

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI M. BALAGANESH, AM

आयकर अपील सं/ I.T.A. No.6654/Mum/2019

(निर्धारण वर्ष / Assessment Year: 2015-16)

Atos Information Technology HK Limited C/o. Atos India Pvt. Ltd. 8 th Floor, Building-3, MindSPACE, Gigaplex, Plot No. IT-5, MIDC, Airoli Knowledge Park, TTC Industrial Area, Airoli West, Navi Mumbai-4000708.	बनाम / Vs.	DCIT (International Taxation)-1(1)(2) Room No. 528, 5 th Floor, Air India Building, Nariman Point, Mumbai- 400021.
---	-----------------------------	--

&

आयकर अपील सं/ I.T.A. Nos.1610 & 1611/Mum/2022

(निर्धारण वर्ष / Assessment Years: 2018-19 & 2019-20)

Atos Information Technology HK Limited C/o. Atos India Pvt. Ltd. 8 th Floor, Building-3, MindSPACE, Gigaplex, Plot No. IT-5, MIDC, Airoli Knowledge Park, TTC Industrial Area, Airoli West, Navi Mumbai- 4000708.	बनाम / Vs.	DCIT (International Taxation)-1(1)(2) Room No. 528, 5 th Floor, Air India Building, Nariman Point, Mumbai- 400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAKCS8720L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Dhanesh Bafna/Shri Yogesh Malpani/Ms. Chandani Shah/Ms. Kinjal Patel
Revenue by:	Shri Sunil Umap (DR)

सुनवाई की तारीख / Date of Hearing:

15/12/2022

घोषणा की तारीख /Date of Pronouncement:

13/03/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

The aforesaid appeals have been preferred by the assessee against the separate final assessment orders dated 27-08-2019, 21-04-



ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.

2022 & 21-04-2022, passed by the Assessing Officer ('the AO') u/s 144C r.w.s. 143(3) of the Act pursuant to the directions given by the Dispute Resolution Panel ('DRP') for the Assessment Years ('AYs') 2015-16, 2018-19 & 2019-20, respectively. Since issues involved in all the appeals are common and are arising out of identical facts, all the appeals are being heard together and are being disposed of by way of this consolidated order.

2. With the consent of both parties, we are first taking up the appeal in ITA No. 6654/Mum/2019 for AY 2015-16 as the *lead case*, the result of which shall *mutatis mutandis* apply to the appeals in ITA Nos. 1610 & 1611/Mum/2022 for AYs 2018-19 & 2019-20, respectively, as well. The grounds raised in the appeal for AY 2015-16 are as under: -

"1. On the facts and in the circumstances of the case and in law, the Learned Deputy Commissioner of Income-tax (International Taxation) 1(1)(2), Mumbai ('the Learned AO') and the Dispute Resolution Panel ('the DRP') erred in holding the sum of Rs.65,19,98,196/- as 'Royalty' under Section 9(1)(vi) of the Income-tax Act, 1961 ('the Act'). -

The Appellant humbly prays that the Learned AO be directed to not treat the aforesaid receipts as 'Royalty' under Section 9(1)(vi) of the Act.

2. On the facts and in the circumstances of the case and in law, the Learned AO and the DRP erred in holding the sum of Rs. 65,19,98,196/- as 'Fees for Technical Services' under Section 9(1)(vii) of the Act.



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

The Appellant humbly prays that the Learned AO be directed to not treat the aforesaid receipts as 'Fees for Technical Services' under Section 9(1)(vii) of the Act.

3. Without prejudice to the above Ground, the Learned AO and DRP erred in holding the sum of Rs. 65,19,98,196/- by Atos India to the Appellant as 'Business Income' under Section 9(1)(i) of the Act.

The Appellant humbly prays that the Learned AO be directed to not treat the aforesaid receipts as 'Business Income' under Section 9(1)(i) of the Act.

4. Without prejudice to the above Ground no. 3, even if it is alleged that the aforesaid receipts are 'Business Income' under Section 9(1)(i) of the Act, such receipts cannot be taxed in India in view of clause (a) of Explanation 1 to Section 9(1)(i) of the Act as no activities are carried out by the Appellant in India. The Appellant humbly prays that the Learned AO be directed to not treat the aforesaid receipts as 'Business Income' under Section (1)(i) of the Act.

5. On the facts and in the circumstances of the case and in law, the Learned AO has erred in giving short credit of TDS amounting to Rs. 60,65,520/-

The appellant humbly prays for allowance of full credit of TDS deducted.”



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

3. Brief facts of the case are that, the assessee is a non-resident company engaged in the business of providing facilities/service for processing of data from Hongkong. Atos Group has a global “Cocteau Agreement” dated 12.02.2004 with the Standard Chartered Bank Group (hereinafter “SCB”) for the provision of facilities for data processing support to SCB in sixty-eight (68) countries. With effect from 01.10.2013, in pursuance to the Cocteau Agreement, an Atos group entity in India, i.e. Atos India Pvt. Ltd. (hereinafter “Atos India”), had entered into a local ‘Service Agreement’ dated 13.12.2013 (w.e.f. 01.10.2013) with the Indian Branch of SCB (hereinafter “SCB India”) on principal-to-principal basis, for provision of facilities for data processing services to SCB either directly or through the Atos group. In turn, Atos India entered into an Inter-company Service Agreement dated 01.10.2013 (“Inter-company agreement”) with the assessee (pages 114-136 of the PB). According to the assessee, the payments made by Atos India under this Inter-Company Agreement was neither in the nature of royalty nor fees for technical services within the meaning of Section 9(1)(vi) or Section 9(1)(vii) of the Income-tax Act, 1961 (in short “the Act”) and therefore claimed it to be not taxable in India.

4. The Ld. AR brought to our notice that, the AO did not agree with the stand taken by the assessee. Following the line of reasoning



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

given by his predecessors in earlier AYs, the AO held that the sum of Rs.65,19,98,196/- received by the assessee for rendering services to SCB India was in the nature of 'Royalty' or 'Fees for Technical Service' u/s 9(1)(vi)/ u/s 9(1)(vii) of the Act. He accordingly taxed the impugned sum at the rates prescribed in Section 115A of the Act. The Ld. AR particularly invited our attention to Para 5.3 of the draft assessment order, wherein the AO had taken note of the fact that, the agreement/payment in question was the same as earlier years. The AO also took cognizance of the fact that this Tribunal had upheld the claim of the assessee in the earlier years that the impugned payments were not in the nature of 'royalty'/'FTS'. The AO, however, chose not to follow the decision rendered by this Tribunal in the assessee's own case for earlier years, the Revenue had preferred appeal against the same before the Hon'ble Bombay High Court. The AO further observed that the assessee had oversimplified the facts before this Tribunal in the earlier year/s, and attempted to distinguish the views expressed by this Tribunal in the matters of the assessee. The AO alternatively held that, even if the payment is held to be not in the nature of 'royalty'/'FTS' but in the nature of 'business income' in the hands of the assessee, then also, according to him, it was taxable u/s Section 9(1)(i) of the Act. According to the AO, the income attributable to the operations of the assessee having business connection in India was taxable at 40%. However, as the AO had already held that the payment in question was in the nature of 'Royalty' or 'Fees for Technical Service' u/s 9(1)(vi)/ u/s 9(1)(vii) of



ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.

the Act, the AO proposed to tax the impugned payment u/s 115A of the Act in the draft assessment order. Aggrieved by this order, the assessee is noted to have filed objections before the Ld. DRP.

5. It is noted that the Ld. DRP in their directions dated 24.06.2019 had observed that there was no change in the facts when compared to earlier years. However, the Ld. DRP decided to follow their order directions issued in AY 2011-12 and directed the AO to assess the impugned payments received by the assessee by way of 'Royalty'/'FTS'. The Ld. AR brought to our notice that, the Ld. DRP in their directions for AY 2011-12 had expressed that they could not follow the order of the Tribunal in the assessee's case for the earlier years since the Department had challenged the same before the High Court and that the appeal had since been admitted by the Hon'ble Bombay High Court. The Ld. DRP therefore held that, *"the Panel feels it is no longer competent to bring finality to this issue by following the ITAT order against which the Department is prevented from filing an appeal"*. The relevant findings recorded by the Ld. DRP in the relevant AY 2015-16 are noted to be at Para 4.9 of the directions (page 35 of the DRP's directions) which reads as under:

"It is noted that the above decision of the DRP covers the entire facts of the case properly. The only difference is that while the earlier contract was between the assessee and the SCB Branches in India, now the contract is between Atos India and the assessee



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

for rendering the same services to the same parties. In absence of any change in facts, except for a change in the contracting parties, the DRP has no hesitation in following the above order. In light of this discussion, the grounds of objection raised by the assessee at ground 1 & 2 are dismissed.” (emphasis supplied)

6. On the issue of taxability of the receipts as business income under section 9(1)(i) of the Act, the Ld. DRP categorically observed that the assessee had a ‘business connection’ in India, which exists between the activities in India and the revenue activities of the assessee. The Ld. DRP however did not ultimately adjudicate on the issue of attribution of income, citing absence of relevant information and in view of their finding that these receipts were in the nature of Royalty/FTS.

7. Following the directions issued by the Ld. DRP, the AO passed the impugned order dated 27-08-2019 wherein he assessed the impugned payment of Rs.65,19,98,196/- by way of royalty/FTS u/s 9(1)(vi)/ 9(1)(vii) of the Act. Further, as directed by Ld. DRP, the AO noted that, alternatively, in case it is not held to be taxable as Royalty/FTS, the receipts were taxable by way of ‘business income’ u/s 9(1)(i) of the Act. The Ld. AO, however, noted that as the DRP had refrained from commenting on income attribution, no exercise was conducted to ascertain the sum taxable u/s 9(1)(i) of the Act.



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

8. Aggrieved by the final assessment order, the assessee is in appeal before us. The Ground Nos. 1 & 2 taken by the assessee are against the action of the lower authorities holding that the sum of Rs.65,19,98,196/- received by the assessee is taxable by way of ‘Royalty’ or ‘Fees for Technical Service’ u/s 9(1)(vi)/ u/s 9(1)(vii) of the Income Tax Act, 1961 respectively. Without prejudice to these grounds, the assessee has raised Ground Nos. 3 & 4 wherein it has objected to the findings of the lower authorities holding that, even if the payment is not regarded as ‘royalty/FTS’ but ‘business income’, it is still taxable in terms of Section 9(1)(i) of the Act.

9. At the outset, the Ld. AR of the assessee brought to our notice that this issue raised in Ground Nos. 1 & 2 are no-longer res-integra. He showed us that the coordinate Benches of this Tribunal had passed orders dated 09.02.2017, 29.03.2017 & 14.02.2022 in assessee’s own case for the earlier AYs 2006-07 to 2013-14. This Tribunal is noted to have consistently held that the payment made by SCB India to the assessee was neither taxable as ‘Royalty’, nor as ‘Fees for Technical Services’ (“FTS”) under section 9(1)(vi) & 9(1)(vii) of the Act. Per contra, the Ld. DR appearing on behalf of the Revenue supported the order of the lower authorities and filed detailed written submissions distinguishing the appellate order/s passed for the earlier years.

10. We have heard both the parties and gone through the written submissions filed by them and perused the material placed before us. It



ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.

is noted that, both the lower authorities agree that the service agreement in question and the facts involved are the same when compared with the earlier years, save for the fact that there has been a change in one of the contracting parties. Therefore, having regard to the decisions rendered by this Tribunal in assessee's own case for earlier years, according to us, the issue raised in Ground Nos. 1 & 2 before us stands covered in favour of the assessee. The Ld. DRP is also noted to have categorically observed that, the facts of the situation was identical to earlier years, but still, they chose not to follow the appellate orders passed by this Tribunal in the assessee's own case for earlier years, as the appeal preferred against them by the Revenue had since been admitted before the Hon'ble High Court. Before us, although the Ld. DR has tried to distinguish the orders passed by this Tribunal for the earlier years but it is noted that, all these aspects were already considered and dealt with by the Hon'ble Tribunal while adjudicating the appeals for those respective earlier years. The Ld. DR was unable to show us that, the Hon'ble High Court has since reversed the decision so rendered by this Tribunal in the assessee's earlier year cases. We are therefore bound by judicial discipline, and follow the *ratio decidendi* laid down in the lead order of the Hon'ble Tribunal dated 09.02.2017 for the AYs 2006-07, 2007-08, 2008-09 & 2012-13, wherein, after detailed analysis of the facts, this Tribunal held as under:



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

“18. We have carefully considered the entire gamut of facts as discussed above, relevant findings given in the impugned order as well as the rival submissions made before us. The main issue involved, which has been raised vide ground no. 1.1 is, whether the payments made by Standard Chartered Bank India (SCB) to the assessee is in the nature of 'royalty' u/s 9(1)(vi) or 'fees for technical services'. Since the assessee-company is incorporated in Hong Kong and is providing services/facilities for processing data to SCB from Hong Kong, therefore, the payment made by SCB India to assessee has to be seen from the perspective of domestic law, i.e. Income-tax Act and not under any treaty. The assessee-company is mainly engaged in the business of providing services/facilities for data processing through computer hardware and software to banking entities. It had entered into an agreement which has been termed as "Cocteau agreement" with SCB for provision of data processing support, which is for 68 countries with various branches. Under the said 'Cocteau agreement', the role and responsibilities of assessee in respect of providing data processing services has already been discussed in detail in the earlier part of the order including the manner in which the entire processing activity is carried out. The Revenue's case is that first of all, it is in the nature of royalty and for coming to this conclusion, the main contention of Assessing Officer is that, firstly, the assessee is not merely providing data processing services, but also providing technology in the form of data centre, infrastructure, connectivity and application technology for its banking operations; and secondly, it has created and provided facility in the form of dedicated centres for exclusive use of SCB with



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

disaster recovery facility and storage facility. These infrastructure facilities in the form of data centre, storage area network, disaster recovery facility and dedicated network connectivity is translated into functional process by defined service flow for the various geographic locations for various business application which would constitute process. The assessee in this process has also made available SCB use of its equipment, model, design, invention and process. After coming to the conclusion that the payment is in the nature of "royalty" within the scope of section 9(1)(vi), the revenue went further to hold that, since assessee has provided technical, managerial and consultancy services to SCB, therefore, it also falls in the nature of 'FTS' and for coming to this conclusion, certain clauses in the Cocteau agreement has been referred to.

19. First of all, we will deal with the issue whether the said payment falls within the realm of 'royalty' or not. From the perusal of the various clauses of the agreement which has been referred to extensively by both the parties at the time of hearing and discussed herein above, we find that the main objective of the 'Cocteau agreement' is to provide SCB group all across the world, processing of data through a network of computer systems in Hong Kong. In the entire agreement there is no whisper of any technology transfer or application of technology per se to SCB. This is a kind of outsourcing activity which has been given by SCB to Atos to process its data from various branches across the country. We agree with the contention of the Id. Counsel that the reference to the various details in the agreement is merely to ensure quality, standard and various



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

safeguards which are to be adopted in the course of processing data especially looking the volume of data required to be processed from all around the Globe. The provisions mainly contains assessee's responsibility to ensure adequate facility, systems and software which are located in Hong Kong and to ensure that all the hardware which is used in Hong Kong is maintained and housed in secured building space and infrastructure, manage proper performance of the hardware and operating systems, ensure adequate technical support of operating systems, to ensure system performance, maintain adequate security measures and effective internal control environment and also put in place appropriate disaster recovery plan. All these are to be maintained by the assessee to conduct the processing of data through computers. There is no providing or giving any use or right to use of any process to SCB. The technology, infrastructure, data centre, connectivity, etc. is solely used by the assessee for its own purposes and not to make available any such thing to SCB as explained by the Id. Counsel. At the first stage, SCB transmits raw data through operating software owned by it to the hardware facility of assessee in Hong Kong. The assessee in Hong Kong mainly receives the data so transmitted and at this stage there is absolutely no use or right to use of any process of assessee in Hong Kong by SCB. At the second stage, the raw data transmitted by SCB is processed by the assessee in its computer system/hardware as per the requirement of SCB and at times may be using the application software owned by SCB. At this stage also, SCB does not use or have any right to use any process. At the third stage, the processed data is transmitted electronically to SCB in



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

India and at this stage also there is no use or right to use of any process which is given or made available to SCB. Here, in this case there is absolutely no use of equipment also as alleged by the Department within the definition given in clause (iva) of Explanation 2 to sec. 9(1)(vi) of the Act. The said clause deals mainly with the 'use' or 'right to use' any industrial, commercial or scientific equipment and applies only to income from leasing of such industrial, commercial or scientific equipment. This is borne out from the Memorandum to the Finance Bill, 2001 through which the said clause was inserted w.e.f. 1-4-2002, the relevant extract of the Memorandum has already been incorporated in the earlier part of our order and same proposition is also held by Mumbai Bench in Yahoo India (P.) Ltd. v. DCIT (supra). Here, in the case of assessee, there is no income from leasing of any equipment. The legislature thus, has clearly envisaged that clause (iva) is to cover lease rent of industrial, commercial and scientific equipment in the definition of royalty and the said definition has been widened to that extent only. Thus, there is no concept of right to use of equipment here in this case. So far as applicability of Explanation 5 & 6 are concerned, we agree with the contentions of Id. Counsel, as reproduced above, that same would not be applicable at all in the case of assessee because, firstly, Explanation 6 enlarges the scope of process to include transmission by satellite cable, fibre optic, etc.; and secondly, Explanation 5 is applicable where consideration is of any right, property or information as defined in clauses (i) to (v) of Explanation 2 only and not in clause (iva) for the reason that Explanation 5 has been inserted with retrospective effect from June 1, 1976. In other words,



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

Explanation 5 has been inserted retrospectively from the birth of section 9(1)(vi) to clarify the intention behind the legislation. Hence, Explanation 5 is to be read with the section 9(1)(vi) which was there on the statute as on April 1, 1976. Whereas clause (iva) to Explanation 2 was inserted from April 1, 2002. Thus, retrospective effect of clause (iva) cannot be deemed from 1-6-1976 and hence it cannot be held that Explanation 5 also applies to the said clause as this clause never existed as on April 1, 1976 and accordingly, the legislation cannot clarify the intention of the clause which never existed on the said date. Hence Explanation 5 & 6 would not be applicable in the case of assessee.

20. Further, for any payment to fall within the term of "royalty" it is sine qua non that there should be some kind of a transfer of any right in respect of various items as given in Explanation - 2 or any imparting of any information or use of any patent, invention, model, design, secret formula, process, etc. Here, in this case, there is neither transfer of any of right in respect of any patent, invention, model, design, secret formula or process or trademark or any similar property by the assessee to SCB, nor there is any imparting of any information or use of any of similar nature of things. Here, the entire equipment and technology which are used for processing the data is solely for performing the activity of assessee for itself while rendering data processing services to SCB. There is absolutely no transfer of any technology, information, knowhow or any of the terms used in Explanation 2 or any kind of providing of technology in the form of data centre, infrastructure, connectivity and



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

application technology by the assessee to SCB for SCB's banking operations. Thus, we are of the opinion that the payment made by SCB to assessee-company does not fall within the realm of "royalty" and hence cannot be taxed in India as royalty u/s 9(1)(vi) of the Act.

21. As regards whether the payment is in the nature of FTS or not, we find that the provision regarding services provided by assessee to SCB is mainly a standard facility and there is no constant human endeavour or human intervention which is required to provide the data servicing service. As stated earlier, raw data fed into by SCB India are transmitted to assessee and the data so transmitted stands captured by the mainframe computers owned by assessee wherein such data are processed automatically and the final result is then transmitted to SCB India. All these transmission and processing of data is done automatically by computers and there is not much human involvement or intervention. There is no application of mind by the employees of assessee on said data because, they are processed through programmed software and neither any verification nor any analysis is carried out by the assessee on such data. The employees of the assessee-company are only required to oversee as to whether the computer systems are functioning properly and performing well and if there is any breakdown or fault, then same needs to be taken care of. The human intervention if at all is mainly for repairing and monitoring the hardware and software of the assessee which are processing the raw data of SCB and there is no human involvement or endeavour for rendering any kind of technical or



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

consultancy services in data processing. It has been stated that before us that even the faults are corrected automatically. Further, looking to the number of volume of transactions transmitted by SCB to assessee, it would be impossible for any number of humans to apply their mind and generate reports. This has been demonstrated by the Id. Counsel before us by way of an example which has been already incorporated above. Thus, the magnitude of transactions undertaken by assessee itself goes to show that the computer systems installed by the assessee in Hong Kong is standard facility through which data is processed. In this regard, strong reliance was placed on the decision of ITAT, Mumbai Bench in the case of Siemens Limited (supra), wherein the Tribunal has emphasised upon the element of human intervention for rendering of technical services. The relevant observation in this regard reads as under:

" In our opinion, this cannot be the criteria for understanding the term "technical services" as contemplated in Explanation 2 to section 9 (1)(vii). If any person delivers any technical skills or services or make available any such services through aid of any machine, equipment or any kind of technology, then such a rendering of services can be inferred as "technical services". In such a situation there is a constant human endeavour and the involvement of the human interface. On the contrary, if any technology or machine developed by human and put to operation automatically, wherein it operates without any much of human interface or intervention, then usage of such technology cannot per se



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

be held as rendering of "technical services" by human skills. It is obvious that in such a situation some human involvement could be there but it is not a constant endeavour of the human in the process. Merely because certificates have been provided by the humans after a test is carried out in a Laboratory automatically by the machines, it cannot be held that services have been provided through the human skills."

Even in the latest decision of Hon'ble Supreme Court in the case of M/s. Kotak Securities Ltd. (supra), (the relevant portion of which has already been reproduced above), the Hon'ble Court opined that, if services are provided through fully automated standard facility, the same cannot be reckoned as rendering of technical services as contemplated u/s 9(1)(vii) of the Act. The relevant observation reads as under:—

"8. All such services, fully automated, are available to all members of the stock exchange in respect of every transaction that is entered into. There is nothing special, exclusive or customized service that is rendered by the Stock Exchange. "Technical services" like "Managerial and Consultancy service" would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

service, is available to all and would therefore stand out in distinction to the former. The service provided by the Stock Exchange for which transaction charges are paid fails to satisfy the aforesaid test of specialized, exclusive and individual requirement of the user of consumer who may approach the service provider for such assistance/service. It is only service of the above kind that according to us, should come within the ambit of the expression "technical services" appearing in Explanation 2 of section 9(1)(vii) of the Act. In the absence of the above distinguishing feature, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered by the aforesaid provision of the Act."

Before us, the Id. Counsel has also pointed out that assessee is also providing similar services to other clients like Hong Kong Government and other big MNEs and there is nothing special or exclusive about the services which are being rendered to SCB. In view of the entire gamut of facts as discussed above, we are of the opinion that the payment made by SCB to assessee-company does not fall within the realm of 'fees for technical services' as contained in sec. 9(1)(vii), albeit the assessee has only provided a standard facility for data processing without any human intervention. Accordingly, we hold that the said payment is not taxable in India as 'fees for technical services' in terms of sec. 9(1)(vii) of the Act. Thus, the issue raised in ground no. 1.1 is decided in favour of the assessee."



ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.

11. It is noted that the above decision has been followed with approval by the coordinate Benches of this Tribunal, in assessee's own case for other assessment years as well, i.e., AYs 2009-10, 2010-11, 2011-12 and 2013-14. Respectfully following the same, and there being no change in the material facts permeating through the years (*except for a change in the contracting parties due to commercial contractual requirements, as also noted by the Ld. DRP*), it is held that the impugned receipts in question cannot be said to constitute 'Royalty'/'FTS' under section 9(1)(vi) and section 9(1)(vii) of the Act respectively. Accordingly, Ground Nos. 1 & 2 are answered in favour of the assessee.

12. It is noted that the facts & issue involved in AY 2015-16 are the same as involved in Ground Nos. 1 & 2 of the appeal for AYs 2018-19 & 2019-20. Following our conclusions drawn above, accordingly, Ground Nos. 1 & 2 for AYs 2018-19 & 2019-20 also stand allowed.

13. With regard to Ground Nos. 3 & 4 raised in the lead AY 2015-16, the Ld. AR of the assessee first argued before us that the issue of 'business connection' and the taxability of impugned sum by way of business income u/s 9(1)(i) of the Act was devoid of jurisdiction. According to him, since the AO ultimately assessed the impugned payment by way of 'Royalty'/'FTS', he could not have made the alternate observation in holding the same payment to be taxable by way of 'Business Income' u/s 9(1)(i) of the Act. For this, the Ld. AR



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

relied on the findings given by this Tribunal in their own case for AY 2011-12 in ITA No. 7205/Mum/2018 dated 01.03.2022, wherein it was held as follows:

“8. As regards ground No 3&4, learned Counsel of the assessee stated that this issue was not at all remanded by the ITAT and the fresh round is pursuant to the remand on specific direction of examining royalty under section 9(1)(vi) and 9(1)(vii). The Assessing Officer has discussed this issue and made addition without prejudice basis. He submitted that since the matter was remanded for specific purpose the Assessing Officer cannot be allowed to venture into a new area. He submitted that noting by learned DRP and Assessing Officer that the ITAT has remanded the matter for *denovo* adjudication is absolutely incorrect. He further submitted that even on merit the said issue is in favour of the assessee.

9. Per contra learned Departmental Representative relied upon the orders of the authorities below. She also relied upon the written submission of the learned Departmental Representative dated 17-9-2021 submitted earlier. In the said submission on the issue of taxability of payment as royalty/FTS, learned Departmental Representative had tried to distinguish the ITAT's order in assessee's own case by submitting that the ITAT erred in allowing assessee's appeal by accepting assessee's contention. Thereafter learned DR also supported without prejudice new issue raised by the assessee on the ground that learned DRP has noted that the ITAT has set aside the issue for *denovo*



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

consideration. Learned CIT-DR conspicuously did not mention to ITAT order itself pointing out as to where it is mentioned to be for denovo consideration.

10. Upon careful consideration in this regard, we note that the issue of taxability under section 9(1)(vi) & 9(1)(vii) has been duly dealt with by the ITAT pursuant to similar remand in favour of the assessee. It is not the case that Hon'ble Jurisdictional High Court has reversed the said decision. The contention of learned Departmental Representative that the said order is erroneous is not at all sustainable, as review of the Coordinate Bench of the ITAT of the same assessee is not permissible by another Bench of the ITAT. Hence, ground No. 1&2 is allowed in favour of the assessee.

11. In ground No. 3 raised by the assessee it is urged that the issue of business connection developed by the Assessing Officer is without jurisdiction as this is a remand proceeding for specific examination and not for denovo examination. Hence, assessee's plea is that the Assessing Officer's order is not sustainable.

12. In the present case we have noted that in the remand by the ITAT the issue was remanded for specific purpose. It was remanded to examine the issue of taxability in term of section 9(1)(vi) and 9(1)(vii). This without prejudice to order by the Assessing Officer taxing the receipt as business income u/s. 9(1)(i) was never dealt with by the Assessing Officer in the original proceedings nor the ITAT has made any such remand for denovo adjudication. Hence, this issue raised by the assessee



ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.

is allowed and orders of the authorities are set aside being devoid of jurisdiction in remand proceedings. In view of our adjudication as above the other grounds raised without prejudice are held to be infructuous. (emphasis supplied)

14. Without prejudice to the above contention, the Ld. AR also filed written submissions before us assailing the findings of the lower authorities in relation to Section 9(1)(i) of the Act. He principally argued that the assessee did not carry out any business activities in India and therefore no portion of the income/receipt was liable to tax u/s 9(1)(i) of the Act.

15. On the other hand, the Ld. DR for the Revenue argued that the above decision as cited by the Ld. AR was distinguishable and not applicable to these relevant AYs as the appeals impugned before us emanated from the original assessment order/s and not the set-aside/remand proceedings by the Tribunal, as was the case in the abovementioned AY 2011-12. The Ld. DR explained that in the above decision, while setting aside the issue back to the AO in the first round of AY 2011-12, this Tribunal had required the AO to only examine the taxability under 'Royalty'/ 'FTS'. Noting that the AO had expanded the scope of remand/set-aside proceedings beyond the limited directions issued by this Tribunal in their first order dated 04.03.2016 in ITA No.1464/Mum/2016, it was held that the findings given in the context of '*business income*' was without jurisdiction.



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

16. He pointed out that, in the present case, both the AO as well as the Ld. DRP had noted in their original/final draft assessment order and the directions respectively, that if the impugned payment is held to be not in the nature of ‘royalty’/ ‘FTS’, then as a corollary it was in the nature of ‘business income’. He showed us that, India does not have a Double Taxation Avoidance Agreement (‘DTAA’) with Hong Kong in this AY and that therefore, the argument that, in absence of any permanent establishment in India, no income is taxable in India, did not hold good in the present case. Taking us through the findings of the AO & Ld. DRP and the written submissions filed by him, the Ld. DR argued that post insertion of Explanation to Section 9(2) by the Finance Act, 2010, the rendering of services in India or outside India was no longer a determinative factor to ascertain the taxability of any payment. According to the Ld. DR, as long as the payment has a ‘business connection’ with India, then in terms of Section 9(1)(i) read with Explanation, it will be taxable in India. He therefore urged that the matters be set aside back to the AO directing him to ascertain the quantum of income attributable to India and levy tax thereon.

17. Heard both the parties. On the given facts of the case, we are unable to agree with the Ld. AR that the findings recorded by the AO & Ld. DRP qua the taxability of the impugned payment by way of ‘business income’ u/s 9(1)(i) of the Act was devoid of jurisdiction. The reliance placed by him on the findings given by this Tribunal in AY



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

2011-12 is found to be mis-placed. As rightly pointed out by Ld. DR before us, in that AY, the findings given by this Tribunal was in an appeal, which had arisen from set-aside/remand proceedings. It is noted that, in the first round of proceedings for AY 2011-12, this Tribunal had set aside the matters to the file of the AO with limited directions to ascertain the taxability of the payment as 'Royalty'/'FTS'. Accordingly, in the second round of set-aside proceedings, this Tribunal held that AO ought to have restricted himself to ascertainment of the taxability of the payment by way of 'Royalty'/'FTS'. The AO was held to have acted in excess of his jurisdiction by proposing to alternatively tax the payment as 'Business Income' u/s 9(1)(i) of the Act, which was not the subject-matter of the set-aside/remand proceedings. The facts involved in this AY is clearly distinguishable as the appeal preferred before us emanates from the original assessment proceedings, in which the question under consideration before the lower authorities was the incidence of tax on the impugned sum earned by the assessee. The primary case of the lower authorities is that, it is in nature of 'Royalty'/'FTS' and therefore the entire sum is taxable u/s 115A of the Act. Alternatively, the lower authorities have held that, even if it is not held to be 'Royalty'/'FTS' but 'Business Income' still it is taxable on net basis u/s 9(1)(i) of the Act. Irrespective of whether these findings/observations are ultimately found to be tenable or not, it cannot be said that the lower authorities did not have the jurisdiction to have had held so.



ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.

18. The broad issue impugned before us is, whether the receipts of the assessee is taxable in India or not. Hence, this Tribunal being the last fact-finding authority is required to ascertain the correct facts, analyze the documents/material, arrive at the correct sum, if any, and decide under which head is the same liable to tax in India. To put it simply, if the payment in question is not in the nature of ‘Royalty’/ ‘FTS’, then the correct nature of the income has to be ascertained. It cannot be a case that, it is a *head-less* item of income. Undisputedly, the assessee is in the business of rendering services for processing of data and the contention of the assessee is that it is not ‘Royalty’/ ‘FTS’ but ‘Business Income’ not liable to tax in India. Having held that the payment in question is not in the nature of ‘Royalty’/ ‘FTS’, then natural corollary is that, it constitutes regular business receipt of the recipient. In such a scenario, it is relevant to ascertain whether any portion of such ‘business income’ is taxable in the Source Country, i.e., India or not.

19. As rightly pointed out by the Ld. DR, the assessee is a resident of Hongkong with whom India did not have a DTAA in the relevant AY 2015-16. The Revenue is therefore well within their rights to ascertain as to whether any portion of the business income is taxable in India by virtue of Section 9(1)(i) of the Act. We note that the lower authorities have not considered the facts & arguments placed before us by the assessee in this regard. Both the AO & Ld. DRP are noted to



*ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.*

have cryptically held that, there was a 'business connection' in India or that 'source of income' is located in India or that the assessee had digital presence in India by way of net connectivity at the branches of SCB India etc. These findings are noted to have been made by the lower authorities without proper enquiry, analysis of facts and without taking into account the prevailing jurisprudence on this issue.

20. Having perused the detailed written submissions filed by both the parties before us, in our considered view, this aspect required de-novo examination by the AO, un-influenced by the findings recorded by his predecessors as well as by us given (*supra*). We are therefore of the opinion that it would serve the interests of justice, if the Ground Nos. 3 & 4 of all the three (3) appeals are set aside back to the file of the AO with a direction to re-adjudicate the issue and examine the taxability of the impugned sum in terms of Section 9(1)(i) of the Act alone, in accordance with the provisions of law. The AO shall provide sufficient opportunity to the assessee in this regard and the assessee shall also co-operate and provide all relevant material/evidence required for adjudication of this aspect (Ground Nos. 3 & 4) before the AO. The AO is free to make any further enquiries in this regard as well. Accordingly, the Ground Nos. 3 & 4 for all AYs 2015-16, 2018-19 & 2019-20 are allowed for statistical purposes.

21. Ground No. 5 in all the appeals pertains to the short granting of credit of TDS. According to us, the AO is legally bound to allow TDS



ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.

to the assessee in accordance with the law. The assessee is also directed to furnish copies of Form 16A/26AS in support of its claim before the AO for inspection and verification. Accordingly, Ground No. 5 of all the appeals in AYs 2015-16, 2018-19 & 2019-20 are allowed for statistical purposes.

22. Ground No. 6 in AYs 2018-19 & 2019-20 pertains to the chargeability of interest u/s 234B of the Act. The exigibility of interest is consequential to the tax computed. The AO is accordingly directed to compute the interest on the tax payable, if any, in accordance with law. Accordingly Ground No. 6 in both appeals for AY 2018-19 & 2019-20 are therefore allowed for statistical purposes.

23. Ground No. 7 in AYs 2018-19 & 2019-20 pertains to the levy of penalty u/s 270A of the Act. In our considered view, this ground is pre-mature at this stage and is therefore dismissed *in limine*.

24. In result, all the three (3) appeals of the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on this 13/03/2023.

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 13/03/2023
Vijay Pal Singh, (Sr. PS)



ITA Nos. 6654/Mum/2019
1610 & 1611/Mum/2022
A.Ys. 2015-16, 2018-19 & 2019-20
Atos Information Technology HK Ltd.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai