2023:DHC:7734-DB

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 03.10.2023*

\+ **ITA 564/2023**

THE COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-1, DELHI ..... Appellant

Through: Mr Puneet Rai, Sr Standing Counsel with Mr Ashivini Kumar and Mr Rishabh Nangia, Advs.

versus

M/S BIO-RAD LABORATORIES (SINGAPORE) PTE LTD ..... Respondent

Through: Dr Sashwat Bajpai, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (Oral)

CM Appl.50704/2023

1. Allowed, subject to just exceptions.

CM Appl.50705/2023 [*Application filed on behalf of the appellant/revenue seeking condonation of delay of 45 days in re-filing the appeal*]

2. This is an application moved on behalf of the appellant/revenue seeking condonation of delay in re-filing the appeal.

2.1 According to the appellant/revenue, there is a delay of forty-five (45) days.

3. Dr Sashwat Bajpai, who appears on behalf of the respondent/assessee, says that he would have no objection if the delay in re-filing the appeal is

condoned.

3.1 It is ordered accordingly.

4. The application is disposed of in the aforesaid terms.

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5. This appeal concerns Assessment Year (AY) 2019-20.

6. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 30.12.2022 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

7. The issue that the Tribunal was called upon to consider was whether income from 'information technology and other administrative services' provided by the respondent/assessee to its affiliate in India could be construed as 'Fees for Technical Services' [in short, "FTS"], having regard to the provisions of India-Singapore Double Taxation Avoidance Agreement [in short, "Indo-Singapore DTAA"].

8. The record shows that the Assessing Officer (AO), *via* the draft assessment order dated 28.09.2021, concluded that the services provided by the respondent/assessee to the Indian subsidiary were in the nature of 'management support services' and hence, taxable at the rate of 10% plus surcharge and education cess under the Indo-Singapore DTAA.

9. The objections lodged before the Dispute Resolution Panel (DRP) by the respondent/assessee did not result in success. The DRP proceeded to reject the objections filed by the respondent/assessee. Consequently, the final assessment order dated 30.03.2020 was passed by the AO under Section 143(3) read with Section 144C(13) of the Income-tax Act, 1961 [in short, "Act"], This led to the institution of an appeal by the

respondent/assessee before the Tribunal.

10. The Tribunal ruled in favour of the respondent/assessee.

11. Mr Puneet Rai, learned senior standing counsel, who appears on behalf of the appellant/revenue, says that the order of the Tribunal is unsustainable.

11.1 In support of his submission, Mr Rai relies on the assessment order passed in the matter. Mr Rai contends that the respondent/assessee is providing professional advice to its Indian subsidiary through studies, evaluation, review of reports, liaising work, advice on key policy issues and business operations, HR management, and financial management among other things.

12. Dr Sashwat Bajpai, who appears on behalf of the respondent/assessee, contends to the contrary.

13. The Tribunal, in concluding that services offered by the respondent/assessee to its Indian affiliates did not come within the purview of FTS, as reflected in Article 12(4)(b) of the Indo-Singapore DTAA, concluded that they did not fulfil the criteria of 'make available' principle.

14. According to the Tribunal, the agreement between the respondent/assessee and its Indian affiliate had been effective from 01.01.2010, and if, as contended by the appellant/revenue, technical knowledge, experience, skill, and other processes had been made available to the Indian affiliate, the agreement would not have run its course for such a long period.

14.1 Notably, this aspect is adverted to in paragraphs 17 to 23 of the impugned order. For convenience, the relevant paragraphs are extracted

hereafter:

> "*17. A perusal of the aforementioned provision shows that in order to qualify as FTS, the services rendered ought to satisfy the 'make available' test. Therefore, in our considered opinion, in order to bring the alleged managerial services within the ambit of FTS under the India-Singapore DTAA, the services would have to satisfy the 'make available' test and such services should enable the person acquiring the services to apply the technology contained therein.*
> "*18. As mentioned elsewhere,* ***the agreement is effective from 01.01.2010 and we are in Assessment Years 2018-19 and 2019-120 [sic…20]. In our considered opinion, if the assessee had enabled the service recipient to apply the technology on its own, then why would the service recipient require such service year after year every year since 2010?***
> *19. This undisputed fact in itself demolishes the action of the Assessing Officer/DRP. Facts on record show that the recipient of the services is not enabled to provide the same service without recourse to the service provider, i.e, the assessee.*
> *20. In our humble opinion, mere incidental advantage to the recipient of services is not enough. The real test is the transfer of technology and on the given facts of the case, there is no transfer of technology and what has been appreciated by the Assessing Officer/ld. CIT(A) is the incidental benefit to the assessee which has been considered to be of enduring advantage.*
> *21. In our understanding, in order to invoke make available clauses, technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imported to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider.*"
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> [Emphasis is ours]

15. We tend to agree with the analysis and conclusion arrived at by the Tribunal.

16. According to us, no substantial question of law arises for consideration.

17. The appeal is, accordingly, dismissed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

OCTOBER 3, 2023/pmc