IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER ANDSHRI PRAKASH CHAND YADAV, JUDICIAL MEMBER

ITA No.718/Bang/2024
Assessment Year : 2013-14

M/s.Herbalife International India Pvt. Ltd., RMZ Pinnacle, No.15, Commissariat Road, Bengaluru North, Museum Road, S.O, Bengaluru – 560 025. **PAN :AAACH8025 R**	Vs.	DCIT (International Taxation), Circle – 1(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Percy Pardiwala, Sr. Advocate
Revenue by	:	Shri. Harischandra Naik, CIT-DR

Date of hearing	:	18.06.2024
Date of Pronouncement	:	.06.2024

O R D E R

Per Prakash Chand Yadav, Judicial Member :

1. Present appeal of theassessee is arising out of Order of the CIT(A) dated 28.07.2023 [DIN No.ITBA/APL/M/250/2023-24/1054687856(1)] and relates to Assessment Year 2013-14.

2. The facts of the case relevant for deciding the issue involved are as under:-

The assessee, M/s Herbalife International India Private Limited(herein after referred to as **Assessee** for the sake of convenience), India is a part of the Herbalife group, and engaged in the business of manufacturing and supplying nutritional products and supplements for personal wellness.

3. For the year under consideration the AO received information from the DDIT(Investigation), Unit-1(2), Bangalore, wherein it is informed that assessee has made payments towards royalty, IT, technical services and administrative

service fees to its parent company M/s Herbalife International Inc(herein after referred to a **AE** of assessee for the sake of convenience), USA without deducting TDS.

4. Accordingly, proceedings under section 201(1) of the Income Tax Act, 1961 (hereinafter called 'the Act') were initiated by the AO vide notice dated 14.11.2019. The AO noted that the assessee company M/s Herbalife International India Private Limited, India was not carrying on business outside India nor was it making or earning any income from any source outside India. Ld AO further held that the situs of the services rendered by Herbalife International Inc., USA to the assessee was in India, relying on the provisions of Explanation to sub-section 2 of section 9, the AO held that since the foreign party performed all the administrative services as part of the group global policies, to maintain control over the employed staff in India, the assessee company was ensured the efficiency and effectiveness of the services at all the times. It is thus held that the services were in the nature of managerial service. It was also held that the services were in the nature of consultancy service as the holding company Herbalife Inc was rendering advice or opinion to the assessee for which it received consideration. Since the services for which the payments had been made were managerial, technical and consultancy in nature, these payments fell within the definition of Fees for Technical Services as per section 9 of the Act, and were taxable in India on which tax was duly required to be deducted by the payer/ Indian entity. Accordingly the AO held that assessee is liable to pay tax and interest u/s 201 and 201(1A) on an amount of Rs 21,50,93,900/-. With respect to the applicability of the provisions of DTAA Article 12(4)(b), the AO in para-5.2(ii) of his order has held that the knowledge, experience embodied in Support services was provided by the AE to the assessee for use in future.

5. Aggrieved by the Order of the CIT(A), assessee filed appeal before the CIT(A) and has raised around 12 grounds of appeal and filed written

submissions in support of its contentions. Assessee also cited various judgments of the Hon'ble High Court and ITAT. It has been further argued by the assessee that the payments made by assessee are in the nature of reimbursement of expenses incurred by the AE, and that do not included any markup. AR of assessee further contented that the AO has incorrectly relied upon the provisions of section 9(1)(vii) of the Act and held that the services rendered by the AE of the assessee were covered in the ambit of "managerial services". The assessee finally contended that AE has not "make available" any knowledge, experience etc, while providing administrative services and hence as per the Article 12(4)(b) DTAA of Indo Us the payments made are out of the purview of FTS.

6. However, the CIT(A) did not find force in the arguments of the assessee and affirmed the view of the AO. The CIT(A) observed that the business model of the assessee was in the nature of distributorship model and the services rendered by AE (Herbalife, USA) of the assessee are not merely in the administrative or back-office support but more importantly consists of advice which was then incorporated by the assessee while running its business. The CIT(A) further held that the knowledge, experience and skill that accrues to the assessee through access to global best practice shared with it by its AE remains with the assessee and were available with the assessee to be utilized in future.

7. Aggrieved with the Order of the CIT(A), assessee preferred appeal before the Tribunal. Assessee has raised four grounds of appeal which are further divided into sub-grounds. At the time of hearing, learned Counsel for the assessee has not pressed ground No.1.2 vis-à-vis limitation issue. So far as ground Nos.2 and 3 are concerned, the solitary issue involved in this case is whether payment made by the assessee to its AE for obtaining administrative services is taxable as FTS/FIS in India. The assessee has relied upon the provisions of Article 12(4) of the DTAA between India and USA. However, the AO has relied upon the provisions of section 9(1)(vii) of the Act to conclude that

the nature of services was managerial in nature. The learned Counsel for the assessee drew the attention of the Bench towards para 6 of the Assessment Order at page 16 and pointed out that while framing the assessment, the AO has relied upon the decision of Shell India Markets Pvt. Ltd., reported in 342 ITR 223 (AAR), for supporting his view that services rendered by the AE of the assessee were in the nature of "managerial services". The learned Counsel for the assessee contended that this decision of Shell India (supra) has been recently reversed by the Hon'ble Bombay High Court in Writ Petition No.10788 of 2012 vide its order dated 01.03.2024. The learned Counsel for the assessee also drew the attention of the Bench to the case laws considered by Hon'ble Bombay High Court while deciding the case of Shell India Markets Pvt. Ltd., (supra). The learned Counsel for the assessee laid emphasis upon the judgment of CIT &Ors. Vs. De Beers India Minerals (P.) Ltd., reported in 21 taxmann.com 214 (Karnataka High Court), in the context of interpretation of expression "make available"

8. Ld Counsel contended that when the judgment relied upon by the AO has already been reversed then the entire edifice of the additions made by the AO is gone. Thereafter, the learned Counsel for the assessee draws the attention of the Bench towards provisions of Article 12(4) of India-USA DTAA for buttressing his argument that there is no such expression like "managerial services" in this article and hence the assessee has an option to govern itself by the provisions of treaty instead of I.T. Act.

9. The learned Counsel for the assessee also pointed out that the services obtained were not made available to the assessee as alleged by the AO and affirmed by the Ld CIT(A).

10. The learned Counsel for the assessee further relied on the decision of the Bangalore Bench of the Tribunal in IT(TP)A No.270/Bang/2021 dated

28.11.2022 in the case of Tyco Fire and Security India Pvt. Ltd. Copy of the order has been filed during the course of hearing.

11. The learned DR relied upon the orders of the authorities below i.e., CIT(A) and AO.

12. We have heard the rival submissions, have gone through the Paper Books filed by the assessee and have perused the judgment of Hon'ble Bombay High Court in the case of Shell India Markets Pvt. Ltd., (supra) and DTAA between India and USA. It is a settled position of law that if there is any conflict among the provisions of DTAA and Income Tax Act 1961, then provisions of treaty would override the domestic law provisions. Reference can be made to the CBDT Circular No.333 dated 02.04.1982 reported in 137 ITR 1, which categorically provides that the provisions of DTAA will override the domestic law provisions. This is now fortified by the express provisions of section 90. In 1n addition to this there are numerous judgments on this aspect.

13. Be that as it may be it has been pointed out by the assessee that so far as payments made for IT related services, the assessee has duly deducted TDS on IT related services However, for administrative services, assessee has not deduct any TDS as the arrangement was on cost to cost basis and the assessee has not charged any mark up.

14. The arguments of the assessee are in two folds a) the AO has wrongly relied on the provision of section 9(1)(vii), in as much as the expression "managerial services is not there in the provisions of DTAA, b) unless the knowledge, expertise embodied in the services provided, is transferred or make available to the recipient, the amount paid in lieu of services would be out of the purview of FTS.

15. The assessee has relied upon the provisions of Article 12 (4)(b) of DTAA between India and USA. We observed that the provisions of Article 12 (4)(b) of DTAA between India and USA are being interpretated by the Bangalore Bench of ITAT in the case of Tyco Fire and Security India Pvt. Ltd., (supra),

16. We deem it proper to extract the relevant Para of the ITAT in the case of Tyco(Supra), wherein the predecessor bench has observed as under:-

70. The relevant articles in the treaty between India and USA are is Article 12 which deals with taxability of Royalties and fees for included services. In terms of Article 12(1) . The same are the wordings in India-Singapore DTAA also. The discussion with regard to India-USA DTAA would therefore be applicable for payment made to Tyco International Asis Inc. Singapore. Royalties and fees for included services arising in a Contracting State (USA in this case) and paid to a resident of the other contracting State (India/Assessee in this case) may be taxed in that other state (i.e., USA). The relevant clause on which reliance was placed by the assessee for non taxability of the sum in question in India in the hands of iRunway Inc. USA was Article 12(4) which provides as follows:

"(4) For the purposes of this article 'fees for included services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provisions of services of technical or other personnel) if such services :

a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in para 3 is received; or

*b) **make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.**"*

71. The case of the assessee is that in terms of Article 12(4)(b) of the Indo US treaty, which is applicable to the present case, only rendering of technical or consultancy services as 'make available' technical knowledge, experience, skill or know-how etc can be taxed in India in the hands of iRunway Inc. In other words, in order to attract the taxability of an income under Article 12(4)(b), not only the payment should be in consideration for rendering of technical or consultancy services, but in addition to the payment being consideration for rendering of technical services., the services so rendered should also be such that 'make available' technical knowledge, experience, skill, know-how, or

processes, or consist of the development and transfer of a technical plan or technical design.

72. These worlds are 'which make available'. The meaning of the expression make available were considered by the Tribunal in the case of Raymond Ltd. Vs. DCIT (2003) 80 TTJ (Mum) 120. The Tribunal after elaborate analysis of all the related aspects observed that :-

"The words 'making available' in Article 13.4 refers to the stage subsequent to the 'making use of' stage. The qualifying words is 'which' the use of this relative pronoun as a conjunction is to denote some additional function the 'rendering the services' must fulfil. And that is that it should also 'make available' technical knowledge, experience, skill etc. The word which occurring in the article after the word 'services' and before the words 'make available' not only ITA No.229/Bang/2019 described or defines more clearly the antecedent noun '(services') but also gives additional information about the same in the sense that it requires that the services should result in making available to the user technical knowledge, experience, skill, etc. Thus, the normal, plain and grammatical meaning of the language employed is that a mere rendering of services is not roped in unless the person utilizing the services is able to make use of the technical knowledge, etc. by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill etc. must remain with the person utilizing the services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skill, etc. from the person rendering services to the person utilizing the same is contemplated by the article. Some sort of durability or permanency of the result of the 'rendering services' is envisaged which will remain at the disposal of the person utilizing the services. The fruits of the services should remain available to the person utilizing the services in some concrete shape such as technical knowledge, experience skill etc.

73. In Raymond's case (supra), the Tribunal also held that rendering of technical services cannot be equated with making available the technical services. In the case of CESC Ltd. Vs. DCIT (2003) 80 TTJ (Cal) (TM) 806: (2003) 87 ITD 653 (Cal)(TM) also the question regarding the scope of expression making available came up for the consideration of the Tribunal. In that case, the Tribunal was dealing with the scope of Article 13(4)(c) of the Indo-UK tax treaty which is admittedly in parimateria with Article 12(4) of the India-USA tax treaty with which we are presently concerned. The majority view was that in order to attract the provisions of the said article of the tax treaty, not only the services should be technical in nature but should be such as to result in making the technology available to person receiving the technical services in question. The Tribunal also referred to with approval the extracts

from protocol to the Indo-US tax treaty to the effect that 'generally speaking, technology will be considered made available, when the person acquiring the service is enabled to apply the technology.

74. ***Honorable jurisdictional Karnataka High Court*** *in the case of* ***CIT vs De Beers India Minerals Private Limited(ITA 549 of 2007)*** *has also interpreted the meaning of the term "make available" and observed that:*

"The service should be aimed at and result in transmitting technical knowledge etc. so that the payer of the service could derive an enduring benefit and utilize the knowledge or know how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skills etc. must remain with the person receiving the services even after the particular contract comes to an end. ***It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the service provider****...payment of consideration would be regarded as FIS only if the* ***twin test of rendering services and making technical knowledge available at the same time is satisfied****."*

75. It is not even the allegation of the revenue that the non-residents had made available to the assessee, the knowledge generated in the course of rendering managerial services. In our view the services rendered were purely managerial services and by no stretch of imagination can be considered as making available any ***technical knowledge, experience, skill, know-how or processes,*** *to the assessee. In view of the fact that the services provided by non-residents, did not make available any technical knowledge, experience, skill, know-how or processes to the assessee, the same cannot be regarded as taxable in India. Consequently, there was no obligation on the part of the assessee to deduct tax at source at the time of making payment. Hence, the disallowance made u/s 40(a)(ai) of the Act cannot be sustained and is directed to be deleted."*

17. Perusal of the above observation of the predecessor bench, would show that after referring to the judgment of Hon'ble Jurisdiction High Court in the case of D-Beers(Supra) and Raymond 80 TTJ 120(Mum), for interpreting the expression "make available". The coordinate Bench has held that in order to attract taxability of an income under Article 12(4)(b), not only payments should be in consideration for the rendering of technical services or consultancy services but in addition to that the payment being consideration for rendering of technical

services the services so rendered should also be such that "make available" technical knowledge, experience, skill, know how or process consist of the development and transfer of a technical plan or technical design.

18. In the present case though the AO has observed that the AE has make available the technical knowledge to assessee. However, failed to bring on record any material to support this averment. Therefore, the case of the assessee is squarely covered by the judgment of Tyco(Supra).

19. We also observed that the judgment of Shell(Supra) as relied upon by the AO at the time of assessment has already stands overruled by the Hon'ble Bombay High Court. So far as other judgment of EON Technology Vs DCIT relied upon by the AO there the issue was regarding the taxability of commission payments made to AE. Which is not the case herein before us.

20. In view of the above deliberation we are of the view that payments made by assessee were not in the nature of FTS hence we allow the appeal of the assessee.

21. In the result, appeal filed by the assessee is allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/- *Sd/-*

(CHANDRA POOJARI) **(PRAKASH CHAND YADAV)**

Accountant Member **Judicial Member**

Bengaluru, Dated: June, 2024
/NS/*
Copy to:

1. Appellants 2. Respondent
3. DRP 4. CIT
5. CIT(A) 6. DR,ITAT, Bangalore.
7. Guard file

By order
Assistant Registrar,
ITAT, Bangalore.

S.No.	Details	Date	Initials	Designation
1	Draft dictated on			Sr. PS/PS
2	Draft placed before author			Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement			Sr. PS/PS
7	File sent to Bench Clerk			Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			