

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं./I.T.A No.4879/Del/2018

निर्धारणवर्ष/Assessment Year:2014-15

DCIT Circle 1(1)(1), International Taxation, Room No.410, E-2 Block, 4 th Floor Civic Centre, New Delhi.	<u>बनाम</u> Vs.	CEVA Asia Pacific Holdings Company Pte. Ltd., No.15, Changi South Street-2, Singapore, Singapore.
		PAN No.AAEECC1885A
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

आ.अ.सं./I.T.A No.4847/Del/2018

निर्धारणवर्ष/Assessment Year:2014-15

CEVA Asia Pacific Holdings Company Pte. Ltd., Singapore, C/o B B SHAH & CO., RAJGURU APARTMENTS, GROUND FLOOR, BABURAO PARULEKAR ROAD, DADAR WEST, MUMBAI, Maharashtra.	<u>बनाम</u> Vs.	DCIT Circle 1(1)(1), International Taxation, New Delhi.
PAN No.AAEECC1885A		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

आ.अ.सं./I.T.A No.712/Del/2015

निर्धारणवर्ष/Assessment Year:2011-12

CEVA Asia Pacific Holdings Company Pte. Ltd., KPMG, Building No.10-B, 8 th Floor, DLF Cyber City, Phase-II, Gurgaon.	<u>बनाम</u> Vs.	DCIT Circle 1(2)(1), International Taxation, New Delhi.
PAN No.AAEECC1885A		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

आ.अ.सं./I.T.A No.1389/Del/2016

निर्धारणवर्ष/Assessment Year:2012-13

CEVA Asia Pacific Holdings Company Pte. Ltd., 21, Jalan Buroh, Singapore.	<u>बनाम</u> Vs.	DCIT Circle 1(2)(1), International Taxation, 4 th Floor, E-2 Block, Pratyaksh Kar Bhawan, Civic Centre, New Delhi.
PAN No.AECC1885A		
अपीलार्थी Appellant		प्रत्यर्थी/ Respondent

आ.अ.सं./I.T.A No.5950/Del/2016

निर्धारणवर्ष/Assessment Year:2013-14

CEVA Asia Pacific Holdings Company Pte. Ltd., C/o B B SHAH & CO., RAJGURU APARTMENTS, GROUND FLOOR, BABURAO PARULEKAR ROAD, DADAR WEST, MUMBAI, Maharashtra.	<u>बनाम</u> Vs.	DCIT Circle 1(1)(1), International Taxation, 4 th Floor, E-2 Block, Pratyaksh Kar Bhawan, Civic Centre, New Delhi.
PAN No.AECC1885A		
अपीलार्थी Appellant		प्रत्यर्थी/ Respondent

आ.अ.सं./I.T.A No.8111/Del/2019

निर्धारणवर्ष/Assessment Year:2010-11

DCIT Circle 1(2)(1), International Taxation, Room No.410, E-2 Block, 4 th Floor Civic Centre, New Delhi.	<u>बनाम</u> Vs.	CEVA Asia Pacific Holdings Company Pte. Ltd., No.15, Changi South Street-2, Singapore, Singapore.
		PAN No.AECC1885A
अपीलार्थी Appellant		प्रत्यर्थी/ Respondent

आ.अ.सं./I.T.A No.7570/Del/2019
निर्धारणवर्ष/Assessment Year:2010-11

CEVA Asia Pacific Holdings Company Pte. Ltd., 21, Jalan Buroh, Singapore.	बनाम Vs.	DCIT Circle 1(1)(1), International Taxation, 4 th Floor, E-2 Block, Pratyaksh Kar Bhawan, Civic Centre, New Delhi.
PAN No.AAECC1885A		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

Revenue by	Ms. Prajna Paramita, CIT-DR & Shri Sanjay Kumar, Sr. DR
Assessee by	S/Sh. Salil Kapoor, Manuj Sabharwal & Vibhu Jain, Advocates

सुनवाईकीतारीख/ Date of hearing:	05.07.2023
उद्घोषणाकीतारीख/ Pronouncement on	25.09.2023

आदेश /O R D E R

PER C.N. PRASAD, J.M.

All these appeals are filed by Assessee and Revenue for the assessment years 2010-11 to 2014-15 against different orders of the Ld. Commissioner of Income Tax (Appeals).

2. Since the issues are common in all these appeals, the same were heard together and disposed of by way of common order for the sake of convenience. First we take up the appeal of the Revenue for the AY 2014-15 which would cover most of the grounds

of the assessee as well as the Revenue. The Revenue in its appeal for the AY 2014-15 raised the following ground: -

1. *“Whether on the facts and circumstance of the case the Ld CIT(A) has erred in giving relief of an amount of Rs.4,44,37,942/- out of total addition of Rs.6,72,88,703/- made by the AO on account of Fee for Technical Services [FTS] holding that services of the nature of Management Support, treasury Support, Legal Support, Information & Communication and Human Resources are not of the nature of FTS as 'make available' clause is not satisfied in case of these services disregarding the facts that the employee of the assessee visited India in connection with rendering of these services and the recipient was enabled to derive benefit of enduring nature from receipt of these services thus satisfying the 'make available' clause.”*

3. Brief facts are that the assessee is a company incorporated under the laws of Singapore and is engaged in the business of providing transportation, logistics and supply chain solutions. The principle activities of the assessee are in the nature of management and support activities to its subsidiaries and related corporation in the Asia Pacific region. During the year under consideration, the assessee has received the following revenue from India: -

1. *Management fee Rs.6,72,88,730/-*
2. *Software license fee of Rs.36,94,196/-*
3. *Reimbursement of expenses Rs.21,96,062/-*

The assessee filed its return of income on 28.11.2014 declaring income of Rs.36,94,196/- offering to tax the amount of software

license fee. The assessee did not offer to tax the amount of management fee and the amount of reimbursement expenses. The Assessing Officer accepted that reimbursement of expenses as not taxable in India as was accepted in earlier years i.e. 2012-13 and 2013-14 upon the direction of the DRP. However, coming to management fee the Assessing Officer observed that on perusal of Intra Group Service Agreements the assessee has provided following services to its various group companies: -

- i. Management Support;*
- ii. Finance and Treasury functions;*
- iii. Information Technology Support;*
- iv. Marketing & Sales Services;*
- v. Human Resources and Administrative Support;*
- vi. Legal Support;*
- vii. Operations & Standardization.*

4. The Assessing Officer held that the assessee has provided the above support services to its Indian affiliates which are clearly in the nature of managerial and/or consulting services and the receipts on such services constitute Fee for Technical Services (FTS) u/s 9(1)(vii) of the Act. The Assessing Officer also observed that the scope of services rendered by the assessee under the Administrative Support Service Agreement is verified and is not limited to the services specified therein, as specifically mentioned

in the said agreement. The Assessing Officer observed that the services mentioned in the agreements are relating to bids, sale proposals, financing business operations, credit and collections management, risk and investment management, treasury and banking management etc. all involved taking of commercial and financial decisions and, therefore, clearly in the nature of FTS. The Assessing Officer also observed that rendering of services involving advise, guidance etc. is certainly involve transfer of knowledge, experience and expertise which enables the recipient to utilize the knowledge so acquired and this certainly a situation in which knowledge or experience is “made available” and, therefore, the conditions specified in Clause (4) of Article 12 of Indo Singapore DTAA are satisfied. Therefore, the AO concluded that the above services “made available” the knowledge and experience to its Indian affiliate which enabled them to apply that knowledge and technology to their own business fall within the purview of FTS u/s 9(1)(vii) of the Act as well as under the Indo Singapore DTAA. Accordingly, the management fee of Rs.67,88,703/- received by the assessee was treated as FTS and brought to tax @10% as per Indo Singapore DTAA.

5. On appeal, the Ld.CIT(A) in so far as the Management Support Services and Management Support, Finance and Treasury functions, Information Technology Support, Human Resources and Administrative Support and Legal Support are concerned held that these services do not satisfy the “make available” clause as mentioned in Clause (4) of Article 12 of the Indo Singapore DTAA and, therefore, held that the same are not chargeable to tax as Fees for Technical Services. However, coming to the Marketing and Sales Operations and Standardization are concerned, the Ld.CIT(A) held that the receipts for these services attract “make available” clause as per Article 12(4) of Indo Singapore DTAA and, therefore, they are liable to tax under FTS.

6. The Ld. DR submits that analysis of the services rendered by the assessee to its group entities through Administrative Support Agreement dated 01/01/2006 and which was later revised w.e.f. 01/01/2010 shows that the services are in the nature of technical/consultancy/managerial or management consultancy services and this fact was brought out by the Assessing Officer in the assessment order. Ld. DR submits that the Hon’ble Apex Court in the case of G.V.K. Industries held that the consultancy services u/s 9(1)(vii) can be rendered with or without expertise of

technology. Therefore, the expression experience, knowledge, skill used in the DTAA if looked into keeping in view the decision of the Supreme Court then it was implied that the services not based on technology which used professional experience, knowledge or skills are also covered within the ambit of consultancy services as appearing under Article 12(4) of DTAA in addition to the consultancy services which may be based on technical expertise. The Ld. DR therefore, submits that the harmonious interpretation of DTAA would therefore mean that when the nature of consultancy services is such where no technology is used the clause of “make available” would not be applicable. Otherwise, it would imply the consultancy services which do not use of technology cannot ever qualify as FTS/FIS under DTAA under any circumstances where “make available” clause is mentioned thereby making the presence of expression consultancy services totally reddened under DTAA. The Ld. DR further submits that a clear cut distinction is there between the words managerial, technical and consultancy services in section 9(1)(vii) and such a distinction was read into the DTAA also while applying the test of “make available” clause of DTAA. When the expression managerial, technical and consultancy services is appearing in the act and the DTAA signed by the India, then it is

clear that these phrases have to be given same meaning under the act and DTAA.

7. On the other hand, the Ld. Counsel for the assessee strongly supported the orders of the Ld.CIT(A) in so far as the services wherein the Ld.CIT(A) held that there is no “make available” condition satisfied under article 12(4) of Indo Singapore DTAA. With respect to marketing and sales services and operations and standardization where the Ld.CIT(A) held that “make available” clause is attracted for the services, the Ld. AR submits as under:

“These services as per the agreement are in the nature of the following:

- *Provide sales training to local business development employees;*
- *Coordinate customer bidding and pricing process;*
- *Create advertising brochures, newsletters, and sales sheets;*
- *Develop and place marketing and promotional materials.*

The appellant provides training to the business development employees as regards product types, product mix, product features offered by CEVA group, market positioning of the group, credit policies, CEVA vision, parameters of customer satisfaction, anti-bribery legislation, service level quality standards, targets, approval process, information security, data protection, confidentiality etc. in place so that they know what is expected by CEVA group and its clients. It is submitted that these activities by the appellant does not create/

build any capacity and consists of merely informing the employees regarding the organization and its policies so that they get acquainted with the work culture and know clear expectations of the group. This cannot be regarded as training per-se but a kind of induction familiarization to understand the expectations of the group. Therefore, the consideration relatable to the above cannot be characterized as FTS under Article 12(4) of India-Singapore tax treaty.

The appellant submits that following training programs have been devised by the head office (CEVA Logistics Head office BV) along with the appellant for the employees of India affiliate.

- 1. Core Compliance training;*
- 2. Global Compliance training - this includes training with regard to anti-corruption practices and code of business dealings;*
- 3. Information security awareness training for usage of CEVA computer / systems;*
- 4. Information security awareness training outlining basic information security awareness principles.*

The appellant also coordinates with the India affiliate with customer bidding and pricing process. The entities are also able to leverage from marketing and promotional publications prepared at the regional level. The CEVA brand is now well recognized in the Asia Pacific region due to various business development activities in the region. In the recent years, despite the economic downturn, the Asia Pacific business has not been affected due to the integrated customer management efforts undertaken at a regional level.

As discussed above, the appellant submits that the training provided by the appellant does not in any way makes available any technical knowledge to the India affiliate to perform these services on their own rather

these training are for acquainting the employees with the organizational policies, expectations, standards etc.

It is submitted that training per se, would not result in make available of technology, experience, skill, processes, etc., unless the training involves the transfer of technology, processes, skills, etc., to the recipient in a manner which enables the recipient to apply the technology and to derive benefit therefrom without recourse to the tutor, it would not fall within the expression "technical services" as defined in the Treaty.

It is submitted that the conclusion of the Id. CIT(A) that the purpose behind these services is to equip the marketing team to provide creative solutions to their customers, and hence the services shall be classified as 'making available' technology etc is devoid of any merits as the purpose of these services is not to provide any technical training but to acquaint the employees regarding the organizational policies and work culture so that they can efficiently perform the services expected out of them. At the cost of repetition, it is submitted that the employees of India affiliate are given acquainted with anti-bribery legislations of the UK, data protection laws etc. of the EU so as to comply with the international obligations of the group (as it operates worldwide and these regulations apply to Indian employees also). These trainings cannot, by any stretch of imagination, equip India affiliate to perform the marketing services on their own and hence the provisions of Article 12(4) are not attracted on facts of the case.

Operation and Standardization

The broad category of services as per the agreement is as follows:

Regional training, assistance, and management of LEAN initiatives;

- Advice on standardization of warehouse designs;*
- Implement and train employees on standard logistics operating processes;*

- *Develop standard solution sets and evaluate regional best practices;*
- *Maintenance of security manuals and training of security managers.*

If is submitted that, the appellant is involved in providing training for intimating the employees employed by India affiliate regarding the standard steps to be followed in executing an order/ trade / business. This improves customer satisfaction and helps in reducing overall cost for the Indian affiliate/ organization. It is submitted that these activities by the appellant does not create/ build any capacity and consists of merely informing the employees regarding the organization and its policies so that they are aware of the clear guidelines/ expectations of the group.

The operations development team is engaged in the strategic management of various products, i.e. freight management, contract logistics and ground transport, and is involved in the plans relating to the development of the respective market segments. Additionally, the team focuses on managing operational efficiencies through the development of processes and standards together with driving operational compliance.

These services can at best be said to be advisory in nature as the act of creation of polices, tools, procedures etc cannot be absorbed by the employees of the India affiliate while implementing the actual procedures etc. and therefore there is no transfer of knowledge to the Indian affiliate in that sense.

In connection with the training, the appellant submits that following training programs have been devised by the head office (CEVA Logistics Head office BV) along with the appellant for the employees of India affiliate:

1. *Core Compliance training;*
2. *Global Compliance training - this includes training with regard to anti-corruption practices and code of business dealings;*

3. *Information security awareness training for usage of CEVA computer / systems;*
4. *Information security awareness training outlining basic information security awareness principles.*

Since in the instant case, the training was for intimating the employees employed by India affiliate regarding the standard steps to be followed in executing an order / trade / business. This improves customer satisfaction and helps in reducing overall cost for the Indian affiliate / organization. It is submitted that training per se, would not result in make available of technology, experience, skill processes, etc., unless the training involves the transfer of technology, processes, skills, etc., to the recipient in a manner which enables the recipient to apply the technology and to derive benefit therefrom without recourse to the tutor, it would not fall within the expression "technical services" as defined in the Treaty .

Such trainings do not 'make available' technical knowledge, experience, skill, know-how or processes. There was no transfer of technology. It merely facilitated the employees of the appellant to work in accordance with the expected standards. Thus, the training did not 'make available' any technical knowledge, experience, skill, know-how or processes."

8. Heard rival submissions, perused the orders of the authorities below. We observe that the Assessing Officer treated the management fee received by the assessee under administrative support agreement as fee for technical services read with article 12(4) of Indo Singapore DTAA. The Ld.CIT(Appeals) on examining the e-mails, the correspondence between the assessee and its group entity in India concluded that in so far as the following services the

“make available” clause as per clause IV of article 12 of DTAA is not satisfied and, therefore, they are not liable to tax as FTS:

1. *Management Support;*
2. *Finance & Treasury functions;*
3. *Information Technology Support;*
4. *Human Resources and Administrative Support; and*
5. *Legal Support*

We observe that the Ld.CIT(A) after examining the submissions of the assessee, evidences on the record in the form of e-mail invoices and the written submissions filed by the assessee concluded that the above services are not liable to tax under FTS holding as under:

“5.16 In the backdrop of the above facts and submissions, it is important to analyze the methodology of delivery of services to examine the presence of critical factor of making available of the technology/skill set/experience along with delivery of services. The broad category of services included under the aforesaid agreement is as follows:

(A) MANAGEMENT SUPPORT SERVICES

6.1 These services as per the agreement are in the nature of the following:

- > Customers relations and competitor analysis;*
- > Business strategy and market intelligence;*
- > Regional strategic planning and business development.*

6.2 The appellant explained the nature of management support services which is reproduced as under:-

"These services are rendered through the office of Regional President. The Regional President spends a relatively large proportion of his time on emerging markets (China and India as the emerging markets account for approximately half of the Group's revenue in the region) compared to some of the smaller markets, such as Philippines and Malaysia.

The Regional President travels in the region and meets key customers in the region during the field visits. In addition to field visits/face to face meetings, there is a regular meeting of the Asia Pacific Board members (directors) every month to review strategy, financial information, key business decisions, etc. of the entities forming Asia Pacific region. In addition, every quarter the Regional President participates in quarterly business reviews for which the worldwide Chief Financial Officer (CFO) and Chief Executive Officer (CEO) are involved. Overall, the Regional President provides key strategy input, approvals and review for the region."

6.3 The arguments of the applicant on the basis of the cited rulings (E&Y (230 CTR 355) and Measurement technology limited (AAR no. 966 of 2010)) are summed up as under:

- The support functions performed by the applicant are aimed at facilitating uniformity in the conduct of the business of India affiliate. It does not amount to 'making available' the technical knowledge and experience of the applicant to the recipient;*
- There is no transfer of technical know-how nor can it be said that the recipient has been enabled to apply the technology which is possessed by the applicant.*

6.4 The appellant submitted seven e-mails on sample basis to demonstrate the nature of services provided

under the head "Management Support Services". The same are discussed as under:-

Date of e-mail: March 28, 2018

6.5 This e-mail is exchanged between the CEO office to the locally operating entities / AP team wherein it was intimated to the group entities that CEVA has been nominated to handle freight for PANASONIC LCL. The summary of the award which has been awarded to CEVA is as follows:

- Ocean Import - All USA*
- Ocean Export - China & India*
- Volume: 80-90 Shipments per year.*

Date of e-mail: February 14, 2018

6.6 This e-mail is exchanged between the CEO office to the locally operating entities / AP team wherein the CEO office has intimated to the group entities that CEVA has been awarded some freight lanes by ANSELL. In connection with India affiliate, ANSELL has awarded the following lanes:

SERVICE PROVIDER	LANE ID	OC-FULL NAME (Origin)	OA-FULL NAME (Origin)	DC-FULL NAME (Destn)	DA-FULL NAME (Destn)	SHIPMENT TYPE	Awards
CEVA	070/Q1-2018	India	Kolkata	UAE	Dubai	ATA	Primary
CEVA	071/Q1	India	Kolkata	Australia	Sydney	ATA	Primary
CEVA	072/Q1	India	Kolkata	Belgium	Brussels	ATA	Primary
CEVA	073/Q1	India	Kolkata	Sri Lanka	Colombo	ATA	Primary
CEVA	075/Q1	India	Delhi	Belgium	Brussels	ATA	Primary
CEVA	076/Q1	India	Chennai	Belgium	Brussels	ATA	Primary
CEVA	077/Q1	India	Chennai	Malaysia	Kuala Lumpur	ATA	Primary

Date of e-mail: January 22, 2018

6.7 This e-mail is exchanged between the CEO office to the locally operating entities / AP team wherein the CEO office has intimated to the group entities that CEVA has been awarded some new business by GSA. In connection with India affiliate, ANSELL has awarded the following new business:

Origin City	Destination Region	Destination Clusters	Country	City	Awarded	Existing	WEIGHT DETAILS				
							Gross Weight [metric tons]	Average Weight [metric tons]	Gross Volume [cbm]	Average Volume [cbm]	# of shipments
Coimbatore	AP	North Asia	JP	Kariwa	yes	NO	93	0.75	216	1.73	63
Coimbatore	AP	North Asia	JP	Kariwa	yes	NO	93	0.75	216	1.73	63
NhavaSheva	AP	Mekong	VN	Haiphong	yes	NO	50	1.00	100	2.00	50
Sangli	Europe	France	FR	Corde Sur Noireau	yes	NO	24	0.45	85	1.73	25
Sangli	Europe	France	FR	Corde Sur Noireau	yes	NO	24	0.45	85	1.73	25
Sangli	Europe	Italy	IT	Casavatore	yes	NO	24	0.74	55	1.73	16
Sangli	Europe	Italy	IT	Casavatore	yes	NO	24	0.74	55	1.73	16

Date of e-mail: January 22, 2018

6.8 This e-mail is exchanged between the CEO office to Ms. Manisha Salian, Senior executive India Pricing Desk (employed by the Indian affiliate) wherein the CEO office has intimated about the win regarding the Air freight business from MICHAEL KORS.

Date of e-mail: March 13, 2018

6.9 This e-mail chain is exchanged between the CEO office to the locally operating entities / AP team wherein the CEO office has intimated to the group entities that CEVA has been nominated to handle freight for PHILIPS' Air freight business. Following business was awarded to the CEVA group:

Air	Volume [metric tons]
Existing	0.0
Loss	0.0
Retention	0.0
New Win	12,938.6
Total Award	12,938.6

Date of e-mail: March 22, 2018

6.10 This e-mail chain is exchanged between the CEO office to the locally operating entities / AP team wherein the CEO office has intimated to the group entities that CEVA has been nominated to handle freight for TOSHIBA Air freight business. The summary of award is as follows:

SUMMARY of AWARD

Air: We grew by +3% (93.6 tons) over our existing business

Air	ChgWt (Tons)
New Win	106.8
Retention	3,254.4
Lost	13.2
Total in 2018	3,361.2
Total in 2017	3,267.6
Increase	93.6

Date of e-mail: March 22, 2018

6.11 This e-mail chain is exchanged between the CEO office to the locally operating entities / AP team

wherein the CEO office has intimated to the group entities that CEVA has been nominated to handle freight for VISTEON Air and Ocean Freight Contract Logistics.

6.12 From the emails as discussed above, it transpires that the CEO Office is involved in acquiring new customers as per the business strategy and these contracts have been awarded to the group entities due to the efforts of CEO/CFO/Regional President of APAC region along with business development team. I find that effectively, in this case, the Indian Affiliate has got client referral and thereafter, it starts working on the orders placed by such clients. I find that the functions such as maintaining customers' relations and performing competitor analysis, business strategy and market intelligence, regional strategic planning and business development are being performed at CEO office level based on data inputs taken from various group entities. The end result of such functions is the business development for the group entities in the form of "client referral". Effectively, the final outcome of the services is received by the recipient of the services and the process of performing functions such as maintaining customers' relations and performing competitor analysis, business strategy and market intelligence, regional strategic planning and business development has not been shared in this case under the head "management support services".

6.13 So, it is a case of sharing of output of services with CEVA India. AAR ruling in Measurement Technologies Ltd. where it had ruled that procurement services can neither be classified as technical or consultancy in nature nor as making available any technical knowledge, experience etc. Therefore, I hold that such services do not make available technology/know-how/experience to the recipient of the services.

(B) FINANCE AND TREASURY SUPPORT SERVICES

7.1 The broad category of services as per the agreement are as follows:

- Financial review, variance analysis, and budgeting
- Financial planning, reporting and auditing
- Regional finance group policies implementation and a compliance
- Financial systems development
- Managements reporting and job costing
- Business, product, and customer profitability analysis
- Maintenance of banking relationship and electronic banking platforms
- Management of foreign exchange and cash-flow initiatives

7.2 The appellant explained the nature of Finance and Treasury Support services which is reproduced as under:-

"The Finance department includes activities relating to Financial Accounting, Management Accounting / Commercial Support, Tax and Treasury. The groups in this function provide support to the local CEVA entities including India.

Financial accounting

The Financial Accounting group's primary roles and responsibilities are listed below:

- *Financial planning and analysis;*
- *Financial reporting;*
- *Financial system and development;*
- *Financial audits for Asia Pacific entities;*
- *Quarterly forecasts for Asia Pacific entities;*
- *Company policies, business rules and compliance; and*
- *Annual budget implementation.*

Management accounting

The Management Accounting group's primary roles and responsibilities are:

- *Management reporting for Asia Pacific divisions including India;*
- *Job costing;*
- *Business analysis, including competitors analysis, strategic finance proposals, and gathering market intelligence for the Asia Pacific divisions;*
- *Product and customer profitability analysis;*
- *Intercompany policies implementation and compliance;*
- *Review and approve capital investments; and*
- *Budgeting and forecasting for local CEVA entities in the Asia Pacific region.*

Tax

The Tax group's primary roles and responsibilities are:

- *Tax planning and compliance;*
- *Management of relationships with external tax advisers;*
- *Tax restructuring across Asia Pacific where required;*
- *Budgeting and forecasting of cash taxes*

Treasury

The Treasury group's primary roles and responsibilities include:

- *Maintaining the banking relationship with CEVA's core third party multinational corporation bank;*
- *Implementation of regional liquidity model - pooling structure;*
- *Foreign exchange management;*

- *Cash management initiatives for Asia Pacific countries;*
- *Maintaining electronic banking platforms centrally;*
- *Appraisal and review of investment proposals;*
- *Intercompany loans portfolio management; and*
- *Banks guarantee facility management and issuance."*

7.3 *As against the functions performed by the appellant, the India affiliate presently having 30 odd employees in Finance and Accounts department spread over at 8 cities is performing the following functions:*

- *Book keeping*
- *Invoicing*
- *Follow-up for payments*
- *Payment processing*
- *Payroll processing*
- *India related management accounting*
- *Vendor liasioning*
- *Preparation of financial statements and filing of various returns required under tax and regulatory laws.*
- *Liasioning with statutory auditors, tax auditors etc*
- *Getting tax assessments done*
- *Dealing with regular financial / accounting matters*
- *Reporting to the top management*
- *Liasioning with other functions within the organization.*
- *Job Costing*
- *Customer profitability analysis*

7.4 The appellant submitted e-mails on sample basis to demonstrate the nature of services provided under the head "Finance and Treasury Support Services". The same are discussed as under:-

Date of e-mail: December 19, 2013 (refer serial no. 6 of submission dated November 6, 2017 and page 62 of the paper book)

7.5 This involves sharing of template prepared by the appellant to all the entities falling within the Asia Pacific region wherein the details for analytical review of both Profit and Loss account and Balance Sheet / fluctuation analysis for respective entity of CEVA group are sought. The handout appended with the e-mail provides guidelines for the purposes of performing fluctuation analysis.

Date of e-mail: November 22, 2013 (refer serial no. 7 of submission dated November 6, 2017 and page 67 of the paper book)

7.6 This involves sharing of monthly schedule prepared by the appellant to all the entities falling within the Asia Pacific region with instructions in the template. The handout appended with the e-mail provides guidelines for the purposes of performing the monthly tasks.

Date of e-mail: January 22, 2013 (refer serial no. 8 of submission dated November 6, 2017 and page 71 of the paper book)

7.7 Based on the data input by India affiliate, the appellant prepares one off summary of major items affecting the business processes of the Indian entity in the template provided by the appellant.

Date of e-mail: January 18, 2013 (refer serial no. 9 of submission dated November 6, 2017 and page 74 of the paper book)

7.8 Based on the data input by India affiliate related to revenue forecasts, the appellant analyses the same and shares the significant variance with the respective management team of the affiliates falling within the Asia Pacific Region. These variances are then discussed with

regard to the reasons attributable to the same, the main cause of concerns and the way in which the entities (including India affiliate) is managing those variances and the corrective action required to address the issues / variances.

Date of e-mail: July 29, 2013 (refer serial no. 10 of submission dated November 6, 2017 and page 93 of the paperbook)

7.9 This includes new Monthly Trading/ Review template and powerpoint which replaces the earlier Templates. As it involves sharing of template (which is prepared by the appellant), the information collected herein by the appellant is processed thereafter and appropriate controls are established / worked out to manage the deviations and the same is discussed with the management of India affiliate.

Date of e-mail: December 11, 2013 (refer serial no. 11 of submission dated November 6, 2017 and page 126 of the paper book)

7.10 By way of this e-mail, the standard steps related to shift in the "format" of reports in respect of month end closing are shared by the director of the appellant to the accounting / finance team of India affiliate. For example, "direct cost summary to branches" report has been shifted from "Excel" to "Insight".

7.11 The above emails highlight that these are in the nature of templates, reports, analysis and information in respect of shift in the formats of month end closing reports. When the templates or general guidelines to fill the templates are shared by the appellant, there is no sharing or dissemination of knowledge or experience to the India affiliate regarding the preparation of such template / processes/ steps etc. The India affiliate merely fills up the desired data set in the template. Once the data is fed by the India affiliate, the same is independently analyzed by the appellant and only the result of such analysis is then shared with the India affiliate. Therefore, I find that such services do not make available any technical knowledge, experience, know-how to the India affiliate.

7.12 It is evident from the above that the functions performed by Indian entity and the appellant entity are distinct. Accordingly, the functionaries of Indian entity at local level are equipped to handle the functions performed at local level in India. For example, bank relations for bank operations are maintained at appellant level and the Indian resources merely follow the directions of the appellant company in maintaining/operating bank accounts with a particular bank(s) as advised by the appellant. The decision of forex management is also taken by the appellant for the Indian entity. In other words, the appellant takes financial decisions on the issues as discussed above on behalf of the Indian entity. As a result of such services, CEVA entities including CEVA India receive a number of benefits from the intra-group finance services provided.

7.13 As pointed out by the appellant, financial services involve various activities such as (a) analysis of data, (b) audit, (c) forecasting analysis, (d) relationship with tax advisors and banks, (e) tax advice, (f) cash management and (g) loan portfolio management. In all such services, the recipient is provided with the decision taken by the experts at the appellant level. There is no involvement of the local entities in the decision making.

7.14 Furthermore, the entities benefit from economies of scale through the centralization of these strategic activities/ decision making. In the absence of regional finance function, each CEVA entity in Asia Pacific region would either have to expand its local finance resources and capabilities, or outsource the function to third party service providers. Hence, by centralizing the functions, each CEVA entity benefits from the reduced costs that are realized through economies of scale and increased specialization. I find that in this case, the services involve decision making on behalf of the group entities and therefore, the recipient of the services get only the final decision in respect of various financial issues. The recipient only complies with such decision without receiving the know-how based on which such decision has been taken.

(C) *LEGAL SUPPORT*

8.1 *The broad category of services as per the agreement is as follows:*

- > Management of regional litigation cases*
- > Review and advice on contract and transactions*
- > Administration and protection of intellectual property rights*
- > Support incorporation and registration of regional entities*

8.2 *The appellant explained the nature of Legal Support services which is reproduced as under:-*

"As part of litigation management services, the appellant's legal department coordinates with third party counsels to respond to lawsuits for the Asia Pacific entities. The expenses associated with the third party counsel are generally billed directly to the affiliate that the litigation affects. Since the appellant receives services from third party counsels, only the report/ advice of the counsel is provided to the appellant / India affiliate, therefore there is no question of technical knowledge etc. being 'made available' by the appellant to to the India affiliate in this case.

The transaction work performed by appellant's legal department includes (but is not limited to) contract review (such as procurement contracts, real-estate contracts and non-disclosure agreements), mergers & acquisitions, dispositions, company secretarial work, banking, employment, compliance with country-specific business licensing requirements and other support as needed. For example, when an agreement is entered into between a vendor and India affiliate, the agreement proposed by the vendor is sent by the India affiliate to the appellant's legal team for their review / comments so that the terms and conditions of the agreement is in compliance with the group/ regional legal policies and business practices.

Thereafter, such agreement, as reviewed is sent back to the India affiliate to take it up with the vendor.

In a case where the agreement is proposed by India affiliate, the template of such agreement prepared by CEVA group is shared by the India affiliate with the vendor. In case vendor objects to the standard agreement / suggests some improvements, the same is shared by India affiliate with the appellant for its comments / suggestions.

In the above process, only the report/ advice / reviewed version of agreement of the in- house counsel of the appellant is provided to India affiliate / vendor, therefore there is no question of technical knowledge etc. being 'made available' by the appellant to the India affiliate.

The intellectual property rights are protected by obtaining applicable registrations by the group. This is further strengthened by constant vigilance being exercised by the appellant by finding out possible cases of IPR infringement. There is no scope of imparting of any technical knowledge, know-how etc in this case.

The industry in which CEVA operates is subject to anti-trust/competition regulations. The legal department advises on the appropriate legal advice in respect of any regional matters relating to anti-trust/competition regulations, queries and litigation and co-ordinates and manages outside counsel in this regard. The appellant department has 4 employees engaged in the provision of legal services in the Asia Pacific region. There is only one legal counsel each in the local affiliates in Australia, China and India and they are responsible for day-to-day local legal matters. The appellant's legal department provides guidance and support to the legal counsels on various local legal matters on an as-needed basis. The appellant's legal department oversees litigation in the region and provides advice during the course of the litigation process. Overall, the appellant's legal

department provides strategic input and advice to ensure that the affiliates comply with the Group's legal policies and adopt an appropriate risk management strategy. The legal department provides company secretarial support and also maintains data relating to shareholders and directors' details, board resolutions, contracts and permits/licenses for the region.

Overall, the functions performed by the appellant's legal department help mitigate business risk for the affiliates as well as assist in complying with the relevant anti-trust regulations in the region. The appellant's legal department also actively monitors regulatory developments in the region. The individual CEVA entities benefit from being able to rely on regional experience of different countries in tackling common legal issues or international issues."

8.3 As against the functions performed by the appellant, the India affiliate is performing the following functions:

- India specific litigation management*
- Routine compliance*
- Secretarial matters*
- Regulatory compliance*
- Preparation of legal documentation from India perspective*
- Liaisoning with Indian counsels with regard to India related matters*

8.4 The appellant relied upon the following decisions to contend that these services do not make available any technology etc to the recipient and hence the same is not taxable in India under Article 12(4) of India-Singapore Tax treaty:

- Invensys Systems Inc. Vs DIT [183 Taxman 81] - discussed above*

- Ernst & Young PvtLimited (323 ITR 184) (AAR) - discussed above.

8.5 The appellant submitted e-mails on sample basis to demonstrate the nature of services provided under the head "Legal Services". The same are discussed as under:-

Date of e-mail: 4th December, 2013

8.6 The appellant reviews the exit letter and send back the same to India affiliate. The possible issues are highlighted by the appellant and the changes are also suggested. This communication ensures alignment with global policies of the group.

Date of e-mail: 11th July

8.7 This correspondence involves review of lease deed / tenancy agreement by the legal team of the appellant from legal and general standpoint and the suggestions are then sent to the India affiliate post review.

Date of e-mail: 23rd and 25th July

8.8 This correspondence involves review of photocopier agreement by the legal team of the appellant from legal and general standpoint and the suggestions are then sent to the India affiliate post review.

Date of e-mail: 14th September

8.9 This communication pertains to negotiating a bulk deal with a hotel chain for the entire group (within Asia Pacific) and thus ensures achievement of economies of scale for the group as a whole. The appellant requests the group companies including the India affiliate to review the list of hotels under the group, and respond with their requirements as regards preferred location, average number of rooms required etc. This would ensure formulation of group policy and shall result in economies of scale for the India affiliate / group as a whole.

8.10 I find that the set of functions performed by the legal team in India is distinct from those performed by the appellant. There is only one legal counsel in India and he is

responsible for day-to-day local legal matters. The appellant's legal department provides guidance and support to the legal counsels on various local legal matters on need basis. The appellant's legal department oversees litigation in the region and provides advice during the course of the litigation process. Overall, the appellant's legal department provides strategic input and advice to ensure that the affiliates comply with the Group's legal policies and adopt an appropriate risk management strategy.

8.11 It may be relevant to take note of the commentary of Klaus Vogel on Double taxation conventions - Third edition, Vogel comments on page 790 the criterion used to distinguish the provision of know-how from rendering advisory services is the concept of imparting.

"Imparting of experience: Whenever the term royalties relates to payments in respect of experience (know-how'), the condition for applying Article 12 is that the remuneration is being paid for 'imparting' such know-how in contrast, the criterion used to distinguish the provision of know-how from rendering advisory services is the concept of 'imparting'. An advisor or consultant, rather than imparting his experience, uses it himself (BFH BstBl II 235 (1971), 'Ministre des Relations exterieures, Response a M Bockel, 36 Dr. Fisc. Comm. 1956 (1984)). All that he imparts is a conclusion that he draws - inter alia - from his own experience. His obligation to observe secrets, or even his own interest in retaining his 'means of production', will already prevent a consultant from imparting his experience. In contrast to a person using his own know-how in providing advisory services, a grantor of know-how has nothing to do with the use the recipient makes of it."

8.12 I find that it is a case where the appellant imparts only conclusion/legal advice which it draws - inter alia - from its own experience. It does not impart the experience. It is also submitted that if the services were not performed by the regional legal team, the functions would have to be either outsourced to third party service

providers or performed in-house by the local CEVA entities by expanding the local teams (where these exist) or hiring new resources.

(D) INFORMATION TECHNOLOGY SUPPORT (ICS)

9.1 *The services as per the agreement include:*

- > Provision of hardware, software, and desktop support services*
- > Software programming and development*
- > Data communication support and monitoring of signal transmissions*
- > Maintenance of program databases.*

9.2 *The appellant explained the nature of Information Technology Support services which is reproduced as under:-*

"This includes General IT services in the nature of:

- Provision of desktop support;*
- Provision of hardware and software support;*
- Update and maintenance of software programs and scheduling databases;*
- Monitoring of servers, systems and networks, providing availability reporting and first-hand insight for both internal and external issues;*
- Maintaining and supporting internal non-customer facing operations, such as the internal emailing system, active directory, file shares and backup;*
- Development and monitoring of standard guidelines for servers, PCs, change management, incident management, project management, procurement and document management; and*
- Maintaining vendor relationships.*

9.3 *The Data Network requirements are supported by the Global Network Group. This group has members in the Asia Pacific region who manage the requests for Asia Pacific network data lines and service for CEVA affiliates in the Asia Pacific region.*

9.4 *The CEVA entities also benefit from the centralized management and consulting services. While there are local teams in most countries, the role of the Regional team is critical to the overall success of CEVA entities, providing standards, information, support, strategies and governance. Therefore, if the services were not performed by the Regional team, they would have to be either outsourced to third party service providers or performed in-house by expanding the local team.*

9.5 *Some examples of ongoing benefits from these services are as follows:*

- *Continual restructuring of organisation in alignment with the global organization;*
- *Continual Business Development support for major contract logistics and freight management regional and local projects;*
- *Cost saving programs initiated by Regional team; and*
- *Preparations for centralising support and hardware housing (regionally or globally)."*

9.6 *As on January 2018, the India affiliate has 7 employees in IT department and they are spread over at 4 locations (Bangalore, Pune, Delhi, Hyderabad). As against the functions performed by the appellant, the India affiliate is performing the troubleshooting and network support related activities.*

9.7 *In the present case, Information technology services are not part of the principal activity of the group. CEVA Group has set up centralized information technology system to handle its operations. The recipient of services avail various IT applications hosted on the central technology platform. Merely because the business of Indian*

entity is dependent on the technical services provided by the appellant (the service provider), it does not follow that technology has been made available for rendering technical services. The source code of the IT applications hosted on central technology platform has not been shared with the recipient of the services. While providing services for centralized provision of hardware, software, and desktop support services, Software programming and development, Data communication support and monitoring of signal transmissions and Maintenance of program databases, the service provider is not imparting the technology/ know-how utilized in rendering such services. As a result of all such services, the recipient has received only the software applications having graphical user interface for performance of its day to day activities. The database and program code is like a black box for the recipient as he can only use various features of software applications by entering input parameters on computer screen without knowing anything about the program code/ database code behind it. In such a situation, it is not a case of make available of information technology services.

(E) MARKETING AND SALES SERVICES

10.1 These services as per the agreement are in the nature of the following:

- > Provide sales training to local business development employees*
- > Coordinate customer bidding and pricing process*
- > Create advertising brochures, newsletters, and sales sheets*
- > Develop and place marketing and promotional materials*

10.2 The appellant explained the nature of Marketing and Sales services which are reproduced as under:-

"The appellant provides training to the business development employees as regards the product types / features offered by CEVA group, market positioning of the group, credit policies, CEVA vision, parameters of

customer satisfaction, service level quality standards, targets, approval process etc. in place so that they know what is expected by CEVA group and its clients. It is submitted that these activities by the appellant does not create/ build any capacity and consists of merely informing the employees regarding the organization and its policies so that they get acquainted with the work culture and know clear expectations of the group.

CEVA drives its customer approach through 5 major sectors globally (Technology, Industrial, Automotive, Consumer & Retail, Energy). These are organised through sector expertise/leadership allowing a deeper understanding of customer's supply chain needs within the respective sectors.

The appellant also coordinates with the India affiliate with customer bidding and pricing process In the absence of the support provided by the department, CEVA affiliates would lag behind their competitors (such as DHL and UPS) in securing deals and being able to deliver creative solutions to customers.

The entities are also able to leverage from marketing and promotional publications prepared at the regional level. The CEVA brand is now well recognised in the Asia Pacific region due to various business development activities in the region. In the recent years, despite the economic downturn, the Asia Pacific business has not been affected due to the integrated customer management efforts undertaken at a regional level.

As on January 2018, the India affiliate has 43 employees in Business Development, Sales and Sales Support department and are spread over at 12 cities. As against the functions performed by the appellant, the India affiliate is performing the following functions:

- Meeting actual customers*
- Supports the global and regional team"*

10.3 The appellant submitted e-mails on sample basis to demonstrate the nature of services provided under the head "Marketing and Sales Services". The same are discussed as under:-

Date of e-mail: June 21, 2017 (refer serial no. 5 of submission dated November 6, 2017)

10.4 This involves sharing of forecasted volume with regard to RFQs forecasted for the next six months (May-Nov) for Air, FCL and LCL with volume per cluster- cluster / port-port pair. All information regarding involved lanes and volumes are based on the same RFQ done last year. RFQs without volume information are not (yet) included in this overview.

10.5 It involves creation of data by the appellant which can be used by the affiliates (including India affiliate) to better understand and analyze prepare proper quotation with regard to pricing and volume information.

10.6 I find that the appellant has admitted the fact of providing a) training to the business development employees of Indian entity and other group entities regarding the product types / features offered by CEVA group, market positioning of the group, credit policies, CEVA vision, parameters of customer satisfaction, service level quality standards, targets, approval process etc. and b) support to the India affiliate with customer bidding and pricing process.

10.7 The appellant submitted that the purpose behind providing such services is to equip the business development team at local level to know what is expected by CEVA group and its clients. The appellant further submitted that in the absence of the support provided by the department, CEVA affiliates would lag behind their competitors (such as DHL and UPS) in securing deals and being able to deliver creative solutions to customers.

10.8 The appellant also stated that CEVA drives its customer approach through 5 major sectors globally (Technology, Industrial, Automotive, Consumer & Retail, Energy) and such services are organised through sector

expertise/leadership allowing a deeper understanding of customer's supply chain needs within the respective sectors.

10.9 However, the appellant submitted that these activities by the appellant does not create/ build any capacity and consists of merely informing the employees regarding the organization and its policies so that they get acquainted with the work culture and know clear expectations of the group. I do not find merit in the argument of the appellant because the appellant on its own admitted the purpose behind marketing services is to equip the business development team to deliver creative solutions to their customers. The recipient has applied the knowledge acquired in the process while working for supply chain solutions for its clients. The delivery of service coupled with training with an intent of capacity enhancement of recipient does satisfy the "make available" test laid down by various courts.

10.10 It may be relevant to refer to the decision of Hon'ble ITAT, Bangalore Bench in the case of Bovis Land Lease (India) Pvt. Ltd wherein the Tribunal held as under:

"In respect of assistance in the operation of the business, it has been made clear that LLAH will provide education and training material for the staff of the appellant company on or off-shore. In respect of majority of services, it has been mentioned that it will provide assistance. Thus, LLAH is providing assistance for various services and as per the agreement, it has to provide the education and training to the employees of the appellant company. The word make available only refers to the 'willingness' of the provider of services and does not refer the acceptance of the receiver of the services".

10.11 The above case of Bovis Land Lease does include the facet of training and education to the employees of the appellant company in respect of various services. It is important to note that mention of "training and education" in the agreement clearly highlights the 'willingness' of the

provider of services which is critical for make available of the technology/know-how.

10.121 find that the Indian entity is operating in supply chain management domain. Since the Indian entity is engaged in logistics domain, therefore, any detailed inputs and training for on boarding of clients clearly impart the knowledge because the recipient of knowledge in turn has used the same in providing services to its clients without going back to the appellant company. This position has been fortified by the decision of Hon'ble ITAT, Chennai in the case of Foster Wheeler France S.A wherein it is held that providing the best practices available in the form of written procedures and specifications and details to the recipient which is also a specialized company in the same domain, it is a case of making available specifications and details. The recipient can very well use the same for execution of other projects also.

HUMAN RESOURCES AND ADMINISTRATIVE SUPPORT

11.1 These services as per the agreement are in the nature of the following:

- > Regional management and coordinate of HR policies*
- > Advise on compensation and benefits benchmarking*
- > Monitoring and support of local labor requirements*
- > Coordinate annual performance appraisals, bonus and salary reviews*
- > Managements of recruiting, employment, and termination matters*

Explanation of the services covered under the arrangement

11.2 Ceva APH's regional HR department assists the foreign affiliates with the company's expatriate program. This program covers employees who transfer between various regions or countries. The department also aligns

the global HR policies and procedures with regional policies and roll-out to local countries to adapt to fit local customs and legal requirements. In particular, the functions of the HR department include:

- Reviewing and coordinating the application of established HR policies through the company and the region;*
- Providing advice on compensation and benefits to achieve external competitiveness and internal equity and synchronization of the compensation benefit for the Asia Pacific region with that of the Group;*
- Administering and coordinating recruitment and termination matters, and preparing employment contracts and termination letters;*
- Ensuring that labour requirements for all jurisdictions are met at a country-level;*
- Administering and coordinating regional people development initiatives and talent management programs;*
- Administering and coordinating yearly performance appraisals, performance bonus and salary reviews;*
- Developing and administering job grading processes;*
- Developing succession plans for the affiliates in the Asia Pacific;*
- Recommending talent development programmes for the region;*
- Implementation of Diversity & Inclusion policy and programmes in the region;*
- Development of overall bonus scheme;*
- Providing consultancy and advice to functions on performance incentive schemes; and*

- *Consolidating employees' data from countries and producing global/regional/country reports pertaining to employee headcount (Full-Time Equivalent / Contractors), attrition, productivity, recruitment status and employees' costs.*

11.3 The appellant submitted e-mails on sample basis to demonstrate the nature of services provided under the head "Human Resources". The same are discussed as under:-

Date of e-mail: March 21, 2018

11.4 This e-mail involves sharing of template by regional HR to India affiliate containing the budget for increments. The increment / promotion data and salary numbers populated in the template was a subject matter of discussion in the conference call with reference to various grades / levels. This formed part of support with regard to yearly appraisals and yearly salary review and is akin to outsourcing a particular function to a third party. The deliverable in this case is in the form of a report which provides for revised salary numbers after the yearly appraisals.

Date of e-mail: April 5, 2018

11.5 This e-mail involves sharing of template by regional HR to the India affiliate. This template confirm to the allowances provided in the countries. The said exercise ensures that CEVA has an accurate inventory, common definitions where possible, and understand how to best configure HR software to hold these values. This is akin to consolidation of data and ensuring that the reasons of providing different allowances / components to the employees of India affiliate is correctly captured centrally within a software system so that a better / informed decision is taken with regard to compensation package is offered to the employees or revised. This ensures uniformity or streamlines the HR process across the organization.

11.6 As on January 2018, the India affiliate has 14 employees in HR department and are spread over at 4

locations (Baroda, Bangalore, Mumbai, Delhi). As against the functions performed by the appellant, the India affiliate is performing the following functions:

- Seeks support of the appellant to fulfill certain vacancies*
- Performs recruitment, training, staffing etc.*
- Liaising with finance for payroll etc.*
- Training - Learning and Development for Indian employees*
- Appraisals - Local*

11.7 In the backdrop of the above sample emails submitted by the appellant, I find that the sharing of templates or general guidelines to fill the templates for filling up the relevant data to all global entities is a process of collection of data in standardized manner. Thereafter, the data analysis is done at the end of the appellant. The result of such data analysis regarding tracking of human resource metrics is then shared with the entities across the Asia Pacific region as a control function by the appellant. I do not find any trace of sharing or dissemination of knowledge or experience to the India affiliate regarding the preparation of such template / processes/ steps etc.

11.8 I find that the appellant company is acting as a coordinator of HR policies and advises on compensation & benefits benchmarking, performance appraisals, bonus and recruitment matters. The appellant clarified that the transfer of resources across the group entities within Asia Pacific region is managed by the appellant. As per the appellant, it is engaged in a) review and coordination of established HR policies through the company and the region b) development of HR schemes c) administering and coordinating HR practices across the group and d) analysis of employees' data from countries and producing global/regional/country reports pertaining to employee headcount (Full-Time Equivalent / Contractors), attrition, productivity, recruitment status and employees' costs. The

appellant submitted that CEVA entities rely on input from the regional HR team to improve their local HR processes and procedures.

11.9 The appellant submitted that if the regional HR functions were not performed by the regional HR team, they would have to be either outsourced to third party service providers or the local HR teams would have to be expanded (in terms of resources and capabilities).

11.10 It may be relevant to make reference of one of the examples of India USA MOU which reads as under:

"Example 7 Facts:

The Indian vegetable oil manufacturing firm has mastered the science of producing cholesterol-free oil and wishes to market the product IT A No.1150/Ahd/2007 Shell International B.V. Netherland Vs. ITO A.Y. 2003-04 worldwide. It hires an American marketing consulting firm to do a computer simulation of the world market for such oil and to advise it on marketing strategies. Are the fees paid to the U.S. Company for included services?

Analysis:

The fees would not be for included services. The American company is providing a consultancy service which involves the use of substantial technical skill and expertise. It is not, however, making available to the Indian company any technical experience, knowledge or skill, etc., nor is it transferring a technical plan or design. What is transferred to the Indian company through the service contract is commercial information. The fact that technical skills were required by the performer of the service in order to perform the commercial information service does not make the service a technical service within the meaning of paragraph 4(b)."

11.11 This example clarifies that the advice on marketing strategy is in the form of information. In view of the above, it is very clear that rendition of HR consultancy

services to its group entities to bring uniformity across the group entities is equivalent to imparting only information and does not impart know-how/skill set to develop and frame the policy.

11.12 Further, it is relevant to refer to page 790 of the commentary of Klaus Vogel on Double taxation conventions - Third edition, Vogel wherein it is mentioned that "The criterion used to distinguish the provision of know-how from rendering advisory services is the concept of imparting." It further explains that "an advisor or consultant, rather than imparting his experience, uses it himself (BFH BstBl II 235 (1971), 'Ministre des Relations exterieures, Response a M Bockel, 36 Dr. Fisc. Comm. 1956 (1984)). All that he imparts is a conclusion that he draws - inter alia - from his own experience. FUs obligation to observe secrets, or even his own interest in retaining his 'means of production', will already prevent a consultant from imparting his experience. In contrast to a person using his own know-how in providing advisory services, a grantor of know-how has nothing to do with the use the recipient makes of it."

11.13 The same view has also been upheld in the following decisions:

- DCIT vs. Boston Consulting Group Pte Ltd. - 94 ITD 31 (Mum. ITAT)
- Bharat Petroleum Corporation Ltd. vs. JCIT - 14 SOT 307 (Mum. ITAT)
- Wockhardt Limited vs ACIT (Mum. ITAT)
- Shell International B.V. Netherland Vs. ITO ITA No.1150/Ahd/2007
- Raymond Limited vs. DCIT (86 ITD 791)

11.14 I find that these HR services are in nature of consultancy services where the provider of the services has imparted only the conclusion part. The scope of HR services provided by the appellant company does not include training of resources of group entities. The element of imparting the know-how is not predominant in this case. It is a settled position that mere provision of technical services is not enough to attract article 12(4)(b). It additionally requires that the service provider should also make his technical knowledge, experience, skill,

know-how etc., known to the recipient of the service so as to equip him to independently perform the technical function himself in future, without the help of the service provider.

G Operations and Standardization

12.1 The broad category of services as per the agreement is as follows:

- *Regional training, assistance, and management of LEAN initiatives*
- *Advice on standardization of warehouse designs*
- *Implement and train employees on standard logistics operating processes*
- *Develop standard solution sets and evaluate regional best practices*
- *Maintenance of security manuals and training of security managers*

12.2 The appellant explained the nature of Operations & Standardization services which is reproduced as under:-

- *It is submitted that, the appellant is involved in providing for intimating the employees employed by India affiliate regarding the standard steps to be followed in executing an order / trade / business. This improves customer satisfaction and helps in reducing overall cost for the Indian affiliate / organization. It is submitted that these activities by the appellant does not create/ build any capacity and consists of merely informing the employees regarding the organization and its policies so that they are aware of the clear guidelines / expectations of the group. The operations team is engaged in the strategic management of various products, i.e. freight management, contract logistics and ground transport, and is involved in the plans relating to the development of the respective market segments. Additionally, the team focuses on managing operational efficiencies through the development of processes and standards together with driving operational compliance. This includes:*
 - *Freight management (freight operational efficiencies),*

- *Contract logistics (developing Standards for Warehousing, Inventory Control, Supporting and validating Solution Design during RFQ/ RFI process, Reviewing and developing plans etc)*
- *Ground Transport (Providing support for renewal of ground transport contracts, Operations review and recommendation for improvement, etc)*
- *Operations Excellence (Conducting safety and security audits, Providing monthly publications, implementing of management systems and developing suitable toolbox to support operations*
- *LEAN and operational performance (scheduling and co-ordination of LEAN activities within Asia Pacific and with the Global Head Office);*
- *Business Implementation and Project Management Office (Project Governance and monitoring to high value and high risk complex projects, Project Management and delivery to high value, high risk complex projects, Support to countries with project subject matter experts and a Best-Practice CEVA methodology);*
- *For projects where the appellant is not entirely responsible for implementation, due to the project being heavily localised to a particular region, the team in the appellant continues to play an important role in providing valuable input due to its vast experience in project management.*

12.3 The appellant submitted that these services can at best be said to be advisory in nature as the act of creation of policies, tools, procedures etc cannot be absorbed by the employees of the India affiliate while implementing

the actual procedures etc. and therefore there is no transfer of knowledge to the Indian affiliate in that sense.

12.4 As on January 2018, the India affiliate has an aggregate of 184 employees in Operations and Logistics department. As against the functions performed by the appellant, the India affiliate is performing the following functions:

- Implementation of best practices*
- Actual implementation of contracts, agreements etc*

12.5 The appellant submitted e-mails on sample basis to demonstrate the nature of services provided under the head "Operations and Standardization". The same are discussed as under:-

Date of Communication: February 1, 2017 (refer serial no. 1 of submission dated November 6, 2017)-Tender Review Board, Air & Ocean

12.6 This documents updates the processes contained within the Rules of Engagement for the Tender Review Board (TRB), these changes will increase efficiency in the bidding process. As per the appellant, the purpose of the updated Rules of Engagement is to support BD in winning and retaining business by having a single, consistent, aligned and representative forum that can fast-track and control decisions on a bid which ultimately supports the strategic goals for growth and profitability. The appellant pointed out that the purpose of this document is to describe the responsibilities, for Freight Management bids, between Business Development, the Business Lines and Global Tender Management and the objective is to strengthen and ensure a seamless process from receipt of a Freight Management customer request (RFI, RFQ, and RFP) up to the response.

Date of e-mail: May 22, 2017 (refer serial no. 2 of submission dated November 6, 2017)

Review of deviations through the process of compliance tool - Station process

12.7 This involves sharing a compliance tool by the appellant with India affiliate. The appellant explained that to meet the global demands of customers, CEVA's freight management (FM) business now serves markets throughout the entire world and this growth resulted in a lot of localized variation in the way some processes are performed. Therefore, the appellant contended that there was a need to standardize the way in which the services / tasks were performed by various locations. As per the appellant, non standardization can have a negative impact on the service the operating companies offer to our customers and cause difficulties for CEVA staff inside the company. It is submitted that finding ways to work away from these standards wastes time for staff, lowers productivity and reduces time to add value for CEVA's customers. This is why CEVA developed Station Process - a toll to manage compliance.

12.8 CEVA has been measuring alignment to the Air & Ocean Process by means of the milestones compliance already. This tool is meant to:

- 1) measure to what extent a station adheres to all process steps and activities as defined in Station Process
- 2) check if the appropriate tools are being used to execute the activities

Date of Communication: September, 2017 (refer serial no. 4 of submission dated November 6, 2017)

Monthly Drewry Shipper Insight newsletter

12.9 This email contains sharing of a newsletter - Sea and Air Shipper Insight prepared by Drewry (Supply Chain Advisors). The said newsletter contains important information concerning ocean freight, airfreight, intermodal / inland transportation, freight operator financial data / parameters. This newsletter provides insight of the freight market and various indicators affecting the same and is helpful learning about the current trade practices. From the appellant's side, this involves hiring a third party to provide the newsletter

which is circulated internally within the firm and therefore provide any service to the Indian affiliate. The cost of this service is pooled and is shared by all the entities falling within the group.

12.10 In the backdrop of the facts discussed above, I find that the services in relation to "OPERATIONS AND STANDARDIZATION" have been found to include training of Indian entity resources by the Regional Head (appellant) regarding "standard operating processes", "new initiatives" and "security". The appellant submitted three emails to demonstrate the nature of services on sample basis in this regard. First email is regarding update in respect of processes contained within rules of engagement for the tender review board. This email highlights the fact of sharing of written detailed out procedures/ processes to the group entities so as to ensure uniformity in operations across globe. Second email is regarding a report of compliance tools which measures the variation in compliance with reference to the process requirements and system requirements. This email highlights that the appellant is not only making available the specifications and other procedures but also is reviewing and tracking the actual performance vis a vis the given set of specifications, it is a case of making available its technical knowledge, expertise, knowhow in execution of the work by the recipient. This position has been upheld by Hon'ble ITAT, Chennai in the case of Foster Wheeler France S.A. Third email is in respect of circulation of news letter prepared by supply chain advisor. This newsletter provides insight of freight market. The sharing of newsletter does not involve make available of know how. Flowever, this fact of sharing news letter containing insight into the freight market clearly highlights that the resources placed in India are competent enough to understand the insights in the news letter. Therefore, in such a situation, services involving training of such competent resources, in respect of particular line of business, regarding the detailed procedure/processes clearly demonstrates the imparting of know-how and thus satisfy the make available clause as per Article 12(4)(b) of DTAA.

12.11 *The fact of sharing operational manual, standard operating procedures and training the resources in respect of particular line of business on the same in order to deliver uniform quality of operations across the globe clearly makes out it to be a case of making available its technical knowledge, expertise, knowhow in execution of the work by the recipient and thus satisfy the make available clause as per Article 12(4)(b) of DTAA.*

12.12 *The appellant submitted that such training activities do not create/ build any capacity and consists of merely informing the employees regarding the organization and its policies so that they are aware of the clear guidelines / expectations of the group. The fact of providing training to the local operated entities including Indian entities does reflect the 'willingness' to impart know-how/experience on the part of the provider of services. It has been held in various decisions that the word make available only refers to the 'willingness' of the provider of services and does not refer the acceptance of the receiver of the services. (Refer decision of Hon'ble ITAT, Bangalore Bench in the case of Bovis Land Lease (India) Pvt. Ltd.)*

12.13 *I find that the Indian entity is operating in supply chain management domain with 184 employees in Operations and Logistics department. Since the Indian entity is engaged in logistics domain, therefore, any detailed inputs on the manner of implementation of standardized processes, best practices in the form of written procedures and specifications clearly impart the knowledge in respect of processes and specifications. The recipient in turn has used the same in providing logistics services to its clients without going back to the appellant company. This position has been fortified by the decision of Hon'ble ITAT, Chennai in the case of Foster Wheeler France S.A wherein it is held that providing the best practices available in the form of written procedures and specifications and details to the recipient which is also a specialized company in the same domain, it is a case of making available specifications and details. The recipient*

can very well use the same for execution of other projects also.

TO SUM UP:

13.1 To sum up, I find that the services performed in this case can be broadly divided into two categories a) where the services pertain to the principal activity of the business run by the group entities (Operations & standardization, Marketing activities, Management Support Services) and b) where the services do not pertain to principal activity of the business such as administrative, financial, legal and HR services. The basic difference in two categories is that the resources engaged in the principal activity (in this case-supply chain management solution) at local level are not only consuming services but at the same time, delivering operational services to its client base in India. The purpose behind the services (Operations & standardization, Marketing activities) is to impart the domain specific knowledge to the resources at field level (say India) so that such resources are equipped to deliver the quality of services in line with the quality standards maintained at group level. It is interesting to see that the phrase "training" has been used only in respect of two types of services (Operations & standardization, Marketing activities).The services are of a highly specialized nature and involves special knowledge of applicant's business and industry.

13.2 As regards the non-principal business activities (administrative, financial, legal and HR services), and Management Support services, the group entities only consume the output of the services for their internal purpose. The board of directors and senior management of the parent company may make all important decisions concerning the affairs of its subsidiaries, and the parent company may support the implementation of these decisions by performing general and administrative activities. Such category services include management, coordination and control functions for the whole group. Effectively, the entities benefit from economies of scale through the centralisation of these services. The mere

fact of receiving a service for longer time per se cannot lead to make available. More important is to understand that whether the knowledge has been imparted or not? If there is no imparting of knowledge, the question of make available does not arise even if the recipient avails such services over a long period of time. For example, if information technology services have been outsourced to a specialist, the longer duration of availing such services would not lead to make available of technology/know-how underlying such services.

13.3 The jurisprudence on this issue has laid down the following criteria to determine whether a service would satisfy the 'make available' condition to be classified as FTS -

- Mere rendering of services is not roped into FTS unless the person utilizing the services is able to make use of the technical knowledge, etc, by himself in his business or for his own benefit and without recourse to the performer of the services in future.
- The technical knowledge, experience, skill, etc, must remain with the person utilizing the services even after the rendering of the services has come to an end.
- A transmission of the technical knowledge, experience, skill, etc, from the person rendering the services to the person utilizing the same is contemplated by the Article.
- Some sort of durability or permanency of the result of the 'rendering of services' is envisaged which will remain at the disposal of the person utilizing the services.
- The fruits of the services should remain available to the person utilizing the services in some concrete shape such as technical knowledge, experience, skill, etc.
- The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that there receiver can deploy similar technology or techniques in future without depending on the provider.
- Twin test of rendering services and making technical knowledge available at the same time is satisfied

13.4 It may be relevant to take note of the judicial decisions relied upon by the AO in this case in treating the

administrative services as FTS which "make available" the knowledge, experience or know how to the Indian affiliate.

- a) *decision of the Hon'ble ITAT, Bangalore Bench in the case of Bovis Land Lease (India) Pvt. Ltd wherein the Tribunal held as under:*

"In respect of assistance in the operation of the business, it has been made clear that LLAH will provide education and training material for the staff of the appellant company on or off-shore. In respect of majority of services, it has been mentioned that it will provide assistance. Thus, LLAH is providing assistance for various services and as per the agreement, it has to provide the education and training to the employees of the appellant company. The word make available only refers to the 'willingness' of the [provider of services and does not refer the acceptance of the receiver of the services".

13.5 The above case of Bovis Land Lease does include the facet of training and education to the employees of the appellant company in respect of various services. Accordingly, this case law has been applied only for such services where training has been imparted as per the agreement. However, the AO has applied it to all types of services without appreciating the fact of training involved in the services.

- b) *decision of the Special Bench, Mumbai in the case of Mahindra and Mahindra Ltd. v DCIT (Mumbai) (SB) 313 ITR 263 (AT) wherein the Tribunal held as under:*

"The assessee has ab initio contended before the authorities below that even if the services rendered by the lead managers were held to be technical services but those were not 'made available' to the assessee. "Rendering of any technical or consultancy services" is followed by "which make available technical knowledge, experience, skill, know-how". In this context it becomes imperative to understand the meaning of the expression 'make available' as used in

this article. Make available means to provide something to one, which is capable of use by the other. Such use may be for once only or on a continuous basis. In our context to make available the technical services means that such technical information or advice is transmitted by the non-resident to the assessee, which remains at its disposal for taking the benefit there from by use. Even the use of such technical services by the recipient for once only will satisfy the test of making available the technical services to the assessee."

13.6 I have gone through the facts of the cited case. In the cited case, the assessee and LDV had proposals for joint venture in the area of automobile manufacture and as a precursor, LDV wanted to do market research to find out the potential market for different types of vehicles and consumer preferences. Further, Ld. CIT(A) observed in the cited case that the services were not confined only in doing some market survey but to provide the technical assistance in improving the quality of their Minibus and to move towards fully engineered Minibus. Further, the note of the Executive Vice President also highlighted that the strategic fit between M&M and LDV is planned to "learn from LDV about development and Manufacturing of niche products". I find that the above decision is in light of the fact that it was a collaborative effort for the conduct of market research and there is clear cut finding of learning from LDV about development & manufacturing of niche products. The facts of the case are not comparable to the facts of the present case.

13.7 In view of the above discussion, the AO is directed to charge the receipts in respect of the "Operations & standardization" and "Marketing activities" services performed in this case as fee for technical services. As regards other services, since the "make available" feature is not present in delivery of services, accordingly, the same are held to be not chargeable to tax as fee for technical services."

9. In so far as the management support services, finance and treasury support, legal support, information technology support, human resources and administrative support are concerned, we agree with the findings of the Ld.CIT(A) that these services do not fall under FTS and none of the services satisfied the “make available” clause as per article 12(4) of Indo Singapore Treaty.

10. We further find that the Ld.CIT(A) in so far as the services i.e. marketing and sales services are concerned after examining the e-mails/correspondence between the assessee and the Indian entity observed that assessee is providing training to the business development employees of the Indian entity and other group entities regarding product types/features offered by Sewa Group, market positioning of the group, credit policies, Sewa vision, parameters of customers satisfaction, service level quality standard, targets, approval process etc. and support to the Indian affiliate with customer bidding and pricing process. Ld.CIT(A) held that assessee admitted the purpose beyond the market services is to equip the business development team to deliver creative solutions to their customers. Therefore, the Ld.CIT(A) is of the view that the recipient has applied the knowledge acquired in the process while working for supply change solutions for its clients. Ld.CIT(A)

observed that the delivery of service coupled as training with an intend of capacity and enhancement of receipt does satisfy the “make available” test. Reliance was placed on the decision of the Bangalore Bench in the case of Bovis Land Lease India Pvt. Ltd.

11. Coming to the operations and standardization services the Ld.CIT(A) on examining the e-mails/correspondence the Ld.CIT(A) observed that services in relation to operations and standardization have been found to include training of Indian entity resources by the regional head (Appellant) regarding standard operating process, new initiatives and security. The Ld.CIT(A) observed that the e-mails highlight that the assessee is not only “making available” specifications and other procedures but also is reviewing and tracking the actual performance viz-a-viz the given set off specifications and, therefore, it is a case of “making available” it’s a technical knowledge, expertise knowhow in execution of the work by the recipient. It is also observed that the fact of sharing an operational manual standard operating procedures and training the resources in respect of particular line of business on the same in order to deliver uniform quality of operations across the globe clearly makes out a case of “making available” its knowledge, expertise, knowhow in execution of the work by the recipient and

thus, satisfied the “make available” clause as per article 12(4)(b) of DTAA. For these reasons the Ld.CIT(A) upheld the action of the AO in treating the amounts received towards marketing and sales services, operations and standardization services as FTS and satisfied the “make available” clause as per article 12(4)(b) of DTAA.

12. We observe that in so far as the marketing and sales services are concerned these services as per the agreement are in the nature of the following:

- *Provide sales training to local business development employees;*
- *Coordinate customer bidding and pricing process;*
- *Create advertising brochures, newsletters, and sales sheets;*
- *Develop and place marketing and promotional materials.*

13. The appellant provides training to the business development employees as regards product types, product mix, product features offered by CEVA group, market positioning of the group, credit policies, CEVA vision, parameters of customer satisfaction, anti-bribery legislation, service level quality standards, targets, approval process, information security, data protection, confidentiality etc. in place so that they know what is expected by CEVA group and its

clients. It is submitted that these activities by the appellant does not create/ build any capacity and consists of merely informing the employees regarding the organization and its policies so that they get acquainted with the work culture and know clear expectations of the group. This cannot be regarded as training per-se but a kind of induction familiarization to understand the expectations of the group. Therefore, the consideration relatable to the above cannot be characterized as FTS under Article 12(4) of India-Singapore tax treaty.

14. We observe that following training programs have been devised by the head office (CEVA Logistics Head office BV) along with the appellant for the employees of India affiliate.

1. *Core Compliance training;*
2. *Global Compliance training - this includes training with regard to anti-corruption practices and code of business dealings;*
3. *Information security awareness training for usage of CEVA computer / systems;*
4. *Information security awareness training outlining basic information security awareness principles.*

15. The appellant also coordinates with the India affiliate with customer bidding and pricing process. The entities are also able to leverage from marketing and promotional publications prepared at

the regional level. The CEVA brand is now well recognized in the Asia Pacific region due to various business development activities in the region. In the recent years, despite the economic downturn, the Asia Pacific business has not been affected due to the integrated customer management efforts undertaken at a regional level.

16. As discussed above, the training provided by the appellant does not in any way makes available any technical knowledge to the India affiliate to perform these services on their own rather these training are for acquainting the employees with the organizational policies, expectations, standards etc.

17. We observe that training per se, would not result in make available of technology, experience, skill, processes, etc., unless the training involves the transfer of technology, processes, skills, etc., to the recipient in a manner which enables the recipient to apply the technology and to derive benefit therefrom without recourse to the tutor, it would not fall within the expression "technical services" as defined in the Treaty.

18. We observe that the conclusion of the Id. CIT(A) that the purpose behind these services is to equip the marketing team to provide creative solutions to their customers, and hence the

services shall be classified as ‘making available’ technology etc is devoid of any merits as the purpose of these services is not to provide any technical training but to acquaint the employees regarding the organizational policies and work culture so that they can efficiently perform the services expected out of them. We observe that the employees of India affiliate are given acquainted with anti-bribery legislations of the UK, data protection laws etc. of the EU so as to comply with the international obligations of the group (as it operates worldwide and these regulations apply to Indian employees also). These trainings cannot, by any stretch of imagination, equip India affiliate to perform the transacted services on their own and hence the provisions of Article 12(4) are not attracted on facts of the case.

Operation and Standardization

19. The broad category of services as per the agreement is as follows:

Regional training, assistance, and management of LEAN initiatives;

- *Advice on standardization of warehouse designs;*
- *Implement and train employees on standard logistics operating processes;*

- *Develop standard solution sets and evaluate regional best practices;*
- *Maintenance of security manuals and training of security managers.*

20. We observe that, the appellant is involved in providing training for intimating the employees employed by India affiliate regarding the standard steps to be followed in executing an order/ trade / business. This improves customer satisfaction and helps in reducing overall cost for the Indian affiliate/ organization. It is submitted that these activities by the appellant does not create/ build any capacity and consists of merely informing the employees regarding the organization and its policies so that they are aware of the clear guidelines/ expectations of the group.

21. The operations development team is engaged in the strategic management of various products, i.e. freight management, contract logistics and ground transport, and is involved in the plans relating to the development of the respective market segments. Additionally, the team focuses on managing operational efficiencies through the development of processes and standards together with driving operational compliance.

22. We observe that these services can at best be said to be advisory in nature as the act of creation of policies, tools,

procedures etc cannot be absorbed by the employees of the India affiliate while implementing the actual procedures etc. and therefore there is no transfer of knowledge to the Indian affiliate in that sense.

23. In connection with the training, following training programs have been devised by the head office (CEVA Logistics Head office BV) along with the appellant for the employees of India affiliate:

1. *Core Compliance training;*
2. *Global Compliance training - this includes training with regard to anti-corruption practices and code of business dealings;*
3. *Information security awareness training for usage of CEVA computer / systems;*
4. *Information security awareness training outlining basic information security awareness principles.*

24. Since in the instant case, the training was for intimating the employees employed by India affiliate regarding the standard steps to be followed in executing an order / trade / business. This improves customer satisfaction and helps in reducing overall cost for the Indian affiliate / organization.

25. We observe that training per se, would not result in make available of technology, experience, skill processes, etc., unless the

training involves the transfer of technology, processes, skills, etc., to the recipient in a manner which enables the recipient to apply the technology and to derive benefit therefrom without recourse to the tutor, it would not fall within the expression "technical services" as defined in the Treaty. Such trainings do not 'make available' technical knowledge, experience, skill, know-how or processes. There was no transfer of technology. It merely facilitated the employees of the appellant to work in accordance with the expected standards. Thus, the training did not 'make available' any technical knowledge, experience, skill, know-how or processes.

26. In the case of Exxon Mobil Company India Pvt. Ltd. Vs. Addl. CIT [92 taxmann.com 5] (Mum.) considered the payment made by assessee to Singapore based Company for providing legal support services including management consulting functional advise, administrative, technical, professional and other support services and held that since foreign company had not made available any technical knowledge, expertise, skill, knowhow or process which enabled assessee to apply technology contained therein on its own payment made by assessee could not be considered as fees for technical services as defined under article 12(4)(b) of Indo Singapore DTAA while holding so the Tribunal considering the

decision of the Karnataka High Court in the case of Bears India Mineral Pvt. Ltd. held as under:

“48. We have heard rival contentions and perused material on record. We have also applied our mind to the decisions relied upon. It is evident, while disallowing the amount in dispute under section 40(a)(i) of the Act, the Assessing Officer has held that the payment made by the assessee to EMCAP towards Global support services is in the nature of fees for technical service as defined under Explanation-2 to section 1(vii) of the Act. It is also relevant to note, under Article-12 of India Singapore tax treaty, fees for technical services, though, is taxable in the hands of the recipient in Singapore, however, it can also be taxed in India under certain circumstances. Applying the said provision, it is necessary to determine whether the payment made can at all be termed as fee for technical services as defined under Article-12 of India Singapore Tax Treaty. In our considered opinion, we have to address this issue at the very outset. Article-12(4) of India Singapore tax treaty defines fee for technical services as under:—

“12.4 the term "fees for technical services" as used in this Article means payments of any kind to any person in consideration of services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:

- (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or*
- (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein; or*

- c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein."

49. The Assessing Officer has treated the payment, made as fees for technical services on the reasoning that under the agreement EMCAP has made available managerial and technical services to the assessee. The expression "make available" which also appears in Article 12(4)(b) of the India-US tax treaty would mean the recipient of such service is able to apply or make use of the technical knowledge, knowhow, etc., by himself in his business or for his own benefit and without recourse to the service provider in future and for this purpose a transaction of the technical knowledge, experience, skills, etc. from the service provider to the service recipient is necessary. Some sort of durability or permanency of the result of the rendering of services is envisaged which will remain at the disposal of the service recipient. In other words, the technical knowledge, experience, skill, etc., must remain with the service recipient even after the rendering of the services has come to an end. In contrast to Article-12(4)(b) of India-U.S. tax treaty, Article-12(4)(b) of India-Singapore tax treaty has made it more specific by providing that technical knowledge, experience, skill, knowhow or process, would not amount to fees for technical service unless it enables the person acquiring the service to apply the technology therein. A perusal of the agreement between the assessee and EMCAP makes it clear that as per the terms of the agreement EMCAP would provide management consulting, functional advice, administrative, technical, professional and other support services to the assessee either itself or through any affiliate or through third parties. However, there is nothing in the agreement to conclude that in the course of such provision of service, EMCAP has made available any technical knowledge experience, skill, knowhow, or process which enables the assessee to apply the technology contained therein on its own without the aid of EMCAP. The Hon'ble Karnataka High Court while

explaining the true import of expression "make available" in case of De Beers India Mineral Pvt. Ltd. (supra) has observed as under:—

'What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing inc service, within the meaning of paragraph "(4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available, in other words, payment of consideration would be regarded as "fees for technical/include services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.'

50. A careful analysis of the observations of the High Court, makes it clear that "make available" not only would mean that recipient of the service is in a position to derive an enduring benefit out of utilization of the

knowledge or knowhow on his own in future without the aid of the service provider but such technical knowledge, skill, knowhow, etc., must remain with the recipient even after the contract comes to an end. The Court has observed, the technology will be considered to have been made available when the person acquiring the service enable him to apply the technology. Further, the Court went on to hold that the payment can be considered as fees for technical services only if the twin test of rendering service and making technical knowledge available at the same time is satisfied. If we apply the aforesaid tests laid down by the Hon'ble Karnataka High Court to the facts of the present case it becomes clear that it has not been established on record that while rendering the services, EMCAP has made available technical knowledge, knowhow, skill, etc., to the assessee in a manner to enable him to apply them independently or on its own. Therefore, the payment made by the assessee cannot be considered as fees for technical services as defined under Article 12(4)(b) of the India-Singapore tax treaty and for this reason also we do not have to examine taxability of the same under section 9(1)(vii) of the Act. Moreover, it is a fact on record that the payment of global support service fee was made under the agreement which has continued from the year 2003. It is a matter of record that in the preceding assessment years though the assessee has paid global support service fees to EMCAP without deducting tax at source, no disallowance under section 40(a)(i) was ever made. Therefore, there being no difference in facts in the impugned assessment year, considering that the payment was made under the same contract, even, applying the rule of consistency, no disallowance under section 40(a)(i) can be made in the impugned assessment year. Accordingly, we delete the disallowance made by the Assessing Officer. These grounds are allowed.”

27. This decision applies to the facts of the assessee’s case. In view of the above, we hold that the marketing and sales services, operations and standardization services do not satisfy the “make

available” clause as per article 12(4)(b) of Indo Singapore DTAA and, therefore, the amounts are attributable for these services cannot be held to be fees for technical services.

28. In the result, the appeal of the Revenue is dismissed and grounds of appeal of the assessee on this issue are allowed.

29. The assessee in its ground of appeal no.3 agitated the order of the Ld.CIT(A) in directing the Assessing Officer to charge interest u/s 234A and 234B of the Act ignoring that section 234A is not applicable as the tax return was filed in time and that section 234B is not applicable as the entire amount due as taxes for already discharged by way of tax deducted at source.

30. On hearing both the sides, we restore this issue to the file of the Assessing Officer to decide the same in accordance with law after providing adequate opportunity of being heard. This ground is allowed for statistical purpose.

31. The facts being identical in all other appeals for the assessment years 2010-11, 2011-12, 2012-13 and 2013-14 the decision taken by us in the AY 2014-15 applies *mutatis mutandis* for the appeals for assessment years 2010-11 to 2013-14.

32. In the result, appeals of the Revenue are dismissed and the appeals of the assessee are partly allowed as indicated above.

Order pronounced in the open court on 25/09/2023

**Sd/-
(G.S. PANNU)
PRESIDENT**

**Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER**

Dated: 25/09/2023

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT
(DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi