DRP, wherein it was directed that the Ld. AO to verify the details regarding the reimbursement and to exclude receipts which are in the nature of reimbursement.*

7. *On the facts and circumstances of the case and in law, the Ld AO erred in initiating penalty proceedings under section 270A of the Act."*

3. Ground No. 1, 2 and 3 are general in nature and therefore, same are dismissed.

4. Brief facts of the case is that the assessee M/s TSYS Card Tech Ltd. Ltd is a company. Assessee is engaged in the business of providing information technology related services to financial payments industry. During the subject AY, the assessee had earned revenue from Indian Customer primarily for rendition of software license (referred to as `PRIME) and provision of software related services including implementation services, enhancement services, annual maintenance services and consultancy services as per the request of the Customers.

5. During the year the assessee received an amount of Rs. 5,21,17,082/- on account of software (Prime) License fee and fee for provision for other related parties of Rs. 12,01,30,877/- and receipt in nature of reimbursement of Rs. 7,24,821/- totaling to Rs. 17,29,72,780/-.

6. As regards the first set of receipts on account of Software (Prime) License Fee of Rs. 5,21,17,082, the assessee filed a copy of "Prime and Online Software Licensing Agreement dated 09.11.2005 with UTI Bank (Axis Bank) and Software License Agreement with ICICI Bank Ltd dated 03.03.2004 before the Id DRP.

7. It is provided that, inter alia, the Licensee shall:

5. Refrain from modifying PRIME and the Operating Environment on which it resides unless authorised or instructed in writing by the Licensor.
6. Neither transfer PRIME (or portions of it) nor divulge it, its specifications or manuals to any third party unless authorised in writing by the Licensor.
7. Refrain from taking more than two copies of PRIME, such copies being for backup purposes only. One further copy of PRIME may be made for disaster recovery purposes...

8. Refrain from taking copies of the PRIME Manuals unless authorised in writing by the Licensor.
9. Refrain from attempting to reverse compile PRIME.

8. Having gone through the agreement since the user has no right to make copies or commercially exploit the right in the copyright of such software the Id DRP following the ratio laid down by Hon'ble Supreme Court in the context of Business Income/Royalty in Engineering Analysis Centre of Excellence Private Ltd. Vs. CIT (Civil Appeal Nos. 8733-8734 of 2018) directed to exclude receipts relating to sale of software licenses in accordance with and to the extent covered under the applicable categories contained in Hon'ble Supreme Court decision. The Id DRP held that there is no dispute regarding the fact that the assessee does not have a permanent establishment in India. Accordingly, such receipts will constitute business income under Article 7 of the DTAA in line with the above-mentioned decision of Hon'ble Supreme Court and will not be taxable in India in the absence of PE.

9. However, the Id DRP held that the second set of receipts of Rs. 12,01,30,877 on account of provision of other related services, it is well settled that such services from a distinct set of receipts which need to be examined independently in terms of their taxability or otherwise under specific Article 13 (Royalty/FTS) and cannot be clubbed as business income under Article 7 of the DTAA. The Id DRP held that taxable under Article 13 India-UK DTAA under the head 'FTS'. The Id DRP held that the make available clause under Article 13 are also stand satisfied. The main argument taken before us is that the other related services provided are in connection with utilization

of the software (PRIME) which are intricately and extricably associated. The services are in respect of training programme and updations in connection with utilization of the software PRIME. Hence, we hold that when software itself is not taxable, the training and the related activities concerned with utilization and installation cannot be held to be FTS. Further, simply latching on to use of words "Make Available" in the agreement, it cannot be said that conditions of Article 13(4)(c) are satisfied. Burden is on the Revenue to demonstrate that make available condition is satisfied. Appeal of the assessee on Ground Nos. 4 and 5 are allowed.

10. With regard to the ground No. 6 pertaining to reimbursement of Rs. 7,24,821/- we find that the Id DRP has remanded the matter to the AO to examine travelling and lodging expenses reimbursed. However, the AO has wrongly taxed the same under FTS. Hence, the action of the AO cannot be supported. The addition made is hereby directed to be deleted.

11. In the result, the appeal is allowed.

Order Pronounced in the Open Court on 24/01/2023.

Sd/-

**(Saktijit Dey)**  
**Judicial Member**

**Dated: 24/01/2023**

**\*Ajay Kumar Keot, Sr. PS\***  
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**