

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 2<sup>ND</sup> DAY OF JUNE 2014

PRESENT

THE HON'BLE MR.JUSTICE N. KUMAR

AND

THE HON'BLE MR.JUSTICE B. MANOHAR

I.T.A. NO.35/2010

BETWEEN:

THE DIRECTOR OF INCOME-TAX  
INTERNATIONAL TAXATION  
RASHTROTHANA BHAVAN,  
NRUPATHUNGA ROAD,  
BANGALORE. ... APPELLANT

(BY SRI.K V ARAVIND, ADV.)

AND:

M/S SUN MICROSYSTEMS INDIA PVT. LTD.,  
6<sup>TH</sup> FLOOR, DIVYASHREE CHAMBERS  
OFF. LANGFORD ROAD  
BANGALORE-560 025. ... RESPONDENT

THIS ITA FILED U/S. 260-A OF I.T ACT, 1961  
ARISING OUT OF ORDER DATED 21-8-2009 PASSED IN ITA  
NO.443/BANG/2006, FOR THE ASSESSMENT YEAR 2005-  
2006, PRAYING TO:

- I. FORMULATE THE SUBSTANTIAL QUESTIONS OF  
LAW STATED THEREIN AND TO

- II. ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE ITAT, BANGALORE IN ITA NO.443/BANG/2006, DATED 21-8-2009 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE INCOME TAX OFFICER (INTL., TAXN.,) WARD-19(2), BANGALORE

THIS APPEAL COMING ON FOR ADMISSION, THIS DAY, **N.KUMAR, J.**, DELIVERED THE FOLLOWING:

### **J U D G M E N T**

The following substantial question of law would arise for consideration in this appeal:

“Whether the Tribunal was correct in holding that as technology, experience or skill has not been made available to the assessee as per Article 12(4) of DTAA between India and Singapore, the payments made by the assessee were not liable to be taxed under the head “fees for technical services?”

2. The material on record discloses that the assessee entered into an agreement for availing

logistic service for Sun Microsystems Singapore Private Limited ('Sun Singapore' for brevity). In terms of the agreement, Sun Singapore is required to provide distribution, management and logistic services to Sun Microsystems India Private Limited ('Sun India' for brevity) and such services included providing spare management services, provision of buffer stock, defective repair services, managing local repair centers, business planning to address service levels etc. Sun Singapore is not having any place of business or permanent establishment in India. Entire services were rendered by Sun Singapore from outside India. Sun Singapore is not engaged in the business of providing logistic services in India. Sun India the assessee avails services of Sun Singapore for which a service fee is paid. From the business description of the assessee, it is clear that assessee is engaged in marketing and support system of hardware and software products.

The material on record do not disclose that Sun Singapore has made available to the assessee its technical knowledge, experience or skill. Under these circumstances, the Tribunal held that, as Sun Singapore is not having any permanent establishment and that Sun Singapore has not made available the technical knowledge, experience or skill, the payments made by assessee to Sun Singapore were not required to be taxed under the head “business” and is not taxable in view of Article 7 of DTAA between India and Singapore. The revenue is challenging the said finding on the ground that the terms of the agreement provides for making available inventory physical movement and self control process, assistance to enable inventory transactions and management and business planning to address service level relating to the local business and customer needs. However, the

assessee is not utilizing the said services in order to avoid deduction tax at source.

3. This Court had an occasion to consider this agreement in the case of **Commissioner of Income Tax and others Vs. De Beers India Minerals (P) Ltd.**, reported in (2012) 346 ITR 467, where, after referring to various provisions of law, it was held that the question, whether along with rendering technical services, whether the technical knowledge with which the services was rendered was also made available to the assessee/customers is purely a question of fact which is to be gathered from the terms of the contract, the nature of services undertaken and what has transmitted in the end after rendering technical services. If along with technical services rendered, If the service provider also makes available the technology which they used in rendering services, then it falls within the definition of “fees for technical services” as

contained in DTAA. However, if technology is not made available along with technical services what is rendered is only technical services and the technical knowledge is withheld, then, such a technical service would not fall within the definition of “technical services” in DTAA and the same is not liable to tax.

4. From the facts of this case, it is clear that Sun Singapore has not made available to the assessee the technology or the technological services which is required to provide the distribution, management and logistic services. That is a finding of fact recorded by the Tribunal on appreciation of the entire material on record. When once factually it is held the technical services has not been made available, then in view of the law declared in the aforesaid judgment, there is no liability to deduct tax at source and therefore, the finding recorded by the Appellate Authority cannot

be found fault with. In that view of the matter, the substantial question of law is answered in favour of the assessee and against the revenue.

5. Accordingly, the appeal is dismissed.

Sd/-  
JUDGE

Sd/-  
JUDGE

RS/\*