आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.657/PUN/2014
निर्धारण वर्ष / Assessment Year : 2009-10

M/s. Sandvik AB,
C/o Sandvik Asia Pvt. Ltd.,
Mumbai-Pune Road, Dapodi,
Pune – 411012 .... अपीलार्थी/Appellant

PAN: AAHCS7486E

Vs.

The Dy. Director of Income Tax
(International Taxation)-II, Pune .... प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri S.B. Prasad, CIT

सुनवाई की तारीख / **Date of Hearing : 18.03.2019**		घोषणा की तारीख / **Date of Pronouncement: 17.05.2019**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by assessee is against the order of DDIT (International Taxation)-II, Pune, dated 28.03.2013 relating to assessment year 2009-10 passed under section 144C(1) r.w.s. 143(3) of the Income-tax Act, 1961 (in short 'the Act').

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

On the facts and circumstances of the case, and in law;

1. Ground 1:

The Learned Dispute Resolution Panel („Ld.DRP') has erred in confirming the action of the Learned Assessing Officer ('Ld.AO') of taxing receipts for Management Services provided to its Indian affiliates amounting to Rs.18.86 crores to be in the nature of Fees for Technical Services' ('FTS') within the meaning of Article 12 of the Double taxation Avoidance Agreement between India and Sweden ('tax treaty between India and Sweden") read with the protocol thereto as well as under section 9(1)(vii) of the Income-tax Act, 1961 (the Act').

The Appellant prays that the receipts for management services amounting to Rs.18.86 crores are not taxable in India and hence, the addition in this regard be deleted.

2. *Ground 2:*

The Ld. DRP has erred in confirming the action of the Ld AO of taxing receipts for Management Services provided to its Indian affiliates amounting to Rs.18.86 crores to alternatively be treated in the nature of dividends and taxable under Article 10 of the tax treaty between India and Sweden as well as under section 9(1)(iv) of the Act.

The Appellant prays that the receipts for management services amounting to Rs.18.86 crores are not taxable in India as dividends and hence, the addition in this regard be deleted.

3. *Grounds:*

Without prejudice to Ground 1 and 2 above, the Ld. DRP has erred in upholding the action of the Ld AO and determined the receipts for management services at Rs.18.86 crores instead of Rs.14.2 crores as submitted by the Appellant ignoring the credit notes issued by the Appellant.

The Appellant prays that the receipts for management services be considered as Rs.14.2 crores after taking into account the credit notes issued by the Appellant.

4. *Ground 4:*

The Ld.DRP has erred in confirming the action of the Ld AO of taxing receip s for IT support provided to its Indian affiliates amounting to Rs.0.44 crores considering it to be in the nature of 'Royalty' within the meaning of Article 12 of the tax treaty between India and Sweden as well as under section 9(1)(vi) of the Act.

The Appellant prays that the receipts for IT support amounting to Rs.0.44 crores are not taxable as royalty in India and hence, the addition in this regard be deleted.

5. *Ground 5:*

The Ld.DRP has erred in confirming the action of the Ld AO of taxing receipts for IT support provided to its Indian affiliates amounting to Rs.0.44 crores considering it to be in the nature of Fees for Technical Services ('FTS') within the meaning of Article 12 of the tax treaty between India and Sweden read with the protocol thereto as well as under section 9(1)(vii) of the Act.

The Appellant prays that the receipts for IT support amounting to Rs.0.44 crores are not taxable as FTS in India and hence, the addition in this regard be deleted.

6. *Ground 6:*

The Ld.DRP has erred in confirming the action of the Ld AO of taxing recovery of expenses at cost amounting to Rs.0.51 crores for a project considering it to be in the nature of FTS within the meaning of Article 12 of the tax treaty between India and Sweden read with protocol thereto as well as under section 9(1)(vii) of the Act;

The Appellant prays that the receipts amounting to Rs.0.51 crores are not taxable as FTS in India and hence, the addition in this regard be deleted.

7. *Ground 7:*

The Ld.DRP has erred in confirming the action of the Ld AO of taxing recovery of expenses at cost amounting to Rs.0.51 crores for a project to alternatively be treated as dividends and taxable under Article 10 of the tax treaty between India and Sweden as well as section 9(1)(iv) of the Act.

The Appellant prays that the receipts amounting to Rs.0.51 crores are not taxable in India and hence, the addition in this regard be deleted.

3. The first issue raised vide grounds of appeal No.1 to 3 is against taxability of receipts from management services provided by the assessee, non-resident to the Indian affiliate amounting to ₹ 18.86 crores. The case of Revenue was that the said receipts were in the nature of Fees for Technical Services (FTS) within meaning of Article 12 of DTAA between India and Sweden read with Protocol thereto as well as section 9(1)(vii) of the Act. In the alternate, the case of Revenue authorities was that the said receipts be treated in the nature of dividend and taxable under Article 10 of the Tax Treaty between India and Sweden as well as under section 9(1)(iv) of the Act. However, the case of assessee before the authorities below and even before us is that the receipts for management services were not taxable in India in the hands of assessee either as FTS or dividend. The ground of appeal No.3 raised by assessee is strictly on without prejudice basis.

4. The learned Authorized Representative for the assessee at the outset pointed out that the assessee was an entity Resident of Sweden and was the holding company of Sandvik group of companies. It had received management

service fees from the Indian company i.e. Sandvik Asia Pvt. Ltd. and Walter Tools Pvt. Ltd. and the assessee had declared the income as its business income but in the absence of any Permanent Establishment (PE) in India, the same was not taxable in the hands of assessee, whereas the case of Assessing Officer / Dispute Resolution Panel (DRP) was that the same was taxable as FTS or dividend. The learned Authorized Representative for the assessee stressed that the said receipts do not make available any technology, so it is not case of FTS and even it was not taxable as dividend income. The learned Authorized Representative for the assessee referred to the orders of Tribunal starting from assessment year 2007-08 2010-11 to 2011-12 and pointed out that the issue stands covered by the said orders.

5. The learned Departmental Representative for the Revenue fairly admitted that the issue has been decided by the Tribunal in assessee's own case.

6. We find that this issue has been decided by the Tribunal starting from assessment year 2007-08 and thereafter in assessment years 2004-05 and 2008-09. Further, in ITA No.384/PUN/2015, relating to assessment year 2010-11, vide order dated 20.12.2017, the Tribunal had considered earlier decisions in the case of assessee and vide paras 6 and 7 has held that the issue is squarely covered by earlier orders of Tribunal, wherein the claim of assessee was allowed on the principle of most favoured nation clause and it was held that management service fees received by assessee from its Indian subsidiaries was not to be taxed in its hands. Relying on the said proposition laid down in assessee's own case, we hold that receipts for management service fees provided to the Indian affiliate amounting to ₹ 18.86 crores are not

to be taxed in the hands of assessee as Fees for Technical Services. Thus, the ground of appeal No.1 raised by assessee is allowed.

7. In respect of second issue, which is raised vide ground of appeal No.2 which is alternate to the ground of appeal No.1 that the said receipts for management services be treated as dividend and taxable under Article 10 of DTAA between India and Sweden as well as under section 9(1)(iv) of the Act. The said issue was also decided by the Tribunal vide paras 8 to 12 and it was held that management service fees received by assessee was income on account of rendering of management services and could not be treated as dividend. Following the same parity of reasoning ground of appeal No.2 raised by assessee is also allowed.

8. The ground of appeal No.3 which is strictly on without prejudice basis to grounds of appeal No.1 and 2 becomes academic in nature and the same is dismissed.

9. Now, coming to the next issue raised which is vide grounds of appeal No.4 and 5 i.e. receipts on account of provision of IT support services to Sandvik Asia Pvt. Ltd. amounting to ₹ 44,72,840/-. The learned Authorized Representative for the assessee pointed out that the issue which arises is whether the receipts of IT support services provided by assessee were in the realm of royalty or not. It was pointed out that in the case of group concern Sandvik, Australia, it has been held to be not taxable. Further, our attention was drawn to the ratio laid down by the Pune Bench of Tribunal in John Deere India Pvt. Ltd. Vs. DDIT (IT) (2019) 70 ITR (Trib) 73 (Pune), wherein also similar services received by the Resident from its associated enterprise were

held to be not royalty under the Income Tax Act or under the DTAA. He further pointed out that the terms in DTAA between India and USA and the terms in DTAA between India and Sweden are similar. In this regard, reliance was placed on para 91 of the decision of John Deere India Pvt. Ltd. Vs. DDIT (IT) (supra). The learned Authorized Representative for the assessee pointed out that legal issue stands decided; however, in the case of assessee the issue was first decided based on different decisions of AARs which were also rejected by the Tribunal in John Deere India Pvt. Ltd. Vs. DDIT (IT) (supra) and the CIT(A) had also placed reliance on the ratio laid down in the case of Cummins Inc for assessment years 2004-05 and 2006-07 in ITA Nos.73 & 74/PN/2011, order dated 08.08.2013. Another linked aspect of the issue was that the authorities below had rejected the plea of assessee in the absence of supports being filed. The learned Authorized Representative for the assessee stated that additional evidence in this regard was filed before Tribunal and the Assessing Officer may verify the stand of assessee whether the same were for IT support services or for purchase of software and apply the ratio laid down in legal precedents on this issue.

10. We have heard the rival contentions and perused the record. The assessee had received limited user rights and IT support fees for providing access to certain software like lotus notes and MS Office to Sandvik Asia Pvt. Ltd. Since the assessee was providing limited user rights in the software which related to lotus notes and MS Office, in order to enable Sandvik Asia to adopt globally accepted practices of Sandvik group and payments for such services were not royalty as it does not include the right of copyright or literary, artistic, scientific work. Since the payments were being made for copyrighted article, the receipts would not be covered by the definition of ‘royalty’ either under the

provisions of the Act or under Article 12 of DTAA between India and Sweden. The Assessing Officer in the draft assessment order vide para 27 observed that the assessee had not submitted End-user License Agreement entered into with Sandvik Asia for the rights to use software. He further holds that exact nature of software provided and the terms and conditions were not known. Referring to the definition of 'computer' as per Explanation 3 to section 9(1)(vi) of the Act and also taking into consideration the provisions of Indian Copyright Act with special reference to section 2(iv), the Assessing Officer was of the view that computer software can also be considered as scientific work. Referring to amendments by the Finance Act, 2012 under which Explanation 4 has been inserted after section 9(1)(vi) of the Act, the Assessing Officer came to the conclusion that payment received was in the nature of royalty and taxable as royalty under section 9(1)(vi) of the Act. The Assessing Officer noted that the assessee was tax-resident of Sweden with which India had DTAA and Article 12(3) of DTAA, the term 'royalty' was defined. Since the source code or the object code of software was protected under the Copyright Act, the Assessing Officer was of the view that software qualifies for the same. Thus, the Assessing Officer held the payment received for right to use software and for support services was clearly 'royalty' as defined in Article 12(3) and DTAA as well as Explanation 2 to section 9(1)(vi) of the Act. Further, reliance was placed on several decisions of various High Courts and the Assessing Officer thus, did not accept the plea of assessee and held the said receipts as taxable in the hands of assessee being in the nature of royalty both under the Income Tax Act and DTAA.

11. We have already elaborately discussed similar issue of receipt of IT support services in the case of John Deere India Pvt. Ltd. Vs. DDIT (IT) (supra)

and have also discussed the legal propositions on the said issue both in favour and against assessee and after applying the ratio laid down by the Hon'ble High Court of Delhi in DIT Vs. Infrasoft Ltd. (2013) 39 taxmann.com 88 (Del) vide para 91 have held as under:-

> *"91. Now, coming to second part of grounds of appeal No.1 to 3, wherein the payment made by the assessee with regard to provision of IT support charges i.e. internet charges, use of e-mail charges, backup support services, etc. was held to be „royalty", in view of the ratio laid down by the Pune Bench of Tribunal in the case of Cummins Inc (supra). The said decision has been recalled by the Tribunal in Miscellaneous Application filed and hence, the said proposition was not applicable. In the facts of the case, the main server of the group was established in USA and that server was used for storing data, which was admittedly not under the domain of assessee. The question which arises is that whether the payments made by the assessee for use of such facility would amount to „royalty". First of all, we hold that the afo esaid payments of IT support services, support charges are not in the realm of „royalty" as no technology was made available to the assessee. It is service provided to the assessee by associate entity in USA and there is no merit in holding that the assessee was liable to deduct tax at source out of such payments to its associated enterprises. In this regard, we find support from the ratio laid down by the Pune Bench of Tribunal in S ndvik Australia Pty. Ltd. Vs. DDIT (supra), by Ahmedabad Bench of Tribunal in DCIT Vs. Bombardier Transportation India (P.) Ltd. (supra) and also on the ratio laid down by Chennai Bench of Tribunal in ACIT Vs. Vishwak Solutions (P) Ltd. (supra), wherein it has been held that payments made for data storage charges were not in the realm of „royalty". The Pune Bench of Tribunal in Sandvik Australia Pty. Ltd. Vs. DDIT (supra), wherein agreement existed for providing backup services and IT support services and the Non-resident company receives payment thereof, since no technical know edge had been made available to the Indian subsidiary, then such services rendered by Non-resident company to its Indian group company were held to be not covered under para 3(g) of Article 12 of India-Australia Treaty and hence, was not taxable in India. The Tribunal had clearly elaborated upon the term „make available" and held as under:-*
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> > *"13. We are concerned with para No.3 of Article 12, which defines the term Royalty. Under the IT Act, the term royalty and expression FTS are classified as two different connotations, i.e. 9(1)(vi) and 9(1)(vii). So far as Article 12 is concerned, FTS is included in the term "royalty" for the purpose of deciding in which contracting state the income from the same is to be taxed. Clause (g) in Article 12(3) goes to the roots of the issue. Main thrust of the argument of the Ld. Counsel is that it is not only sufficient to render the services but the same should be made available to the recipient and this particular important aspect is missed by the DRP/TPO. We find that the expression "making available" is very much important to decide in which contracting state the amount received for rendering the services relating to the technical know-how is to be taxed. The expression "make available" is used in the context of supplying or transferring technical knowledge or technology to another. It is different than the mere obligation of the person rendering the services of that persons own technical knowledge or technology in performance of the services. The technology will be considered as made available when the person receiving the services is able to apply the technology by himself."*

12. The law on the issue thus, stands settled by the aforesaid decision. However, since the assessee had failed to furnish the evidence in this regard, the matter is remitted to the file of Assessing Officer for limited purpose of verifying the factual aspects of the assessee having provided IT support services to Sandvik Asia Pvt. Ltd. The assessee is directed to furnish necessary evidence in this regard before the Assessing Officer, who shall apply the legal proposition as discussed in the paras hereinabove to determine the nature of receipts in the hands of assessee.

13. Before parting, it may also be pointed out that in the hands of Sandvik, Australia, group concern, it has been laid down that the receipts of provision of similar services of IT support services are not taxable in the hands of non-resident entity. Accordingly, the grounds of appeal No.4 and 5 stands allowed as indicated above.

14. Now, coming to ast issue raised vide grounds of appeal No.6 and 7 of taxability of ₹ 51 lakhs on account of 'Project Connect'.

15. Brief facts relating to the issue are that the assessee had declared receipts on account of reimbursement of miscellaneous expenses incurred on behalf of Sandvik Asia Pvt. Ltd. The Assessing Officer from the invoices submitted by assessee noted that it pertained to cost for common global implementation of connected project. The cost was 500 SEK per employee. The assessee was asked to provide complete details including copy of agreement, if any, and also explain the reason why it was not taxable in India. The assessee pointed out that as mentioned in the invoice of 'Project Connect', it pertains to consolidation of all Sandvik group employees related data under

one web application. This project was initiated by assessee, wherein data relating to all the employees of Sandvik group as a whole was sought to be collated and shifted to common web application. The cost of collating the data, consolidating and implementing the same on its internal web portal had been allocated to Sandvik Asia, based on the number of employees. The receipts were thus, in the nature of reimbursement of cost incurred by the company. It was also claimed by the assessee before the Assessing Officer that the receipt did not fall in the ambit of FTS as the same was not received for providing any technical or consultancy services under Article 12 of DTAA between India and Sweden read with Protocol. The Assessing Officer notes that the assessee had failed to provide working of cost incurred by it for 'Project Connect', so that it could be said to be reimbursement. Further, cost for development of software for collation of data of employees and since the software was modified and customized for the use of Sandvik Asia and the support was provided, then such services were technical in nature and therefore, such receipts were in the nature of Fees for Technical Services as per section 9(1)(vii) of the Act and within meaning of Article 12 of DTAA between India and Sweden. The assessee filed objections before the DRP, which were rejected and the Assessing Officer passed final assessment order, against which the assessee is in appeal before us.

16. The learned Authorized Representative for the assessee pointed out that as a holding company of Sandvik group of companies, it had decided to create a data base of all employees of the group. The assessee then asked for reimbursement of expenses incurred for creating data base, where Indian entity had 1456 employees. The learned Authorized Representative for the assessee stressed that it was pure reimbursement of expenses and could not be charged

as royalty or Fees for Technical Services. The learned Authorized Representative for the assessee referring to the order of Assessing Officer pointed out that it was held that the said receipts were taxable on the ground that as to what benefit Sandvik Asia would derive. However, that aspect was totally irrelevant. Further, our attention was drawn to paras 2.3.7 to 2.3.9 at pages 18 and 19 of the order of DRP. It was argued that where the assessee was recovering cost of expenditure incurred, then the taxability had to be seen in the hands of assessee and since the assessee had no PE, the said receipts which were purely reimbursement of expenses were not chargeable. He stressed that reimbursement of expenses do not fall in the realm of either 'royalty' or 'FTS'.

17. The learned Departmental Representative for the Revenue placed reliance on the orders of authorities be ow.

18. We have heard the rival contentions and perused the record. The last issue raised by assessee is in relation to the part of expenditure recovered from the Indian entity Sandvik Asia Pvt. Ltd. being the share of Indian entity in the 'Project Connect'. The assessee as the holding company of various Sandvik group of companies had created a data base of all the employees of the group concern, being available on one site. So, a web portal was designed for this purpose and the details of all the employees were uploaded thereon and the assessee allocated cost of creating such data base to the entities on the basis of number of employees employed by them. The Indian entity had total number of employees of 1456 and on that basis it was charged about ₹ 51 lakhs. The said expenditure which does not make available any technology to the assessee, cannot be termed as 'Fees for Technical Services'. Similarly, it is

not royalty as defined in the Act. The said receipts are pure reimbursement of expenses, which are allocated by assessee entity-wise and the Indian entity had reimbursed the cost to the extent of ₹ 51 lakhs. Such reimbursement of expenses is not taxable in the hands of assessee, in the absence of any PE in India and also it is not taxable either as royalty or FTS as the said payment do not fall within realm of either of them. Accordingly, the claim of assessee in this regard is allowed. The grounds of appeal No.6 and 7 are thus, allowed.

19. In the result, the appeal of assessee is allowed.

Order pronounced on this 17th day of May 2019.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 17th May, 2019.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The DIT(TP&IT), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune