IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM

And

SHRI SUNIL KUMAR SINGH, JM

ITA No2466/Mum/2024

(Assessment Year: 2014-15)

The Assistant Commissioner of Income tax (International taxation 2(1) (1) Mumbai 17th Floor Air India Building Nariman Point Mumbai	Vs.	Dee Beers U K Limited C/o S R Batliboi & co 14th Floor The Ruby 29, Senapati BapatMarg Dadar W Mumbai
(Appellant)		**(Respondent)**

PAN No. AACCT5530B

Assessee by	:	Shri Pranay Gandhi
Revenue by	:	Shri Anil Sant , SR DR

Date of hearing:	25 July 2024
Date of pronouncement :	29 July 2024

O R D E R

PER PRASHANT MAHARISHI, AM:

1. This appeal is filed by THE ASSISTANT COMMISSIONER OF INCOME TAX (International taxation) – 2 (1) (1), Mumbai (the learned assessing officer against the appellate order passed by the COMMISSIONER OF INCOME TAX (APPEALS) – 56, Mumbai dated

21/2/2024 wherein appeal filed by the assessee against assessment order passed under section 143 (3) read with section 144C) of the income tax act by The Deputy Commissioner of income tax (International taxation – 2 (1) (2) Mumbai wherein the receipt from supply planning services of Rs. 536,843,276/– is treated as fees for technical services/royalty and tax at the rate of 15% under the India United Kingdom tax treaty , was allowed.

2. Therefore, the learned assessing officer is aggrieved and has raised following grounds:-

   i. Whether on the facts and in circumstances of the case the learned CIT – A) erred in holding that the services rendered under the Supply planning services is not falling within the purview of royalty under para 3 (a) and fees for technical services under para 4 (a) and Para 4 (c) of the Indo UK treaty. The learned CIT – A has held that SOC contract (2005 – 2008) and SOC contract 2008 – 11) are separate, whereas the assessing officer brought has brought out in the order that the services rendered before and after the two sets of agreement were one and the same.

   ii. Whether on the facts and in circumstances of the case the learned CIT (A) erred in holding that the services rendered under the SPS is not falling within the purview of royalty under para 3 (A) and FPS under para 4 (a) and Para 4 (C) of the Indo UK treaty despite the fact that assessee during the assessment proceedings as well as the DRP proceedings had not made a claim to this effect and this was nothing but an afterthought arising during the appellate proceedings wherein the difference in the SOC agreement for the period 2005 – 07 and 2008 – 11 were raised.

iii. Whether on the facts and in the circumstances of the case the learned CIT (A) has erred in holding that the receipt of Rs 536,843,276/– being fees for supply planning services under the supplier of choice contract 2008 – 2011 not falling within the purview of royalty under para 3 (a) and FTS under para 4 (a) Para 4 (C) of the Indo UK treaty.

3. Brief facts of the case shows that the assessee is a company Incorporated in the United Kingdom and is a tax resident of that country. During the year under consideration the assessee was primarily involved with selling draft diamonds to worldwide customers. Assessee filed return of income on 29 September 2014 declaring total income at Rs. Nil. The case of the assessee was picked up for scrutiny, notice under section 143 (2) was issued on 31/8/2015. The learned assessing officer found that the assessee has received a sum of Rs. 536,843,276 towards surrendering of services called supply planning services to Indian service recipients who have entered into a contract to receive the same. Assessee claimed that such receipts are not taxable in India.

4. The supply planning services consist of (1) intention to offer and (2) maintaining integrity of supplier of choice. According to the intention to offer, the assessee communicates in advance to every sight holder the aggregate value of each box it intends to make available to the sight holder during the selling., Categorized by box and by site. This communication is termed as intention to offer. The intention to offer consist of provision of consistency of boxes thus the assessee under stakes to use its reasonable efforts to ensure that there is a consistency as to the size, type, quality, and Lake color of diamond is contained in each box in any category that it supplies during any given intention to offer period. The other services provision of extra net wherein the sight holder extranets accelerate efficiency in the process and provides platform for saving

the information, third-party content plus tailored access each sight holder their own specific business information and process via secure, web-based, information sharing and business platform. The third service comprising therein is the provision of key account management wherein the main point of contact between sight holder and the assessee and assist in managing that relationship. The key account management manages and provides support in planning the intention to offer and delivery schedules. They are based in United Kingdom.

5. On the basis of these services the learned assessing officer held that the services provided are value-added services provided in earlier years. The dispute resolution panel for assessment year 2007 – 08, 2008 – 09 and 2009 – 10 has upheld treatment of value-added services as fees for technical services and taxed them at the rate of 10%. Thus, even the coordinate bench for assessment year 2007 – 08 and assessment year 2008 – 09 has upheld taxability of such value-added services receipt as fees for technical services and royalty. The AO was also of the view that in the group concern of the assessee de Beers global sight holders sales Pty Ltd the activity and operations are identical, and the income has been offered for taxation under fees for technical services so it can be clearly inferred that the assessee's claim of that such services are not fees for technical services is not tenable. Therefore, the learned assessing officer held that the supply running services receipt of Rs. 536,843,276 falls under the head of fees for technical services and royalty and taxed accordingly. According with that draft assessment order was passed on 9/12/2016.

6. Similarly, final assessment order under section 143 (3) read with section 144C was also passed on 14/2/2017 as the assessee submitted that it is opting not to file its objections before the dispute resolution panel. Thus, the draft order was finalized on a similar line.

7. Assessee aggrieved with that preferred an appeal before the learned CIT – A, who passed an order on 21/2/2024 wherein in paragraph number 5.2 he held that that the coordinate bench has decided in case of the assessee for assessment year 2009 – 10 to assessment year 2013 – 14 on similar lines. The Tribunal has considered the SOC contract also. The coordinate bench in the combined order held that the receipts from supply planning services do not constitute fees for technical services or royalty and therefore are not taxable in India. Thus, the appeal of the assessee was allowed.
8. The assessing officer is aggrieved and has preferred this appeal. The learned departmental representative vehemently supported the order of the learned assessing officer and also referred to the grounds of appeal.
9. The learned authorized representative submitted the copy of the order of the coordinate bench in assessee's own case for assessment year 2009 – 10 to assessment year 2013 – 14 wherein the issue is squarely covered in favour of the assessee. He therefore submitted that there is no change in the facts and circumstances of the case, the agreement is also the same, and the arguments of the revenue/assessing officer are also the same and therefore the order of the coordinate bench needs to be followed.
10. The learned departmental representative agreed that the issue is covered by the decision of the coordinate bench however submitted that grounds of appeal may be considered.
11. We have carefully considered the rival contention and perused the orders of the learned lower authorities. We find that the coordinate bench by order dated 16/12/2023 has decided the identical issue wherein the receipt from SPS services amounting to Rs. 1,026,221,488 is not chargeable to tax as fees for technical services or royalty as per the Indo UK Double Taxation Avoidance Agreement. (ITA number 6509, 2267, 5733, 5734, 1833/MU M/2016) for assessment year 2009 – 10, 2010 – 11, 2011 – 12,

2012 – 13 and, 2013 – 14 pronounced on 16/12/2023). The coordinate bench from paragraph number 44 has held that:-

> *"44. We are in agreement with the contention of the ld. Counsel. Firstly there is no make available of any services of technical knowledge as held above and also this extranet is merely a platform to provide information to the sightholder. It is nothing but a website that that allows controlled access to partners, vendors and suppliers or an authorised set of customers normally to a subset of the information accessible from an organization's intranet. Thus, no technical service was provided to sightholders for providing access to the extranet. Thus, this reason given by the AO is rejected. 45. Regarding taxability under Article 13(3), i.e., Royalty, it has been submitted that assessee communicates in advance to every sightholders the aggregate value of each Box it intends to make available to the sightholders during the selling period, categorized by box and by sight (referred to as Intention to Offer). It mainly consists of provision of consistency of boxes, provision of extranet, provision of key account manager. Now, whether intention to offer amounts to 'Plan' and thereby, covered in the scope of Royalty as held by the AO, the submission of the ld. DR was that assessee providing such information well in advance ITA No.6509/Mum/2016 and other appeals M/s. De Beers UK Ltd 36 based on its in-depth experience and therefore, such information helps to understand future marketing trends which enables the sightholders to plan their trading schedule, therefore, such information has a market value as it helps in the furtherance of the business. Accordingly, the case of the department before us is that the assessee provides plans to the sightholders and therefore, it falls within the ambit of royalty. 46. First of all, we find that there is no mention that there is no mention of the word 'Plan' under the SoC contract 2008-2011. The fees charged by assessee are merely for providing the basic information in relation to the type and quality of diamonds that assessee may offer for sale to the sightholders in a particular period so that the sightholders is assured of the quality of the diamonds it intends to purchase. Thus, basic information is shared with the sightholders and sharing of such basic information in relation to the goods assessee would offer for sale during a particular period could not be construed as „Plan" for commercial exploitation for the purpose of royalty as per para 3(a) of Article 13 of the India-UK DTAA. Otherwise also the definition of Royalty provided under Explanation 2 to*

Section 9(i)(vi) of the Act, does not include the word 'Plan' and therefore, use of 'Plan' canot considered as royalty for the purposes of the Act. Giving information to „intention to offer" to be considered as any kind of plan which is again the same kind of providing design or provision or any systematic draft to carry out certain action. Here, the intention to offer cannot be held as a plan to fall within the ambit of royalty under Article 13 of India UK DTAA, ITA No.6509/Mum/2016 and other appeals M/s. De Beers UK Ltd 37 accordingly, the contention raised by the revenue is rejected. The ld. DR also submitted that assessee grants sightholder licence to use trademarks „sightholder and / or DTC sightholderand also use its logo. Finally, he submitted that benefits received by the sightholders are due to the use of trademarks and therefore, the income earned by assessee should be chargeable to tax as royalty. 47. Here in this case, use of trademark is for specific purpose and sightholders have provided undertaking to the assessee that logo should be used only for the specific purpose. In any case, the fees earned by the assessee are through provision of SPS services and not through the use of trademarks which are having from clause 6 of conditions for the Supply of Planning Services and the Service Fee are reproduced as under for ease of reference: 2.1. The DTC will provide the Services to Sightholders on the terms and conditions set out therein..... 2.2. The services offered by the DTC and as set out in Appendix A may be varied by the DTC from time to time in its sole and absolute discretion. 2.3. Sightholders shall pay the Service Fee for the Services. The Service Fee relates to the ITO and will comprise a flat rate charge calculated, separately for each Sight at each Sight location, with regard to the aggregate price of boxes purchased by the relevant Sightholder (or Sightholder group member) at each Sight at each such Sight location during the relevant 12 month Selling period ITA No.6509/Mum/2016 and other appeals M/s. De Beers UK Ltd 38 Thus, fees earned for providing SPS services can not be treated as fees earned through the use of logo/ trademark which can be held to chargeable to tax as royalty. 48. The ld. DR has also contended that the service fees is also for the use of trademark Sightholders and/or DTC Sightholder' cannot be accepted because selection of a person as 'Sightholder of DTC' is a competitive process wherein following criterion need to be satisfied by the person concerned: 1. Criteria A. Mandatory Criteria - Pass or Fail Criterion 1 Financial Standing and Reliability Criterion 2: General Business Reputation Criterion 3. Compliance with the Diamond Best

Practice Principles and associated Assurance Programme B. Relative Performance Criteria Criterion 4. Core Strengths (Weighting 30%) Criterion 5. Distribution and Marketing Ability (Weighting 50%) Criterion 6. Technical Ability (Weighting 20%) Other Considerations ('Sightholder Considerations') 49. This has been detailed in the notes placed in the paperbook from pages 38-47. Thus, where a person is selected as „Sightholder“ by DTC it is but natural to designate him with the trademark of „Sightholder“ and/ or 'DTC „Sightholder“. But this does not come based on payment of any service fees. As mentioned in Para 8 of the Service Contract, the „Sightholder“ is required to give certain undertaking to DTC e.g., the trademark „Sightholder“/ „DTC Sightholder“ and any logo supplied shall only be used in a business to business context at all times to be used ITA No.6509/Mum/2016 and other appeals M/s. De Beers UK Ltd 39 in accordance with the written guidelines supplied by the DTC and not to be used in such a way that might prejudice the goodwill of DTC etc. The service fees which is the subject matter of dispute in appeal, is received by DTC in lieu of services (which has been set out in Appendix A) is not for allowing any usage of the trademark 'Sightholder' and/ or 'DTC Sightholder'. 50. In so far as AO“S observation or allegation that its information concerning industrial, commercial or scientific experience, nowhere it can be inferred that assessee provides any information concerning industrial, commercial or scientific experience. The term “industrial commercial or scientific” experience does not mean information of a commercial nature based on experience, albeit it means information concerning industrial, commercial or scientific experience itself here in this case, assessee has merely provided information to its sightholder with regard to its intention to offer via the extranet, which is merely a means of secured communication between assessee and its sightholders. Before us reliance was placed on the decision of GEC GECF Asia Limited (ITA No 8922/Mum/2010) wherein the term industrial, commercial or scientific experience has been discussed, wherein it was observed and hold as under:- “11. The thin line distinction which is to be taken into consideration while rendering the services on account of information concerning industrial, commercial and scientific experience is, whether there is any imparting of knowhow or not. If there is no "alienation" or the "use of" or the "right to use of any knowhow i.e., there is no imparting or transfer of any knowledge, experience or skill or knowhow, then it cannot be termed as "royalty" The

services may have been rendered by a person from ITA No.6509/Mum/2016 and other appeals M/s. De Beers UK Ltd 40 own knowledge and experience but such a knowledge and experience has not been imparted to the other person as the person retains the experience and knowledge or knowhow with himself, which are required to perform the services to its clients. Hence, in such a case, it cannot be held that such services are in nature of "royalty" Thus, in principle we hold that if the services have been rendered de hors the imparting of knowhow or transfer of any knowledge, experience or skill, then such services will not fall within the ambit of Article-12…." 51. The Hon"ble Jurisdictional High Court in the case of Diamond Services International (P) Ltd. (169 Taman 201), observed AND HELD as under:- "9. Considering that the term 'royalty' envisages grant or share of industrial or commercial experience, In other words there should be a transfer of "industrial or commercial experience from assignor to the assignee for a consideration. Therefore, to fall within the meaning of the term 'royalty' under article 12 of the DTAA it must envisage the person who is the owner of any intellectual property right, designs or model, plan, secret formula or process, etc. to retain the property in them and permit the use or allow the right to use such patents, designs or models, plans, secret formula, etc, to another person. Where there is no transfer of the right to use, payment made cannot be treated as royalty 11. From the impugned order of the authorities what emerges is that GIA by using its experience, does the work of diamond grading. In other words, parts in favour of the person seeking its specialised knowledge as to the particular diamond in the form of grading certificate. It is on account of this activity that in the order of 13-6-2007 or for that matter in the order dated 13-11-2006 it is set out that there is a transfer of commercial experience in the share of diamond grading report. As discussed earlier it is true that GIA may have the experience of grading However, does it impart its experience to its client? in our opinion there is no imparting of its experience in favour of the client……. ITA No.6509/Mum/2016 and other appeals M/s. De Beers UK Ltd 41 52. Thus, the receipt of SPS fees by the assessee cannot be said to be falling in the definition of Royalty by virtue of information concerning industrial, commercial or scientific experience as the information is provided based on experience and not for imparting of experience. 53. However, with regard to taxability of supply planning services under Article 13(4)(a), for use of brand "Nakshatra

or "Forevermark to promote sale of branded diamond products, it has been stated that the Nakshatra brand which was owned by assessee from which it has earned royalty income, earlier was sold in AY 2008-09. Thus, this payment cannot be held in the nature of FTS or royalty. Albeit this is business income for assessee in India. However, if assessee does not have a PE in India, therefore, in the absence of PE, the receipts from supply planning services cannot be taxable in India."

12. The learned departmental representative could not show us any difference in the facts and circumstances of the case compared to those years in the current year, therefore, respectfully following the decision of the coordinate bench in assessee's own case for last 5 years, we also hold that the amount of Rs. 536,843,276/– cannot be held to be taxable within the purview of royalty or under FTS as per India United Kingdom Double Taxation Avoidance Agreement. Accordingly, all the grounds of the appeal raised by the learned assessing officer are dismissed, order of the learned CIT – A is upheld.

13. In the result, the appeal of the learned assessing officer is dismissed.

Order pronounced in the open court on 29th July 2024

Sd/-	Sd/-
(SUNIL KUMAR SINGH)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 29.07.2024

Sudip Sarkar, Sr.PS/Dragon

Copy of the Order forwarded to:

1. The Appellant

2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

Sr. Private Secretary/ Asst. Registrar

Income Tax Appellate Tribunal, Mumbai