INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1503/Del/2014
(Assessment Year: 2010-11)

CEVA Asia Pacific Holdings Company Pte Ltd, C/o. BSSR & CO, DLF Building No. 10, 8th Floor, Town-B, DLF Cybercity, Phase-II, Gurgaon PAN: AAECC1885A	Vs.	DDIT, Circle-1(1), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Salil Kapoor, Adv
Revenue by:	Shri TM Shivkumar, CIT DR
Date of Hearing	12/10/2017
Date of pronouncement	08/01/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the assessee against the order of the Dy. Director of Income Tax, Circle 1(1), International Taxation, New Delhi [Ld AO] passed u/s 143(3) read with section 144C(13) of the Income Tax Act [the Act] dated 23.12.2013 pursuant to direction of the ld Dispute Resolution Panel [Ld DRP] passed u/s 144C(5) dated 27.11.2013 for the Assessment Year 2010-11.

2. The assessee has raised the following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the Ld. AO has erred in taxing, and Hon'ble DRP has erred in confirming to tax, consideration for administrative support functions of Rs. 8,03,91,497 received by appellant from CEVA Freight India Pvt Ltd ("India affiliate" or "CEVA India") as Fees for Technical services ("FTS") under Article 12 of India- Singapore Tax Treaty ("Tax Treaty") by not appreciating:

- *that such functions do not 'make available' any technical knowledge, skills, expertise etc to the India affiliate;*
- *judicial precedents relied upon by the appellant, inter alia, wherein similar functions were held not to 'make available' any technical knowledge, skills etc to the recipient;*
- *reliance placed by appellant on other Tax Treaties and/or rulings for interpretation of 'make available' concept as per rules of interpretation.*

2. On the facts and in the circumstances of the case and in law, the Ld. AO has erred in making and the Hon'ble DRP has erred in confirming addition of tax deducted at source

("TDS") of Rs. 84,87,498, deducted by India affiliate while making payment of administrative support fee, on account of grossing up of such fee by not appreciating that such fee was actually paid 'gross of tax' to the appellant and the India affiliate was not liable to pay any amount over and above administrative support fee of Rs 8,03,91,497 (inclusive of TDS of Rs. 84,87,498).

3. *On the facts and in the circumstances of the case and in law, the Ld. AO has erred in levying and Hon'ble DRP has erred in confirming levy of interest under section 234B of the Act disregarding that even if consideration is treated as FTS, interest under section 234B is not applicable on facts and in law since:*

- *The entire income of appellant, being a non-resident, was subjected to tax deduction at source and tax was actually deducted by India affiliate, therefore, interest under section 234B of the Act is not applicable.*

4. *On the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty for furnishing inaccurate particulars of income."*

3. The assessee is a company incorporated under the laws of Singapore engaged in the business of providing transportation, logistics, and supply chain solutions. It is regional operational headquarter to provide management and support activities to its subsidiaries in related corporation in Asia pacific region. It has entered into an administrative support agreement with CEVA Freight India Pvt. Ltd on 01.01.2006 to provide day-to-day administrative support. The assessee filed its return of income on 12.12.2012 showing nil income in the status of non-resident company. The ld Assessing Officer examined the nature of administrative support services rendered to the Indian entity with respect to procedure, details of employees visiting India as well as service recipient employee going to the company, copies of the emails, bills, and ledger accounts with respect to such services rendered. Therefore, the ld Assessing Officer raised the query that why above services shall not be taxable in India. The assessee submitted its reply on 18.01.2013 describing the nature of services along with the description of functions performed and submitted that above functions performed cannot be said to "make available" any technical knowledge, experience, skill etc to Indian Service

recipient. It was further submitted that no Indian employee visited Singapore but on few occasion few employees may have visited Singapore for few days a week for attending internal meetings. The assessee on further query filed reply on 14.02.2013 submitting sample copy of some emails. The ld Assessing Officer vide para No. 5 of the Assessment order held that despite specific query assessee has furnished only sample copy of some email and further in para No 5.1 it submitted only 8 emails out of which 5 are just one liner and balance three are with respect to sending templates. Therefore, he held that Rs. 80391497/- received by the assessee from Indian entity is chargeable to tax as fees for technical services u/s 9(1) (vii) of the Act He further held that in terms of Article 12(4) of India-Singapore DTAA is attracted, as the assessee has made available the administrative support services. He also drew support from the submission of assessee that its employees visit India in connection with rendering of services and further the assessee did not divulge the specific details as called for but submitted cryptic emails and communications and did not divulge specific details as asked for. He further held that this services are rendered by working closely with

employees Indian affiliate for customizing the needs of the payer that helps in improving the performance by employing the best practices and industry experience that assessee possesses in the functions of management, finance and accounts and IT. Therefore, these services are made available and hence, fall within the purview of FTS under the Indian-Singapore Tax Treaty. Therefore, he held the above sum taxable as fees for technical services under the Income Tax Act as well as Double Taxation Avoidance Agreement. The assessee preferred objection before the ld Dispute Resolution Panel who concurred with the view of the ld Assessing Officer. Therefore, assessee is in appeal before us in Ground No. 1 challenging the above finding of the lower authorities.

4. The ld Authorised Representative referred to the agreement which is placed at page 1-4 of the paper book and also referred to role of the assessee as per that agreement. He submitted that ld Dispute Resolution Panel has held that services are highly technical but has held that services were made available by the assessee. He further held that merely because the services have been availed by the service recipient are on a long term basis and for the limited duration and are the

category of managerial and consultancy in nature same are held to be made available. He further referred to Article 12(4) of India-Singapore DTAA. He therefore, submitted that services are not available and hence, same are not chargeable to tax as per DTAA. It was further submitted that the issue is squarely covered in favour of the assessee by the order of the coordinate bench in assessee's own for Assessment Year 2005-06 in ITA No. 1527/Del/2011, wherein, the disallowance on account of non-deduction of tax at source was deleted. The Ld. authorized representative further relied upon the several decisions. Mainly he relied on decision of the Hon'ble Delhi High Court in case of 346 ITR 504 and Hon'ble Karnataka High Court in case of 346 ITR 467 and several other decision of the various coordinate bench and authority of advance ruling. From those decision he tried to demonstrate that if the make available clause is not satisfied with respect to the services then it does not qualified as fees for technical services according to the double taxation avoidance agreement.

5. The ld DR vehemently relied on the orders of the lower authorities and submitted that ld Assessing Officer has consistently asked the details which were not furnished by the

assessee. Even the mails furnished were creptic and irrelevant. He referred to para No. 5.1 to show that what kind of information assessee has furnished. He further submitted that assessee is not providing services, which can be said to be not made available. He referred para No. 5 of the order of the ld AO wherein, the services rendered are with respect to MIS and accounting support and information technology support service. He submitted that if the mails of these services can be looked into it is evident that these mails are provision of simple services. He further referred to the administrative support agreement and stated that assessee has not submitted any evidence with respect to marketing and advertising support as well as treasury functions support. He further supported that in MIS and accounting support also the assessee has only shown the emails pertaining to templates. With respect to the IT support he submitted that these emails do not show how the services are being not made available because they are merely for the query related for system not allowing saving of the data. The other mail is just a query showing the accounting head. He submitted that once this information is shared the recipient of the service would definitely use the identical

method to solve that issue. He further submitted that repeatedly doing same thing will definitely make available the services to the service recipient and therefore, there is no infirmity in the orders of the lower authorities.

6. We have carefully considered the rival contentions and perused the orders of the lower authorities. The assessee is providing following services which are under dispute:-

Nature of Administrative Support.

1. Marketing and advertising support including service relating to marketing materials, brochures, bids and sales proposals.
2. MIS and accounting support including internal accounting standards and procedures, US GAAP reporting procedures, and formulation of budgetary control systems along with appropriate standard costing procedures.
3. Treasury function support including advice and assistance on financing business operations, credit and collections management, risk and investment management, and treasury and banking management.
4. information technology support including but not limited to systems applications assistance, management

information reporting and facilitating and worldwide network connectivity.

7. With respect to the nature of services rendered by the assesee, it has submitted the eight emails as well as the copy of the bills raised on service recipient. The emails also relate to the only two services such as management Information system and I T Support system though assessee rendering for kind of services as per agreement. For other two services, assessee has not provided any details either before the ld AO or before ld DRP. Even before us, the assessee has not provided any proof about nature of those services rendered and manner in which they are rendered with respect to marketing and advertising support as well as treasury function support services. For the 2 services for which emails have been submitted , On examination of these emails the ld AO has specifically mentioned that out of the 8 emails, 5 emails are just one-liners, asking about some option available in the software reporting the status of the problem and the balance 3 emails are in respect of sending of templates. Such emails have been tabulated at para No. 5 of the order of the Ld. assessing officer. We have also looked at the content of those

mails as mentioned in paragraph No. 5 of the order, which are mostly related to the templates with respect of MIA and account support services and provision of certain guidelines relating to forecast on quarterly reporting for the alignment of data of group entities. In respect to information technology support services simple queries were raised with respect to the saving of data and exact location of certain accounting heads. Further, naturally the copies of the bills do not show the nature of services and does not help in examining whether it makes available the impugned services. Before the lower authorities, assessee has not submitted the complete details. From the above scanty details submitted by the assessee before the Ld. assessing officer, it is apparent that the natures of services rendered by the assessee are very preliminary, basic, or simple support systems. Looking at the nature of the queries in the email as well as the nature of information that is transmitting between the assessee to the service recipient, do not show that if those services are provided for longer period, how the service recipient does not become capable of solving those issues on its own. The ld DRP has made correct observation that in such services if they were provided for a longer period,

then naturally recipient of service would be capable of performing on its own. 'Make available' definitely means that person receiving the service is enable to utilize the same in the sense that the service should be of nature that makes receiver able and wiser on the subject of services. Though, observation made by the Ld. Dispute Resolution Panel is very relevant and appropriate, however without looking at the whole gamut nature of the services rendered by the assessee to the service recipient, it is not possible to decide whether the services are capable of ' make available' or not. One needs to examine with respect to the nature of services, various correspondence, conduct of the assess e, conduct of the service recipient and the nature of services involved, it is not possible to say that whether the services have been made available by the assessee or not. In the present case, assessee has not shown before the lower authorities that the natures of services are so that the service recipient is not capable of using them in future on its own without the support of the assessee. In view of this we direct the assessee to lead ample evidence before the ld Assessing Officer to show that services involved are of such a nature that assessee has not made available them to the

recipient. The reliance on the order of the coordinate bench for Assessment Year 2005-06 in ITA No. 1527/Del/2011 dated 19.01.2017 was heavily placed by the ld AR. We have carefully perused the order of the coordinate bench. In that order the limited issue was allowability of deduction in the hands of the payee. The disallowance was made for non-deduction of tax. The agreement in consideration in that order was dated 11.09.2003. We have carefully perused this agreement, however, on looking at para No. 4 the nature of services are tax and legal consultancy services, management information system consultancy system, accounting consultancy services and treasury consultancy services. Further, in that particular case the services were provided to that assessee by EGL US. The nature of the services considered and para 14 of that decision describes the services therein. We have carefully considered the nature of services mentioned in appendix A to impugned agreement involved in this appeal with the agreement dated 11.09.2003 in the agreement involved in the appeal decided by the coordinate bench. They are found to be nowhere similar for the reason that management information systems and consultancy services involved as per that

agreement relating to design, modification, upgrading, and maintenance of management information systems and procedures and standard for maintenance of systems documentation. However, in the impugned agreement before us the MIS and accounting support services speaks about internal accounting standards and procedures, US GAAP reporting and budgetary control system. Furthermore, the tax and legal services rendered in those agreements clearly spokes about the legal services provided as well as drafting, reviewing, and approval of various commercial and financial agreements. One of the services mentioned there in accounting consultancy services matches with the MIS and accounting support services before us. The ld Authorised Representative also could not show that services mentioned in both these agreements are similar Further, in that decision it was noted that copies of details of emails were produced before the lower authorities as well as before us. In that appeal it was the submission of the assessee that it is merely reimbursement of an expenditure and therefore, withholding tax do not apply which was recorded by the ld 1st Appellate Authority. Further, for that year, no information was submitted before the ld Assessing

Officer by the assessee but before the ld 1st Appellate authority and in remand report the ld Assessing Officer could not point out anything which remotely suggest that services have made available to that assessee and before the coordinate bench also no such claim was made. In the present case before us the ld Assessing Officer has made out a specific case and ld DRP has also considered all the aspects and held that services have been made available by the assessee to the service recipient. Therefore, reliance placed by the assessee on the decision of the coordinate bench is rejected. Further, the assessee has relied upon the host of decisions where concept of 'make available' has been deliberated. However, applicability of those decisions can only be decided if the assessee leads ample evidence before the lower authorities about the nature of services, manner of rendering those services and further to show that without the support of the assessee the recipient of the services would not be able to perform them on its own. In the present case, the assessee has not provided adequate details before the Assessing Officer as well as before the ld DRP. Before us, also, no evidences were laid but assessee attempted to press upon only the legal arguments. Before

laying down the facts of a case reliance on judicial precedents becomes an exercise in futile. Therefore, as assessee has not provided the complete details, in the interest of justice, we set aside the whole issue back to the file of ld Assessing Officer for deciding whether the services involved in the agreement satisfy the ' make Available' criteria or not. We also direct assessee to provide complete details about the services showing their nature, manner of rendering and demonstrate before the AO that the services are of such a nature that recipient would not be able to perform them on its own. Needless to say, that proper opportunity of adducing information as well as the hearing shall be granted to assessee before deciding the issue. In the result ground, No. 1 of the appeal of the assessee is allowed with above direction.

8. Ground No. 2 of the appeal of the assessee is with respect to grossing up the above services by the amount of tax deduction at source. The ld Authorised Representative referred clause 6 of the agreement. payer has deducted TDS @10% but according to clause 6 the same shall be on the account of the first party. The ld Departmental Representative relied upon the orders of the lower authorities.

9. We have carefully considered the rival contentions and perused the orders of the lower authorities. As we have already set aside the whole issue of determination of fees for technical services back to the file of the ld Assessing Officer the issue of grossing up of those services is related to that issue only, in the interest of justice, we also set aside ground No. 2 of the appeal of the assessee to the file of Assessing Officer.

10. Ground No. 3 relates to charging of interest u/s 234B of the Act.

11. The ld AR submitted that even if the fees for technical services are held to be taxable in India, the payer should have deducted tax at source thereon. Therefore, no interest u/s 234B is chargeable on the income of the assessee. He further submitted that the entire income of the appellant being non-resident is subjected to tax deduction at source and there was in fact tax deducted at source by the Indian affiliate and therefore, interest u/s 234B does not apply in case of the assessee. The ld Departmental Representative vehemently submitted that the above interest is automatic.

12. We have carefully considered the rival contentions and perused the orders of the lower authorities. The issue is squarely

covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in case of DIT (International Taxation) Vs. GE Packaged Power Inc. 373 ITR 65 (Delhi), wherein, it has been held that where assessee is non-resident company, entire tax to be deducted at source at payments made by the payers to it and there was no question nof payment of advance tax by the assessee, therefore, revenue could not charge any interest u/s 234B of the Act. In view of the above decision of the Hon'ble Delhi High Court, we allow ground No. 3 of the appeal of the assessee.

13. Ground No. 4 is against initiation of penalty proceedings u/s 271(1)(c) of the Act, which is premature and therefore, same is dismissed.

14. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 08/01/2018

-Sd/-	-Sd/-
(BHAVNESH SAINI)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 08/01/2018
A K Keot

Copy forwarded to

1. Applicant

2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi