

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

BEFORE SMT BEENA PILLAI, JUDICIAL MEMBER
AND
SHRI RATNESH NANDAN SAHAY, ACCOUNTANT MEMBER

ITA No.2444/M/2024
Assessment Year: 2020-21

DCIT (IT)- 2(2), Room No.1722, 17 th Floor, Air India Building, Nariman Point, Mumbai- 400021.	Vs.	ESAB Holdings Limited 6 th Floor, 322 High Holborn, WC1V 7PB, London, Foreign United Kingdom PAN: AABCE6787C
(Appellant)		(Respondent)

Present for :

Assessee by : Shri Ajit Jain & Siddesh Chaugule, A.R.

Revenue by : Shri Anil Sant (SR. D.R.)

Date of Hearing : 09 . 09 . 2024

Date of Pronouncement : 24 . 10 . 2024

O R D E R

Per : Ratnesh Nandan Sahay, Accountant Member:

1. This appeal has been filed by the revenue against the Order of the Ld. CIT (Appeals) passed u/s. 250 of the Income Tax Act [the 'Act' in short]

vide DIN & Order No. ITBA/APL/S/250/2023-24/1060846840(1) Dated 13/02/2024 for the Assessment Year 2020-21.

2. Following grounds of appeal have been raised by the appellant:

1. *"On the facts and in the circumstances of the case and in law, Income from rendering management services of Rs.10,98,79,025/- erroneously treated as Fees of Technical services taxable in India on gross basis under Article 13.*
2. *On the facts and in the circumstances of the case and in law. Erroneous levy of interest under the provisions of the Income-Tax Act, 1961.*
3. *On the facts and in the circumstances of the case and in law. Erroneous recovery of refund not received by the appellant till date.*
4. *On the facts and in the circumstances of the case and in law. Erroneous penalty proceedings-initiated u/s. 270A of the Act."*

3. The facts of the case, in brief, are that the ESAB UK is a company engaged primarily in the business of providing management services to its group companies. It is a resident of UK for tax purposes in terms of article 4 of the India & UK Tax Treaty and is eligible to claim the benefit thereof. During the year under consideration, ESAB UK had provided services in the areas of accounting, finance, sales, tax, legal, insurance, information technology, human resources, quality assurance and environment, manufacturing process, lean manufacturing, business development, etc. to EWAC Alloys Limited ('EWAC Alloys') pursuant to management services

agreement entered into by it with EWAC Alloys. During the period under consideration, the assessee company has earned income of Rs.10,98,79,025/- from rendering the aforesaid management services from outside India to EWAC Alloys and no personnel of ESAB UK has travelled to India for rendering such services. The assessee company has claimed the aforesaid income as non-taxable in its return of income claiming that it has treated the income from management services as not taxable in India by claiming the beneficial provisions of Tax Treaty as the services rendered by the assessee company do not make available in technical knowledge, experience, skill know-how or processes, or consist of the development and transferred of a technical plan or technical design. Accordingly, the income from said services should be treated as business income not taxable in absence of Permanent Establishment (PE) of the company in India.

4. The case of the assessee company was selected for scrutiny assessment, wherein, the Ld. AO examined the above position adopted by the company and submissions made with respect to the India source income earned by it. Thereafter, the Ld. AO completed

the assessment proceedings by alleging that the income earned by ESAB UK from rendering management services is in the nature of FTS by merely concluding that there is performance nexus in India without any explanation on why the income is taxable as FTS as per the India & UK Tax Treaty.

5. Aggrieved by the order of the Ld. AO, the assessee company preferred an appeal before the Ld. CIT(A). the Ld. CIT(A) after considering the submissions made by the assessee company concluded that the services rendered by the company are as follows:
 - a. Merely managerial in nature and outside the ambit of FTS as defined under India & UK Tax Treaty.
 - b. Without prejudice to the above, the services do not make available in technical knowledge, experience, skill know-how or processes or consist of the development and transfer of technical plan or technical design and hence, not in the nature of FTS under the beneficial provisions of India & UK Tax Treaty.

c. Thus, the income from management services earned by the company is in the nature of business income not taxable in India in absence of 'PE' of the company in India.

6. Aggrieved by the order of the Ld. CIT(A), the revenue has preferred this appeal on the ground that the Ld. CIT(A) has erred in holding that income from management services earned by the assessee company is not in the nature of FTS under article 13 of India & UK Tax Treaty and also, not in the nature of FTS even after rendering of managerial services in India.

7. During the appellate proceedings before us, the assessee company submitted as under:-

2.1. *"The Company, at the outset, submits that the aforesaid management services rendered by it are majorly in the nature of managerial services as they are provided with a view to rationalize and standardize the business conducted by EWAC Alloys in India and hence, such services are only intended to support the business of EWAC Alloys in accordance with the Group global practice. In this regard, the Company seeks to submit that the ambit of FTS in Tax Treaty is narrow as compared to the provisions of the Act and managerial services are not covered under the definition of FTS under the Tax Treaty, hence, the income earned by*



ESAB UK from services should not be taxable as FTS under the beneficial provisions of the Tax Treaty.

- 2.2. *In support of the aforesaid contention, Company places reliance on the decision of N.M. Rothchild & Sons Ltd. v. DCIT [2023] 152 taxmann.com 18 (Delhi Tribunal) (please refer Page 6 to 14 of the Paper Book containing 277 pages submitted on 9th September 2024 during the course of hearing/ wherein the facts of the case are similar to the case of the Respondent involving India UK DTAA and services in the nature of management services such as human resources, internal audit, corporate events, group finance, global finance, legal and compliance, global planning, marketing etc. It was inter-alia held by Hon. Delhi ITAT that the services rendered are in the nature of advisory and does not fall in the category of either technical or consultancy services under India - UK DTAA. The Company also relies on the various judicial precedents submitted in the case laws compilation No. 1 (please refer Page 1 to 40 of the Paper Book containing 277 pages submitted on 09 September 2024 during the course of hearing).*
- 2.3. *Without prejudice to our contentions that services, being managerial services, does not fall within the ambit of FTS under India-UK DTAA, the Company submits that the said services rendered, even if considered as technical, do not make available any technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design to EW AC*

Alloys. Thus, the conditions of clause 4(c) of Article 13 of the India-UK Tax Treaty are also not satisfied in the present case.

- 2.4. *The Company submits that the term make available is not defined under the Tax Treaty. However, the Memorandum of Understanding (MoU) to the Tax Treaty between India and USA which has this "make available clause similar to the India-UK Tax Treaty which explains the term "make available as under "Generally speaking, 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 may require technical input by the person providing the service does not per se mean that technical knowledge, skills etc. are made available to the person purchasing the 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."*
- 2.5. *Therefore, the following tests are relevant in determining whether services 'make available technical knowledge, experience etc.:*
 - a. *The expression "make available" is used in the sense of one person supplying or transferring technical knowledge or technology to another;*
 - b. *Technology is considered "make available" when the service recipient is enabled to apply the technology contained therein,*

- c. *The service recipient is able to make use of the knowledge, experience etc by himself in his business without recourse to the service provider:*
 - d. *The service recipient is at liberty to use the technical knowledge, skill, know-how and process in his own right.*
- 2.6. *It is submitted that the management services provided by the Company to EWAC Alloys do not "make available" technical knowledge, experience, skill, know-how or process etc. This is on account of the following reasons:*
 - a. *The management services provided by the Company to EWAC Alloys are on various business and commercial matters, best practices, guidelines which are standardized and internationally accepted practices for the Group as a whole and are provided by the Company only to its various ESAB group entities (including EWAC Alloys). Thus, EWAC Alloys always needs to approach the Company to gain insights on particular aspects and is not able to apply any expertise or use any knowledge on its own.*
 - b. *The management services provided by the Company ultimately lead to protection of ESAB's brand image and client relations and EWAC Alloys is not at liberty to use the technical knowledge, skill know-how, and processes in their own right.*
 - c. *Providing of information, furnishing guidelines, and suggesting plans of action aimed at uniformity and seamless quality in business dealings of all ESAB Group entities*

should not amount to making available technical skills, knowledge, experience etc. to them.

2.7. *To support the contentions that management services rendered by the Company do not make-available any technical knowledge, skills, know-how etc, the Company places reliance on the following judicial precedents submitted in the case laws compilation No. 1 (please refer Page 41 to 277 of the Paper Book containing 277 pages submitted on 09 September 2024 during the course of hearing)*

- a. *CIT v. De Beers India (P) Ltd. [2012] 346 ITR 467 (Karnataka HC),*
- b. *US Technology Resources (P) Ltd. vs. CIT [2018] 97 taxmann.com 642 (Kerala HC),*
- c. *CIT v. Jefferies LLC [2024] 164 taxmann.com 468 (Mumbai Tribunal),*
- d. *Swiss Re Asia Pte Ltd. v [2024] 159 taxmann.com 34 (Mumbai Tribunal);*
- e. *NTT Asia Pacific Holdings Pte Ltd. v. ACIT [2022] 141 taxmann.com 137 (Mumbai Tribunal),*
- f. *Nielsen Company vs DCIT [2019] 109 taxmann.com 264 (Mumbai Tribunal),*
- g. *Exxon Mobil Company India (P.) Ltd. v. ACIT [2018] 92 taxmann.com 5 (Mumbai Tribunal),*
- h. *Shell International B.V. v. DCIT [2024] 160 taxmann.com 761 (Ahmedabad Tribunal),*



- i. *DCIT CEVA Asia Pacific Holdings Company Pte Ltd. [2023] 155 taxmann.com 475 (Delhi Tribunal),*
- j. *Xansa India Ltd. v. DCIT [2016] 75 taxmann.com 123 (Delhi Tribunal),*
- k. *M/s. Faurecia Automotive Holding v. DCIT [2019] ITA No. 784/PUN/2015 (Pune Tribunal)*

2.8. *Also, the Company submits that the services can be said to have made available only if the recipient of services, by virtue of rendition of services, is enabled to apply the technology contained in the services on its own with recourse to the service provider. The technical knowledge and skills of the service provided should be imparted and absorbed by the service recipient and should remain with the person for their application/deployment without any recourse to the service provider.*

2.9. *In the facts of the case of the Respondent, the service recipient i.e., EWAC Alloys is continuously availing the services of the Company which is rendered on a year-on-year and recurring basis. The continuous rendition of services by the Company in addition to our earlier submissions, additionally justifies that the services are not made available to the EWAC Alloys and the EWAC Alloys has to approach the Company time and again for the said services.*

2.10. *It is a well-settled principle that in case of continuous rendition of services where services are provided on recurring basis, the make-available test is not satisfied as*

the service recipient would need to take recourse of service provider each time when services are required. The Company places reliance on the various judicial precedents submitted in the case laws compilation No II which have upheld the aforesaid principle (please refer Paper Book containing 89 pages submitted on 09 September 2024 during the course of hearing). ”

The D.R. of the revenue relied on the order of the Ld. AO.

8. It is the case of the department that the claim of the assessee company that the management services fees are not liable to be taxed in India as per the article 13 of the India & UK Treaty is not acceptable to the Ld. AO. The services rendered as per agreement are covered under the meaning of FTS India IT Act as well as the DTAA. The assessee has not disputed the nature of services being in the nature of FTS. The assessee has basically contended that the services have been rendered in UK and thus as per Para (4) of Article 13 of the India-UK DTAA it is not taxable in India. The relevant portion of the DTAA is reproduced as under:

As per the aforesaid article, the term FTS is defined as under.

....“4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy



services (including the provision of services of a technical or other personnel) which:

- (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received, or
- (b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or
- (c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

Thus the question that needs to be answered is whether the services were performed in India or in UK. In this regard, it would be pertinent to note that the performance of a managerial service in the nature of FTS would be in the state where the service is used. In the instant case of the assessee the managerial services provided by it are being used by its group companies in India. Thus, even if the performance nexus rule is followed, the services have been clearly rendered by the assessee in India. Hence, in the light of the above discussions the income of the assessee from fees management services is held to be taxable as Fees for Technical Services under Section 9(1)(vii) of the Income tax Act, under Article 13

of the India-UK DTAA. Thus, the amount of Rs.10,98,79,025/- on account of Management Service received by the assessee from its India group companies is treated as FTS Income taxable in India @ 10% under the beneficial rate as per the DTAA.

9. We have also gone through the decision of the N.M. Rothchild & Sons Ltd. v. DCIT [2023] 152 taxmann.com 18 (Delhi Tribunal), wherein, the facts of the case are similar to the present case involving India-UK DTAA and services in the nature of management services such as human resources, internal audit, corporate funds, group finance, global finance, legal and compliance, global planning, marketing, etc. It was inter alia held by the Hon'ble Delhi ITAT that the services rendered are in the nature of advisory and do not fall in the category of either technical or consultancy services under India- UK Tax Treaty. We are in agreement with the submissions of the assessee company that the services being managerial services, does not fall within the ambit of FTS under India & UK Tax Treaty, the services rendered, even if considered as technical, do not 'make available' in technical knowledge, experience, skill know-how, or processes, or consist of the developments and transfer of technical plan or technical design to EWAC Alloys. Thus, the conditions of clause 4(c) of article 13 of



the India & UK Tax Treaty are not satisfied in the present case. We are also agreed with the submissions made by the assessee company that the services can be set to have made available only if the recipient of the services by virtue of rendering of services is enabled to apply the technology content in the services on its own with recourse to the service provider. The technical knowledge and skills of the service provider should be imparted and absorbed by the service recipient and should remain with the person for their application or enjoyment without any recourse to the service provider. We, therefore, hold that income from management services should not be treated as FTS as per the beneficiary provision of article 13 of the India & UK Tax Treaty considering that the services are mostly managerial in nature which are outside the ambit of FTS as per the tax treaty. Further, the services rendered by the company do not ‘make available’ in technical knowledge, experience, skills know-how or processes, or consist of the development and transfer of a technical plan or technical design to EWAS Alloys. Thus, the conditions of clause 4(c) of article 13 of the India & UK Tax Treaty are also not satisfied in the present case. In view of the above, we



hold that the Ld. CIT(A) was correct in holding that the services rendered by the assessee company are merely managerial in nature and formed outside the ambit of the FTS as defined in article 13 of the India - UK DTAA.

10. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 24.10.2024.

Sd/-

**BEENA PILLAI
JUDICIAL MEMBER**

Sd/-

**RATNESH NANDAN SAHAY
ACCOUNTANT MEMBER**

Mumbai, Dated: 24.10.2024.

Snehal C. Ayare, Stenographer

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.