IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'C' PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.265 & 211/PUN/2021
निर्धारण वर्ष / Assessment Years : 2012-13 & 2013-14

Aktiebolaget Tetra Pak, Ruben Rausings Gata, SE 22186, Sweden PAN : AALCA4391E	Vs.	ACIT (IT), Circle-1, Pune
Appellant		Respondent

Assessee by	Shri Nikhil Pathak
Revenue by	Shri Rajeev Kumar
Date of hearing	09-12-2021
Date of pronouncement	09-12-2021

आदेश / ORDER

PER R.S.SYAL, VP :

These two appeals by the assessee relate to the assessment years 2012-13 & 2013-14. Since common issues are raised in these appeals, we are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

A.Y. 2012-13 :

2. The first issue challenged by the assessee is against the initiation of reassessment proceedings.

3. Briefly stated, the facts of the case are that the assessee is a foreign company who filed its return declaring total income of

Rs.1,89,73,041/- on 12-03-2014. The assessment u/s. 143(3) of the Income-tax Act, 1961 (hereinafter also called `the Act') was completed on 28-03-2016. Thereafter, the AO issued notice u/s.148 dated 29-03-2019 on the ground that a sum of Rs.7,81,23,918/- declared by the assessee as non-taxable got accepted in the assessment as such, which ought to have been charged to tax. The AO notified the draft assessment order u/s.143(3) r.w.s. 147 and section 144C(1) of the Act on 27-12-2019 computing total income at Rs.9,46,20,724/-. The assessee remained unsuccessful before the Dispute Resolution Panel (DRP) on its contention that the initiation of re-assessment proceedings after four years from the end of the assessment year was not valid. That is how, the final assessment order was passed u/s.143(3) r.w.s.147 and 144C(13) of the Act on 16-04-2021 computing total income at Rs.11,16,96,461-. The assessee has come up in appeal before the Tribunal.

4. We have heard the rival submissions and gone through the relevant material on record. The reasons recorded by the AO before initiating reassessment proceedings, have been reproduced on pages 3 to 6 of the draft assessment order, which read as under :

"Reasons for reopening of the assessment in the case of
For A.Y. 2012-13 u/s.147 of the I.T. Act, 1961

The return of income for the assessment year 2012-13 was filed by the assessee M/s. Aktiebolaget Tetra Pak on 12.03.2014 offering receipts of Rs.1,89,73,041/- as tabulated below for taxation as fees for technical services at the rate of 10% under Article 12 of the India Sweden DTAA :

Sr.No.	Description of Receipt	Amount (in Rs.)
1	Network charges, i.e. WAN and lease line, DATA charges, CIC charges	1,84,46,949/-
2	Training Expenses	5,26,092/-
	Total taxable transactions	1,89,73,041/-

2. The return of income for the assessment year 2012-13 was selected for scrutiny and vide notice u/s.142(1) dated 24.11.2014, the assesee was asked to furnish the details of all payments received by the assessee from any person in India and whether the entire receipts has been considered as taxable in India. In response to the said notice, the assessee has vide letter dated 10.02.2015 submitted that an amount of Rs.7,81,23,918/- as tabulated below was also received and the same has not been considered taxable in India.

Sr.No.	Description of Receipt	Amount (in Rs.)
1	Other Consultancy Income	12,589/-
2	Testing Charges	3,11,957/-
3	Training Expenses	40,19,007/-
4	Reimbursement of expenses received	4,82,100/-
5	Import of Carton components & spares	7,28,182/-
6	Credit Notes/Reversals	-72,99,886/-
7	Service Income-IT support & maintenance allocation	7,98,69,699/-
	Total non taxable transactions	7,81,23,918/-

3. Order u/s.143(3) read with section 92CA was passed by the Assessing Officer on 28.03.2016 accepting the submissions made by the assessee and assessing the total income at the income returned by the assessee. No supporting invoices or documents has been filed by the assessee in respect of the receipts not considered taxable in India. With regard to the major receipt of service income of Rs.7,98,69,699/-, it is submitted by the assessee that the same is not considered taxable under the Most Favoured Nation clause inserted in the India Sweden DTAA and hence, the restrictive definition of 'fees for technical services' as defined in Article 12(4) of the India Portugal DTAA will apply and as the services do not make available any technical knowledge, experience, skill, know-how etc. to Tetra Pak India, the services are not taxable in India. However no supporting documents has been furnished by the assessee in the course of the assessment proceedings to establish that the services rendered by the assessee to Tetra Pak India, i.e. IT support & maintenance do not make available any technical knowledge, experience or skill. Further an amount of Rs.5,26,092/- received on account of training expenses has been offered for taxation. However training expenses of Rs.40,19,007/- has not been offered for taxation with no supporting documents to establish how the two receipts were different and considered for taxation independently and differently. It has been held in a plethora of cases (ITO v Veeda Clinical Research Pvt. Ltd. 2013-TII-122-ITAT-AHM-INTL., MOU to the India-USA Tax Treaty (Example 6), Sahara Airlines Ltd. V DCIT (2003) 79 TTJ 268 (Del.), Hindalco Industries Ltd. V. ACIT (2005) 94 TTJ 944 (Mum), JCIT v. Kaiser Aluminium Technical Services Inc. ITA No.826/Mum/99, International Tire Engineering Resources LLC In re (2009) 319 ITR 228 (AAR)) that the receipts from the area of technical training are taxable as 'fees for technical services' as the said services could not make technology available to the recipient. Further it has been held by the Hon'ble Mumbai Bench of the ITAT in the case of WNS North America Inc v. ADIT (International Taxation)-2(2), Mumbai (2013) 141 ITD 117 (Mumbai – Trib.) that the onus is on the taxpayer to produce adequate documentation before the Revenue to demonstrate that it has merely received 'reimbursement' of expenditure actually incurred on behalf of

the service recipient without any markup. No supporting documents have been filed by the assessee to support the claim that the receipts of Rs.4,82,100/- was purely on account of reimbursement of expenses and that there was no markup with regard to the said expenses.

4. It is clear from the records that the Assessing Officer while passing the order dated 28.03.2016 has not formed an opinion on the basis of documentary & supporting evidences that the receipts to the tune of Rs.7,81,23,918/- are not taxable in India. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of ITO v. TechSpan India Private Limited (2018) 255 Taxman 152 (SC) wherein the Hon'ble Supreme Court has in Para 12 of its order dated 24.04.2018 observed as under ;

"Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment made earlier has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the AO any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings."

5. In the light of the discussion in the preceding paragraphs, I have reason to believe that income chargeable to tax of Rs.7,81,23,918/- has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year 2012-2013. The assessee has during the course of the original assessment proceedings failed to furnish the bills, invoices & supporting documents to establish its case that the receipts to the tune of

> Rs.7,81,23,918/- are not taxable in India. The income which has escaped assessment amounts to or is likely to amount to Rupees One Lakh or more for the said assessment year."

5. A bare perusal of the above reasons deciphers that the AO wanted to bring the sum of Rs.7,81,23,918/- within the ambit of chargeability, which was considered by the assessee as not taxable in India and got accepted by the AO during the original assessment. At this stage, it is relevant to note the mandate of first proviso to section 147 of the Act which provides that where an assessment has been completed u/s.143(3), no action shall be taken under this section after expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The assessment year under consideration is 2012-13. Original assessment u/s.143(3) of the Act was completed on 28-03-2016. A copy of the assessment order has been placed at pages 2 onwards of the paper book. The period of four years from the end of the relevant assessment year draws to close on 31-03-2017. Notice u/s.148, a copy placed at page 10 of the paper book, was issued on 29-03-2019, which is obviously beyond a period of four years from the end of the relevant assessment year. In such circumstances, we need to ascertain if there was any

failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. From the reasons reproduced above, it is seen that the AO initiated reassessment on the ground that the assessee received a sum of Rs.7.81 crore which was not offered for taxation. It is seen that during the course of original assessment proceedings, the AO conducted inquiry on this point vide notice u/s.142(1) dated 24-11-2014, as has also been referred to in the reasons extracted above. In response thereto, the assessee submitted details of its taxable transactions at Rs.1,89,73,041/- and non-taxable transactions totalling to Rs.7,81,23,918/- vide letter dated 10-02-2015, a copy of which has been placed at page 101 of the paper book. Bifurcation of such non-taxable transactions has been given in tabular form. First column of such Table is `Nature of services'; next column is `amount received'; next is `whether taxable in India'; and the last column is `Remark'. The assessee gave item-wise details of the amounts totalling Rs.7.81 crore with respective amounts and specifically mentioning that the amount is not chargeable to tax in India. Not only that, the assessee also gave detailed submissions as to why the respective amounts were not chargeable to tax. For example, as against the `Testing Charges', the assessee gave copious reasons at page 125 of the paper book as to

why the amount is not chargeable to tax. In the like manner, the assessee gave detailed reasons at page 129 of the paper book for receipt of `Training Expenses'. Similar is position for all other items. On perusal of the details and reasons furnished by the assessee as to why amounts were not offered for taxation, the AO got convinced and completed the assessment u/s.143(3) of the Act on 28-03-2016 accepting the returned income as total income. The AO in the reasons has fairly taken note of this fact that the assessee was asked to furnish the details of all the amounts received by it from any person in India during the course of original assessment proceedings and the assessee complied with the same by submitting that a sum of Rs.7.81 crore was received but was not chargeable to tax. Notwithstanding that, the AO initiated reassessment proceedings by observing in the reasons that "No supporting documents have been furnished by the assessee in the course of assessment proceedings to establish that the services rendered by the assessee to Tetra Pak India, i.e. IT Support and Maintenance did not make available any Technical Knowledge, Experience or Skill." On going through the relevant material on record, it becomes emphatically clear that the assessee disclosed fully and truly all material facts necessary for the assessment during the course of original proceedings completed

u/s.143(3) and there was nothing which was withheld by it. What inference the AO draws from the material placed before him is a secondary question and matter of concern for the Department only. Insofar as the proviso to section 147 is concerned, the same gets immediately magnetized when it is proved that the original assessment was completed u/s.143(3) and a period of four years has elapsed form the end of the relevant assessment year and further there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

6. Adverting to the facts of the instant case, we find that there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment completed u/s.143(3). Since the period of four years from the end of the relevant assessment year expired at the time when the AO issued notice u/s.148, we hold that such a notice and the consequential assessment order are bad in law and hence vitiated.

A.Y. 2013-14 :

7. The factual panorama for this year is almost similar to that of the assessment year 2012-13. For this year also, the assessee filed return declaring total income of Rs.1,83,93,865/-. The original

assessment u/s.143(3) was completed on 28-03-2016 on the returned income. Thereafter, the AO issued notice u/s.148 on 29-03-2019 on the ground that a sum of Rs.9,26,60,482/- declared by the assessee in the original assessment as not chargeable to tax, was, in fact, includible in the total income of the assessee. The draft assessment u/s.143(3) r.w.s. 144C(1) and section 147 of the Act was notified on 27-12-2019 computing total income at Rs.11,10,54,350/-. The assessee unsuccessfully challenged the initiation of reassessment proceedings before the DRP. The final assessment order u/s. 143(3) r.w.s. 147 and section 144C(13) was passed on 01-04-2021 determining total income at Rs.11.10 crore. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

8. We have heard the rival submissions and gone through the relevant material on record. Initiation of reassessment has been challenged on the same basis as is for the assessment year 2012-13. The original assessment in this case was finalised on 28-03-2016. Notice u/s.148 was issued on 29-03-2019 which is beyond a period of four years from the end of the relevant assessment year. Proviso to section 147 mandates that no reassessment can take place after four years from the end of the relevant assessment year when the original assessment was completed u/s.143(3) and there is no failure

on the part of the assessee to disclose fully and truly all material facts necessary facts for reassessment. Here again, we find that the AO inquired about the amounts received by the assessee not offered for taxation during the course of original assessment proceedings by means of a notice u/s.142(1) of the Act. The assessee furnished details of income of Rs.9.26 crore not offered for taxation in its reply with the necessary justification. A copy of the assessee's reply dated 07-03-2016 has been placed at page 110 of the paper book. Thus, it is evident that the AO initiated reassessment proceedings by means of notice u/s.148 dated 29-03-2019 after four years from the end of the relevant assessment year when the original assessment was completed u/s.143(3) and there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Following the view taken hereinabove, we quash the notice u/s.148 and the consequential assessment order.

9. In the result, both the appeals are allowed.

Order pronounced in the Open Court on 09th December, 2021.

Sd/-	Sd/-
(PARTHA SARATHI CHAUDHURY)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 09th December, 2021
सतीश

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. The Respondent
3. प्रत्यर्थी / The DRP-3, Mumbai-1/ DRP-3, Mumbai-2/ DRP-3, Mumbai-3/
4. The CIT(IT & TP), Pune
5. DR, ITAT, 'C' Bench, Pune
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	09-12-2021	Sr.PS
2.	Draft placed before author	09-12-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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