

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D" NEW DELHI****BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT  
AND  
SHRI SAKTIJIT DEY, JUDICIAL MEMBER****आ.अ.सं./I.T.A No.8267/Del/2019****निर्धारणवर्ष/Assessment Year: 2016-17**

<b>Wolters Kluwer Financial Services Belgium NV, C/o 10<sup>th</sup> Floor, Building No.10, Phase-II, DLF Cyber City, Gurgaon, Haryana.</b>	<b>बनाम Vs.</b>	<b>DCIT Circle 3(1)(1), International Taxation, New Delhi.</b>
<b>PAN No. AABCW8353J</b>		
<b>अपीलार्थी Appellant</b>		<b>प्रत्यर्थी/Respondent</b>

<b>निर्धारितकीओरसे /Assessee by</b>	<b>Shri Salil Kapoor &amp; Ms. Ananya Kapoor, Advs.</b>
<b>राजस्वकीओरसे /Revenue by</b>	<b>Shri Sanjay Kumar, Sr. DR</b>

<b>सुनवाईकीतारीख/ Date of hearing:</b>	<b>06.09.2022 &amp; 26.12.2022</b>
<b>उद्घोषणाकीतारीख/Pronouncement on</b>	<b>28.12.2022</b>

**आदेश /O R D E R****PER SAKTIJIT DEY, J.M.**

Captioned appeal by the assessee arises out of the order dated 22.07.2019 of learned Commissioner of Income Tax (Appeals)-43, New Delhi pertaining to AY 2016-17.

2. Though the assessee has raised as many as 13 grounds, however, the short issue arising for consideration is, whether the amount received by the assessee for providing management support services can be

treated as Fee for Technical Services (FTS) under the India-Belgium Double Taxation Avoidance Agreement (DTAA).

3. Briefly the facts are, the assessee is a non-resident corporate entity incorporated under the laws of Belgium and is a tax resident of Belgium. As observed by the Assessing Officer, the assessee provides management support services, such as, administration, management, marketing and sale of company's product and other services. For providing such services to the Indian subsidiary, namely, Wolters Kluwer (India) Pvt. Ltd. during the year under consideration the assessee had received an amount of Rs.1,53,36,510/-. For the assessment year under dispute, the assessee filed its return of income offering nil income claiming that the amount received by the assessee from providing management support services is not taxable in India. In course of assessment proceedings the Assessing Officer called upon the assessee to explain why the fee received towards management support services should not be treated as FTS both under the provisions of Section 9(1)(vii) of the Act as well as under the tax treaty. In reply, the assessee submitted that as per Article 12(3)(b) of the India-Belgium tax treaty, FTS includes payment received for services of managerial, technical or consultancy nature and chargeable to tax @10%. However, the assessee submitted, the taxation of FTS under India-Belgium tax treaty can be altered or reduced on account of Most Favoured Nation (MFN) clause as referred to in clause (1) of the protocol to the India-Belgium tax treaty.

He submitted, as per the said protocol to India-Belgium tax treaty, where India enters into a tax treaty after 01.01.1990 with a third state, being a Member of the OECD, whereby vide such DTAA India limits its taxation in respect of royalty or FTS to a rate lower or a scope more restricted than the rate or scope provided in India-Belgium tax treaty of such item of income, the same rate or scope as provided for in the other tax treaty in respect of said item of income shall also apply under the India-Belgium tax treaty. It was submitted, as per India-UK tax treaty, under Article 13(4) the term FTS has been defined to mean consideration received for rendering of any technical or consultancy services. Thus, it was submitted, managerial services have been specifically excluded from the definition of FTS under India-UK tax treaty. Thus, it was submitted, the meaning of FTS under India-UK tax treaty, being more restricted, will apply to India-Belgium tax treaty as per the MFN clause under the protocol to India-Belgium tax treaty. The Assessing Officer, however, did not accept the contention of the assessee. Firstly, he held that the amount received is taxable under section 9(1)(vii) of the Act as FTS. Secondly, he held that the amount is also taxable under India-Belgium tax treaty read with India-UK DTAA. Accordingly, he taxed the amount received as FTS by applying the rate of 15% on gross basis. Against the aforesaid decision of the Assessing Officer, assessee preferred an appeal before learned Commissioner (Appeals).

4. After considering the submissions of the assessee in the context of facts and materials on record learned Commissioner (Appeals) observed that as per the Master Service Agreement (MSA) under which the assessee has provided management support services, the nature of services rendered cannot be considered to be in the nature of simply managerial services. He observed, the services include logistics, planning, business development, etc. He observed, the assessee has advised Indian subsidiary on a complete strategic business proposition and how to advance the business prospects efficiently and specifically in the Indian context. Therefore, the services are more in the nature of consultancy services rather than managerial. Further learned Commissioner(Appeals) observed that while providing consultancy services the assessee makes available some skills to the recipient. While coming to such conclusion learned Commissioner (Appeals), though, accepted assessee's contention that services were rendered offshore with no point of contact where the employees had visited in India or services have been rendered in India, however, he observed that assessee was constantly guiding and advising the Indian subsidiary on the manner and mechanism on which Indian business was to be developed. Thus, on the aforesaid basis, he held that services rendered are in the nature of consultancy services. However, he accepted that the entire amount received by the assessee cannot be attributed to consultancy services alone. He observed, amount received from services, such as, business planning, product management, business

development, accounting and budgeting, planning, logistics and reporting, client contract and preferred provider agreement, finance and accounting system, human resource services, information system, corporate communication, legal services, etc. actually enable the recipient to apply the knowledge received. Alleging that segmental details of cost charged for various services are not available, he attributed 50% of the receipts are for consultancy services, hence FTS. Against the aforesaid decision of learned Commissioner (Appeals), the assessee is before us.

5. Reiterating the stand taken before the Departmental Authorities, learned Counsel submitted that the services rendered are simply in the nature of managerial services, hence, cannot be regarded as consultancy services. He submitted, as per the MFN clause available in the Protocol to India-Belgium tax treaty, the more restricted meaning of FTS under India-UK tax treaty would be applicable. He submitted, as per Article 13(4) of the India-UK tax treaty, managerial services are specifically excluded from being treated as FTS. Therefore, he submitted, the amount received by the assessee, being in the nature of managerial services, is not taxable in India. Without prejudice, he submitted, even assuming that the services rendered are in the nature of consultancy services, unless, the service provider makes available technical knowledge, experience, skill, knowhow processes, etc. while rendering such services to the recipient it will not fall within the category of FTS as

per the definition of FTS under India-UK tax treaty. He submitted, the Departmental Authorities have failed to demonstrate that the assessee had made available technical knowledge, experience, skill, knowhow, processes while rendering such services to the recipient, which can enable the recipient to apply such technical knowledge, experience, skill, knowhow independently without the aid and assistance of the service provider. Thus, he submitted, the amount received cannot be treated as fee for consultancy services as well under India-Belgium tax treaty read with India-UK tax treaty. In support of such contention learned Counsel relied upon the following decisions:

1.	Steria (India) Ltd. Vs. CIT (386 ITR 390)
2.	Concentrix Services Netherlands B.V. - WP(C) 9051/2020
3.	Perfetti Van Melle ICT & BV - ITA No. 139/Del/2022
4.	Intertek Services, In Re (307 ITR 418)
5.	Ernst & Young (P) Ltd., In re (323 ITR 184)
6.	Cummins Ltd., In re (381 ITR 44)
7.	Measurement Technology Ltd. United Kingdom (2015) 60 taxmann.com 1
8.	Everest Global Inc. (TS-247-ITAT-2022)
9.	Inter-Continental Hotels Group (Asia Pacific) Pte. Ltd. vs. ACIT (TS - 933 - ITAT - 2021)
10.	Magotteaux International SA (141 taxmann.com 8)
11.	Invensys Systems Inc. vs. DIT (AAR No. 796 of 2009)
12.	Apollo Tyres Ltd. (2018) 92 taxmann.com 166
13.	US Technology Resources Pvt. Ltd. (97 taxmann.com 642)
14.	CIT vs. De Beers India Minerals (P) Ltd. - (346 ITR 467)
15.	Koninklijke Philips Electronics Pvt. Ltd. N.V. (2018) 99 taxmann.com 23
16.	SCA Hygiene Products AB ITA No. 7315/Mum/2018
17.	Exxon Mobil Company India (P) Ltd. (2018) 92 taxmann.com 5
18.	Raymond Ltd. vs. DCIT (86 ITD 791)
19.	National Organic Chemical Industries Ltd. vs. DCIT (2004) (96 TTJ 765)
20.	NTT Asia Pacific Holdings Pte Ltd. vs. ACIT (ITA No. 1212/Mum/2021)
21.	Endemol India Private Limited (264 CTR 117)
22.	Trigo SAS vs. DCIT (TS-855-ITAT-2021 (PUN))

23.	GRI Renewable Industries S.L. vs. ACIT(IT) (ITA No. 202/PUN/2021)
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6. Strongly relying upon the observations of the Departmental Authorities learned Departmental Representative submitted that the services rendered by the assessee under the MSA cannot be regarded as simply in the nature of managerial services. Drawing our attention to various clauses of the MSA, as reproduced in the order of learned Commissioner (Appeals), he submitted, some of the services rendered by the assessee are in the nature of consultancy services. Therefore, comes within the restrictive meaning of FTS under India-UK tax treaty, even applying the MFN clause. Further, he submitted, while rendering such services the assessee also makes available some amount of technical, knowledge, experience, skill, knowhow, etc. to the recipient for enabling him to perform such services. Therefore, it also satisfies make available condition. Thus, he submitted, a part of the amount received by the assessee is towards consultancy services, hence, taxable as FTS under the treaty provisions.

7. We have considered rival submissions in the light of the decisions relied upon and perused the material on record.

8. The short issue arising for consideration is, whether the amount received by the assessee from provision of management support services is in the nature of FTS. Undisputedly, the assessee is a tax resident of Belgium, hence, eligible to avail the benefit of treaty provisions in so far

as they are more beneficial to the assessee. As per Article 12(3)(b) of India-Belgium tax treaty, the expression FTS includes any payment received towards managerial, technical or consultancy services and chargeable to tax @10% in the source country. However, clause (1) of the Protocol to India-Belgium tax treaty provides that if India has entered into a tax treaty with a member of OECD countries and as per the tax treaty with that country India limits its taxation on royalty or FTS to a rate lower or a scope more restricted than as provided under India-Belgium tax treaty on such items of income, then the restrictive rate or scope of the other tax treaty will be applicable to India-Belgium tax treaty. In fact, the Departmental Authorities have accepted assessee's claim of applicability of MFN clause under the Protocol of India-Belgium tax treaty. Therefore, it has to be seen what is the scope and meaning of FTS under India-UK tax treaty.

9. As per Article 13(4) of India-UK tax treaty, the term FTS means payment of any kind to any person in consideration for rendering of any technical or consultancy services, including, the provision of service of a technical or other personnel which (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of the article is received; or b) ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of the 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. While the Assessing Officer has treated the services rendered by the assessee to be in the nature of consultancy services, learned Commissioner (Appeals) has partly accepted assessee's claim by attributing 50% of the amount received to FTS.

10. At this stage, we have to examine the scope of services performed under the MSA. On going through a copy of the agreement placed at page 130 of the Paper Book it is observed that the assessee provides management support services to the Indian subsidiary. Paragraph 1 of the agreement provides that the assessee shall provide assistance to the Indian subsidiary in administration, management, marketing and sale of company's products and services including but not limited to business planning, product management, business development, market and manufacturing strategy, logistics and distribution planning, personnel and human resources management. Paragraph 2 to the agreement makes it clear that the assessee shall have no power or authority to conclude or accept contracts on behalf of the customer while rendering services. Paragraph 3 makes it clear that the service recipient shall maintained confidentially of all confidential or proprietary information or data of the supplier including without limitation technical specifications, technological data and price information, lists of customers and proposals made to or receive from third party customers. Such proprietary material shall at all times remain the property of the supplier

and shall be deemed to have been furnished to the customer in confidence and solely in connection with the customer's obligation under the agreement. It also provides that on termination of the agreement the customer shall immediately deliver to the supplier written documentation including copies, of such proprietary materials and shall make no further use thereof not only by him but also by its employees, agents, or contractors. Paragraph 4 to the agreement provides for the terms of payment for rendering services which will be calculated based on customers share in the global revenue.

11. Since other clauses of the agreement are not relevant for deciding the issue at hand, we refrain from deliberating in detail on them. Be that as it may, the scope of services to be rendered under the agreement certainly does not indicate that they are anything other than managerial services as it aids and assists the customer for performing its day to day business activity. In fact, learned Commissioner (Appeals) has partly accepted assessee's claim and allowed benefit of 50% of the amount received to be fee for managerial services, that too, purely on estimate. This, in our view is without any basis. Once the assessee was able to demonstrate that the amount received is in the nature of managerial services, it cannot be treated as FTS in view of the restrictive meaning of FTS under Article 13(4) of India-UK tax treaty, which specifically excludes managerial services. As regards the applicability of MFN clause and the restrictive provision of India-UK tax treaty, in our view, there

cannot be any dispute as the Assessing Officer has accepted the legal position.

12. Therefore, the only other aspect which remains to be seen is whether 50% of the amount received can be treated as FTS under India-UK DTAA. Firstly, we have held that the nature of services provided by the assessee do not give any impression that they are not in the nature of managerial services. Even, assuming that part of such services are in the nature of consultancy services, as held by learned Commissioner (Appeals), it has to be seen whether it qualifies as FTS under India-UK DTAA, under which, the meaning of FTS is more restrictive than what is provided under India-Belgium tax treaty. As discussed earlier, Article 13(4)(c) of India-UK tax treaty says that if in course of rendering services the service provider makes available technical, knowledge, experience, skill, knowhow, or processes etc then it can be regarded as FTS. The expression 'make available' has not been defined either under the treaty provisions or under the Act. However, the expression 'make available' has been judicially interpreted in various decisions. As per the ratio laid down 'make available' would mean imparting of technical knowledge, skill, knowhow, etc. which enables the recipient of service to apply such technical knowledge, experience, skill, knowhow etc. independently in exclusion of the owner of such technical knowledge, experience, skill, knowhow etc. In the facts of the present appeal, admittedly, except some general observations of the Departmental Authorities that the

assessee has made available technical knowledge, skill, experience, knowhow, etc. there is no material on record to demonstrate such fact. Therefore, in our view, the make available condition of Article 13(4)(c) of India-UK tax treaty has not been satisfied. In any case of the matter, attribution of 50% of the receipts to the alleged consultancy services is purely on estimate and without any reasonable basis. In view of the aforesaid, we are inclined to delete the addition sustained by learned Commissioner (Appeals).

13. In the result, the appeal is allowed, as indicated above.

Order pronounced in the open court on 28/12/2022

Sd/-  
**(G.S. PANNU)**  
**PRESIDENT**

Sd/-  
**(SAKTIJIT DEY)**  
**JUDICIAL MEMBER**

Dated: 28.12.2022

*\*Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

**By order**

**Assistant Registrar, ITAT: Delhi Benches-Delhi**