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

\+ **W.P.(C) 4793/2014 & CM APPL. 9551/2014**

STERIA (INDIA) LTD. ..... Petitioner

Through: Mr. S. Ganesh, Sr. Advocate with Mr. S. Sukumaran, Mr Anand Sukumar and Mr. Bhupesh Kumar Pathak, Advocates.

versus

COMMISSIONER OF INCOME TAX-VI & ANR. ..... Respondents

Through: Mr. Rahul Chaudhary, Sr. Standing Counsel and Mr. Raghvendra Kishore, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE NAJMI WAZIRI

O R D E R

% 28.07.2016

Dr. S. Muralidhar, J.:

1. The challenge in this petition is to the order dated 2nd May, 2014 passed by the Authority for Advance Rulings (Income Tax) ('AAR') in A.A.R. No. 1055 of 2011 and to the consequential orders dated 21st November, 2014 under Section 201(1) and 201(1A) of the Income Tax Act, 1961 ('Act').

2. The facts in brief, are that the Petitioner Steria (India) Limited ('SIL') is a public limited company registered in India providing IT driven services for its clients' core businesses. It is stated that the Petitioner is assessed to tax as a resident in India. Groupe Steria SCA ('Steria France') is a non-resident company incorporated in France as a limited liability partnership. It is stated that Steria France centralizes technical skills for carrying on management

functions such as legal finance, human resources, communication risk control, information systems, controlling and consolidation, delivery and industrialization, technology and management information services. It is also stated that the Steria France does not have any office presence or personnel in India and that it does not have a Permanent Establishment ('PE') in India as defined in the Double Taxation Avoidance Agreement ('DTAA') between the India and France entered into on 29th September, 1992.

3. A Management Service Agreement was entered into on 1st January, 2009 between the Petitioner and Steria France. Under the said agreement, Steria France was to provide various management services to the Petitioner with a view to rationalise and standardise the business conducted by the Petitioner in India. Services under the broad category of General Management Services included Corporate Communication Services, Group Marketing Services, Development Services, Information System and Services, Legal Services, Human Relation Services etc. It is stated that these services are provided by Steria France through telephone, fax, e-mail etc. and no personnel of Steria France visited India for providing such services.

4. An application was filed by the Petitioner before the AAR under Section 245Q(1) of the Act seeking a ruling on the following questions:

> (i) On the facts and circumstances of the case whether the payment made by Steria (India) for the management services provided by Steria France will not be taxable in India in the hands of Steria France as per the provisions of the DTAA entered into between India and France?

(ii) On the facts and circumstances of the case, if the consideration for management services is not subject to tax in the hands of Steria France in India, whether Steria India will be liable to withhold tax as per the provisions of Section 195 of the Act from the payments made/ to be made to Steria France under the Management Services Agreement?

5. In support of the above application, the Petitioner placed reliance on the provisions of the DTAA including a "Protocol" executed by India and France which formed part of the DTAA.

6. It is not in dispute that another DTAA was entered into between India and United Kingdom ('UK') in which the scope and ambit of the term 'fees for technical services' was more restrictive than the India- France DTAA in two important aspects:

i. The India-France DTAA included fees for managerial services in "Fees for Technical Services", whereas, in contrast, the India-UK DTAA expressly excludes fees for managerial services from "Fees for Technical Services".

ii. The India-UK DTAA contained a - "make available" clause, for a service to constitute "technical service" i.e. that the provider of the service, must "make available" technical knowledge, experience, skill, know how or processes to the persons to whom the service is rendered, or must have developed and transferred a technical plan or technical design to the person to whom the service is rendered. In contrast, the India-France DTAA did not incorporate any such "make available" requirement or criterion and, therefore, ambit of the term "Fees for Technical Services" is much more restricted in the India-UK DTAA as compared to the India-France DTAA.

7. Before the AAR, the Petitioner contended that having regard to Clause

7 of the 'Protocol' the less restrictive definition of the expression 'fees for technical services' appearing in the Indo-UK DTAA, must be read as forming part of the India- France DTAA as well. The AAR, by the impugned order, disagreed with the Petitioner. It ruled that the Protocol could not be treated as forming part of the DTAA itself. It further held that restrictions imposed by the Protocol were only to limit the taxation at source for the specific items mentioned therein. The restriction was only on the rates. Further, the 'make available' clause found in the Indo-UK DTAA could not be read into the expression 'fee for technical services' occurring in the India-French DTAA unless there was a notification under Section 90 of the Act issued by the Central Government to incorporate the less restrictive provisions of the Indo-UK DTAA into the India-France DTAA. In other words, the plea of the Petitioner that Clause 7 of the Protocol did not require any separate notification and could straightway be operationalised was not accepted by the AAR.

8. Consequent on the above ruling of the AAR orders under Section 201(1) and 201(1A) were passed against the Petitioner which have been challenged by the Petitioner by amending the writ petition.

9. The submissions of Mr. S. Ganesh, learned Senior Counsel appearing for the Petitioner and Mr. Rahul Chaudhary, learned Counsel for the Revenue, have been heard.

10. At the outset, the Court would like to refer to the definition of 'fee for technical services' occurring in the DTAA between India and France

which reads as under:

> "**ARTICLE 13-** ***Royalties and fees for technical services and payments for the use of equipment*** –
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> **** **** ****
>
> (4) The term "fees for technical services" as used in this Article means payments of any kind t o any person, other than payments to an employee of the person making the payments and to any individual for independent personal services mentioned in Article 15, in consideration for services of a managerial, technical or consultancy nature"

11. The corresponding provision in the DTAA between the India and the UK reads as under:

> "**ARTICLE 13-** ***Royalties and fees for technical services-***
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> **** **** ****
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> 4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means repayments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:
>
> (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or
>
> (b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or
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> (c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(a) of this Article;

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the private use of the individual or individuals making the payment; or

(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 15 (independent personal services) of this Contention"

12. At this juncture, it is necessary to refer to Clause 7 of the Protocol executed separately between India and France which forms part of the DTAA. Clause 7 thereof which is relevant for the present purposes reads as under:

"At the time of proceeding to the signature of the Convention between France and India for the avoidance of double taxation with respect to taxes on income and on capital, the undersigned have agreed on the following provisions which shall form an integral part of the Convention.

.....

7. In respect of articles 11 (Dividends), 12 (Interest) and 13 (Royalties, fees for technical services and payments for

> the use of equipment), if under any Convention, Agreement or Protocol signed after 1-9-1989 between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention Agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later."

13. What is immediately apparent on a plain reading of Clause 7 is that it applies in respect of three different kinds of payments i.e. dividend under Article 11, interest in Article 12 and Royalties, Fees for Technical Services and payments for use of equipments under Article 13. In respect of any of the above payments, if any convention agreement or protocol is signed between India and a OECD member State under which India limits its taxation at source on the above "to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items or income, the same rate or scope as provided for in that Convention, agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention, Agreement or Protocol enters into force, whichever enters into force later".

14. An attempt has been made by Mr. Rahul Chaudhary, learned Counsel for the Revenue, to urge that if a reference is made to one Convention signed after 1st September, 1989 between India and another OECD member

State for the purposes of ascertaining if it had a more restrictive scope or a lower rate of tax, then that Convention alone has to be referred to for both purposes. He submitted that in certain Conventions where the tax base was restricted the rate of tax would be higher and vice-versa i.e. where the tax base is larger the rate of tax would be lower. In other words, he contended that it is not permissible for the Petitioner, in terms of Clause 7 of the Protocol, to rely upon one Convention between India and an OECD member State for the purposes of taking advantage of a lower rate of tax and then refer to another Contention between India and another OECD member State to take advantage of a more restricted scope.

15. The Court finds no warrant for the above restrictive interpretation placed on Clause 7 of the Protocol. The words "a rate lower or a scope more restricted" occurring therein envisages that there could be a benefit on either score i.e. a lower rate or more restricted scope. One does not exclude the other. The other expression used is "if under any Convention, Agreement or Protocol signed after 1-9-1989 between India and a third State which is a member of the OECD". This also indicates that the benefit could accrue in terms of lower rate or a more restrictive scope under more than one Convention which may be signed after 1st September 1989 between India and a State which is an OECD member. The purpose of Clause 7 of the Protocol is to afford to a party to the Indo-France Convention the most beneficial of the provisions that may be available in another Convention between India and another OECD country.

16. The AAR appears to have failed to notice that the wording of Clause 7

of the Protocol makes it self-operational. It is not in dispute that the India-France DTAA was itself notified by the Central Government by issuing a notification under Section 90 of the Act. It is also not in dispute the separate Protocol signed between India and France simultaneously forms an integral part of the Convention itself. The preamble in the Protocol, which states "the undersigned have agreed on the following provisions which shall form an integral part of the Convention", makes this position clear. Once the DTAA has itself been notified, and contains the Protocol including para 7 thereof, there is no need for the Protocol itself to be separately notified or for the beneficial provisions in some other Convention between India and another OECD country to be separately notified to form part of the Indo-France DTAA.

17. Reliance is rightly placed by the Petitioner on the following passage at page 32 in the commentary by Klaus Vogel on "Double Taxation Conventions":

> "As previously mentioned, (final) protocols and in some cases other completing documents are frequently attached to treaties. Such documents elaborate and complete the text of a treaty, sometimes even altering the text. Legally they are part of the treaty, and their binding force is equal to that of the principal treaty text. When applying a tax treaty, therefore, it is necessary carefully to examine these additional documents"

18. The Court is, therefore, unable to agree with the conclusion of the AAR that the Clause 7 of the Protocol, which forms part of the DTAA between India and France, does not automatically become applicable and that there has to be a separate notification incorporating the beneficial provisions of

the DTAA between India and UK as forming part of the India- France DTAA.

19. The next question that arises is concerning to extent to which the benefit under the India-UK DTAA can be made available to the Petitioner. As already noticed, the definition of "fee for technical services" occurring in Article 13(4) of the Indo-UK DTAA clearly excludes managerial services. What is being provided by Steria France to the Petitioner in terms of the Management Services Agreement is managerial services. It is plain that once the expression 'managerial services' is outside the ambit of 'fee for technical services', then the question of the Petitioner having to deduct tax at source from payment for the managerial services, would not arise. It is, therefore, not necessary for the Court to further examine the second part of the definition, viz., whether any of the services envisaged under Article 13(4) of the Indo-UK DTAA are "made available" to the Petitioner by the DTAA with France.

20. Mr Ganesh, learned Senior Counsel made a reference to the decision of the ITAT in ***DCIT v. ITC Ltd. (2002) 82 ITD 239 (ITAT Kolkata)***, where the Protocol separately executed between the India and France which formed part of the DTAA between the two countries was interpreted. It was held by the ITAT, and in the view of this Court correctly, that the benefit of the lower rate or restricted scope of fee for technical services under the Indo-French DTAA was not dependent on any further action by the respective governments. It was held that the more restricted scope of fee for technical services as provided for in a DTAA entered into by India with

another OECD member country shall also apply under the Indo-French DTAA with effect from the date on which the Indo-French DTAA or such other DTAA enters into force.

21. It has been contended by Mr. Chaudhary that the question as to the exact nature of the services provided by the Petitioner under the Management Services Agreement has not yet been examined by the AAR. It is further pointed out that the contention raised regarding Steria France having a PE in India and its income being taxable under Article 7 of the DTAA has not been addressed.

22. As rightly pointed out by Mr Ganesh, the question whether Steria France has a PE would arise only if it is the case of the Revenue that Steria France earns any business income in India. That is not even the case of the Revenue. The case projected is that what has been paid by the Petitioner to Steria France partakes the character of "fee for technical services". Therefore, the question whether Steria France has a PE in India and whether its business income is taxable under Article 7 of the DTAA , does not arise.

23. As regards the nature of the service being provided under the Management Services Agreement, again the Court is unable to find any case made out by the Revenue before the AAR that what was provided was anything other than the managerial service which in any event stands excluded in the definition of the "fees for technical services" under the Indo-UK DTAA. Consequently, this question also does not survive for consideration.

24. For all of the above reasons, this Court finds that the impugned order dated 2nd May, 2014 of the AAR holding that the payment made by the Petitioner for the managerial services provided by Steria France should be treated as fee for technical services in respect of which tax had to be withheld under Section 195 of the Act, is unsustainable in law. The questions posed by the Petitioner before the AAR are accordingly answered as under:

(i) The payment made by the Petitioner to Steria France for the managerial services provided by the latter cannot be taxed as fee for technical services; and

(ii) The said payments are not liable to withholding of tax under Section 195 of the Act.

25. Consequently, the further orders passed on 21st November, 2014 against the Petitioner under Sections 201(1) and 201(1)(1A) of the Act are hereby set aside.

26. The writ petition is allowed and the application is disposed of in the above terms. In the circumstances, there shall be no order as to costs.

S.MURALIDHAR, J

NAJMI WAZIRI, J

JULY 28, 2016/kk