IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.273/Bang/2023
Assessment year : 2014-15

ABB Switzerland Ltd., (erstwhile ABB Technology Ltd. since merged), C/o. ABB India Ltd., Disha-3rd Floor, Plot No.5 & 6, Second Stage, Peenya Industrial Area IV, Peenya, Bangalore – 560 058. **PAN: AACCA 9979R**	Vs.	The Deputy Commissioner of Income Tax (International Taxation), Circle 1(1), Bangalore – 560 095.
APPELLANT		RESPONDENT

Appellant by	:	Shri Chavali Narayan, CA
Respondent by	:	Shri Veera Raghavan, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	01.08.2023
Date of Pronouncement	:	03.08.2023

O R D E R

Per Laxmi Prasad Sahu, Accountant Member

This appeal is filed by the assessee against the order dated 29.03.2019 of the CIT(Appeals)-12, Bengaluru for the AY 2014-15.

2. At the outset, it is noticed that the assessee was issued a defect notice dated 03.04.2023 by the registry stating that the appeal is time

bared by 1,377 days. In this regard, the assessee has made submissions vide letter dated 11.07.2023 that the delay of 1,377 days has been computed considering the date of filing of original appeal before the ITAT, Mumbai on 12.09.2019 ending with the date of filing of appeal before the ITAT, Bangalore on 24.03.2023. It is further submitted that M/s ABB Technology Limited (Now known as ABB Switzerland Ltd - the Appellant) was assessed at Bangalore, by the DCIT (International Taxation), Bangalore for AY 2014-15 who passed assessment order dated 22.12.2017 u/s. 143(3) 143(3) r.w.s 92CA of the Income-tax Act, 1961 ('the Act'). Aggrieved with the adjustment made in the Order, ABB Technology Ltd filed an appeal before the Commissioner of Income-tax (Appeals) -12, Bangalore. While the appeal was pending to be heard before the Commissioner of Income-tax (Appeals), Bangalore, M/s ABB Technology Limited, Switzerland (Bangalore entity) was merged into ABB Switzerland Ltd (Mumbai entity). In the meanwhile, the Commissioner of Income-tax (Appeals) -12, Bangalore passed the order dated 29.03.2019, upholding the adjustment made in the assessment order. Since the merged entity i.e., ABB Switzerland Ltd, was getting assessed at Mumbai, the assessee filed the appeal before the ITAT, Mumbai, on 12.09.2019. There was a delay of 100 (one hundred) days while filing this appeal before the ITAT, Mumbai. The assessee also filed condonation petition along with the affidavit while filing the appeal stating the reasons for the delay that due to inadvertence of the consultant, the Appellant could not file the appeal within the due date. Due to unavoidable circumstances, the consultant

had to be changed and a new consultant had to be appointed. This led to the delay in filing of appeal before the ITAT, Mumbai.

3. The appeal was admitted by the ITAT, Mumbai and was posted for hearing on 01.02.2023. While the proceedings were on before the Mumbai Bench, the assessee came to know about the Hon'ble Supreme Court judgement in case of PCIT v. ABC Papers Ltd [2022] 141 taxmann.com 332 (SC)dated 18.08.2022 wherein it was held as under;-

> ***33.*** *In conclusion, we hold that appeals against every decision of the ITAT shall lie only before the High Court within whose jurisdiction the Assessing Officer who passed the assessment order is situated. Even if the case or cases of an assessee are transferred in exercise of power under section 127 of the Act, the High Court within whose jurisdiction the Assessing Officer has passed the order, shall continue to exercise the jurisdiction of appeal. This principle is applicable even if the transfer is under section 127 for the same assessment year(s).*

Accordingly, the assessee was advised that the jurisdiction for filing of ITAT appeal is at Bangalore instead of Mumbai. Noting the above ruling, the assessee filed a letter dated 01.02.2023 withdrawing the Appeal filed at Mumbai. Pursuant to the hearing, the Mumbai Bench passed order dated 01.02.2023 dismissing the assessee's appeal as withdrawn and the order was served on 21.02.2023.

4. Under the above circumstances, the assessee has filed fresh appeal against the assessment order with the ITAT, Bangalore on 27.03.2023. The ld. AR submits that the filing of appeal before the Bangalore Tribunal was on account of the fact that the Appellant became aware of the fact that the appeal does not lie before the Mumbai Tribunal (the original forum) in view of the Apex Court

decision in the case of PCIT v. ABC Papers Ltd (2022) 141 Taxmann.com 322 (SC). Hence, there was a reasonable cause for delay in filing of appeal before the Hon'ble Bangalore Tribunal. In this regard, reliance is placed on decisions rendered by the Hon'ble Supreme Court in the case of Balkrishnan vs. M. Krishnamurthy (1998) (AIR 3222), Balkrishnan vs. M. Krishnamurthy (1998) (AIR 3222), Collector, Land Acquisition v. Mst. Katiji Ors. (1987) 167 ITR 471 (SC), Lala Mata Din vs. A. Narayan AIR (1970) (AIR 1953) (SC) and Suhas Suresh Shet v. ITO, International Taxation (140 taxmann.com 96)(Bang. Trib). It was submitted that no prejudice would be caused to Revenue by admitting the instant appeal. In view of the above, condonation of delay was prayed for.

5. After hearing both the parties and considering the reasons for delay explained by the assessee, respectfully following the Hon'ble Supreme Court judgment in the case of Collector, Land Acquisition v. Mst. Katiji Ors. (1987) 167 ITR 471 (SC), we are of opinion that there was reasonable cause for delay in filing the appeal before the Tribunal and condone the delay.

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

> "1. The orders passed by learned Deputy Commissioner of Income-tax (International Taxation), Circle-1(1), Bangalore ("learned AO") under section 143(3) read with Section 92 CA of the Act and the learned CIT(A) under Section 250 of the Act to be struck down as invalid, as the orders are based on surmises and conjectures, and hence are bad in law and facts.

2. The learned AO and the learned CIT(A) have erred in law and facts by assessing the total income of the Appellant at INR 1,85,69,65,570 as against the returned income of INR 1,84,07,46,733 and in determining an erroneous demand of INR 23,51,740.

3. The learned AO and the learned CIT(A) have erred in law and facts, in making an addition of an amount of INR 1,62,18,833 (being the differential amount of actual receipt and amount as accrued) to the returned income.

4. The learned AO and the learned CIT(A) have erred in law and facts, while making the above addition erred in considering the total income on accrual basis of INR 1,85,69,65,570 instead of considering the actual receipt of INR 1,84,07,46,733.

5. The learned AO and the learned CIT(A) have failed to appreciate that the royalty income should be considered on basis of actual receipt in accordance with the India-Switzerland Tax Treaty, therefore, erred in considering the royalty income on accrual basis.

6. The learned AO and the learned CIT(A) have erred in law and facts, in taxing the aforesaid amount twice — once in AY 2014-15 and again in AY 2015-16.

7. The learned AO has erred in law and facts by levying interest under Section 234B of the Act amounting to INR 7,29,855.

8 The learned AO has erred in law and facts by initiating penalty proceeding under Section 271(1)(c) read with Section 274 of the Act."

7. Ground No. 1 was not pressed by the assessee and hence it is dismissed as not pressed. The ground No. 07 & 08 is consequential in nature.

8. Ground Nos. 2 to 6 relate to addition of Rs.1,62,18,833. The brief facts of the case are that the erstwhile ABB Technology Ltd. is a

company incorporated and operating in Switzerland (presently ABB Switzerland Ltd. since merged), filed return of income for AY 2014-15 on 29.11.2014 declaring total income of Rs.184,07,46,733 as special income (royalty income). The case was selected for scrutiny with a reason 'International Transaction(s) in respect of intangible property (Form 3CEB) and Large International transaction(s) (Form 3CEB.) Statutory notices were served on the assessee. The case was referred to the TPO for determination of ALP of the international transactions u/s. 92CA of the Act after obtaining approval from the competent authority. The TPO concluded no adjustments u/s. 92CA r.w.s. 92C to the ALP determined by the assessee in respect of international transactions with its AE.

9. During the assessment proceedings, the AO observed from the Form 3CEB that assessee had received Rs.185,69,65,563 as royalty from M/s. ABB India Ltd. but in the return of income the assessee had offered only Rs.184,07,46,730. A show cause notice was issued to the assessee on the difference of Rs.1,62,18,833 in respect of royalty income. In response, the assessee submitted that ABB India Ltd. had unilaterally created a provision of Rs.1,62,18,833 in respect of royalty payments and since no corresponding invoices to such provision was raised by the assessee company, it did not declare this royalty income. Further, it was stated that royalty is taxed in the year in which consideration towards the same is received. The AO held that royalty arises in India and therefore such royalty income is duly taxable in India as per Indian Taxation laws. He referred to Article 12(2) of

India-Switzerland DTAA and noted it is apparent that royalty income may be taxed in the Contracting State in which they arise and according to the laws of that State. Where the meaning of a term is not defined in the Treaty, the domestic Act may be referred and u/s. 9(1)(vi) of the I.T. Act, 1961, royalty income is charged on accrual basis and not on receipt basis. The AO relied on the judgments in the case of *Standard Triumph Motor Co. Ltd. v. CIT (1993) 201 ITR 391 (SC), Raghava Reddi v. CIT (1962) 44 ITR 720 (SC)* and *Trishla Jain v. ITO [2009] 310 ITR 274 (P&H)*. Further the AO noted that the assessee failed to substantiate the difference of royalty income was offered by it in the subsequent year or the reconciliation of the difference of Rs.1,62,18,833. Accordingly the AO made addition of the amount as royalty income for the year under consideration. The assessee passed draft assessment order and the assessee did not opt to file objections with the DRP. Accordingly the final assessment order was passed.

10. The assessee filed appeal before the CIT(Appeals) along with detailed written submissions and relied on various case laws. The ld. CIT(Appeals) after relying on the DTAA provisions held that royalty income arising in India is taxable in India on accrual basis only and he rejected the plea of the assessee and dismissed the assessee's appeal. Aggrieved, the asse is in appeal before the Tribunal.

11. The ld. AR reiterated the submissions made before the lower authorities and submitted that the assessee is consistently following cash system of accounting since AY 2011-12. The company is a tax

resident of Switzerland and accordingly eligible to claim the benefit of DTAA provisions between India-Switzerland. Further as per the provisions of section 90(2) of the Act, the provisions of DTAA are applicable to the company to the extent it is more beneficial than the corresponding provisions of the Act. The license provided by the appellant is in the nature of royalty and the term 'royalty' has been defined in the Indian Income-tax Act as well as the treaty provision. In view of the DTAA provisions, royalty is taxable in the year in which consideration is actually received. He also submitted that as per Form 26AS, ABB India Ltd. (Deductor/payer) has reported an amount of Rs.184,07,46,733 on which tax has been deducted and the same amount has been offered by the assessee as for taxation in India on receipt basis in the impugned assessment year. He further submitted that the AO has taxed twice on the same amount, which has been offered for taxation in the subsequent year. He relied on the decision of this Tribunal in the case of its sister concern, M/s. ABB AG in IT(IT)A No.1444/Bang/2019 dated 24.11.2020 where following the Bombay High Court judgment in the case of DIT(IT) v. Siemens Aktiengesellschaft (ITA No. 124 of 2010 dated 22.10.2012), the issue of fees for technical services in India-Germany DTAA was decided in favour of the assessee. He submitted that provisions of Article 12 of DTAA for royalty and fees for technical services between India-Switzerland and India-Germany are similar and therefore the decision of the coordinate Bench is squarely applicable to the assessee's case. He also relied on the following decisions:-

DCIT v. Uhde Gmbh (1996) 54 TTJ 355 (Mum. Trib)

DIT(IT) v. Siemens Aktiengesellschaft (ITA No. 124 of 2010 dated 22.10.2012)

Johnson & Johnson v. ADIT (IT-3) (2013) 32 taxmann.com 102 (Mum. Trib)

Booz Allen & Hamilton (I) Ltd. & Co. Kg. v. ADIT(IT)1(1) (2012) 28 taxmann.com 245 (Mum. Trib).

CSC Technology Singapore Pte Ltd. v. ADIT Cir. 1(1) [2012] 19 taxmann.com 123 (Del Trib)

12. The ld. DR relied on the orders of lower authorities and submitted that as per Article 12 of the DTAA provisions, royalty and fees for technical services arising in India and paid to non-resident should be taxed on accrual basis. Therefore the royalty arises in India in the impugned assessment year and accordingly it should be taxed. He also submitted that the difference in the amount of income from royalty offered to tax as pointed out by the AO could not be reconciled by the assessee and there was provision made in the books of the account of the payer. For the words not defined in the DTAA provisions, the Indian Income Tax law will be applicable. Therefore, it would be deemed income in the hands of the assessee for the assessment year under considered.

13. In the rejoinder, the ld. AR submitted that the case laws relied by the revenue authorities are not applicable to the present facts. He submitted that the decision of Supreme Court in Standard Triumph Co. Ltd. (1979) 119 ITR 573 (Mad) was a case where no DTAA was available between India and the other country, but in the instant case

there is DTAA between India and Switzerland. Similarly the decision of *Trishla Jain v. ITO [2009] 310 ITR 274 (P&H)* is also not applicable since the assessee is entitled to choose a beneficial provision as per the DTAA provisions. He therefore submitted that the decision of coordinate Bench in the case of M/s. ABB AG (supra) is squarely applicable to assessee's case.

14. We have considered the rival submissions and perused the material on record. The assessee is a NRI and has received royalty from ABB Technology Ltd. of Rs.184,07,46,730 which has been offered to tax @ 10% and the same is reflected in Form 26AS. The assessee is offering income since AY 2011-12 on cash basis. From the Form 3CEB the AO found a difference of Rs.1,62,18,833. The ld. AR assessee submitted this amount has not been received by the assessee. We note that similar issue has been decided by the coordinate Bench in M/s. ABB AG (supra) as follows:-

> "9. We heard Ld. D.R. and perused the record. There is no dispute with regard to the fact that India has entered into a Double Taxation Avoidance Treaty with Federal Germany Republic as per notification dated 26.8.1985. It is also settled proposition of law that the DTAA provisions shall override the Income tax provisions unless the provisions of Income tax Act is beneficial to the assessee. Article 12 of DTAA is concerned with taxability of Royalties and fees for technical services. Article 12 (1) reads as under:
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> "1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State."
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> The Mumbai Bench of Tribunal in the case of UHDE GMBH (supra) has examined the issue as to whether the royalties of FTS

is taxable on receipt basis or accrual basis. For the sake of convenience we extract below the operative portion of the order:-

"3. The AO, inter alia, relying on the Madras High Court decision in the case of CIT vs. Standard Triumph Co. Ltd. (1979) 119 ITR 573 (Mad), had held that the income by way of fees for technical services was liable to be taxed on accrual basis and not on receipt basis. When the matter was carried in Appeal, the CIT(A) relying on art. VIIIA of the Agreement for the Avoidance of Double Income-tax between India and the Federal Republic of Germany, held that the same was liable to be taxed on receipt basis. It is, this controversy, we are required to resolve in this appeal.

4. After hearing the parties to the dispute, we are of the view, that the order passed by the CIT(A) does not suffer from any legal infirmity. There cannot be any dispute that where there is a conflict between the agreement for avoidance of double taxation and the domestic laws relating to taxation of income arising in the Contracting State, the former has to prevail. We have also been informed by the assessee, that in the past, fees for technical services were not at all taxed in India as the assessee did not have a permanent establishment in India and the fees received were in the nature of an industrial and commercial profit. Income of this nature require to be taxed in India only because of the new treaty entered into between India and the Federal Republic of Germany. The relevant provisions governing the ambit of taxation of such income are contained in art. VIIIA of the agreement for the avoidance of double taxation. In cl. 2 of the said agreement, fees for technical services, could be taxed in the Contracting State in which they arose and according to the law of that State. The term "fees for technical services" has been defined in cl. 4 of the said article in a wide manner so as to include payments of any kind to any person. If we read cl. 3, which defines the term "royalties" and cl. 4, as observed earlier, which defines the term "fees for technical services" together, there cannot be any doubt that what is taxable is payment received by a person of the other Contracting State. Though under s. 5(2)(b) of the IT Act, in the case of a non-resident, income which accrues or arises or deem to accrue or arises to him in India is taxable, in view of the specific provisions of Art. VIIIA, what could be taxed, is only a payment to him. This presupposes, that the liability to tax arises only on the non-resident receiving such payment. The same is not liable

to be taxed on an accrual basis as has been laid down under s. 5 of the IT Act. The order of the CIT(A) which is to this effect, is not, therefore, open to any challenge. The reliance by the Revenue on the decision of the Madras High Court reported in (1979) 119 ITR 573 (Mad) (supra), is of little help. The decision, no doubt, is an authority for the proposition that income accruing to a nonresident assessee is liable to tax even if the assessee is keeping its account on the cash basis in regard to its income. This decision has not taken into consideration the double taxation avoidance agreement between India and the Federal Republic of Germany, as there was no occasion to do that. It has merely explained the scope of s. 5(2)(b) of the IT Act and we have already observed earlier that there is apparent conflict between the provisions of s. 5(2)(b) of the IT Act and art. VIIIA of the treaty for avoidance of double taxation and we have also adverted to the accepted principle of interpretation that when there is such a conflict, the provisions of the treaty would have to prevail. In the light of this discussion, what emerges is that in the case of a non-resident, who is a resident of Germany, income arising to him in India by way of royalties or technical charges could be taxed in India but that could be only on the receipt basis."

10. The Hon'ble Bombay High Court has also considered an identical issue in the case of M/s. Siemens Aktiengesellschaft (supra) and it was held as under:

2. As regards first question is concerned, the Income Tax Appellate Tribunal referring to para 1 to 3 under Article XII –A of the Double Taxation Avoidance Treaty with the Federal Germany Republic as per notification dated 26th August 1985 held that the assessment of royalty or any fees for technical services should be made in the year in which the amounts are received and not otherwise. Counsel for the Revenue relied upon the Special Bench decision of the Tribunal in the assessee's own case, which in our opinion, has no relevance to the facts of the present case, as it relates to the period prior to the issuance of Notification dated 26th August 1985. In this view of the matter the decision of the Income Tax Appellate Tribunal in holding that the royalty and fees for technical services should be taxed on receipt basis cannot be faulted.

> 11. In view of the above said decisions, we are of the view that there is merit in the submissions of the assessee that the FTS is taxable only in the year of receipt as per the provisions of DTAA. Accordingly, we are of the view that the tax authorities are not justified in assessing the impugned income on accrual basis. Accordingly, we set aside the order passed by Ld. CIT(A) and direct the A.O. to delete the impugned addition.
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> 12. It is the submission of the Ld A.R that the impugned income has been offered to tax in the year relevant to the assessment year 2015-16. However, we notice that no material was placed either before the A.O. or before us to substantiate the above said submission. In fact, the AO has specifically mentioned in the assessment order that the assessee has not proved its submissions. The Ld. A.R. submitted before us that the assessee has received several payments and the impugned income would form part of any of those payments. Since the Ld. A.R. also could not also exactly pinpoint with evidence that the impugned income was offered to tax in assessment year 2015-16, he agreed that this fact may be verified by the assessing officer. Accordingly, we restore this issue to the file of A.O. for limited purpose of satisfying himself that the impugned amount has been offered to tax by the assessee in A.Y. 2015-16 or in any other assessment year."

15. The facts of the above decision on fees for technical services in M/s. ABB AG (supra) relating to India-Germany DTAA are similar to present case, the only difference is that it relates to royalty under India-Switzerland DTAA, and Article 12 of DTAA defines royalty and fees for technical services in the same manner and also the DTAA provisions of India-Germany and India-Switzerland are similar. Therefore, respectfully following the above judgment, we allow the appeal of the assessee.

16. In the result, the appeal by the assessee is allowed.

Pronounced in the open court on this 03rd day of August, 2023.

Sd/-	Sd/-
(GEORGE GEORGE K.) VICE PRESIDENT	(LAXMI PRASAD SAHU) ACCOUNTANT MEMBER

Bangalore,
Dated, the 03rd August, 2023.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.