VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

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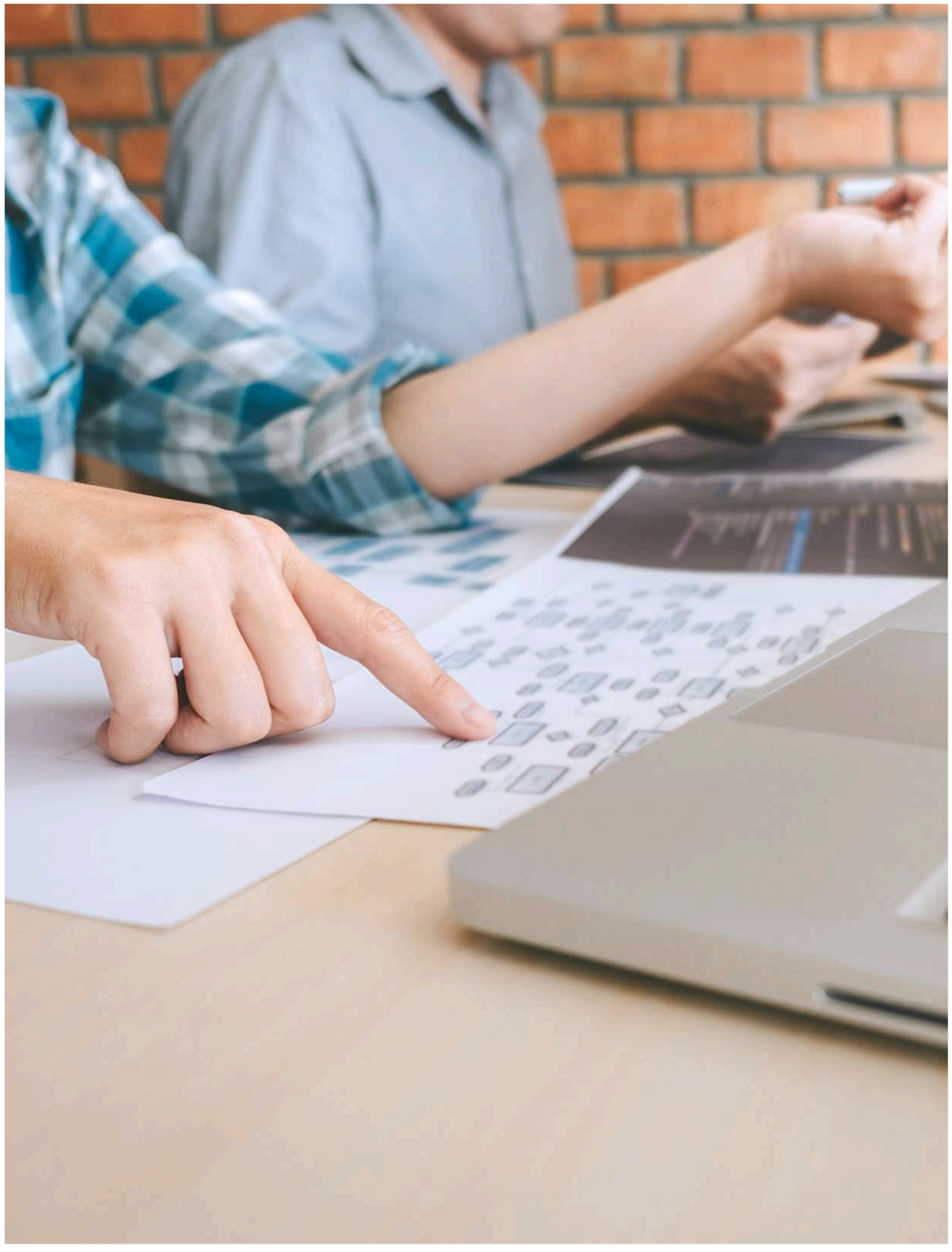
Reimbursement of GIS charges for group use not FTS, sub-letting software license not transfer of skill

Facts

The assessee is a foreign company based in United Kingdom. The assessee has two AEs in India namely M/s W S Atkins India Pvt Ltd and M/s Confluence Project Management Pvt Ltd. During the year under consideration, the assessee received payment on different account from the said two Indian companies. Indian companies/ AEs, on the payments to the assessee company deducted withholding tax. The assessee in the return filed offered income on account of the above receipts except the receipt of GIS Charges (Software License Payment).

The assessee contended that it purchases various types of software products like Civil-3D, Navisworks, Microsoft office products etc. from third party venders for the usage of group companies globally. The cost of purchases of such software and their maintenance charges were reimbursed by the group entities on cost-to-cost basis without any element of profit and the same accounted as GIS Charges. The assessee accordingly claimed that such receipt is not chargeable to tax. The AO during the assessment proceeding found that the assessee's claim of cost allocation on a pure cost-to-cost basis lacked supporting evidence and a clear formula for allocation. The assessee asserted that costs were allocated based on software usage by employees, but no verifiable details, such as a proper break-up of expenses or internal records, were provided.



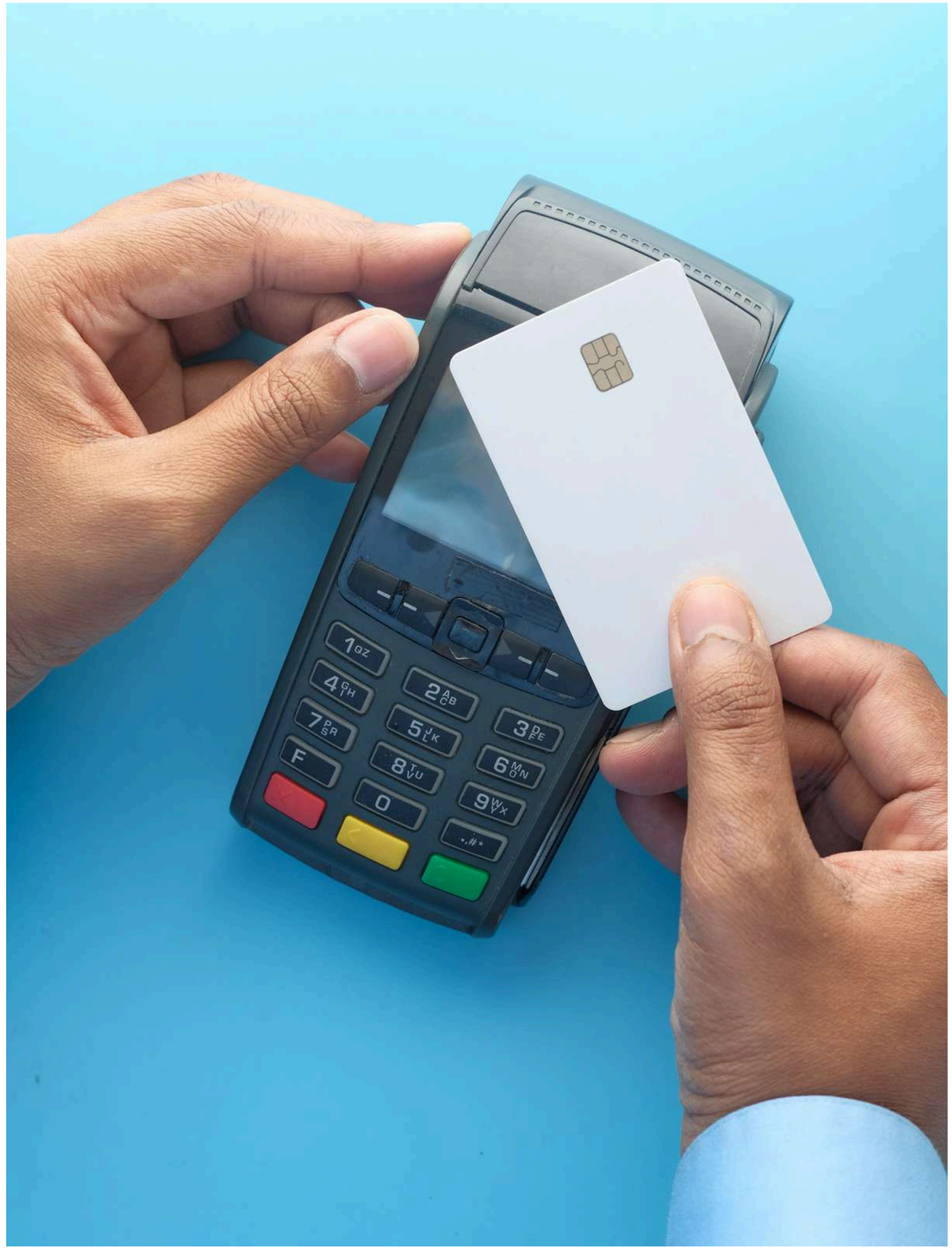
The AO noted that while debit notes were submitted, there was no clarification on how the usage parameters influenced these debit notes or whether they were revised accordingly. Additionally, the assessee did not maintain books of accounts in India and did not offer independent verification of the claims, making the cost allocations unverifiable.

Ruling

In the present case, the Hon'ble Tribunal noted that the assessee has two AEs in India from whom assessee received payments under various heads, including GIS Charges (Software License Payment). While offering income from other receipts to tax, the assessee claimed that GIS Charges were pure reimbursements and hence not chargeable to tax. After considering the submissions made by both parties and the evidence on record, the bench holds that the primary issue to be determined is whether the receipts towards GIS Charges qualify as Fees for Technical Services (FTS) under the India-UK DTAA. It is evident that the payments made by the Indian AEs were for the reimbursement of costs incurred by the assessee in procuring software licenses for group companies. The mere subletting of software licenses does not involve any transfer of technical knowledge, experience, or skill from the assessee to the Indian AEs. The assessee has not provided any additional services such as training, customization, or technical support to Indian entities. Consequently, the receipts do not fall within the ambit of FTS. Even assuming that the assessee has sublet the software licenses and earned a markup, such activity does not involve any

managerial, technical, or consultancy services. The procurement and allocation of software licenses do not require specialized expertise or skill but are mere administrative functions. The AO's reliance on the "make available" clause is misplaced, as no technical knowledge or know-how has been imparted to the Indian entities. The Hon’ble Tribunal are of the considered opinion that the characterization of a transaction must be based on its substance rather than its label. In this case, the absence of technical involvement by the assessee in providing the software licenses demonstrates that the payments are in the nature of cost reimbursements or business transactions and not technical services. Hence the AO’s conclusions are based on assumptions rather than verifiable evidence. In light of the foregoing discussion, the bench hold that the GIS Charges received by the assessee do not qualify as Fees for Technical Services under the India-UK DTAA. The subletting of software licenses does not involve the transfer of technical knowledge, expertise, or skill, and therefore, the payments cannot be taxed as FTS. Furthermore, the reliance placed by the AO and DRP on the "make available" clause is unfounded, as no technical knowledge was transferred. Accordingly, the addition made by the AO and upheld by the learned DRP is deleted. Therefore, the ground of appeal of the assessee is allowed.

Source : ITAT, Bangalore in the case of Atkins Realis UK Limited VS DCIT vide [TS-142-ITAT-2025(Bang)] on February 17, 2025



Hire charges of bareboat charter not royalty, business income not attributable sans Assessee's PE in India

Facts

The Assessee Company is incorporated in Belgium providing construction and development of ports and harbours, artificial islands, estuarial dans, canala and inland waterways, dyke construction and reinforcement, beach replenishment and coastal protection, supply of dredged aggregates and salvage activities. The Assessee is one of the primary operating companies of the DEME Group. During Assessment Year ('AY') 2014-15, the Assessee had let out one of its dredgers-"Nile River", to its Associated Enterprise (AE) [namely International Seaport Dredging Private Limited ('ISDPL)] for executing projects in India. The dredger was let out on bareboat charter basis, i.e., the crew was not included as part of the agreement. The charterer, ISDPL, was responsible for hiring the crew for the dredger. The Assessee had received consideration for letting its dredgers on hire on bareboat basis amounting to INR 105.67 crores. The Assessee filed its return of income on March 13, 2015 declaring Nil taxable income. The return filed by the Assessee was selected for scrutiny and case was referred to the Transfer Pricing Officer (TPO) to determine the arm's length price of the international transaction with ISDPL. The TPO confirmed that the hire charge received by the Assessee is at arm's length vide order under section 92CA(3) dated October 31, 2017. Subsequently, the Assessing Officer ('AO') issued a show-cause notice (SCN) on December 23, 2017,

proposing to conclude that subject receipt of hire charges should be treated as royalty and business income in the hands of the Assessee, relying on statements recorded during survey carried out onthe premises of ISDPL. The Assessee in the response dated December 27, 2017 highlighted that the transaction cannot be taxed as 'royalty' as per the relevant provisions of DTAA, and that the Assessee has no place of business in India.

Ruling

The Hon'ble Tribunal found that the appellant/assessee merely supplies dredger to ISDPL on hire on bareboat basis. As evident from Article 12 of India-Netherlands DTAA that term 'Royalty' does not include payments for the use or right to use industrial, commercial or scientific equipment, as mentioned by the AO in the SCN. The judgment in the case of Van Oord ACZ Equipment BV and orders of the Tribunal in the case of DDIT v. Nederlandsche Overzee Baggermaatsehappiji BV (2010) 39 SOT 556 (Mum.)(page 23 of CLC) and M/s International Seaport Dreding Ltd (ITA No.418/Mds/2015 dated 22.07.2016 (Pg 1 of CLC) referred supra also strengthen the argument of the assessee that hire charges of bareboat charter would not constitute "Royalty' and hence, not taxable as 'Royalty' under Article 12 of India-Netherlands DTAA. The bench also noted that the word 'plant' in India-Beligium DTAA under Article 12 is a typographical error for word 'plan'. This factual error has been acknowledged in the Notification S.O.54 [NO.20 (F.NO.505/2/89-FTD] Dated 19.01.2001 [refer Pg 83 of Paper

Book]. Hence, the Hon'ble Tribunal are of the considered view that hire charges of bareboat charter does not fall under the garb of definition "Royalty' and hence, not taxable as 'Royalty' under Article 12 of India-Belgium DTAA. The bench have gone through the judgments of the Hon'ble Apex Court in the cases of CIT Vs R.D. Aggarwal, Carborandum Co. Vs CIT, Ishikawajma-Harima Heavy Industries Ltd. Vs DIT, Hon'ble Gujrat High Cout in the case of Metror Sattellite Ltd. Vs ITO and Netherlandsche Overzee Baggermaatsehappiji B V all referred supra and also taking guidance therefrom, it is clear from the above facts that the appellant has no business connection in India or PE. The bench also find that the AO without adherence to the principles laid by the Hon'ble Courts in above referred cases has held that assessee has business connection and PE in India is devoid of merit. Since, assessee does not constitute a PE in India, therefore attribution of profits to PE does not arise. Therefore, the appeal of the assessee is allowed.

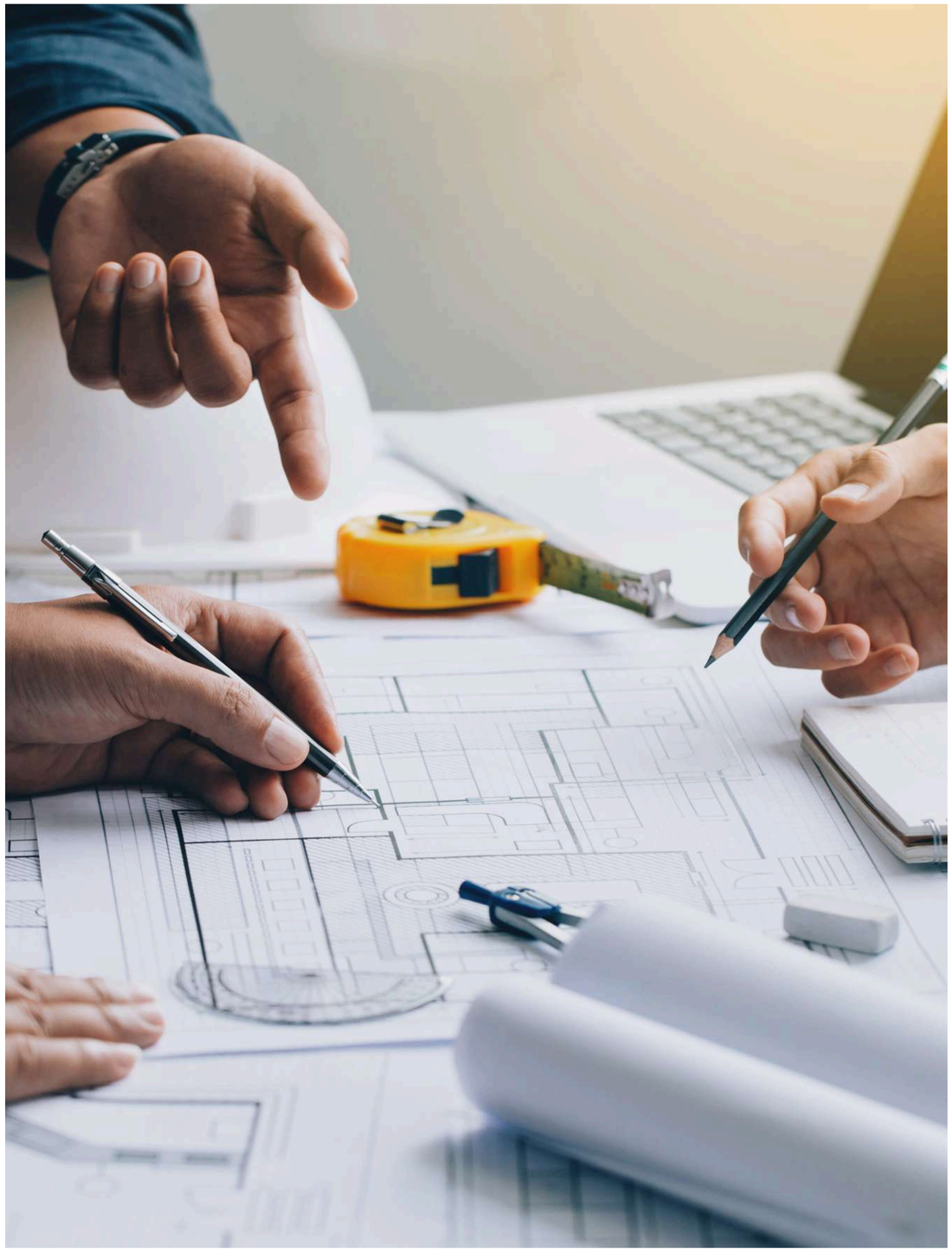
Source : ITAT, Chennai in the case of Baggerwerken Decloedt En Zoon vs DCIT vide [TS-152-ITAT-2025(CHNY)] on February 25, 2025

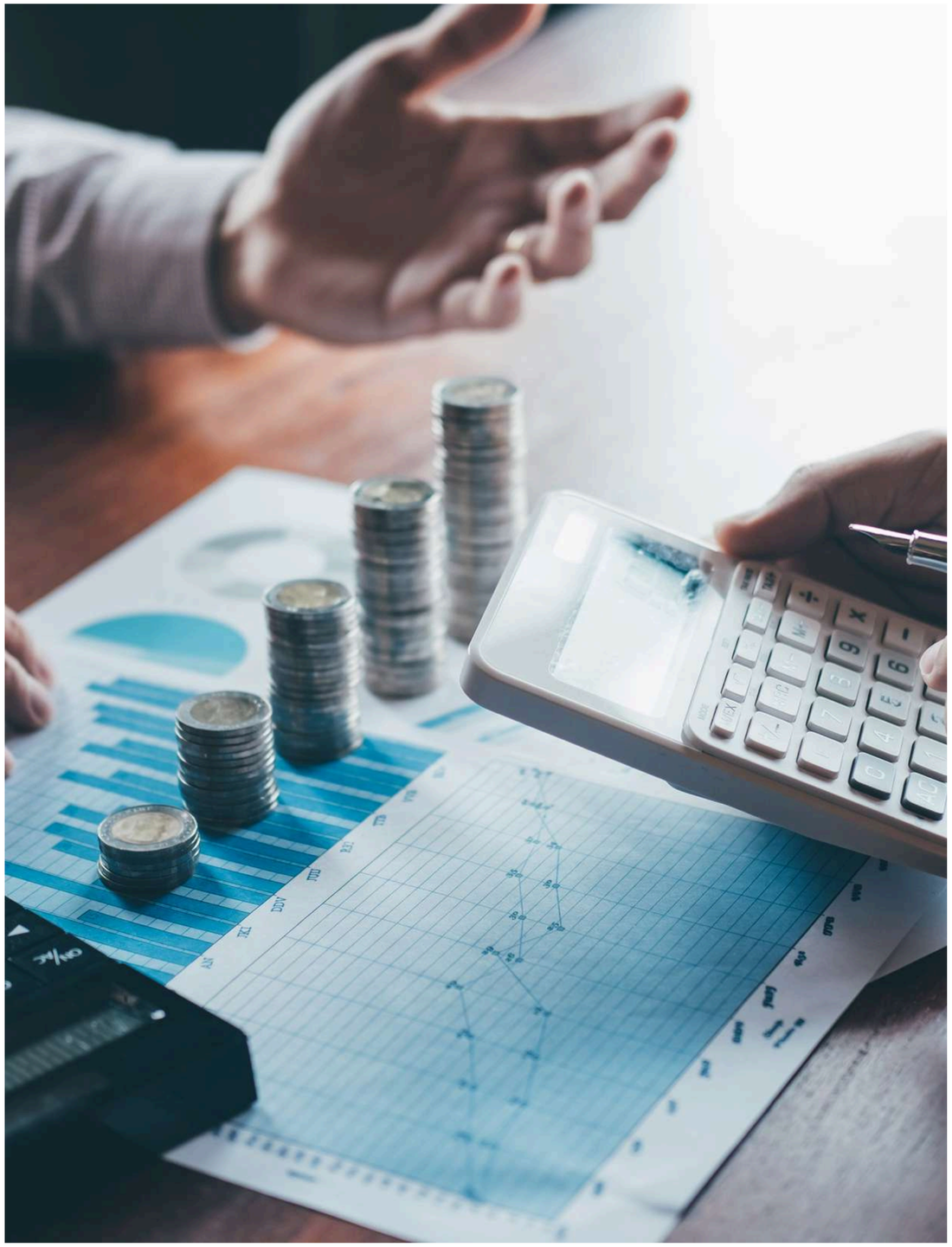
Third party an independent consultant, provides similar services to others, no DAPE under DTAA

Facts

The appellant company is an entity incorporated in the United States of America and is engaged in manufacturing and selling of products and

equipment primarily for the American Steel Industry. Products are generally used by steel companies to improve their iron desulfurization. During the year under consideration, the assessee earned Revenue from RashtriyaIspat Nigam Limited [RINL] and from Steel Authority of India Limited [SAIL]. The assessee company has undertaken the two projects during the year that are Project with SAIL for design and engineering supply of drawings and equipment's, and Project with RINL for technology design, engineering of hot metal desulphurization plant SMS-2 completes in all respects for imported portion on discrete turnkey basis. The assessee had not filed any return of income for the year under consideration. The AO observed that the assessee had three source of income and had earned Fees for Technical Services from Supplies of equipment & commissioning of spares, Drawing & design and Training charges. As the assessee had not filed any return, the AO issued notice u/s 148 dated in response to which the assessee filed NIL return of income stating that no part of its income from engineering supply is taxable in India. The AO however, determined the profit @3.5% from supply of equipment in India to SAIL during the year. The AO also taxed the revenue earned from Drawing and Design and Training charges, received from SAIL. The assessee has denied having a PE in India. The crux of the dispute between the Revenue and the assessee therefore is, whether RIC is a dependent agent permanent establishment in order to tax the business income of the assessee in India and that the receipts for design and drawing is taxable as FTS u/s 9(1)(vii) of the Act.





Ruling

The Hon'ble Tribunal after perusal of the entire contract with RIC found that RIC is an independent consultant having no rights to conclude contract on behalf of the assessee so as to construe as a permanent establishment in India. Since, in its independent professional capacity it provides similar services to other clients as mentioned elsewhere. Considering the facts of the case in totality and in appreciation of the agreement with RIC, the bench is of the considered opinion that RIC does not constitute DAPE of the assessee under the relevant article of the India – USA DTAA. The court also find that there is no dispute that the Drawing and design has been supplied from outside India and the payment for the same has been received outside India. The bench find force in assessee's argument that supply of Drawings and Designs are an integral part of Imports and are highly integrated to the supply of the Plant, Machinery and equipment. Without the Drawings, the other supplies are of no worth. The hon'ble Tribunal are of considered view therefore that being a component of supply of Plant and Machinery and being an accrual overseas, the receipts on account of Drawing and designs formed part of business income within the purview of Article 7 of the USA-India DTAA and the same cannot be taxed separately under Article 12 of the USA-India DTAA. Since it has been decided that the assessee doesn't have a DAPE in India nor an installation PE in India, the receipts on account of Drawing and Design cannot be taxed as Income in India nor the same be attributed to the assessee as FTS u/ 9(1)(vii) of the

Income Tax Act. In the result, appeal filed by the assessee is allowed.

Source : ITAT, New Delhi in the case of ESM Group Inc. vs DCIT vide [TS-155-ITAT-2025(DEL)] on February 25, 2025

SB allows expenses allocated to Indian PE, u/Article7(3) of India-UAE DTAA, restrictions u/s 44C not applicable

Facts

The assessee is a non-resident banking company incorporated in United Arab Emirates (UAE) and operates in India through its branches in Mumbai and New Delhi. As stated by the Assessing Officer, in the assessment year under consideration, assessee had carried out corporate banking business and had undertaken foreign exchange business only to the extent of covering operations for its existing clients. For the assessment year under dispute, the assessee had initially filed a return of income on 31.10.2002 declaring book profit under section 115JB of Rs.3,19,76,508/-. Whereas it offered nil business income after set off of brought forward losses. Subsequently, assessee filed a revised return of income on 01.12.2003 declaring total loss of Rs.17,78,01,164/-. In course of assessment proceeding, the Assessing Officer, while verifying, noticed that the assessee had stated that it has not claimed any deduction on account of head office expenses, since, it has returned loss, but, reserves its right to claim deduction at 5% as per section 44C of the Act. Without prejudice, the assessee submitted that as per Article 7(3) of India-UAE Double Taxation Avoidance Agreement (DTAA), all expenses incurred for the purpose of business of the Permanent Establishment (PE), including, the executive and administrative expenses, are allowable without applying the restriction imposed under section 44C of the Act. The Assessing Officer, however, did not find merit in the submissions of the assessee. Relying upon decision taken in the past assessment years, the Assessing Officer held that head office expenses are allowable in terms with section 44C of the Act and accordingly, he held that assessee is entitled to get deduction at the rate of 5% of the average adjusted total income. Further, he observed, certain expenditure incurred outside India, such as, swift expenses and Globus Accounting Software Maintenance have been debited to the profit and loss account. When called upon to justify the claim, the assessee submitted that these expenses were directly connected to and incurred for the PE in India, hence, would not be covered under the expression "General and Administrative Expenses" coming within the ambit of section 44C of the Act. This claim of assessee was also rejected by the Assessing Officer.

Ruling

The Hon'ble Tribunal found that the disputed expenses are-SWIFT expenses of Rs. 1,68,349.17, and Globus Accounting Software expenses of Rs. 1,90,072.08. As far as factual aspect of the issue is concerned, there is no dispute that such expenses are incurred outside India exclusively for Indian branches. While SWIFT expenses are charged to Indian operations

on actual usage basis, Globus Accounting Software Maintenance expenses are charged to Indian operations on number of users' basis. The issue arising for consideration is, whether the provisions of section 44C would apply to such expenditure. Looking at the nature of expenditure incurred, there cannot be any doubt that they are exclusively related to the operations of Indian branches. Whereas section 44C speaks of head office expenditure. The expression 'head office expenditure' has been defined in clause (iv) of Explanation to section 44C. As could be seen from the definition, head office expenditure broadly means executive and general expenditure incurred by the non-resident assessee outside India. In circular no. 649 dated 31.02.1993 issued in the context of section 44C of the Act, the CBDT has clarified that expenditure not covered under section 44C of the Act are to be allowed without any limit while computing the business profits of the branch office. In case of CIT Vs. M/s. Emirates Commercial Bank Ltd. Vs. (Civil Appeal No. 1527 of 2006, dated 26th August, 2008), the Hon'ble Supreme Court upheld the decision of Hon'ble Bombay High Court, wherein, it was held that section 44C contemplates allocation of expenses amongst various entities. The expenditure covered under section 44C is of common nature, which is incurred for various branches, or which is incurred for the head office and branches. In case of DIT Vs Credit Agricole Indosuez, [2016] 69 taxmann.com 285, the Hon'ble Bombay High Court has held that expenses incurred by head office on behalf of Indian branch are deductible under section 37(1) of the Act without applying the restrictions of section 44C of the Act. Same view was expressed by the Hon'ble Bombay High Court again in case of American Express Bank Ltd. (ITA No. 1294 of 2013). The ratio that can be deduced from these decisions are, the expenditure specifically incurred for the branches has to be allowed without the restrictions of section 44C. Thus, keeping in view the definition of head office expenditure under section 44C and theratio laid down in the judicial precedents, discussed above, the bench hold that the expenditure incurred outside India exclusively for the Indian branches does not fall within the ambit of section 44C. Hence, would be allowable in full. Therefore, the appeal of the assesse is partly allowed.

Source : ITAT, Mumbai in the case of Mashreq Bank PSC vs DCIT vide [TS-92-ITAT-2025(Mum)] on February 06, 2025

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