

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "L", MUMBAI**

BEFORE SHRI B.R. BASKARAN (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 2726/MUM/2016
Assessment Year: 2015-16**

**ITA No. 2727/MUM/2016
Assessment Year: 2015-16**

&

**ITA No. 2728/MUM/2016
Assessment Year: 2015-16**

The DCIT (IT)-3(1)(2), Room No. 113, 1 st Floor, Scindia House, Ballard Estate, Mumbai - 400038	Vs.	M/s Kotak Securities Ltd., Plot No. C-27, BKC, Bandra Kurla Complex, Bandra (East), Mumbai - 400051 PAN : AAACK3436F
(Appellant)		(Respondent)

Revenue by : Shri M.V. Rajguru (Sr. DR)

Revenue by : Shri Farrokh Irani (AR)

Date of Hearing: 04/07/2018
Date of Pronouncement: 12/07/2018

आदेश / O R D E R

PER BENCH

These appeals have been filed by the revenue against the three orders dated 27.01.2016 passed by the Commissioner of Income Tax (Appeals) (for short 'the CIT (A)')-57, Mumbai, for the assessment year 2015-16, whereby the Ld. CIT (A) has allowed the appeals filed by the assessee against order passed u/s 248 of the Income Tax Act, 1961 (for short 'the Act'). Since, all the three appeals pertain to the same assessee and the issues involved in all the

three appeals are identical, all the three appeals were clubbed, heard together and are being disposed of by this common and consolidated orders for the sake of convenience.

2. Brief facts of the case are that the assessee is a registered as broker with NSE and BSE and Portfolio Manager with SEBI and registered Depository participant of NSDL and CSDL and also registered AMFI for distribution of mutual funds, appointed Kotak UK vide agreement dated 31.01.2014 to render inter alia following services:

1. Identifying clients in UK and Europe and developing relationship with clients.
2. Promoting products of the appellant to them such as opening share trading account, DP account, PM etc.
3. Arranging marketing road shows of Indian companies coming out with an IPO to enable the overseas clients to subscribed it,
4. Organizing and participating in road shows, conferences, etc.

3. For providing the services inter alia share broking, Dmat service, PMS service, distribution of MFs and Insurance products, for the Month of June, 2014 Kotak UK raised a debit note. Accordingly, the appellant made payment of US\$ 2,26,234.18 to Kotak UK and borne TDS of US\$ 33,935.12 (Rs. 20,42,046) as per the agreement, the assessee was required to bear the Income Tax on the charges to be remitted. Accordingly, the appellant remitted US\$ 1,92,299.05 and paid the tax @ 15% under Article 13 of the India UK DTAA on the gross up value of US\$ 2,26,234.18 amounting to US\$ 33,935.12 and paid the tax of Rs. 20,42,046/-. Similarly, the Kotak UK raised a debit note for US\$ 1,88,511.23 for providing such services during the Month of April and May, 2014 and debit note US\$ 76,585.08 for providing such services during the month of July and August and the assessee remitted the said amounts and paid the tax @ 15% under article 13 of Indo India UK DTAA on

the gross up value. Later on, the assessee taking the view that the recipient was not liable to pay tax in India filed appeals u/s 248 of the Act before the CIT (A) contending that the remittances in question are not liable for deduction of tax at source as they constitute business profit in the hands of the recipient and further they are not liable to pay tax on it since the recipient does not have permanent establishment in India. The Ld. CIT (A) after hearing the parties held that remittance made by the assessee to Kotak UK constitute business profit in the hands of the recipient and in the absence of permanent establishment of the recipient in India, the recipient cannot be brought to tax in India as per the provisions of DTAA entered between India and UK. Against the said findings, the revenue is in appeal before the Tribunal.

4. The revenue has preferred this appeal before the Tribunal on the following effective ground:-

“Whether on the facts and in the circumstances of the cases and in law the Ld. CIT (A) was justified in holding that the remittances constitute business profit in the hands of Kotak Mahindra (UK) in the absence of Permanent Establishment in India of Kotak Mahindra (UK), such business profit cannot be taxed in India by virtue of Article 5 of India-UK DTAA”.

5. At the outset, the Ld. counsel for the assessee submitted that the issue involved in this appeal is covered in favour of the assessee by the decision of the ITAT rendered in the assessee’s own case for the A.Y. 2014-15. Therefore, there is no merit in the appeal of the revenue.

6. On the other hand, the Ld. Departmental Representative (DR) did not controvert the said facts. However, contended that the Ld. CIT (A) has wrongly held that the remittances in question constitute business profit in the hands of

Kotak UK, but in the absence of permanent establishment in India of the said company, such amount cannot be taxed in India by virtue of Article 7 of the DTAA between India and UK.

7. We have heard the rival submissions. The only grievance of the revenue is that the Ld. CIT(A) has wrongly held that the remittance constitute business profit in the hands of Kotak UK and in the absence of permanent establishment of Kotak Mahindra UK in India such business profit taxed in India by virtue of Article 5 of the India UK-DTAA. The Ld. CIT (A) has decided the identical issue in favour of the assessee in assessee's own case ITA No. 1532/Mum/2015 and 1533/Mum/2015 for the A.Y. 2014-15 by upholding the findings of the Ld. CIT (A). In the present case also the Ld. CIT (A) has decided the identical issue in favour of the assessee. For sake of convenience, we abstract the relevant portion of the order passed by the Ld. CIT (A):

"4 In the course of appellate proceedings, the appellant's AR has filed a details written submission in support of its contentions against the ground of appeal so raised in Form No. 35. The appellant's submissions so made is extracted herein below: Kotak Securities Limited (referred as "the Appellant") is in the business of Share & stock Broking and other financial services.

The Appellant is a registered member broker with NSE & BSE, and registered Portfolio Manager with SEBI and registered Depository Participant NSDL and CDSL and is also registered with AMA for distribution of Mutual Funds.

The Appellant offers various financial Products and Services inter alia such as:

- Share broking*
- Demat Service*
- PMS Service*
- Distribution of MFs and Insurance products*

Kotak Mahindra (UK) Ltd. ("Kotak UK"), is a company incorporated in London. Kotak UK is authorized and regulated by the Financial Conduct Authority in UK and is permitted to make arrangements with a view to transactions in investments in the UK and with passporting rights, in a few countries in Europe. It is a tax resident of UK as per Double Taxation Avoidance Agreement between India and UK.

The Appellant has appointed Kotak UK vide agreement dated 31st January 2014 to render inter alia following services:

- Identifying clients in UK and Europe and developing relationship with clients,
- Promoting products of the Appellant to them such as opening share trading account, DP account, PM etc.,
- Arranging marketing road shows of Indian companies coming out with an IPO to enable the overseas clients to subscribed it;
- Organizing and participating in roadshows, conferences, etc.;

In consideration for the carrying out the above activities, Kotak UK would be staff cost and other indirect cost.

Copy of the agreement dated 31st January 2014 is enclosed in as Annexure I.

For providing such activities for the month of June 14, Kotak UK has raised a debit note dated 30th June 2014 for US\$ 1,92,299.05. Copy of the debit note is enclosed in as Annexure 2.

The Appellant had made payment of US\$ 2,26,234.18 to Kotak UK and borne the TOS of US\$ 33,935.12 (Rs.20,42,046) on 5.7.2014, details of which are as under:

<i>Debit Note dated</i>	<i>Date of Remittance</i>	<i>Remittances in US\$</i>	<i>Gross Amount US\$</i>	<i>TDS in @ 15% US\$</i>	<i>Amount in Rs.</i>	<i>Deposit with Bank</i>	<i>Date of Deposit</i>
30.06.14	30.06.2014	1,92,299.05	2,26,234.18	33,935.12	20,42,046	IDBI Bank Ltd. BSR Code 6910333-3- Challan Sr. No. 12517	05.07.14

As per the letter of agreement dated 31st January 2014, the Appellant is required to bear the income-tax on the charges to be remitted and the remittance to be made to Kotak UK is gross of tax.

In view of the same, the Appellant has remitted US\$ 1,92,299.05 and has paid the tax @15% under Article 13 of the India-UK DTAA on the gross up value of US\$ 2,26,234.13 amounting to US\$ 33,935.12 (i.e. 15% of US\$ 2,26,234.18) and has paid the tax of Rs,20,42,046 vide BSR Code No.6910333 - Challan Sr. No.12517 on 05-07-2014 for the above payment.

Copy of the said Challan of Rs.20,42,046 are enclosed in as Annexure 3.

As required by Your Honour, we give below, our submissions in writing in support of the above appeal.

Before we embark upon the submissions relating to the captioned appeal, it is submitted that the issue is no longer *res integra* as this ground is squarely covered in favour of the Appellant's own case by following order of CIT (A):

Covered by CIT (A)'s order No.	Dated	Assessment Year	Para No.
CIT (A)-10/ADIT(IT)/3/IT-47/14-15	30.10.2014	2014-15	5

Copy of the said order is enclosed in as Annexure 4.

The learned CIT(A), in the said order had given clear finding of fact that such remittances made by Appellant neither constitute income that accrue or arise in India nor constitute income that deemed to have accrued or arise in India u/s 9(1)(i) or as Royalty or as Fees for Technical Services ("FTS") as per section 9(1)(vi) or 9(1)(vii) of the Act or under Article 13 of the India-UK treaty. The learned CIT(A) further held that the said remittances constitutes business profits in the hands of Kotak UK and In absence of Permanent Establishment (PE) in India of Kotak UK, such amount cannot be taxed in India by virtue of Article 7 of the treaty between India and UK.

It is to be noted that the said order the learned CIT(A) was concerned with the payment under same agreement with which present appeal is concerned. It's merely a different month i.e. in the said order the OT(A) was concerned with debit note raised in the Month of March 14 for the period January 14 to March 14 whereas in the present appeal the payment is in respect of Debit note raised in the month of June 14 for the month of June 2014 emanating from the same agreement dated 31-01-2014.

Therefore, the issue is no longer *res integra* as CIT(A) has already decided this issue in favour of the Appellant.

Further, it is submitted that in the case of holding company of the Appellant, the issue of relating to payment of referral fees to USA entity and TOS thereon was considered by CIT(A)-10 in appeal No CIT (A) 10/ ADIT(IT)-3(1)/IT-127/12-13 dated 30.12.2013 and it was held that payment to USA entity for such referral services was neither accrued or arose in India nor could be deemed to accrue or arise in India U/s.9(1)(i). Further, the same was not taxable u/s 9(1)(vi) i.e. "Royalty or u/s 9(1)(vii) i.e. fees for technical services". The said payment was also not considered as taxable under the India USA Treaty as the same did not constitute Royalty or fees for included services under Article 12 of India USA Treaty.

Copy of the said order is enclosed in as Annexure 5.

It is submitted that the above payments is not subjected to India due to the following reasons:

A. UNDER THE INCOME TAX ACT

1. Not "Royalty" u/s 9(1)(vi)

The term Royalty has been defined under the provisions of Explanation 2 to 6 of Section 9(1)(vi) which is as follows:-

"Explanation 2. - For the purposes of this clause, 'royalty' means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for -

(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

(iii) the use of any patent, invention, model, design, secret formula or ~~we!~~ or trade mark or similar property;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vi) the rendering of any services in connection with the activities referred to in subclauses (i) to (iv), (iva) and] (v).

In this regard, it is submitted as under:

The Appellant is not paying any consideration to Kotak UK for use of patent, invention, model, design, secret formula or process or trade mark or similar property;

Kotak UK is not imparting of any information concerning technical, industrial commercial or scientific knowledge, experience or skill;

Activities carried out by Kotak UK are in the nature of commercial services and the term royalties" also does not include payments for commercial services.

Kotak UK does not provide any right to use copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting.

Kotak UK has rendered following services to the Appellant;

Identifying clients in UK and Europe and developing relationship with clients,

Promoting products of the Appellant to them such as opening share trading account, DP account, PMS etc.

Arranging marketing road shows of India companies coming out with an IPO to enable the overseas clients to subscribe it; Organizing and participating in roadshows, conferences, etc.

These services do not fall within the ambit "Royalty" u/s 9(1)(vi).

(2) Not "Fees for Technical Services" u/s 9(1)(vii)

Section 9 (1)(vii) deals with income by ways of fees for technical services. The term "Fees for Technical Services" has been defined under the provisions of Explanation 2 of Section 9(1)(vii).

(vii) Income by way of fees for technical services payable by-

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India.

Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

In this regard, it is submitted as under:

Kotak UK is not rendering any 'technical, managerial or consultancy service' to the Appellant.

Kotak UK is identifying clients in UK and Europe and developing relationship with clients and promoting products of the Appellant to them such as opening share trading account, DP account PMS etc.,

Such commercial services cannot be construed in the nature of "technical, managerial or consultancy service".

Kotak UK is not giving any technical advice or consultancy nor it is rendering any managerial service;

(3) Not Deemed to accrue or arise in India and not taxable u/s 9

a) No part of amount paid to Kotak UK is either accrued or arose in India or could be deemed to accrue or arise in India under Section 9 of the Act and thus, is not taxable in India.

b) Reliance is placed on the Hon'ble Supreme Court of India in the case of CIT v. Toshoku Ltd. (1980) 125 ITR 525 (Refer combined Paper Book Pg. Nos. 43 to 47) where It has held that it no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India.

In view of the above, it is submitted that amount received by Kotak UK is not taxable u/s 9(1)(i) or as Royalty u/s 9(1)(vi) or as Fees for Technical Services u/s 9(l)(vii).

(B) UNDER INDIA - UK DOUBLE TAXATION AVOIDANCE AGREEMENT

Not Royalty u/Article 13(3) of India UK DTAA

The term Royalty has been defined under Article

For the purpose of this Article, the term "royalties means:

a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than incomes derived by an enterprise of a contracting State from the operation of ships or aircraft in international traffic.

The first limb of the definition of Royalty (i.e. sub clause (a), relates to payment for use of a right to use of any copyright of a literary, artistic or scientific work .. any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

In the present case, Kotak UK is not granting rights to the Appellant for use of any copy right of a literary, artistic or scientific work etc.

The term 'information concerning industrial, commercial, or scientific experience' alludes to the concept of know-how and means information that is not publicly available and that cannot be known from mere examination of a product and mere knowledge of the progress of technique.

The second limb of the definition deals with payment of use or right to use of any commercial, scientific equipment... There is no equipment which Is being to the Appellant and therefore this is not a Royalty under this clause as well.

The term of "Fees for Technical Services" is defined as:

The term 'fees for technical services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) which:

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

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

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

The first limb (i.e. sub clauses (a)) is not applicable as it deals with services rendered in relation to royalty. In the present case, the said clause is not applicable. The second limb (i.e. sub clauses (b)) deals with services rendered in relation to enjoyment of property located in that country. Considering the facts of the Appellant's case, this clause is also not applicable.

The third limb (i.e. sub clause (c)) deals with 'make available' technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

In order to come within the ambit of "Fees for Technical Services" it is essential that the payment to Kotak UK should be to "make available", technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

The above services provided by Kotak UK to the Appellant does not result in making available any technical knowledge, experience ... and as such the same should not qualify as Fees for Technical Services".

The Mumbai Tribunal in the case of Raymond Limited v DCIT (86 ITD 791) (Refer combined Paper Book Pg. Nos.48 to 79) held that services rendered by a UK lead manager in managing a GDR issue does not make available any technical knowledge, skill, experience, etc. The Tribunal observed that services could be considered as "making available" technical knowledge, experience, when the recipient is able to make use of the technical knowledge by himself in his own business or for his own benefit and without recourse to the service provider in the future.

The Special Bench; Mumbai in the case of Mahindra and Mahindra Ltd. v DCIT (Mumbai) (SB) 313 ITR 263 (AT) (Refer Combined Paper Book Pg. No. 80 to 116), had an occasion to consider the meaning of the word 'make available' with reference to DTAA between India and UK) wherein the Tribunal at page 329 observed as under:-

"We have considered the rival submissions in the light of material placed before us and precedents relied upon. We find that clause (1) and (2) of article 13 in the DTAA with the UK clearly provide that the fees for technical services are taxable in India. Now we have to consider the meaning of the term 'fees for technical services' as employed in this article. As noted above clause (4) of article 13 defines the meaning of the term 'fees for technical services'. The entire quarrel is about the applicability of otherwise of sub-clause (c) of clause 4 of article 13 as per which fees for making available of the: technical knowledge, experience, skill, etc; is included in the definition of this Sub-clause. In other words, the technical knowledge, experience or skill etc. must be made available to the assessee so as to be covered within its scope and mere providing of such services, without making them available to the assessee will not serve the purpose and hence will be outside the ambit of article. The assessee has ab initio contended before the authorities below that even if the services rendered by the lead managers were held to be technical services but those were not 'made available' to the assessee, "Rendering of any technical or consultancy services is followed by "which make available technical knowledge, experience, skill, know-how". in this context it becomes Imperative to understand the meaning of the expression 'make available' as Used in this article. Make Available means to provide something to one, which is capable of use by the other. Such use may be for once only or on a continuous basis, in our context to make available the technical services means that such technical information or advice is transmitted by the non-resident to the assessee, which remains at its disposal for taking the benefit therefrom by use. Even the use of such technical services by the recipient for once only will satisfy the test of making available the technical services to the assessee. if the non-resident uses all the technical services at its own end, albeit the benefit of that directly and solely flows to the payer of the services, that cannot be characterized as the making available of the technical services to the recipient.

The Special Bench thereafter held that management and selling commission cannot be taxed in India as Article 13 of the DTAA with UK does not apply.

The Delhi Tribunal in the case of *Guy Carpenter & Co Ltd (2011-TII 190-ITAT-DEL-INTL)* (Refer combined Paper Book Page Nos.117 to 134) held that rendering intermediary or advisory services in the process of selecting re-insurer were not in the nature of any technical or consultancy services which make available technical knowledge, experience, skill, know-how or processes to the user. Accordingly, it cannot be considered as 'FTS' under Article 13(4)(c) of the tax treaty. The same was upheld by Delhi High court in *Guy Carpenter & Co Ltd (2012-TII-14-HC-DEL-INlt)* (Refer combined paper book page Nos.135 to 141).

In the case of *De Beers India Minerals (P) Ltd 2007-TIII-33-ITAT-BANG-INTL, 113 TTJ 101*, (Refer Combined Paper Book Page Nos.142 to 152) Bangalore Tribunal held that Conducting surveys for providing commercial and technical data do not involvemaking available technical know-how or transfer of technical design, and therefore, will not qualify as FTS under India-Netherlands Treaty.

This view has been upheld by the Hon'ble Karnataka High Court in De Beers India Minerals (P.) Ltd 2012-TII-17-HC-KAR-INTL, [2012] 21 taxmann.com 214 (Karnataka) (Refer combined Paper Book Pg.Nos.153 to 169 of the Paper Book) wherein High court emphasized on the meaning of 'make available" and that technical services make available the technical knowledge, experience, skill, know-how or process only when the person acquiring the services is enabled to apply technology contained therein without recourse to the service provider in future. The High Court held that:

- 1. To satisfy the 'make available' condition, 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. Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available.*
- 2. To satisfy the 'make available' condition, it is imperative that the technical knowledge or skills of the service 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 provider.*
- 3. if technical services are only rendered and the technical knowledge is withheld from recipient service, the 'make available' condition under DTAA is not satisfied and consideration for such technical service is not liable to tax in terms of DTAA.*

Therefore, it is the present case that no part of the amount paid to Kotak UK for the above services is taxable in India inter alia because, such amounts payable by the Appellant to Kotak UK constitute Kotak UK business profits" and, since Kotak UK has no Permanent Establishment/Fixed Base in India and such amounts cannot be taxed in India by virtue of Article 7 of the Agreement for the Avoidance of Double Taxation between India and UK ("the Treaty").

It is further submitted that in the case of holding company of the Appellant, an issue was adjudicated by CIT(A)-10 as to whether payment made for services rendered by law firm would constitute fees for technical services and chargeable to tax in India. Vide Order Ref No, CIT(A)- 10/ITO(IT)(TDS)-3/IT-29/12-13 dated 30.12.2013 (Refercombined Paper Book Page Nos.170 to 180), it was held by CIT(A)-10 that on account of the 'make available" provision in the India UK Treaty the payment for advisory services obtained by the Appellant were not chargeable to tax in India. It is submitted that due to "make available' clause in India UK Treaty the payment to Kotak UK should not be liable to tax in India in accordance with the principle laid down by C1T(A)-10 in the above order.

Therefore, to summarize, it is submitted that:

- it does not constitute Income deemed to accrue or arise in India under section 9(1)(1) or as Royalty u/s 9(1)(vi) or as Fees for Technical Services u/s 9(1)(vii). of the Income Tax Act.*

- *without prejudice to the above, it does not constitute "Royalty" or "Fees for Included Services (FTS)" within the meaning of Article 13 of India-UK Treaty.*
 - *such amounts payable by the Appellant to Kotak UK constitute its "business profits" and, since it has no Permanent Establishment in India and such amounts cannot be taxed in India by virtue of Article 7 of the DTAA between India and UK.*

Decisions:-

I have considered the appellant's submission so made and took note to the contentions so raised by the appellant. Reference is made to the decision of my predecessor in the assessee's own case in order pronounced on 30.10.2014.

"Having taken note to the same, / find that the appellant is a registered memberbroker with NSE & BSE and registered Portfolio Manager with SEBI and registered Depository Participant with NSDL and CSDL and also registered with AMFI for distribution of Mutual Funds. The appellant offers various financial products and services to its clients in such operation of activities. The appellant availed services of Kotak Mahindra UK which is regulated by Financial Conduct Authority (FCA) as a broker/ dealer under the UK authorities. It is also a tax resident of UK as per Double Taxation Avoidance Agreement between India and UK. As per the appellant's submission, from the agreement entered between the appellant and Kotak Mahindra (UK), it is clear that the services so rendered by the Non Resident to the appellant was exclusively in the nature of assisting the appellant in UK for increasing the customer base and also for identifying clients in UK and promoting products of the Appellant, Having perused the detailed submission and also after taking note to the decision of Supreme Court in the case of CIT Vs Toshoku Ltd. reported in 125 ITR 525.

I consider it proper and appropriate to hold that none of the operation of business carried out by Kotak Mahindra (UK) was in the taxable territory of India. Hence, income which was remitted by the appellant to Kotak Mahindra (UK) can only be held as accrued and arisen in UK in relation to services rendered therein. As the Kotak Mahindra (UK) does not have any business connection in India and hence, the same cannot be held as deemed to have accrued or arisen in India. Further, even after taking note to the decision of Karnataka High Court in De Beers India Minerals (P) Ltd. 2012-TII/-17-HC--KAR-INTL, (2012), 21 taxmann.com 214 (Karnataka) and Delhi High Court's decision in the case of Guy Carpenter & Co. Ltd. (2011-TII/-190-ITAT-DEL-/INTL) and also taking note to Article 13 of India-UK Tax Treaty, wherein, the provisions of "make available" concept has been inserted, / consider it proper and appropriate to hold that the remittances so made by the appellant also does not income deemed to have accrued or arisen in India u/s.9(1)(i) or as Royalty as per section 9(1)(vi) or as Fees for Technical Services (FTS) u/s.9(1)(vii) of the I.T. Act r.w. Article 13 of the India-UK Treaty. The said remittances that constitutes business in the hands of Kotak Mahindra (UK), but in the absence of Permanent Establishment in India of Kotak Mahindra (UK), such

*amount cannot be taxed in India by virtue of Article 7 of the DTAA between India and UK.
As a result, the appellant's appeal is allowed".*

8. We notice that the Ld. CIT (A) has decided the issue in favour of the assessee after taking into consideration, the contentions of the assessee in the light of the evidence on record. We further notice that the coordinate Bench of the Tribunal has decided the identical issue in favour of the assessee in assessee's own appeals ITA No. 1532/Mum/ 2015 and 1533/Mum/2015 for the A.Y. 2014-15 by upholding the findings of the Ld. CIT (A). The Coordinate Bench has upheld the findings of the Ld. CIT (A) holding that the revenue could not furnish any material to contradict the findings given by the Ld. CIT (A). In the present case also, the revenue did not produce any material to contradict the findings given by the Ld. CIT (A) and substantiate its contention. Since, the coordinate Bench has already decided the identical issue in favour of the assessee, we do not find any reason to take a different view. Hence, respectfully following the order dated 31.07.2017 passed by the coordinate Bench in assessee's own appeals aforesaid, we uphold the findings of the Ld. CIT (A) in all the three appeals.

In the result, all the three appeals filed by the revenue for assessment year 2015-16 are dismissed.

Order pronounced in the open court on 12th July, 2018.

Sd/-

(B.R. BASKARAN)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 12/07/2018

Alindra, PS

Sd/-

(RAM LAL NEGI)
JUDICIAL MEMBER

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

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