IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.7464/Mum./2017
(Assessment Year : 2014–15)

Dimension Data Asia Pecific Pte. Ltd.
(Formerly known as Datacraft Asia Pte Ltd.), 1101 & 1102, 11th Floor
One India Bulls Centre, Tower–2B ……. Appellant
841, Senapati Bapat Marg
Elphinstone Road, Mumbai 400 013
PAN – AADCD4348L

v/s

Dy. Commissioner of Income Tax (I.T)
Circle–2(1)(2), Mumbai ……. Respondent

Assessee by : Shri Sunil Moti Lala
Revenue by : Shri Nishant Momaiya

Date of Hearing – 23.01.2019	Date of Order – 22.04.2019

O R D E R

PER SAKTIJIT DEY. J.M.

The aforesaid appeal has been filed by the assessee challenging the final assessment order dated 31st October 2017, passed under section 143(3) r/w section 144C(13) of the Income-tax Act, 1961 (for short *"the Act"*) pertaining to the assessment year 2013–14.

2. On the instructions of the assessee the learned Authorised Representative did not press grounds no.2, 3 and 4. Hence, these grounds are dismissed as not pressed.

3. In ground no.1, the assessee has challenged the decision of the Departmental Authorities in treating the management fee received by the assessee as fees for technical services.

4. Brief facts are, the assessee company is a tax resident of Singapore and is engaged in providing management advisory services. In the course of such business activity, the assessee entered into an agreement with its Indian subsidiary viz. Dimension Data India Ltd. (DDIL) to provide advisory services in the field of management, sales, marketing, finance and administrative, human resources and information technology etc. By rendering such services to the Indian company, the assessee in the previous year relevant to the assessment year under dispute, earned management fee of ₹ 32,23,41,117. Claiming that the management fee received is in the nature of business profit which cannot be brought to tax in India in absence of a Permanent Establishment (PE), the assessee filed its return of income for the impugned assessment year declaring nil income. In the course of assessment proceedings, the Assessing Officer was of the view that the management fee received by the assessee is in the nature of fees for technical services, since, the

services provided by the assessee involve operational budgeting, as well as forecasting, information technology supporting cash acknowledgment, revenue preparation and analysis of financial statements, review of cash flow analysis and over all cash balances and various other services are in the nature of technical services. Thus, he called upon the assessee to explain why the management fee received should not be treated as fees for technical services and brought to tax in India. In response to the show cause notice issued by the Assessing Officer, the assessee made detailed submissions stating that as per Article–12(4) of the India–Singapore Double Taxation Avoidance Agreement (DTAA) while providing managerial / technical services, the assessee must make available technical knowledge, experience skill, knowhow or process, which could enable the recipient of such services to apply the technology content therein independent of the service provider. It was submitted, since the assessee has not made available any technical knowledge, experience, skill, knowhow, etc., to the Indian entity, the management fee received by it cannot be treated as fees for technical services. The Assessing Officer, however, did not find merit in the submissions of the assessee and concluded that the management fee received by the assessee from the Indian entity is in the nature of fees for technical services as per the India–Singapore Tax Treaty, hence, taxable in India @ 10%. Accordingly, he proposed a draft assessment by bringing to tax the

management fee received by the assessee of ₹ 32,23,41,117, as per Article–12(4) of the India–Singapore Tax Treaty.

5. Against the draft assessment order so passed, the assessee raised objections before learned DRP. By following its order in assessee's own case for the assessment year 2011–12, learned DRP rejected the objections of the assessee and upheld the decision of the Assessing Officer. In pursuance to the directions of learned DRP, the Assessing Officer passed the impugned assessment order bringing to tax the management fee received by the assessee.

6. The learned Authorised Representative submitted, the assessee provides management support service to the Group companies in Asia Pacific Region since the year 2001. He submitted, for this purpose, the assessee has entered into agreement with each Group company. He submitted, as per the terms of the agreement the assessee is remunerated at cost plus 10% for the services rendered. The learned Authorised Representative submitted, the basic terms of the agreement have remained the same, though, it is renewed on yearly basis. He submitted, the management fee received by the assessee cannot be termed as fees for technical services under Article–12(4) of the India–Singapore Tax Treaty, since, the assessee has not made available any technical knowledge, experience, skill, knowhow or process, while rendering such services. He submitted, though, learned

DRP has held the management fee received by the assessee to be fees for technical services by relying upon its own order for the assessment year 2011–12, however, the final assessment order passed in pursuance to the directions of learned DRP in assessment year 2011–12, was restored back to the Assessing Officer by the Tribunal while deciding assessee's appeal in ITA no.684/Mum./2016, dated 5th May 2017. He submitted, while completing the assessment in pursuance to the directions of the Tribunal for the assessment year 2011–12, the Assessing Officer has accepted assessee's claim that the management fee received from DDIL is not in the nature of fees for technical services and has assessed it as business profit. In this context, he drew our attention to the assessment order dated 28th December 2018. Further, he submitted, while deciding assessee's appeals for the assessment years 2012–13 and 2013–14, in ITA no.1635 & 1636/Mum./2017, dated 12th October 2018, the Tribunal has held that the management fee received by the assessee is not in the nature of fees for technical services but has to be treated as business profit and only the profit attributable to the Indian PE can be brought to tax in India. Further, he submitted, though in the aforesaid decision rendered for the assessment years 2012–13 and 2013–14 the Tribunal held that service fee earned by the assessee is in the nature of fees for technical services, however, in the impugned assessment year the assessee has only received management fee and service fee has not been received.

Thus, he submitted, in view of the decision of the Tribunal for the assessment years 2012–13 and 2013–14, the management fee received by the assessee cannot be treated as fees for technical services and is to be treated as business profit of the assessee.

7. Proceeding further, he submitted, since in the relevant year the total number of days assessee's employees stayed in India for rendering services is less than 30 days, there is no PE of the assessee in India as per Article–5(6)(b) of the India–Singapore Tax Treaty to bring to tax the business profit at the hands of the assessee.

8. The learned Departmental Representative relied upon the observations of the Assessing Officer and learned DRP.

9. We have considered rival submissions and perused material on record. The dispute in the present appeal is confined to the nature of management fee earned by the assessee from its Indian subsidiary DDIL. While it is the claim of the assessee that the management fee received is in the nature of business profit and in the absence of any PE in India it is not taxable, the Department's case is, management fee received is in the nature of fees for technical services under Article–12(4) of the India–Singapore Tax Treaty, hence, taxable in India @ 10% of the amount received. Notably, while deciding assessee's appeal for the assessment years 2012–13 and 2013–14

(supra), the Tribunal has held that the management fee received by the assessee from DDIL is not in the nature of fees for technical services. Further, the Tribunal has also held that the management fee received by the assessee is in the nature of business profit and only the part attributable to the PE in India can be brought to tax. It is relevant to observe, learned DRP while deciding the issue relating to the nature of management fee has simply relied upon its decision for the assessment year 2011–12. Notably, the Assessing Officer while completing the proceedings for the assessment year 2011–12 in pursuance to the directions of the Tribunal and Hon'ble Jurisdictional High Court has also held that the management fee received by the assessee is in the nature of business profit and not fees for technical services. Therefore, following the decision of the Tribunal in assessee's own case for the assessment year 2012–13 and 2013–14 (supra), we hold that the management fee received by the assessee from DDIL is not in the nature of fees for technical services but business profit.

10. Having held so, it is necessary to examine whether such business profit is taxable in India. In this regard, the contention of the learned Authorised Representative is, as per Article–5(6)(b) of India–Singapore Tax Treaty if the employees of the assessee for rendering services to the AE in India for a period of more than 30 days, it will constitute PE. He submitted, in the relevant previous year, only two

employees of the assessee have stayed in India for rendering services for 18 man–days and 15 solar–days. Thus, he submitted, in neither of the cases, the stay of the employees in India has exceeded 30 days. That being the case, no PE existed in India to bring to tax the business profit earned by the assessee. In our view, the aforesaid claim of the assessee has neither been considered by the Assessing Officer nor by learned DRP, as; they have treated the management fee received by the assessee as fees for technical services. In view of the aforesaid, we direct the Assessing Officer to examine assessee's claim that there is no PE in India in terms of Article–5(6)(b) of the India–Singapore Tax Treaty. In case assessee's claim is found to be correct, no part of the management fee would be taxable in India. Therefore, subject to the aforesaid verification, the grounds raised are allowed.

11. In ground no.4, the assessee has challenged the levy of interest under section 234B of the Act.

12. Having considered rival submissions, we find that the aforesaid issue has been decided in favour of the assessee by the Tribunal while deciding assessee's appeals for the assessment years 2011–12, 2012–13 and 2013–14 cited supra. While deciding the issue, the Tribunal has held that liability to pay advance tax is not on a non–resident as the liability is on the payer to deduct tax at source under section 195 of the Act while making such payment. Following the decision of the Co–

ordinate Bench in assessee's own case, we hold that interest under section 234B is not chargeable. In any case of the matter, levy of interest under section 234B of the Act is inconsequential in view of our decision in ground no.1.

13. In the result, appeal is partly allowed.

Order pronounced in the open Court on 22.04.2019

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 22.04.2019

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai