$~78

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

% *Date of Decision:15.12.2022*

\+ **ITA 530/2022**

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -1 ..... Appellant

Through: Mr Shlok Chandra, Standing Counsel.

versus

FUJITSU AMERICA INC. ..... Respondent

Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MS. JUSTICE TARA VITASTA GANJU

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

RAJIV SHAKDHER, J. (Oral):

1. This appeal is directed against the order of the Income Tax Appellate Tribunal [in short, "the Tribunal"] dated 09.06.2022.

2. In order to adjudicate the appeal, the following broad facts are required to be noted:

2.1. The respondent/assessee, which is a company incorporated under the laws of United States of America, rendered branding and management services to an Indian entity going by the name Fujitsu Consulting India Pvt. Ltd. [in short, "FCI"]. In respect of the services offered by the respondent/assessee, it received an amount equivalent to Rs.9,87,11,121/- during the Assessment Year (AY) in issue, i.e., A.Y. 2015-16.

3. The Assessing Officer [in short, "AO"], however, sought to tax the said receipts @ 25%, albeit, on a gross basis. Thereby, the AO denied the

respondent/assessee the benefit it had sought to take by resorting to Article 12 of the India-USA Double Taxation Avoidance Agreement [in short, "DTAA"].

3.1 The respondent/assessee, in terms of Article 12 of the DTAA, had offered the aforementioned amount for taxation @ 15% of gross receipts.

3.2. The main plank on which the AO's order is founded is that the respondent/assessee had a back-to-back arrangement of passing on the fee received to its holding company, i.e., Fujitsu Limited, Japan [in short, FL].

4. The respondent/assessee, being aggrieved by the assessment order dated 19.12.2018 passed under Section 143(3) of the Income Tax Act, 1961 [in short, "the Act"], preferred an appeal with the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"].

4.1 The CIT (A), after a detailed hearing and examination of the record, via order dated 13.12.2019, ruled in favour of the respondent/assessee.

5. Since the appellant/revenue was aggrieved by the order of the CIT(A), an appeal was preferred before the Tribunal, which met with same fate i.e., the appeal of the appellant/revenue was dismissed, and the order of CIT(A) was sustained.

6. It is in this backdrop that the appellant/revenue has preferred the instant appeal under Section 260A of the Act.

7. Mr Shlok Chandra, learned standing counsel for the appellant/revenue, has submitted that the orders passed by the Tribunal and CIT(A) deserve to be set aside as there is clearly a back-to-back arrangement between the respondent/assessee and its holding company i.e., FL.

7.1 In support of this plea, Mr Chandra has relied upon the order passed

by the AO. In particular, our attention has been drawn to the following parts of the order:

> *"5. During the course of assessment, it came to light that the assessee has an agreement with its sister concern named Fujitsu Limited, Japan (FJ) (a company based in Japan) under which the branding and management fee received by the assessee from FCI is transferred to FJ on a back- to- back basis. Vide questionnaire dated 27.11.2018 the following query was made:*
>
> > *"Furnish a copy of your agreement with Fujitsu Consulting India under which branding and management fee is charged. Also, furnish a copy of your agreement with Fujitsu Japan under which Fujitsu Japan charges branding and management fee from you. What is the difference between the branding and management fee received by you from Fujitsu Consulting India and branding and management fee paid by you to Fujitsu Japan. Did you pass on the entire branding and management fee received from Fujitsu Consulting India to Fujitsu Japan or you did you charge a mark-up or commission thereon ?"*
>
> *The assessee's reply dated 03.12.2018 to the above query is reproduced below:*
>
> > *"A copy of agreement with Fujitsu Japan (for charging branding and management fee), is attached. Please note that Fujitsu Consulting India was also incorporated as a purchasing entity in the aforesaid mentioned agreement by way of an amendment. The amendment agreement is also attached for your kind perusal.*
> > *There is no difference between branding and management fee paid by us to Fujitsu Japan and the branding and management fee cross charged to Fujitsu Consulting India. The fee is cross charged to our subsidiaries including Fujitsu Consulting India mostly based upon sales turnover."*
>
> *5.1. From the above it is cleared und undisputed that the assessee is only a recipient and not the beneficial owner of the said receipts, as the receipts transferred to a separate entity an [sic-on] a back-to-back basis. In other words, the assessee merely serves as a conduit or channel for the said income and the beneficial owner of the FIS is actually Fujitsu Japan. In these circumstances, the rate that shall apply to the said FIS under the DTAA shall be rate applicable for a recipient who is not a beneficial owner. This rate is determined by a reading of first sentence of para 2 of*

Article 12, which states that such FIS may be taxed in the source State and according to the law of that State. In the present context, it means the said receipts will be taxable in accordance with the provisions of the Income tax act, 1961.

5.2 Vide notice u/s 142(1) dated 9.12.2018, the assessee was asked "Since the entire branding fee and management fee received from Fujitsu India is transferred to Fujitsu Japan through a back-to back-agreement, why should you not be treated as a pass-through entity or conduit with respect to this receipt and not beneficial owner? Therefore, why should the rate given in India US DTAA for beneficial owner not be denied to you, and you be taxed as per Indian domestic law rates on this income?" The questionnaire was duly delivered to the assessee via e-assessment portal, as is evidenced by the delivery confirmation received by the undersigned. No reply was received on due date. Another opportunity was then provided to the assessee. Vide its reply dated 17.1.2018, the assessee responded as follows:

> *"There is no transfer of branding fee and management fee received from Fujitsu Consulting India to Fujitsu Japan through a back to back arrangement. The fee for these services had been received by us in consideration for services provided to Fujitsu Consulting India. We have full and unconditional right to use and enjoy the fee received from Fujitsu Consulting India and there exists no obligation on us to pass it on to Fujitsu Japan. We are therefore not in agreement with your observation that Fujitsu America, Inc. could be treated as a pass through entity or conduit in relation to these charges. We confirm that we are the beneficial owner of all these service charges and have the fall and unconditional right to use and enjoy these payments."*

The assessee's position is clearly contrary to the facts. When the assessee has a binding obligation to forward the entire fee receipts under consideration to another entity, how can it claim to have an "unconditional right to use and enjoy the fee received"? For reasons explained in the above paragraphs, the claim that the assessee is not a pass-through entity with respect to these particular receipts is without any foundation. This claim is therefore rejected."

8. We have heard the learned counsel for the appellant/revenue and examined the record.

9. According to us, findings of fact have been returned, as noticed above, by the CIT(A). For the sake of convenience, the relevant part of the order passed by the CIT(A) is extracted hereafter, which discloses that the CIT(A) concluded that there was no back-to-back arrangement between the respondent/assessee and its holding company i.e., FL:

> *"5.13 Further, during the appellant proceedings, the appellant was asked to submit email communication between the appellant and Indian entity FCI (recipient of the service) in order to ascertain the fact of actual involvement of the appellant in rendering of management services to the Indian entity and to decide the issue of beneficial ownership. Accordingly, the appellant submitted relevant e-mail communications with FCI evidencing dissemination of services to FCI vide submission dated July 29, 2019. The detailed explanation of the emails was also submitted vide submission dated August 21, 2019. The appellant has submitted 7 emails as sample evidence in this regard which are discussed as under:*
>
> *A. Email dated May 15, 2014 from Your IT Desk@.in.Fujitsu.com (India) to FC.IN.Entireoffice@in.Fujitsu.com (Central ID)*
>
> > *This email is regarding logging of high priority ticket with FAI for resolution. It is raised by Fujitsu Consulting India at the central e-mail id to report downtime of Virtual Private Network ('VPN') primary and secondary links with the Appellant which were not accessible. In the given email, downtime notification mentions about FAI support engagement. The response received by the Indian AE was that the alternate SSL VPN link provided by FAI Service Desk can be logged in during the intervening period when the primary and secondary VPN are not accessible. By way of this communication, the network service requirements of the Indian AE had been resolved through the ticket raised by the Indian AE to the Appellant.*
>
> *B. Email dated Oct 24, 2014 from ReqTrack.Support@in.Fujitsu.com to FC.IN.EntireOffice@in.fujitsu.com*
>
> > *This email is regarding Ticket raised by Fujitsu Consulting India at the central e-mail id to report downtime of ReqTrack and Trioka with the Appellant which were not accessible. In the given email, downtime notification mentions that FAI networking team is working on high priority.*

C. Email dated March 21, 2015 from erpprod@us.fuiitsu.com (email ID of FAI) to Sachin.amonkar@in.Fujitsu .com (employee of Indian AE)

> *This email is by the central email id maintained by the FAI to remind the approver at Indian AE to approve/reject the time card entries submitted by the employees of the Indian AE in relation to a project.*

D. Email dated April 5, 2014 from far.hvperiomsupport@fuiitsu.com (email id of FAI) to Ashutosh.Prabhucles@ai(a)in.fuiitsut.com (employee of Indian AE)

> *This is an email from Hyperion financial system, which is maintained by FAI and used by Indian AE wherein a regular FAICONS application update was provided.*
> *E. Email dated January 16, 2015 from offshore Appsupport@in.Fujitsu.com FC.IN.Entireoffice@in.Fijitsu.com*

> *There was a downtime due to technical issue with the FAI for which a notification was sent to Indian users by FAI. The email shows the resolution regarding an update that the Oracle application working normally.*

F. Email dated September 9, 2014 to September 29, 2014 from (Johanne.clouatre(d)ca.fuiitsu.com) (email ID of FAI) to Ashutosh.Prabhudesai(d)in.fuiitsu.com (employee of Indian AE)

> *It is a chain of emails where the appellant entity's (FAI) resource Mr. Wen Zhu highlighted that as per JSOX requirement, there is a need to perform financial access review to make sure users have the correct financial access in Oracle. In this regard, FAI released list of active oracle users with their finance responsibilities and was forwarded to the Indian Team for confirmation and modifications if any. The email is for review of names of users to provide access of financial data of Fujitsu Consulting India in Oracle and requires confirmation from the employees of Fujitsu Consulting India. The access was granted to the users requiring the financial access by FAI.*

G. Email dated May 18, 2016 from (Sachin.amonkar@in.Fujitsu.com) (employee of - Indian AE to Arthur Nussbaum and Ken Fuse (FAI)

> *It is a chain of emails regarding communication between Fujitsu Consulting India team (Sachin Amonkar) and FAI (Arthur Nussbaum and Ken Fuse) wherein the Indian entity informed the*

appellant (FAI) regarding site visit of TP authorities to the Rune Office to review the detailed working of FNA(Finance & Accounts) and in this regard requested the appellant to share the detailed calculations of the allocation charge.

5.14 ***It may be added that sample email submission was not the additional evidence but the material called for during the appellate proceedings as per the provisions of section 250(4) of the act. On perusal of email communications, I find that the FCI (Indian Entity) used to contact the appellant in respect of procurement of services. The appellant has played active and meaningful intervention in delivery of services. Thus, the appellant was playing the role of service provider after procuring it from other group companies. Moreover, it is a case of cost pooling where various group companies are delivering services of different nature of mutual benefit to each other in the group. The group has allocated the cost based on allocation key and region wise entities have been made responsible to ensure smooth delivery of services as well as of clearing mechanism of payments within the group.***

5.15 ***The agreement provides that the supplying company will provide the Services through Correspondence. Telephone and other means agreed on from time to time with the Purchasing company. As per the agreement, the appellant in this case is a "supplying company" responsibilities which are set out in the description of the services set out in Schedule 1 Description of Services.***

5.16 ***It may be relevant to note that beneficial owner is someone who besides being a legal owner has "dominion and control" over the property I.e. an owner of property who holds it for his own benefit and not as an agent, trustee or nominee for some other person, one who has right to deal with the property as is own. Based on judicial precedents, following principles emerge in order to consider the attribution of beneficial ownership:***

*• **Possession** - Whether the recipient of income exercises dominion over income received;*

*• **Risk and control** - Whether the recipient of income is its bearing the risks associated with such income and exercises power or influence over such income received*

*• **Assesses is not an agent/nominee** - Whether the recipient is acting on its own account and neither an agent/nominee of its holding company nor acting as funnel of flowing incomes to other entity.*

xxx xxx xxx

5.18 It flows from the above that the beneficial owner status can be denied

> *only to agents and/or conduit companies. The concept of beneficial ownership is akin to adopting principle of substance over form.* ***In this case, I find that the appellant has place of management in USA and it is one of group companies, which is providing Global HQ services. It is a separate legal entity within the group with a particular set of roles and responsibilities. The right to collect the service charges is with the appellant, being in the capacity of Supplying Company for its region as per the agreement. Further, the sample email communication does portray the meaningful role played by the appellant in delivery of services to Indian entity. Thus, [sic]***
>
> *5.19* ***I find that the facts of the case strongly support the contention of the appellant that it being beneficial owner of the fee for technical services is entitled for treaty benefit. It is not a case where the appellant company is acting as a Conduit Company. Hence, in the backdrop of the above discussion, I hold that the tax rate of 25% applied by the AO does not hold good in this case."***
>
> [Emphasis is ours.]

10. A perusal of the above extract would show that there are two important aspects that the CIT(A) touched upon. First, there was no back-to-back arrangement, according to him, between the respondent/assessee, as noticed above, and its holding company, FL. Second, in order to deny the respondent/assessee the status of a beneficial owner, the AO had to find that the assessee was either an agent or conduit for the holding company i.e., Fujitsu Limited, Japan.

10.1. The second proposition, as a matter of fact, flows from the findings of fact returned by the CIT(A). The CIT (A) has found as a matter of fact that the appellant was playing the role of a service provider after procuring the same from other group companies and that it had dominion over the fees received by it.

11. We have also put to Mr Chandra as to whether there was any ground raised in the appeal preferred before the Tribunal that the finding returned

by the CIT(A) was perverse.

11.1. Mr Chandra says that no specific ground in those terms was framed. It is Mr Chandra's submission though that the ground raised was that the CIT(A) had erred in concluding that the respondent/assessee was entitled to the status of a beneficial owner.

12. To our minds, once it is held that there was no back-to-back arrangement and the respondent/assessee had dominion and control over the fees received by it and thus entitled to status of a beneficial owner, then, even according to the appellant/revenue, the provisions of Article 12 of the DTAA will kick in.

13. The Tribunal, as noted above, has sustained the orders passed by the CIT(A).

14. According to us, no substantial question of law arises in the above-captioned appeal. Thus, for the foregoing reasons, we see no reason to interfere with the impugned order. The appeal is, accordingly, dismissed.

15. The Registry will dispatch a copy of the judgement passed today to the respondent at the address given in the appeal as well via email.

RAJIV SHAKDHER
(JUDGE)

TARA VITASTA GANJU
(JUDGE)

DECEMBER 15, 2022/pmc