VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

Communiqué

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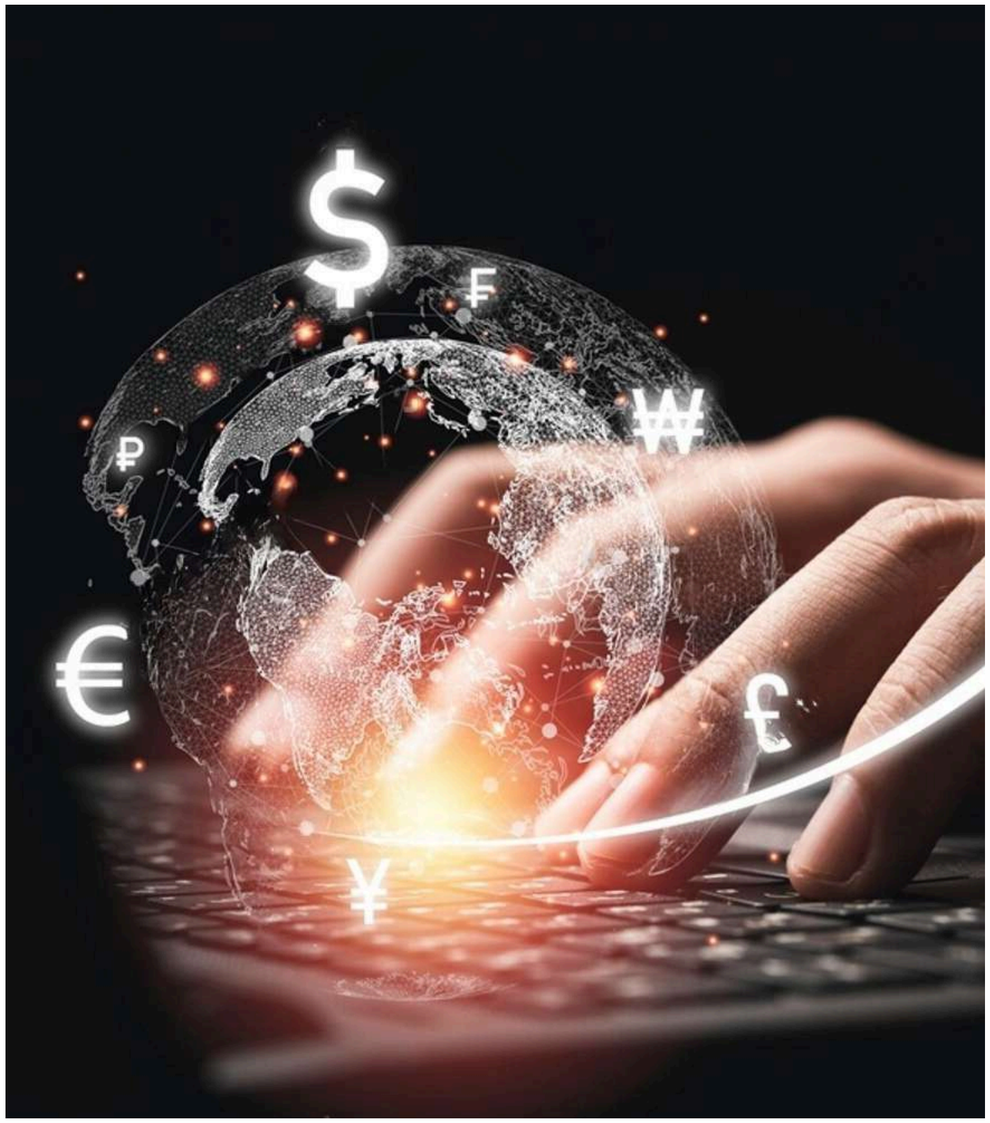

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Interconnectivity charges not FTS, not taxable under residual clause of India-Oman DTAA

Facts

The assessee is a non-resident corporate entity incorporated in Oman and a tax resident of that country and is is engaged in the business of fixed-line, internet and data, mobile and wholesale communication services. In course of providing such services, the assessee, in the year under consideration, and received an amount of Rs.4,42,33,967/- from an Indian corporate entity, viz., Vodafone Essar South Limited (in short 'Vodafone') for providing roaming and termination of international voice traffic services, otherwise known as interconnectivity charges. Whereas the assessee has not offered such receipts to tax in India. The Assessing Officer further noticed that while remitting the interconnectivity charges, Vodafone had not deducted tax at source under section 195 of the Act. Being of the view that income assessable to tax has escaped assessment, the Assessing Officer reopened the assessment under section 147 of the Act by issuing a notice under section 148 of the Act. As alleged by the Assessing Officer, in response to the notice issued under section 148 of the Act, the assessee neither filed any return of income nor complied with the said notice and other statutory notices issued under section 142(1) of the Act. Alleging non-compliance by the assessee, the Assessing Officer proceeded to complete the assessment ex-parte, to the best of his judgment, invoking the provisions of section 144 of the Act. While doing so, he treated the disputed

receipts of Rs.4,42,33,967/- as royalty income under the provisions of the Act and brought it to tax.

Ruling

In the present case apparently, the Hon’ble tribunal analyze the nature of services provided by the assessee to the Indian entity, it can be seen that such services were provided without any human intervention at any stage. The roaming services and termination of international voice traffic services were provided by the assessee using its own system located outside Indian and the entire process of providing such services is fully automated without any human element involved therein. In fact, learned DRP has acknowledged the fact that the interconnectivity usage involves high degree of machines powered by sophisticated software. Thus, the facts on record clearly indicate that the assessee has provided the services to the Indian entity through a standard facility and system set up by it, which is fully automated.The Hon’ble Delhi High Court in case of CIT Vs. Bhari Cellular Limited (supra), held that while deciding identical nature of dispute has held that the expression ‘technical services’ as used in Explanation 2 to section 9(1)(vii) takes colour from the expression ‘managerial and consultancy services’, which necessarily involve a human element or human interface. The Hon’ble Court proceeded further to hold that the interconnect/port access facility is only a facility to use the gateway and the network of service provider. Hence, such service provider does not provide any assistance or aid or help to the service recipient in managing, operating,

and setting up their infrastructure and network. Revenue was unable to bring any contrary decision to our notice. Thus, keeping in view the ratio laid down in the judicial precedents cited before us, we hold that the receipts towards interconnectivity usage charges cannot be treated as FTS.

Having held so, now it is necessary for the bench to decide whether the receipts can be treated as other income under section 56 of the Act and under Article 24 of India – Oman DTAA. The line of thinking of learned DRP is, if a particular income cannot be characterized under any other heads of income provided under the Act, it has to be treated as other income under the residual provision of section 56 of the Act and similar provision under Article 24 of the Treaty. The Assessing Officer had treated it as royalty income, whereas, learned DRP has treated it as FTS and suggested for addition as FTS on substantive basis. The aforesaid facts clearly indicate that the departmental authorities themselves were not sure regarding the true nature and character of the receipts. Merely, because a particular item of income cannot be treated as royalty or FTS, as such, receipts may not fit into the definition of royalty/FTS provided under the Treaty, that by itself would not make it taxable under the residual clause of the treaty. It needs to be seen, whether such income can come within the ambit of any other Article preceding Article 24 of the Treaty. The interconnectivity usage charges have to be treated as business income, hence covered under Article 7 of India – Oman DTAA. However, since, the assessee did not have any Permanent Establishment (PE) in India, the business profit has to be taxed in the country of residence in Oman. Merely, because the income is not taxable in India under a particular head due to beneficial provisions under the Treaty, it cannot automatically lose its character, as in the present case, and made taxable as other income. Thus, taking an overall view in the context of facts and materials on record and the ratio laid down in the judicial precedents cited before the bench, the tribunal hold that interconnectivity usage charges received by the assessee are not taxable in India, either as FTS or as other income.

ITAT, New Delhi in the case of Oman Telecommunications Company SAOG VS DCIT vide [TS-810-ITAT-2024(DEL)] on October 24, 2024

No make available clause satisfied under Article 12(4), India-US DTAA on sale of copyrighted article

Facts

The Company is a USA technology based global company focused on digital security. The Company provides public key infrastructure and validation required for issuing digital certificates or TLS/SSL certificates. These certificates are used to verify and authenticate the identities of organizations and domains and to protect the privacy and data integrity of user's digital interactions with web browsers, email clients, documents, software programs, apps, networks and connected loT devices. The total receipts earned by the Company during the captioned Assessment Year ('AY') 2021- 22 through operations in India amounts to INR 10,89,13,249. The assessee filed its return of income on 11 March 2022 and since the income earned by the assessee was not chargeable to tax, the same was not offered to tax by the assessee by placing reliance on the judgment of Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Private Limited (432 ITR 471) and applying the beneficial provisions under India-USA Double Taxation Avoidance Agreement ('DTAA') and claiming a refund of INR 1,18,82,920. The Learned AO passed the draft assessment order under section 144C(1) of the Act on 30-9-2022 making an addition of Rs 10,89,13,249/- by characterizing the receipts from licensing of the software as fee for technical services and treated it as income chargeable to tax as per India-USA DTAA.

Ruling

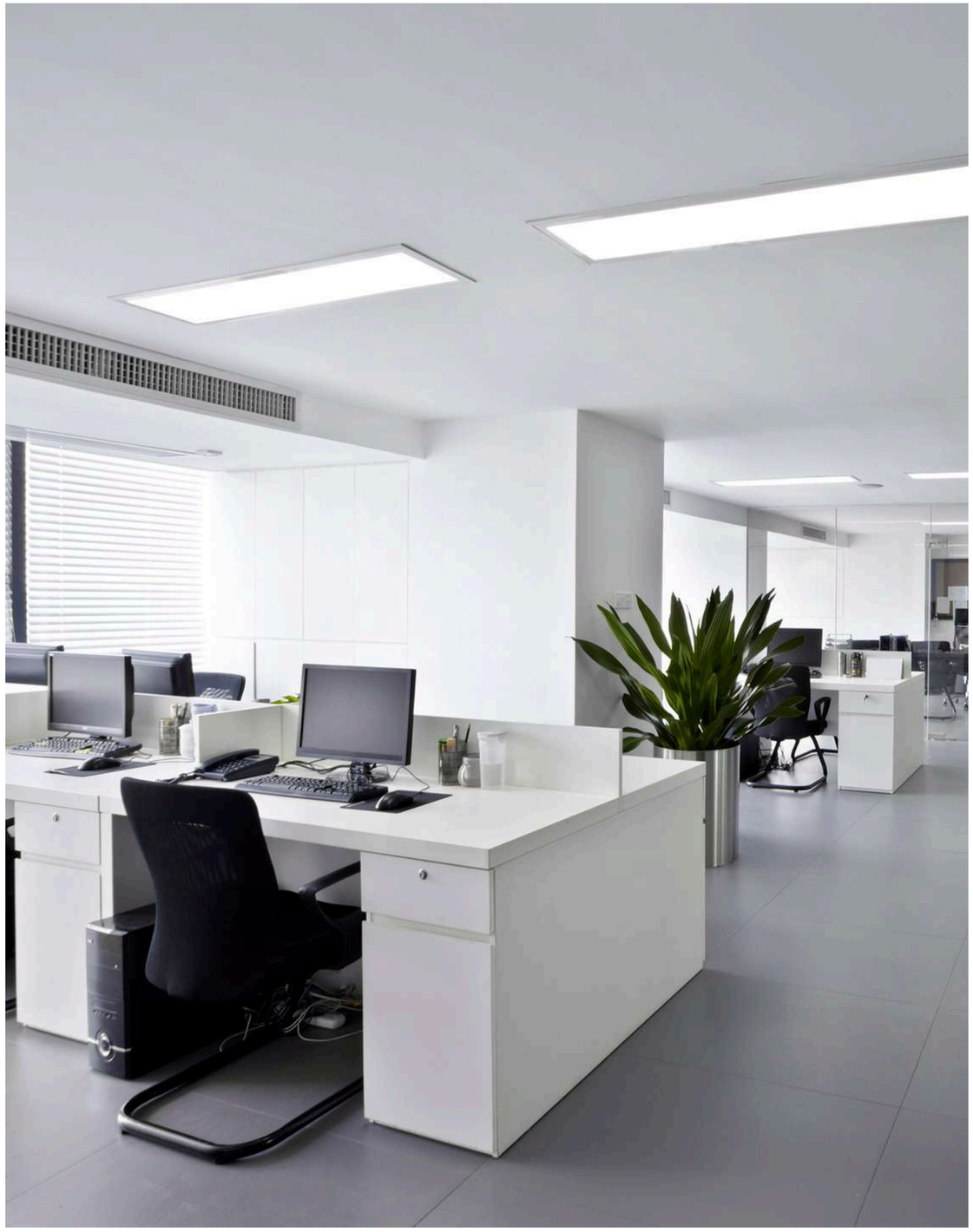
The Hon’ble Tribunal find that the reliance placed by the assessee on the decision of Hon’ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt Ltd. reported in 432 ITR 471 (SC) is well founded wherein the transaction of the assessee is specifically covered under the second category of software sale stated in the said decision and such sale of software as end-user model or a reseller model granting non-exclusive restrictive license model would not be covered in the definition of royalty as per DTAA and accordingly not taxable in India. The assessee submitted that the Indian AE does not provide any technical services relating to software sale to the customers in India. The bench find that the earning of the Indian AE has no relevance to the issue in dispute before us. The learned Assessing Officer had stated that the Indian AE is rendering FTS for Indian customers. The bench finds that there is no specific agreement in place between the AE and its Indian customers. Hence, the bench was unable to comprehend ourselves to accept to the contention of the revenue that the services rendered by Indian AEs are FTS.In view of the aforesaid observations and respectfully following the judicial precedent relied upon herein above, the bench hold that the assessee was duly justified in treating the receipts of Rs 10,89,13,249/- as exempt from tax both under the Act as well as under the treaty in the facts and circumstances of the instant case. The appeal of the assessee is partly allowed.

ITAT, Delhi in the case of DigiCert Inc. vs ACIT vide [TS-851-ITAT-2024(DEL)] on November 14, 2024

Closure of Liaison Office, no visits by expats, change duly substantiated; Holds no PE of Bently Nevada

Facts

The assessee is a US based company engaged in the business of supplying goods from outside India. The assessee is a wholly owned subsidiary of a General Electric Company. During the relevant period, the assessee made offshore sale of goods and offshore sale of software and related support services to its various customers in India. In the past, the assessee has been carrying out similar activities through its Liaison Office (LO) in India. Due to presence of LO in India the Assessing Officer (AO) in the preceding assessment years i.e. AY 2002-03 to 2006-07 held that the assessee has PE in India. Since, the assessee was held to be carrying out its operation through Permanent Establishment (PE), the AO attributed profits to assessee's PE in India. The Dispute Resolution Panel (DRP) in principle following its earlier directions for AY 2001-02 rejected assessee's objection and upheld the assessment order; however, the DRP modified attribution of profits restricting it to 2.6%. The ld. Counsel for the assessee submitted that in the preceding assessment years i.e. AY 2001-02 to 2006-07, the findings of the AO and the DRP were confirmed by the Tribunal, the Tribunal held that the assessee was having business connection in India and the LO was treated as PE of the assessee in India. In the year 2012, the assessee closed down operations of it's LO and since then no activity was carried out at the LO and no employees were expatriated to LO in India. Hence, there is



change in the circumstances with the closure of LO in India.

Ruling

The Tribunal found that in the assessment order the AO has treated the receipts from sale of software as royalty under the provisions of section 9(1)(vii) of the Act. The assessee raised objections before the DRP, the DRP directed the Assessing Officer to verify the records and, if, software supplied by the assessee is found to be embedded in hardware itself, the addition on account of royalty income was directed to be deleted. The bench finds that the AO without complying with the directions of the DRP reiterated the findings given in draft assessment order and treated the receipts from software & related support as Royalty. This issue was also considered by the coordinate Bench in assessee's own case in the preceding assessment years i.e. AY 2012-13, 2014-15 & 2015-16 (supra). In this view of the matter and by respectfully following the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Center of Excellence Pvt Ltd. [2021] 432 ITR 471, the bench direct the Assessing Officer to delete the impugned addition in the captioned Assessment Years. In the result, appeal filed by the appellant is partly allowed.

ITAT, Delhi in the case of Bently Nevada LLC vs ACIT vide [TS-805-ITAT-2024(DEL)] on October 29, 2024

Managerial services outside ambit of FTS; Not taxable in India under Art 13 of India-UK DTAA

Facts

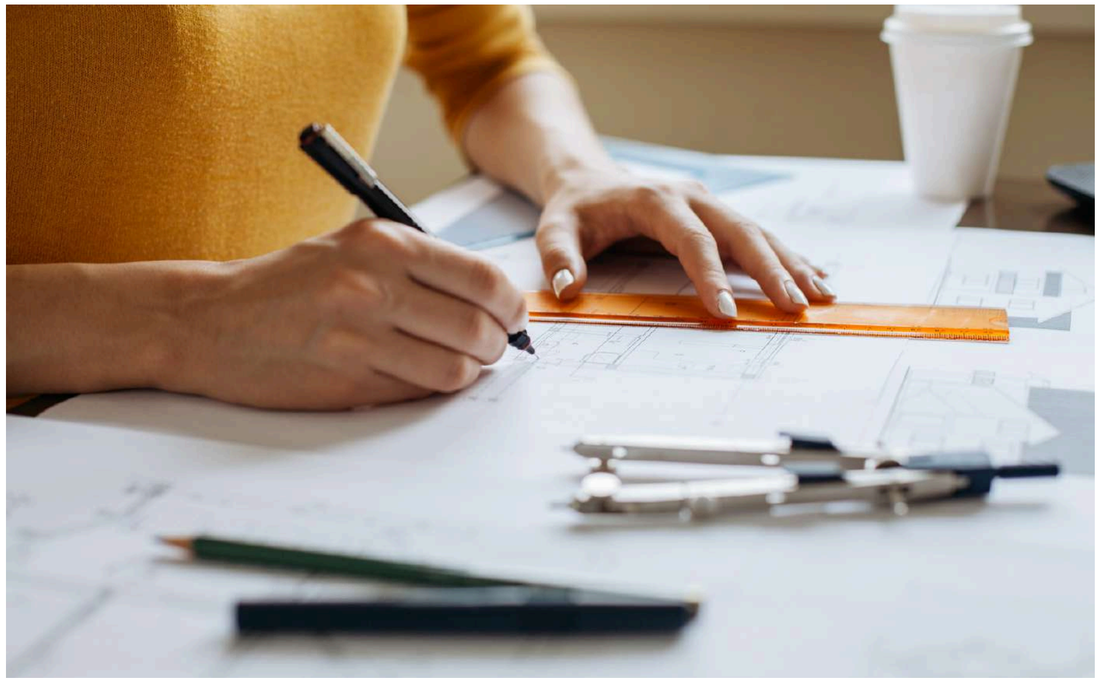
The ESAB UK is a company engaged primarily in the business of providing management services to its group companies. It is a resident of UK for tax purposes in terms of article 4 of the India & UK Tax Treaty and is eligible to claim the benefit thereof. During the year under consideration, ESAB UK had 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.

Ruling

The Hon'ble Tribunal agree 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. The bench, 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, the bench holds 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. The appeal of the revenue is dismissed.

ITAT, Mumbai in the case of DCIT vs ESAB Holdings Limited vide [TS-839-ITAT-2024(Mum)] on October 24, 2024



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