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

Before Shri Rajpal Yadav, Vice-President
&
Shri Rajesh Kumar, Accountant Member

I.T.A. No. 300/KOL/2022
Assessment Year: 2018-2019

Metso Outotec OYJ,.....Appellant
(Earlier known as "Outotec OYJ"),
C/o. Metso Outotec India Private Limited,
1st Floor, Building No. 10, Tower-A,
DLF Cybercity, Phase-II, Gurugram-122002,
Haryana
[PAN: AABCO2957Q]

-Vs.-

Deputy Commissioner of Income Tax,.....Respondent
(International Taxation),
Circle-1(2), Kolkata,
Aayakar Bhawan Poorva,
110, Shanti Pally, 2nd Floor,
Kolkata-700107

&

I.T.A. No. 269/KOL/2023
Assessment Year: 2020-2021

Metso Outotec OYJ,.....Appellant
(Earlier known as "Outotec OYJ"),
C/o. Metso Outotec India Private Limited,
1st Floor, Building No. 10, Tower-A,
DLF Cybercity, Phase-II, Gurugram-122002,
Haryana
[PAN: AABCO2957Q]

-Vs.-

Assistant Commissioner of Income Tax,....Respondent
(International Taxation),
Circle-1(2), Kolkata,

Aayakar Bhawan Poorva,
110, Shanti Pally, 2nd Floor,
Kolkata-700107

Appearances by:
Shri KM. Gupta, Advocate & Shri R. Malhotra, C.A., appeared on behalf of the assesseee

Sri Guru Bhashyam, CIT (D.R.), appeared on behalf of the Revenue

Date of concluding the hearing : July 05, 2023
Date of pronouncing the order : August 29, 2023

O R D E R

Per Shri Rajpal Yadav, Vice-President (KZ):-

The present two appeals are directed at the instance of assessee against the assessment orders dated 15.02.2022 and 30.01.2023 passed for assessment years 2018-19 and 2020-21 respectively passed under section 143(3) read with section 144C(13) of the Income tax Act, 1961.

2. The issues agitated by the assessee in both the years are common, therefore, for the sake of brevity, we deem it appropriate to hear both these appeals together and dispose off by this common order.

3. The assessee has taken six grounds of appeal along with sub-grounds in A.Y. 2018-19 and eight grounds of

appeal along with sub-grounds in A.Y. 2020-21. As far as the first ground of appeals is concerned, it is general in nature, which does not call for recording of any specific finding.

4. In Ground No. 2, the assessee has raised sub-grounds also and it has agitated the determination of taxable income under the head "IT Services".

5. Brief facts of the case are that the assesese-company has filed its return of income electronically on 29.03.2019 and 12.02.2021 declaring income of Rs.4,05,940/- and Rs.2,33,61,680/- in A.Y. 2018-19 and 2020-21 respectively. The case of the assessee was selected for scrutiny assessment in both the years and accordingly notice under section 143(2) was issued and served upon the assessee. The assessee has provided IT Services to Indian customers during the relevant financial year. It has raised invoices on account of supply of services amounting to Rs.2,04,00,802/- in A.Y. 2020-21, whereas Rs.1,38,10,480/- in A.Y. 2018-19. The stand of the assessee was that it had earned income from IT Services in pursuance of a Service Agreement with Outotec India Private Limited and it had performed the said services in Finland through its office/workshop under Clause 3 of the Service Agreement. The assessee

further contended that it has no permanent establishment in India and, therefore, as per Article 12 of the India-Finland DTAA, the alleged receipts are not taxable in the hands of the assessee. The ld. Assessing Officer was not satisfied with the contention of the assessee and he proposed the addition.

6. Dissatisfied with the proposal of the ld. Assessing Officer, the assessee filed objections before the Dispute Resolution Panel and the ld. DRP has rejected the contention of the assessee and upheld the levy of taxation on the alleged receipt for sale of IT Services as FTS. The discussion made by the ld. DRP is worth to note. For the facility of reference, we are taking note of DRP's directions in A.Y. 2020-21, which reads as under:-

> *"DRP Directions*
> *3.1 The assessee has provided IT Services to Indian customers during the relevant financial year. In the relevant period the assessee has raised invoices on account of supply of services amount into Rs 2,04,00,802/- .The assessee had furnished the copy of contract for IT Services during the assessment proceedings. The above issue was also earlier contested by the assessee before this Panel. The Panel has since given a comprehensive direction to the AO vide its order dated 07.01.2022 for the assessment year 2018-19. The operative part of the order is placed below for reference.*
>
> *3.2. In DRP proceedings, the assessee stated that it earned income from IT services in pursuance of a Service Agreement with Outotec India Private Ltd, and that it performed the said services through its premises in Finland through its offices/workshops under the clause 3 of the service agreement, which reads as under-*

"3. Place of work to be performed

3.1 All activities related to the Services shall be provided at Service Providers premises".

3.3. The assessee stated that none of its employees had visited India to provide the services to Outotec India. The assessee contended that in terms of paragraph 5 of Article 12 of the DTAA, FTS shall be deemed to arise in India if the payer is a resident of India. However, the second sentence of the said paragraph limits the operation of the first paragraph in as much as where the FTS relates to services performed within Finland, then such FTS shall be deemed to arise in the State in which the services are performed, which in this case is Finland. Hence the income therefore will only be taxable in Finland and not in India. On the PE observation of the AO, the assessee stated that the provision will apply only if the non-resident has a PE in India and that it had no PE in India during the year.

3.4. The submissions have been examined along with the materials available on record. The dispute is essentially about the scope and applicability of Paragraphs (1), (2) and (5) of the DTAA to the facts and circumstances relating to the assessee's rendition of IT services is. Relevant extracts of said Article 12 of the India- Finland DTAA are as follows-

ARTICLE 12
ROYALTIES AND FEES FOR 'TECHNICAL SERVICES

1. *Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State,*

2. *However, such royalties or fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of trie royalties is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services,*

3(a) The term "royalties" as used in this Article means payments of any kind received as a consideration for the

use of or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, and films or tapes for television or radio broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.

(b) The term "fees for technical services" as used in this Article means payments of any kind, other than those mentioned in Articles 14 and 15 of this Agreement as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.

4.The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect ofwhich the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Royalties or fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, or a resident of that State. Where, however, the right or property for which the royalties are paid is used within a Contracting State or the fees for technical services relate to services performed, within a Contracting State, then such royalties or fees for technical services shall be deemed to arise in the State in which the right or property is used or the services are performed. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred, and such royalties or fees for technical services are borne by

such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

3.5. A conjoint reading of Paragraphs (1) and (2) clearly shows that Royalties / fees for technical services may be taxed in the State of residence of the payee [Paragraph (1)] as well as in the State of Source [Paragraph (2)]. In this context, Paragraph (5), inter alia, provides that ivhere the payer is a resident of a Contracting State (India in the present case), royalties/FTS shall be deemed to arise in such Contracting State. However, if the right/property for which such royalties are paid is used within a Contracting State or the services in relation to such FTS are performed in that Contracting State, the said royalties/FTS shall be deemed to arise in that Contracting State. As the India - Finland DTAA does not contain the make available clause in the FTS Article, there is no requirement to discuss that aspect of the services in the assessee's case for this AY.

3.6. In the present case, the assessee has stated that the said IT services have been performed by it in Finland through its offices / workshops in Finland and that none of its employees visited India to perform the services under aforesaid clause 3 of the Service Agreement. The services provided under Appendix 1 to the Service Agreement are as follows -

(i)IT infrastructure services - including client Administration system service, wide area network, or to take active directory, antivirus control, mail no Lotus Notes, Internet and remote access, dial-up and wireless service, push mail, partner virtual private network, Internet connections website, encryption service, videoconference service etc,

(ii) IT infrastructure special services - including virtual private network hardware site connection and video equipped meeting room

(iii) IT application services - including SAP and SAP related services, project data Administration Systems, design applications support, development and support of customer relationship Administration Systems, community tools for information sharing and collaboration etc.

3.7.The Assessing Officer has stated that the service is treated to be performed only when the beneficiary is able to use it for its purpose. In this context, the Panel notes that for AY 2015-16 in ITA No. 2601/Kol/2018 in the assessee's case, the Hon'ble ITAT, Kolkata held that income from testing and other services is taxable in India even if the technical services of testing were performed outside the country. The Tribunal held that even though the process of testing ivas conducted outside India, the payment for the same was not for the process but for the results of testing which were used in India. Accordingly, the services provided by the assessee were held to be taxable as fees for Technical Services under Article 12(5) of the India - Finland DTAA. It is that for the said assessment year, the assessee had, inter alia, earned four types of revenue including income from the rendition of technical services which was offered to tax. On income from rendering of testing services, the Hon'ble Tribunal did not accept the assessee's contention that as the services have been rendered outside India, the same was not taxable in India under Article 12(5) of the DTAA. Specifically, the Hon'ble Tribunal held as follows -

> *"22, The assessee argues that the technical services of testing is performed outside the country, i.e. in Finland and hence cannot be taxed in India in view of the exception carved out to Article 12(5) of the India - Finland DTAA. The exception in question is, when the fees is paid for technical services which are performed within a contracting state, then the income therefrom is deemed to accrue or arise within the state in which the services were performed. In our view, this Clause does not apvlu as the payment in question was made for the test results which were used within the contracting state. India. It may be true that the process of testing may have been conducted outside India. But the payment in question is not for the process but for the results of testing which is used in India. The argument of the Id. DR that these services were available in India and hence are taxable in India has to be upheld. Hence, we agree ivith the finding of the Assessing Officer as upheld by the DRP on this issue. In the result, this ground of the assessee is dismissed." (Emphasis supplied)*

3.8. In the present case, the ratio of the decision of the Hon'ble Tribunal above is squarely applicable to the income from technical services amounting to INR 1,38,10,480 as well. The said services, even if rendered in Finland under the Services Agreement, were for the purpose of the business of Outotec India in India. Without such use in India, the rendering of the services in Finland would be devoid of meaning. Clause 2 (Scope of Services) clearly affirms the above as it states that "the services provided may be adjusted from time to time by the Parties as is necessary in order to reflect changes in Buyer's needs, economic conditions, business operations and practices."

3.9. As rightly held by the AO, the performance of services can be said to have been made only when the beneficiary is able to use it for its purpose. In the light of the abovementioned discussion, the Panel upholds the action of the AO. The objection is dismissed.

3.10. Since the factual and legal matrix remain same, the Panel reiterates its own stand as spelt out for assessment year 2018-19. The assessee's objection on the above is rejected".

7. With the assistance of ld. Representatives, we have gone through the record carefully. The ld. Counsel for the assessee has reiterated his submissions as were made in A.Y. 2012-13 as well as before the ld. DRP, which has been noticed by the ld. DRP in the finding extracted supra. The main thrust of the assessee's argument is that it has no permanent establishment in India and the services were performed outside India in Finland. Therefore, these receipts in lieu of IT Services are not taxable as FTS in the hands of the assessee. We find that in the assessee's own case for A.Y. 2015-16,

ITAT has considered in details all these issues. The judgment of the ITAT is reported in 109 taxmann.com 69 rendered in I.T.A. No. 2601/KOL/2018. The Tribunal has recorded the finding that no doubt the assessee has no permanent establishment in India and these services were also rendered outside India but the services has been used in India and, therefore, it is taxable in India. The ITAT as well as DRP has made reference to Article 12(5) of India-Finland DTA in this connection.

8. During the course of hearing, we asked the ld. Counsel for the assessee to show how these services available for everybody and anybody can claim it over the counter. These are specific services for the entities of the assessee only, which are to be used in their respective organisation between different countries. Therefore, as far as the user of the services in India is concerned, their fees paid for such user in India deserve to be taxed in India. The ld. DRP has observed that there is no clause to make available in the treaty between India and Finland. According to which, it was not necessary upon the assessee to make the technology available to Indian entity and only then the receipt would be taxable. Without making it available, if the technology has been used, then also, on those receipts, the assessee has to pay taxes.

9. The next issue involved in both the appeals is, whether receipt received in the shape of guarantee fees deserves to be taxed in India within the meaning of Article 21 of India- Finland Treaty. The ld. DRP has made discussion on this issue as under:-

> *"4. Ground of objection No 3: Taxability of income from fee for Corporate Guarantee*
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> *(a)That on the facts and in the circumstances of the case and in law, the Ld. AO erred in holding that guarantee fee is taxable in India under section 56 of the Income-tax Act, 1961 ("Act") read with Article 21 of India-Finland* DTAA.
>
> *(b)That on the facts and in the circumstances of the case and in law, the Ld. AO erred in not appreciating that guarantee fees being business income of the assessee is not taxable in India in the absence of permanent establishment of the assessee in India under Article 5 read with Article 7 of the DTAA.*
>
> *(c)That on the facts and in the circumstances of the case and in law and without prejudice to the Ground No. b, the Ld. AO erred in holding that the guarantee fees as taxable in India without appreciating the fact that such income does not accrue or arise in India and accordingly cannot be brought to tax in India as per the relevant provision of the Act as well as DTAA.*
>
> *DRP Directions*
>
> *4.1.The assessee has provided corporate guarantee to M/s Outotec India Pvt Ltd during the year under consideration. In the relevant period the assessee raised invoices on account of fee for providing corporate guarantee amount into Rs 1,04,57,452/-. The above issue was also earlier contested by the assessee before this Panel. The Panel has since given a comprehensive direction to the AO vide its order dated 07.01.2022 for the assessment year 2018-19. The Panel while giving its directions for Assessment Year 2018-19 has*

distinguished its view which is separate from the view it had given for assessment year 2013-14.The operative part of the order is placed below for reference.

"During assessment proceedings, the assessee submitted that the income constituted business income in its hands and was not taxable in India in the absence of permanent establishment in India. It also submitted that DRP had accepted the position of non-taxability of guarantee fees in its own case for AY 2013- 14. The Assessing Officer noted that the agreement signed between the assessee and Outotec India Private Limited was limited to IT services and that no other contract/agreement was provided by the assessee regarding providing corporate guarantee. The AO held that there was no reason to believe that the income from providing corporate guarantee xvas business income of the assessee since the same was already included in the supply of IT services. On the abovementioned DRP directions for AY 2013- 14, the AO stated that the DRP had confirmed the AO's view that the income from fee for providing corporate guarantee is income from other sources and taxable under Article 21(3) of the India- Finland DTAA but had held that since the income arose in Finland and corporate guarantee was provided in Finland, it was not taxable under Article 21(3). The AO noted that the assessee did not submit any evidence to show that the corporate guarantee was provided in Finland, while the invoices submitted by the assessee confirmed that the income accrued in India as the invoices were addressed to Outotec India Private Limited in India. The AO further held that the service is treated to be performed only when the beneficiary is able to use it for its own purpose and that the intended use of the corporate guarantee was ultimately in India from where the assessee derived its right to receive the income and raise the invoices.

4.2 In DRP proceedings, the assessee stated that it earned guarantee fees from Outotec India on account of parent company guarantee under its Articles of Association, which defines the scope of the line of business of the company. The Articles permit the company to engage in business of providing guarantees to its subsidiaries on a regular basis. To facilitate the same, the assessee had negotiated with a syndicate of eight banks, whereby in connection with the above services, the bank charged fees at the rate of 1.5% per

annum of the guarantee fees and the assessee subsequently recharged the cost to Outotec India together with a premium of 0.25% per annum. The assessee stated that the activity of provision of guarantees is a continuous systematic activity which had a direct impact on the revenue of the company. The assessee stated that section 5 read with section 9(l)(i) of the IT Act provides that income shall accrue or arise in India if the same is earned through any business connection in India. The assessee referred to the observations of the Hon'ble Supreme Court in Carborundum Co vs CIT (108 ITR 335) that carrying on activities in India is essential to make non-residents have business connection in India. The assessee stated that it is not carrying any activity in India in connection with the guarantee fees charged from Outotec India and hence there zvas no presence of business connection in India and no scope for attributing income to Indian operations. The assessee also stated that under the DTAA, income derived by it from guarantee fees is governed by Article 7 of the DTAA and since it does not have a fixed place of business in India, the question of PE in India does not arise. Therefore, guarantee fees cannot be taxed under Article 7 read with Article 5 of the DTAA. Also, such income being business income will fall outside the scope of Article 11 (Interest) as had been accepted by the AO and also outside Article 21 ('Other income')

4.3. In DRP proceedings the assessee also filed additional evidence in the form of copy of the Articles of Association and copies of invoices pertaining to guarantee fees, which was admitted by the Panel in the interest of natural justice under the DRP Rules, 2009. However, it is noted that no agreement for any such corporate guarantee was furnished by the assessee in DRP proceedings.

4.4. The submissions of the assessee along with the additional evidence have been examined. It is seen that the same issue arose in AY 2013 -14, which was examined by DRP as follows -

> *"...The assessee had given bank guarantee/ Parent company guarantee of Nordes Bank Finland (lead arranger of syndicate of banks) for OT1N. OTIN used this bank guarantee to give bank guarantee to its customers in respect of the advance money received for the projects. The AO*

> *has held that the income earned by the assessee against the bank guarantee given in favour of OTIN as income from other sources for the assessee giving bank guarantee is not the business of the assessee. To this extent the findings of the A.O. is correct. Once having decided the head of income, the A.O. relied upon Indo Finnish DTAA to determine the taxability of the commission received for providing bank guarantee...*

The A.O has held that the commission income earned by the assessee for providing bank guarantee is taxable under sub clause 3 of the Article 21 of the DTAA.

The assessee claimed that the Articles of Association of the assessee authorizes the company to engage in business of providing guarantees to its group companies including Outotec India on a regular basis. Provision of guarantee is not an isolated event but a planned continuous systematic activity which has direct impact on the revenues of the company. The assessee also charges premium on the guarantee provided to its subsidiary company. Hence provision of guarantees has a direct effect on the profitability of the assessee which substantiates that it has direct nexus or control zoith the business of the assessee. Thus the income earned from providing guarantee to Outotec India will qualify as business income and not income from other sources.

The contention of the assessee has been considered. Providing bank guarantee/parent comyamj guarantee is not a routine activity for the assessee. It does it as an obligation to its subsidiary comyamj being the owner of the subsidiary. Hence it is more likely to be a share holder obligation/service than business activity. Had it been a business activity, the assessee should not have restricted it to it's subsidiaries only. Therefore the decision of the A.O. that the commission income earned by the assessee for providing bank/parent company guarantee is income from other sources is confirmed.

The A.O. has held that the income is taxable in India by virtue of sub clause 3 of article 21 of Indo Finnish DTAA. This interpretation appears to be wrong. For the sake of clarity sub section3 is reproduced once again:

" 3. *Notwithstanding the provisions of paragraphs 1 and 2 of this Article, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Agreement and arising in the other Contracting State may be taxed in that other State."*

In this case income of the assessee which is a resident of Finland is arising in Finland as bank/Parent company guarantee has been given in Finland. The service was provided in Finland. Hence the income has arisen in Finland. The income has not arisen in India; hence as per sub clause 3 of article 21, income is not taxable in India.

The AO is directed to delete the addition. This objection is allowed." (Emphasis supplied)

4.5. As *seen from the afore said directions, DRP agreed with the AO that the income earned by the assessee against the bank guarantee given in favour of the company is income from other sources since the assessee as giving bank guarantee is not the business of the assessee. For this AY also, the Panel agrees with the above observation and holds that the said income is not income from business in terms of Article 7 of the DTAA for the reasons give therein. However the Panel also notes that DRP had held that the income was not taxable under Paragraph 3 of Article 21 on the grounds that the service had been provided in Finland and hence the income arose in Finland. Said Article 2lof the India-Finland DTAA reads as under-*

ARTICLE 21 OTHER INCOME

(1)Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.

(2)The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect ofiohich the income is paid is

effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

(3)Notwithstanding the provisions of paragraphs 1 and 2 of this Article, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Agreement and arising in the other Contracting State may be taxed in that other State.

4.6.Article 2 (Line of Business) of the Articles of Association of the assessee company reads as follows -

Article 2 (Line of Business)

The company's line of business is to carry on, by itself or through its subsidiaries, the design, manufacture, construction of and trade in methods, machinery, devices, equipment, spare parts and production facilities for the mining, concentration, metallurgical and other processing industry, metals forming technology, materials technology, energy technology and environmental protection, the production and sale of technical design, project services and research and product development services for the processing industry, energy technology and environmental protection, including any industrial and commercial operations and the sale of business management and consultancy services based on or relating to these activities or know - how acquired in this sphere of activities, as well as the holding and control of domestic and foreign securities, own and control domestic and foreign securities, raise and punt loans, gave guarantees and pledge its assets. Within the limits of its line of business, the Company may also establish domestic and international companies and consortiums,'(Emphasis supplied)

4.7. From the above, it is clear that the activities highlighted above including giving of guarantees are only in furtherance of the assessee's business of business of providing innovative and environmentally sound solutions in metals processing industries. The Panel notes that the DRP did not have the benefit of the ratio laid down by the Hon'ble IT AT as discussed in paragraph 3.7 above before it for AY 2013-14. As seen in the case of income from IT services

earlier, the Panel is of the view that the corporate guarantee was given for the business of the assessee's subsidiary in India namely Outotec India Private Ltd., with the invoicing address for the costs related to bank guarantee being that of Outotec India Private Ltd in Kolkata, India. In other words, the sit us of utilization of the service of providing corporate guarantee is in India, with the income arising there from in the form of corporate guarantee fee arising in India and falling within the scope of the non-obstante Paragraph 3 of Article 21. In view of the above, the Panel upholds the action of the AO. The objection in Ground 3 stands dismissed.

4.8. Since the factual and legal matrix remain same, the Panel reiterates its own stands as spelt out for assessment year 2018-19. The assessee objection on the above is rejected.

10. The ld. Counsel for the assessee while impugning the finding of the ld. DRP raised multiple submissions as were raised before the ld. DRP. He drew our attention towards pages no. 55 to 61 of the paper book, wherein submissions filed by the assessee are placed on record. He pointed out that the assessee has received guarantee fees from Outotec India Private Limited for standing as a Corporate Guarantee *qua* the loan obtained by the Outotec India Private Limited as a subsidiary company of the assessee. According to the assessee, it has included providing of a Corporate Guarantee as a line of business in its Memorandum of Association and in lieu of that, it has provided Corporate Guarantee towards loan taken by its subsidiary and sister concern. Therefore, whatever has been received by the assessee, it is to be construed as a business income. Further taking us through Section

5(2) of the Income Tax Act read with Section 4, he contended that total income of the non-resident would include all income from whatever sources derived which (i) accrue or arise in India or (ii) deemed to accrue or arise in India or (iii) is received in India or (iv) deemed to be received in India. According to the ld. Counsel for the assessee that the consideration was received outside India in foreign currency by the assessee and no part of revenue from guarantee fees can be considered as received or deemed to be received in India. He further drew our attention towards Section 9(1)(i) of the Income Tax Act and contended that this Section contemplates that all income accruing or arising whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situated in India, then to the extent it is attributable reasonably to the operations carried out in India will be taxable. According to the ld. Counsel for the assessee, the assessee is not having any permanent establishment in India. He drew our attention towards the order of ITAT in the case of M/s. Capgemini S.A. –vs.- ADIT (Mumbai ITAT) in ITA No. 7198/Mum/2012. On the strength of all these details, he contended that Corporate Guarantee

was not received by the assessee for India nor arose in India.

11. On the other hand, ld. CIT(DR) relied upon the Article 21 of the India-Finland DTA. He submitted that all these aspects have been considered either by the ld. Assessing Officer or by the ld. DRP. The income has been assessed with the help of sub-clause 3 of Article 21 of the Treaty. He drew our attention towards paragraph no. 4.7 of the finding recorded by the ld. DRP.

12. We have duly considered the rival contentions. We find that the ld. DRP has observed that as per Article 2 of the Article of Association of the assessee-company, its main line of business to carry on, by itself or through its subsidiary the design, manufacture, construction of a trade, machinery, devices etc. According to the ld. DRP, the activities of giving of guarantee are only a routine activity. It is an obligation to its subsidiary being the owner of the subsidiary. Hence it is more likely to be a shareholders' obligation/service than business activity. The ld. DRP has held that it is not a business activity and we do not find any error in this finding of the ld. DRP. Because except its subsidiary, the assessee has not given Bank Guarantee to anybody else, which can establish that it was engaged in the business of

providing Bank guarantee. It was just only safeguarding the business interest of a subsidiary and providing them this type of guarantee. The commission income earned on providing such guarantee is taxable under the head "income from other sources". The ld. DRP has rightly dealt with the issue and rightly directed the ld. Assessing Officer to tax it under the head "income from other sources" as per Article 21.

13. During the course of hearing, the assessee has pointed out that it has raised additional ground of appeal under Grounds No. 4.1 and 4.2 in A.Y. 2020-21. In these grounds, the assessee has pleaded that it has received interest on refund amounting to Rs.2,33,61,678/- and under Article 11 of DTA, this interest income ought to have been assessed @ 10%, which has not been considered by the revenue authorities. The ld. Counsel for the assessee has submitted that this aspect has been gone into by the Tribunal in A.Ys. 2018-19 and 2019-20 vide ITA Nos. 350 & 351/KOL/2022. Therefore, according to him, it is covered by the order of the ITAT.

14. The ld. D.R., on the other hand, contended that there is no discussion either in the assessment order or in the order of the ld. DRP. Therefore, at the most, this

issue be remitted back to the ld. Assessing Officer for re-adjudication.

15. On due consideration of the record, we find that there is no discussion on this point in the impugned order of the ld. DRP as well as of the ld. Assessing Officer. Therefore, we remit this issue to the file of ld. Assessing Officer for re-adjudication. The ld. Assessing Officer shall take into consideration the order of the ITAT in ITA Nos. 350 & 351/KOL/2022 in the assessee's own case. The ld. Assessing Officer shall re-adjudicate them after giving due opportunity of hearing to the assessee and after considering the order of the ITAT in the case of assessee. Accordingly, this ground of appeal is allowed.

16. In Ground No. 4 of ITA No. 300/KOL/2022 for A.Y. 2018-19, the assessee has pleaded that ld. Assessing Officer has erred in granting the TDS Credit for an amount of Rs.24,79,026/- as against the TDS Credit of Rs.32,58,306/- claimed by the assessee. No discussion is discernable *qua* this aspect also. Therefore, we remit this issue also back to the file of ld. Assessing Officer for re-verification and adjudication. In case it revealed that TDS Credit is of Rs.32,58,306/-, then, ld. Assessing Officer shall record a specific finding as to why Credit of reduced amount is to be given to the assessee.

17. All other grounds, namely levy of interest under sections 234A and 234B are consequential in nature, initiation of penalty under section 270A is pre-mature in nature. The assessee will be given fresh opportunity as to why penalty be not imposed, if any imposable. Therefore, it can explain its stand in the penalty proceeding independently.

18. In the result, the appeals of the assessee are partly allowed.

Order pronounced in the open Court on August 29, 2023.

Sd/-	**Sd/-**
(Rajesh Kumar)	**(Rajpal Yadav)**
Accountant Member	**Vice-President(KZ)**

Kolkata, the 29th day of August, 2023

Copies to : *(1) Metso Outotec OYJ,*
(Earlier known as "Outotec OYJ"),
C/o. Metso Outotec India Private Limited,
1st Floor, Building No. 10, Tower-A,
DLF Cybercity, Phase-II, Gurugram-122002,
Haryana

(2) Deputy/ Assistant Commissioner of Income Tax,
(International Taxation),
Circle-1(2), Kolkata,
Aayakar Bhawan Poorva,
110, Shanti Pally, 2nd Floor, Kolkata-700107

(3) Dispute Resolution Panel-2, New Delhi

(4) Commissioner of Income Tax ,
(5) The Departmental Representative
(6) Guard File

TRUE COPY

By order

Assistant Registrar
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.