

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

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT  
AND  
SHRI SAKTIJIT DEY, VICE PRESIDENT**

ITA No.517/Del/2022  
Assessment Year: 2018-19

N.M. Rothchild & Sons Ltd., New Court, St. Swithin's Lane, United Kingdom, 999999	<b>Vs.</b>	DCIT, International Taxation, Circle-2(2)(2), New Delhi
<b>PAN :AAGCN2900F</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

With

ITA No.1382/Del/2022  
Assessment Year: 2019-20

N.M. Rothchild & Sons Ltd., C/o- Walker Chandiook & Co. LLP, 2 <sup>nd</sup> Floor, Plot No. 19A, Sector-16A, Noida	<b>Vs.</b>	DCIT, International Taxation, Circle-2(2)(2), New Delhi
<b>PAN :AAGCN2900F</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Sh. Ajay Vohra, Sr. Advocate Ms. Somya Jain, AR
Respondent by	Sh. Vizay Vasanta, CIT(DR)

Date of hearing	06.04.2023
Date of pronouncement	30.06.2023

**ORDER**

Captioned appeals have been filed by the assessee challenging the final assessment orders passed under section

143(3) read with section 144C(13) of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment years 2018-19 and 2019-20, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. The only common issue arising for consideration is regarding taxability of certain receipts earned by the assessee as Fees for Technical Services (FTS) under Article 13 of India – United Kingdom (UK) Double Taxation Avoidance Agreement (DTAA). Briefly the facts, more or less, common in both the assessment years are the assessee is a non-resident corporate entity and a tax resident of UK. While verifying the return of income filed by the assessee for the impugned assessment year, the Assessing Officer noticed that, though, the assessee had received an amount of Rs.1,54,35,120/- and Rs.2,45,19,751/- for the assessment years 2018-19 and 2019-20 respectively, however, he has not offered them to tax. On further verification of facts, he found that the aforesaid amounts were received by the assessee towards rendition of services pertaining to human resources, finance, legal and compliance and conducting of internal audit assurance work to its associated enterprise, viz., Rothschild & Co. India Pvt. Ltd. (Rothschild). Being of the view that such receipts are in the

nature of FTS under Article 13 of India – UK DTAA, the Assessing Officer called upon the assessee to explain, why the receipts should not be brought to tax in India. In reply to the show-cause notice, the assessee submitted that the services rendered do not qualify as FTS, since they are neither technical, nor consultancy services. Further, the assessee submitted that as per Article 13(4)(c) of the India – UK DTAA to qualify as FTS, the services rendered must make available technical know-how, knowledge, skill etc. to the service recipient. After verifying the nature of services rendered by the assessee, the Assessing Officer observed that some of the services rendered by the assessee to the India AE are in the nature of FTS. Such services are as under:

- i. Assistance in relation to Human Resource Management (HRM)
- ii. Assistance in relation to Accounting
- iii. Assistance in Tax and Legal Support

3. Thus, considering these services to be in the nature of technical or consultancy services in terms of Article 13(4) of India – UK DTAA, the Assessing Officer brought them to tax on gross basis by applying the rate of 10%. Accordingly, he framed the draft assessment orders. Against the draft assessment orders, the

assessee raised objections before learned DRP. Learned DRP disposed of assessee's objections in cryptic and unreasoned manner by upholding the decision of the Assessing Officer.

4. Before us, learned Senior Counsel appearing for the assessee drew our attention to the group service agreement entered with the Indian AE, under which certain services were rendered on cost sharing basis. He submitted, the services rendered under the group services agreement are standard services and all participating companies in the group shared the cost. Drawing our attention to Article 13(4) of India – UK DTAA, learned counsel submitted, the services of the nature of technical or consultancy can be treated as FTS. He submitted, the services rendered by the assessee to the Indian AE can neither fall in the category of technical or consultancy services. He submitted, even assuming that services rendered may fall in the category of consultancy services, however, as per Article 13(4)(c) of the Treaty, such services must make available the technical knowledge, know-how, skill etc. to the service recipient to make it FTS under the treaty provisions. He submitted, while rendering services, the assessee has not made available any technical knowledge, know-how, skill etc. to Indian AE. Therefore, the

receipts from rendition of services cannot be treated as FTS. He submitted, the term 'make available', though, is not defined in India – UK DTAA, however, it has been explained in Memorandum of Understanding (MoU) between India and USA under India – USA DTAA as well as various judicial precedents. In this regard, he drew our attention to the explanation of the term 'make available' in the MoU to India – USA DTAA. Thus, he submitted, Revenue has failed to establish fulfillment of 'make available' condition, hence, receipts cannot be treated as FTS under India – UK DTAA. In support of such contention, learned counsel relied upon the following decisions:

1. *Ernst & Young (P.) Ltd., In re\** [2010] 189 Taxman 409 (AAR)
2. *US Technology Resources (P.) Ltd. Vs. CIT*, 97 taxmann.com 642 (Kerala HC) [2018]
3. *CPP Assistance Services Pvt. Ltd. Vs. CIT*, 147 taxmann.com 484 (Delhi - Trib.) [2023]
4. *H.J. Heinz Company Vs. ADIT* [2019] 108 taxmann.com 473 (Delhi- Trib.)
5. Drawing our attention to the observations of the Assessing Officer and learned Departmental Representative as well as the nature of services rendered under the group services agreement, learned Departmental Representative submitted that the services rendered by the assessee are not routine day to day services. He submitted, the services have been rendered remotely through

technical process. He submitted, the nature of services rendered will also fall in the category of technical or consultancy services. He submitted, merely because services rendered are part of intragroup services, they cannot be excluded from the purview of FTS as the nature of services rendered has to be looked into.

6. As regards assessee's contention that the make available condition is not satisfied, learned Departmental Representative submitted, the nature of service rendered clearly establishes that while rendering such services the assessee has issued necessary guidance to the India AE regarding the mode and manner of certain activities to be carried out. Thus, essentially, the assessee has made available the technical, knowledge, know-how, skill etc. to enable the Indian AE to perform such services independently. Thus, he submitted, the receipts are taxable as FTS.

7. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. Undisputedly, the assessee has entered into intragroup services agreement with various group entities, including the Indian AE. In terms with the group services agreement, the assessee renders following services:

- **Human resourcemanagement:** NMR manages payroll processes, recruitment, performancemanagement, pensions, learning and development for operating entities including Rothschild India;
- **Internal Audit:** NMR is responsible for conduct of global internal audit assurance programme;
- **Corporate events:** NMR manages corporate events, memberships, sponsorships and hospitality functions in order to perform event management services at a centralized level;
- **Group Finance:** NMR is responsible for management reporting (including forecasts, planning and budgeting), financial reporting and capital planning. These include balance sheet reporting, funding, liquidity and regulatory issues, P&L reporting, covering actual results, forecasts and budgets, with the focus on divisional performance;
- **Global Finance:** NMR produces global management information for financial advisory business of the Group. It provides decision support for the management and co-ordinates global fee sharing, global expense policies and pipeline reporting;
- **Legal and compliance:** NMR provides legal and regulatory advice in terms of monitoring of compliance with legal and regulatory matters. It includes liaisoning with regulators, new client acceptance and name protection/trademarks. It also provides services to implement compliance rules within the Group and assist local teams to be compliant.
- **Global Planning:** Under this, NMR supports management committees annual planning process;
- **Marketing:** NMR provides support for collating credentials for marketing to clients, which includes league tables, tombstones, deal announcements, regional performance slides, preparation of marketing materials such as global divisional, sector and product brochures and flyers, crisis management etc.

8. The cost incurred by the assessee for performing this services are allocated to the group companies, including the India AE on the basis of applicable allocation keys, such as, time spent, activity level or head count. The costs incurred are cross charged to the group companies on cost plus 5% basis. The short issue arising for consideration is, whether the amount received by the assessee through cost recharge from Indian AE is in the nature

of FTS under Article 13(4) of India – UK DTAA. Before we proceed to decide this issue, it is necessary to look into the definition of FTS under Article 13(4) of the Treaty, which reads as under:

*“Article 12 (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*

- (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 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.”*

9. A careful reading of Article 13(4) makes it clear that FTS means payments of any kind in consideration for rendering of any technical or consultancy services, which firstly, are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment of the nature of royalty is received. Secondly, they must be ancillary and subsidiary to the enjoyment of the property for which the payment in the nature of royalty is received. Thirdly, the services ‘make available’, technical knowledge, experience, skill, knowhow or processes or consists of development and transfer of a technical plan or technical design. The facts on record reveal that the first two conditions noted above do not apply to the fees received as such fees are not for



any services, which are ancillary and subsidiary to any payment made in the nature of royalty. Beside the aforesaid two categories, where the payment can fit in as FTS is the category where the services rendered make available technical, experience, skill, know-how, processes etc. Thus, the first condition, which needs to be satisfied, is the services rendered must be in the nature of technical or consultancy services.

10. As discussed earlier, under the group services agreement the assessee provides services in the nature of management, such as, payroll processes, recruitment, performance management, pensions, learning and development for operating entities, including the Indian AE. The assessee also conducts a global internal audit assurance programme. It also manages corporate events, memberships, sponsorships and hospitality functions in order to perform professional event management services at a centralized level. It also involve intra-group finance activities, such as, management reporting, financial reporting and capital planning, which includes, balance-sheet reporting, funding, liquidity and regulatory issues, profit and loss reporting, covering actual results, forecast and budgets with the focus on divisional performance. It also produces global management information for

financial advisory business of the group. It provides decision support for the management and co-ordinates global fee sharing, global expenses policies and pipeline reporting. The assessee provides legal and regulatory advice in terms of monitoring of compliance with legal and regulatory matter, including liaising with regulators, new client acceptance and name protection/trademarks. It also provides services to implement compliance rules within the group and assist local teams to be compliant. The assessee also provides services of global planning for annual planning process. It also provides support for collating credentials for marketing to clients. Thus, from the nature of services rendered, it is quite clear that they are in the nature of advisory services in certain areas as per the terms of the agreement. From the nature of services, it is quite evident that assessee's role in the services provided is purely to assist the Indian AE or other participating group entities in making correct decision on the aspects specifically referred to in the agreement. Thus, the nature of services provided to the Indian AE does not seem to be falling in the category of either technical or consultancy services. In fact, in the assessment orders, the Assessing Officer himself has stated that some of the services are

of the nature of FTS. Thus, the Assessing Officer clearly admits that all the services rendered by the assessee are not in the nature of FTS. In spite of that the Assessing Officer has treated the entire receipts as FTS and added at the hands of the assessee. This, in our view, is unacceptable.

11. Having said so, it is necessary to examine whether the other condition of Article 13(4) of India – UK treaty is fulfilled. Even assuming that as per the Assessing Officer’s version, few of the services are in the nature of technical and consultancy nature, the crucial factor needs to be examined is whether while rendering such services the assessee has made available technical knowledge, experience, skill, know-how or processes to the India AE. The expression ‘made available’ has not been defined in India – UK DTAA. However, in this context reference can be made to the MoU to India – US DTAA wherein the term ‘make available’ has been explained. For ease of reference such explanation provided in the protocol to India – USA DTAA is reproduced hereunder:

*“Paragraph 4(b) of Article 12 refers to technical or consultancy services that make available to the person acquiring the services, technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design to such person. (For this purpose, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person). This category is narrower than the category described in paragraph 4(a ) because it excludes any*

*service that does not make technology available to 'the person acquiring the service. Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available.*

12. The expression 'make available' has been subjected to judicial interpretation in various decisions. As per the interpretation given to the said expression, technological skill, know-how etc. to render the services should get transferred to the service recipient in a manner so that the service recipient is able to perform the same services independently on its own in future, without the aid and assistance of the service provider. In other words, in course of rendition of service, the service provider must transfer the technology, technical know-how, skill etc. to the service recipient to the extent that service recipient can perform such services in future without required the assistance of the service provider and without depending upon the service provider. Meaning thereby, the service recipient must be in a position to acquire technical knowledge, knowhow, skill etc., so as to independently apply it. In the facts of the present case, evidently,

the services provided by the assessee to the Indian AE are merely for enabling and assisting the Indian AE in making the correct decisions on certain aspects as specifically provided under the group service agreement. Such rendition of services do not result in transfer of technical knowledge, know-how, skill etc. to the Indian AE. Therefore, in our view, the 'make available' condition provided under Article 13(4)(c) remains non-compliant. That being the position, the receipts would not fall within the definition of FTS as provided under Article 13(4) of India – UK DTAA. While coming to such conclusion, we have drawn support from the judicial precedents cited before us by learned counsel for the assessee.

13. In view of the aforesaid, we hold that the receipts, not being in the nature of FTS under Article 13(4) of India – UK DTAA, are not taxable at the hands of the assessee in India. Grounds are allowed.

14. In the result, appeals are allowed.

***Order pronounced in the open court on 30<sup>th</sup> June, 2023***

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

***Sd/-***  
**(SAKTIJIT DEY)**  
**VICE PRESIDENT**

Dated: 30<sup>th</sup> June, 2023.  
RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi