

IN THE INCOME TAX APPELLATE TRIBUNAL "I", BENCH MUMBAI

BEFORE C.N.PRASAD, JUDICIAL MEMBER

&

SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA No.6974/Mum/2014  
(Assessment Year: 2008-09)

SGS India Private Limited NITCO Biz Park, 5 <sup>th</sup> Floor Plot No.C/19, Road No.16 Wagle Industrial Estate MIDC, Thane Thane(W)- 400 064	Vs.	Add.CIT-10(3) Mumbai
<b>PAN/GIR No. AAACS5514Q</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

&

IT(TP).A No.2512/Mum/2017  
(Assessment Year: 2009-10)

SGS India Private Limited NITCO Biz Park, 5 <sup>th</sup> Floor Plot No.C/19, Road No.16 Wagle Industrial Estate MIDC, Thane Thane(W)- 400 064	Vs.	Add.CIT,Range-10(3) (present jurisdiction with DCIT 15(3)(2), Mumbai) Mumbai
<b>PAN/GIR No. AAACS5514Q</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

&

ITA No.2513/Mum/2017  
(Assessment Year: 2010-11)

SGS India Private Limited NITCO Biz Park, 5 <sup>th</sup> Floor Plot No.C/19, Road No.16 Wagle Industrial Estate MIDC, Thane Thane(W)- 400 064	Vs.	Add.CIT,Range-10(3) (present jurisdiction with DCIT 15(3)(2), Mumbai) Mumbai
<b>PAN/GIR No. AAACS5514Q</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Revenue by	Shri. Vaibhav Jain, Sr.DR
Assessee by	Shri. Nilesh Modi, AR

<b>Date of Hearing</b>	<b>20/11/2019</b>
<b>Date of Pronouncement</b>	<b>28 /11/2019</b>

**आदेश / O R D E R**

**PER G.MANJUNATHA (A.M):**

These three appeals filed by the assessee are directed against separate, but identical order of the Commissioner of Income tax (Appeals)-11, Mumbai for AY 2008-09 and orders of the Ld. Commissioner of Income tax (Appeals)-58, Mumbai for AY 2009-10 and 2010-11. Since, the facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed-off by this consolidated order.

**ITA No. 6974/Mum/2014 for AY 2008-09:-**

2. This is a recalled appeal, therefore the grounds of appeal qua recalled order of the Tribunal is only necessary to dispose of the present appeal and accordingly, only those grounds, which are required to be adjudicated, as per the order of the Tribunal are reproduced as under:-

**Disallowance under Section 40(a)(i) of the Income Tax Act, 1961 on account of payments towards Inspection, Verification, Testing and Certification Services (IVTC), Reimbursements of expenses and Representation / Co-ordination Services**

1 On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) -11, Mumbai ['CIT (A)'] has erred in allowing partial relief to the extent of Rs. 9,86,632 out of the total disallowances of Rs.1945872/- under section 40(a)(i) of the Income Tax Act, 1961 ('Act') on account of Inspection, Verification, Testing and Certification services ('IVTC')

2 On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in law and on facts in allowing partial relief of Rs. 2,17,31,522 out of the total disallowances of Rs.23528174/- under section 40(a)(i) of the Act on account of reimbursement of expenses.

3. The first issue that came up for our consideration from ground No.1 of assessee appeal is disallowance of payments towards inspection, verification, testing and certification services, (IVTC) u/s 40(a)(i) of the I.T.Act, 1961 for failure to deduct tax at source u/s. 195 of the I.T.Act, 1961.

4. The brief facts of the impugned disputes are that the assessee is an Indian company, which is engaged in the business providing, inspection, verification, testing and certification services. The assessee has made payments to its affiliated/associated enterprises towards IVTC charges for services rendered by non-residents to assessee in outside India. But, these services were utilized by the assessee in India. The assessee claims before the lower authorities that although, the services are technical services within the meaning of FTS u/s 9(1)(vi) of the I.T.Act, 1961, but, at the time of remittance to the non-resident, FTS was not subject to tax in India in the hands of non-resident. Further, in 2010, the legislature has retrospectively amended section 9 of the Act, from the year 1976 onwards and brought non-residents to tax in India u/s 9(1)(vi) of the Act, even though, services were rendered by non-resident outside India. The Ld. AO/TPO did not accept the arguments of the assessee and held that as per the amended provision of section 9(1)(vi) with respective effect from 1976, FTS is liable to tax in India, even though the services were rendered in outside India and accordingly, made additions towards amount paid for IVTC charges u/s 40(a)(i) for failure to deduct tax at source u/s 195 of the I.T.Act, 1961.

5. The Ld. AR for the assessee, at the time of hearing, submitted that this issue squarely covered in favor of the assessee by the

decision of Hon'ble Bombay High court, in the case of CIT vs KPMG in ITA No. 690/2017, order dated 24/09/2019, where the Hon'ble High Court held that retrospective amendment cannot fasten obligation to deduct tax when not in force at the relevant time i.e, when payment was made. Consequently, no disallowance could be made u/s 40(a)(i) for failure to deduct tax at source on such payments.

6. The Ld. DR, on the other hand, strongly supporting order of the Ld.CIT(A) submitted that the law is very clear, as per which FTS is liable to tax in India in the hands of non-resident u/s 9(1)(vi), even though services were rendered by such non-residents outside india. The Ld. AO, as well as Ld.CIT(A) were right in disallowed said expenditure u/s. 40(a)(i) for failure to deduct tax at source u/s 195 of the I.T.Act, 1961.

7. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. The facts with regard to taxability of FTS u/s 9(1)(vi) in the hands of non-residents in India, even though services were rendered by such non-residents outside India is not disputed, because the law has been amended by the Finance Act, 2010 with retrospective effect from 1976 to the provision of section 9(1)(vi) and amended the definition of FTS and accordingly, even non-residents are liable to pay tax on FTS in India, even though services were rendered in outside India. But, fact remains that whether, the assessee was liable to deduct TDS u/s 195 in a situation, where the non-residents service provider are not liable to tax in respect of FTS u/s 9(1)(vii), at the time of remittance, but became liable to tax by virtue of a

retrospective amendment made in the year, 2010 i.e two years after the end of financial year 2007-08 was examined by the courts. We find that the Hon'ble Bombay High Court in the case of CIT vs KPMG in ITA No. 609 of 2017 had considered identical issue and after considering relevant amendments to provision of section 9(1)(vii) of the I.T.Act, 1961 held that a retrospective amendment cannot fasten obligation to deduct tax when not in force at the relevant time i.e when payment was made. The Hon'ble Court, further held that the party cannot be called upon to perform an impossible Act i.e to comply with the provision, which was not in force at the relevant time. The relevant findings of the Hon'ble Court are as under;-

*“11. So also, question (ii) as proposed is academic as no occasion to deduct tax at source would arise in the absence of any income in the hands of the service providers outside India in view of Section 195 of the Act. Even otherwise a retrospective amendment cannot cast an obligation to deduct tax when not in force at the relevant time i.e when payment was made. In fact, this court in Commissioner of Income Tax v/s. M/s. NGC Networks (India) Pvt.Ltd (Income Tax Appeal No. 397 of 2005, decided on 29<sup>th</sup> January, 2018) has held that a party cannot be called upon to perform an impossible act i.e. to copy with the provision which was not in force at the relevant time. Admittedly the Explanation, if applicable is introduced later by a retrospective amendment. Thus, there could be no obligation no deduct tax at source when the payments have been made to the service providers abroad in the absence of a specific provision at the time when the payments were made.”*

8. In this view of the matter and respectfully following the decision of Hon'ble Bombay High Court, in the case of CIT vs KPMG, we are of the considered view that no disallowance could be made u/s 40(a)(i), in respect of payments made towards IVTC charges for failure to deduct tax at source u/s 195 of the I.T.Act, 1961, on the basis of retrospective amendment to the provision of section 9(1)(vii) of the I.T.Act, 1961. Hence, we direct the AO to delete additions

made towards disallowances of IVTC charges u/s 40(a)(i) of the I.T.Act, 1961.

9. The next issue that came up of our consideration from ground No.2 of assessee appeal is reimbursement of expenses incurred in providing technical services. We find that when payments made for FTS is not liable for disallowances u/s 40(a)(i) of the I.T.Act, 1961 for failure to deduct tax at source u/s 195 of the I.T.Act, 1961, then the consequent reimbursement of expenses in relation to providing said technical services cannot be disallowed u/s 40(a)(i) of the I.T.Act, 1961, for failure to deduct tax at source u/s 195 of the I.T.Act, 1961. Therefore, by respectfully following the decision of Hon'ble Bombay High Court in the case of CIT vs KPMG, we direct the AO to delete additions made towards reimbursement of expenses u/s 40(a)(i) of the I.T.Act, 1961.

10. In the result, appeal filed by the assessee and consequent ground No.1 and 2 are treated as allowed in terms of our observations given hereinabove.

**IT(T.P).A.No. 2512/Mum/2017 for AY 2009-10**

11. The assessee has raised the following grounds of appeal:

**Transfer pricing adjustment in relation to provision of expenses**

*On the facts and circumstances of the case and in law, the TPO erred and CIT(A) further erred in determining the arm's length price (or provision of expenses to the extent of INR 12, 00,000 as NIL. The Appellant prays that there ought not to be any addition in AY 2009-10 as The Appellant itself has written back the said provision amount in AY 2010-11.*

**Disallowance under Section 40(a)(i) of the Income Tax Act,, 1961 with respect to Inspection., Verification, Testing and Certification Services (IVTC) charges Reimbursements of expenses and Training**

2. On the facts and in the circumstances; of the case and in law, the learned Commissioner of Income-tax (Appeals) - 58, Mumbai ['CIT (A)'] has erred in confirming disallowance of Rs.17,91,498 made by AO under section 40(a)(i) of the Income Tax Act. 1961 ('Act') on account of non-deduction of TDS in respect of Inspection, Verification, Testing and Certification services ('IVTC') charges.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming disallowance of Rs. 34,31,334 made by AO under section 40(a)(i) of the Act on account of non-deduction of TDS in respect of reimbursement of expense incurred in connection with IVTC services.

4. On the facts and in the circumstances of The case and in law, The learned CIT(A) has erred in confirming disallowance of Rs 12,00,882 made by AO under section 40(a)(i) of the Act on account of non-deduction of TDS in. respect of Training expenses.

5. Without prejudice to the above grounds. On The facts and in the circumstances of the case and in law. the learned CIT(A) has erred in confirming disallowance of entire transaction amount made by AO u/s 40(a)(i) of the Act with respect to ground no. 1. ground no 2 and ground no 3 above, without appreciating that disallowance u/s 40(a)(i) of the Act would apply only to amounts which are outstanding as on 31<sup>st</sup> March 2009.

6. Without prejudice to the above grounds, On the facts and in The circumstances of the case and in law, the learned CIT(A) has erred in confirming disallowance of entire Transaction amount made by AO u/s 40(a)(i) of the Act with respect to ground no 1, ground no 2 and ground no 3 above, without appreciating that as per DTAA, Fees for technical services are taxable only on payment basis and therefore disallowance u/s 40(a)(i) of the Act would apply only to extent of payments actually made during the year under consideration.

7. Without prejudice to the above grounds. On the facts and in the circumstances of The case and in law, the learned CIT(A) has erred in not restricting the disallowance with respect to IVTC charges, Reimbursements of expenses and Training expenses on which TDS has not been deducted, to 30% on the basis of following.

- a) the amendment Section 40(a)(ia) of The Act, brought by The Finance (No 2) Act, 2014, should be applied retrospectively from 1 April 2005.

b) by applying non-discrimination article provided under The DTAA's, in the event of non-deduction of Tax at source while making payment to non-resident, the disallowance should be restricted to 30% of the amount.

**Denying the benefit of Article 10 of the India Switzerland DTAA:**

8. On the facts and in the circumstances of the case and in law, the AO as well as learned CIT(A) has erred in not granting the benefit of Article 10 of the India Switzerland Double Taxation Avoidance Agreement for determining dividend distribution tax ('DDT') liability under section 115-O on distribution of dividend to Swiss shareholder. The AO as well as CIT(A) erred in not appreciating that the Appellant is liable to pay DDT at the beneficial rate of 10% (as per India-Swiss DTAA) as against @16.995% (as per section 115-O of the Act).

8.1 On the facts and in the circumstances of The case and in law, the learned AO as well as CIT(A) has erred in not granting refund with respect to DDT paid in excess of 10% amounting To Rs. 1,39,90,000 (i.e. Rs 20,00,00,000 @ 6.995%).

**Penalty:**

9. On the facts and in the circumstances of the case and in law. The AO erred in initiating penalty proceedings under Section 271(1)(c) of the Act and the learned CIT(A) erred in not adjudicating on The said ground.

**Relief**

Your appellant, Therefore, respectfully prays To direct the learned AO to

- a) Modify the assessment order to the above extent and
- b) Grant other relief deemed necessary

12. The first issue that came up for our consideration from ground No.1 of assessee appeal is TP adjustment in relation to provision of expenses amounting to Rs. 12 lacks. The Ld. AR for the assessee, at the time of hearing made it clear that the assessee do not want to press the grounds no.1 relating to TP adjustment and hence, the same is dismissed as not pressed.

13. The next issue that came up for our consideration from ground No. 2, 3 and 6 of assessee appeal is disallowances of remittances of payment towards IVTC services charges and consequent reimbursement of expenses u/s 40(a)(i) of the I.T.Act, 1961 for failure to deduct tax at source u/s 195 of the I.T.Act, 1961. We find that an identical issue has been considered by us in assessee's own case for AY 2008-09 in ITA No. 6974/Mum2014, where by following

the decision of Hon'ble Bombay High Court in the case of CIT vs KPMG (supra) held that a retrospective amendment cannot fasten obligation to deduct tax when not in force at the relevant time, i.e. when payment was made. Consequently, a party cannot be called upon to perform an impossible act i.e to comply with provision, which was not in force at the relevant time. Thus, there could be no obligation to deduct tax at source, when the payment have been made to the services providers abroad in the absence of specific provision at the time, when the payment were made. Consequently, no disallowances made u/s 40(a)(i) of the I.T.Act, 1961 for failure to deduct tax at source u/s 195 of the I.T.Act, 1961. Therefore, consistent with view taken by the coordinate bench, we direct the AO to delete additions towards disallowances of IVTC services charges and consequent reimbursement of expenses u/s 40(a)(i) of the I.T.Act, 1961. Insofar as, ground No.6 is concerned, we find that the assessee has taken a alternative ground without prejudice to the main ground of no disallowances u/s 40(a)(i) and consequently, the alternative ground taken by the assessee is dismissed as infructuous.

14. The next issue that came up for our consideration from ground No.4 of assessee appeal is disallowances of training charges u/s 40(a)(i), for failure to deduct tax at source u/s 195 of the Act, 1961. The assessee claims that training rendered outside India by non-residents are not liable to TDS in India, when payments were made although, the said provisions have been retrospectively amended by the Finance Act, 2010 w.e.f financial year 1976. We find that an identical issue had been considered by us, in light of amended provision of section 9(1)(vii) of the I.T.Act, 1961 by the Finance Act ,

2010 with retrospective effect from 1976 and by following the decision of Hon'ble Bombay High Court, in the case of CIT vs KPMG. (supra) held that a party cannot be called upon to perform an impossible Act i.e to comply with the provision, which was not in force at the relevant time. Consequently, there could be no obligation to deduct tax at source, when the payments have been made to the services providers outside India, in the absence of a specific provision at the time, when the payments were made and hence, the said payments cannot be disallowed u/s 40(a)(i) of the I.T.Act, 1961 for failure to deduct tax at source 195 of the I.T.Act, 1965. Therefore, consistent with view taken by the coordinate bench in assessee own case, we are of the considered view that there cannot be any disallowances of training charges u/s 40(a)(i) of the act, for failure to deduct tax at source u/s 195 of the Act, and hence, we direct the AO to delete additions made towards disallowances of training charges u/s 40(a)(i) of the I.T.Act, 1961.

15. The next issue that came up for our consideration from ground No.7 of assessee appeal is restriction of disallowances of IVTC services and reimbursement relating to IVTC services and training charges to 30% of amounts paid during the financial year and balance amount payable is not liable for disallowances. The Ld. AR for the assessee, at the time of hearing, submitted that this issue is covered against the assessee by the decision of ITAT in assessee's own case for AY 2008-09 in ITA No. 6974/Mum/2014, where it was held that the amendment to section 40(a)(ia) restricting disallowances to 30% of the amount paid should not be made applicable retrospectively, since it is clarificatory in nature was decided against the assessee.

16. Having considered arguments of both the sides, we find that the Tribunal had decided issue against the assessee, in light of Article 24(3) of the treaty and also, amended provision of section 40(a)(ia) of the I.T.Act, 1961 and held that the amendment to section 40(a)(ia) brought by the finance Act,2014, restricting the disallowances to 30% of the amount paid is substantive and not clarificatory, hence, will have no retrospective operation. Therefore, consistent with view taken by the coordinate bench in assessee's own case, we reject ground taken by the assessee.

17. The next issue that came up for our consideration from ground No.8 of assessee appeal is denying the benefit of Article 10 of the India-Switzerland DTAA in respect of dividend distribution tax, whether it can be levied @10% as per Article 10 of India-Switzerland DTAA are @ 16.995%, as per the I.T.Act, 1961 and consequent refund with respect to excess tax paid towards dividend distribution tax. The Ld. AR for the assessee submitted that this issue has been set aside to the file of the CIT(A) for fresh consideration and accordingly, for this year also, the same may be set aside to the file of the CIT(A) for fresh adjudication.

18. We have heard both the parties, perused the material available on record and gone through and orders of the authorities below. We find that an identical has been considered by Tribunal for AY 2008-09 in assessee own case and after considering relevant facts, the issue has been set aside to the file of the Ld.CIT(A) for fresh consideration. The relevant findings of the Tribunal are as under:-

*“We have heard the rival contentions and perused the material available on record. Undisputedly, in the return of income filed assessee has computed DDT @ 15% on the dividend of ` 35.95 crore payable to SGS, Switzerland, in terms of provisions contained under section 115O of the Act. It is also relevant to observe, in the course of assessment proceedings, the assessee has not raised any issue with regard to the applicable rate of DDT. In the course of hearing before the first appellate authority, the assessee had raised an additional ground claiming that the DDT paid under section 115O is excess of the amount actually payable by the assessee on the dividend declared in terms of Article-10 of the India Switzerland DTAA. As could be seen from the submissions of the assessee, the premises on which such claim has been made is DDT is nothing but a tax on dividend, therefore, the provisions contained under Article-10 of India Switzerland DTAA would apply. It is the contention of the assessee that since as per the Article-10(2) of the DTAA, on dividend is chargeable at the maximum rate of 10% of the dividend income, the assessee should get benefit of the DTAA in terms of section 90 of the Act. Before we proceed to examine the validity of assessee’s claim, it is necessary to observe that section 115O, provides that if a domestic company in any assessment year declares dividend or pays any amount by way of dividend out of current or accumulated profits, then, in such case in addition to income tax chargeable in respect of the income of the domestic company, an additional income tax computed @ 15% of the dividend amount shall also be charged. Thus, on a plain reading of the aforesaid provisions, it appears that the DDT is a liability of the domestic company declaring dividend and not liability of the shareholder receiving such dividend income. Whereas, careful reading of Article-10 of India Switzerland treaty prima-facie gives an impression that it speaks of taxability of the dividend at the hands of the recipient of such dividend which is a resident of the other contracting state. Therefore, keeping in perspective the provisions contained under section 115O vis-a-vis Article-10 of DTAA it needs to be examined whether the benefit of tax treaty can be extended to the DDT paid / payable by the assessee. We have noted, the various proposition advanced by the assessee claiming benefit under Article-10 of India Switzerland DTAA as contained in the written notes are nothing but repetition of submissions made before the learned Commissioner (Appeals) on 20<sup>th</sup> February 2014, a copy of which is at Page-112 of the paper book. Though, reading of Article-10 of India Switzerland DTAA prima-facie gives an impression that it will only apply to non-resident shareholder receiving the dividend, however, still it leaves a scope for examining the claim of the assessee that DDT being a tax on dividend, Article-10 of the DTAA would be applicable even if such dividend is payable by the domestic company. In our view, it will be too simplistic to reject the contention of the assessee on the plea that it will only apply where the non-resident recipient of dividend incurs the liability in respect of dividend. In our considered opinion, the learned Commissioner (Appeals), though, was required to deal with all propositions advanced by the assessee, he has not done so. Therefore, we are inclined to restore the matter back to the file of the learned Commissioner (Appeals) for fresh consideration after reasonable opportunity of being heard to the assessee.”*

19. In this view of the matter and consistent with view taken by the coordinate bench , we restored this issue to the file of the Ld.CIT(A) for fresh consideration, in light of observations of the Tribunal for the AY 2008-09

20. In the result, appeal filed by the assessee is partly allowed for statistical purpose.

**ITA No. 2513/Mum/2017 for AY 2010-11:-**

21. The assessee has raised the following grounds of appeal:-

**Disallowance under Section 40(a)(i) of the Income Tax Act, 1961 with respect to Inspection, Verification, Testing and Certification Services (IVTC) charges and Reimbursements of other charges**

1. *On the facts and In the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) - 58, Mumbai [CIT (AH) has erred in not deleting the voluntary disallowance made by the Appellant, under protest, in the revised return of income amounting To Rs 26,97,547. The CIT(A) has further erred in confirming additional disallowance of Rs.1,66,588 made by AO, under section 40(a)(i) of the Income Tax Act, 1961 ('Act') on account of non-deduction of TDS in respect of Inspection, Verification, Testing and Certification services ('IVTC') charges.*
2. *On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not deleting the voluntary disallowance made by the Appellant, under protest, in the revised return of income amounting to Rs 1,24,01.925, the CIT(A) has further erred in confirming additional disallowance of Rs 7,75,203 made by AO. under section 40(a)(i) of the Act on account of non-deduction of TDS in respect of reimbursement of expenses incurred in connection with IVTC services.*
3. *Without prejudice to the above grounds, On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming disallowance of entire Transaction made by AO u/s 40(a)(i) of the Act with respect to ground no 1 and ground no.2,*

*without appreciating that disallowance u/s 40(a)(i) would apply only to amounts which are outstanding as on 31<sup>st</sup> March 2010.*

4. *Without prejudice to the above grounds, on the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming disallowance of entire transaction made by AO u/s 40(a)(i) of the Act with respect to ground no.1 and ground no.2, without appreciating that as per DTAA, fees for technical services are taxable only on payment basis and therefore disallowance u/s 40(a)(i) would apply only to extent of payments actually made during the year under consideration*

5. *Without prejudice to the above grounds, on the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in not restricting the disallowance with respect of IVTC charges and reimbursements of expenses on which TDS has not been deducted, to 30% on the basis of following:*

a) *The amendment to Section 40(a)(ia) of the Act, brought by The Finance (No. 2) Act, 2014. should be applied retrospectively from 1 April 2005.*

b) *By applying non-discrimination article provided under the DTAA's, in the event of non-deduction of tax at source while making payment to non-resident, the disallowance should be restricted To 30% of the amount.*

**Denying the benefit of Article 10 of the India Switzerland DTAA;**

6. *On the facts and in the circumstances of the case and in law, the AO as well as learned CIT(A) has erred in not granting the benefit of Article 10 of The India Switzerland Double Taxation Avoidance Agreement for determining dividend distribution Tax ['DDT'] liability under section 115-O on distribution of dividend to Swiss shareholder. The AO as well as CIT(A) erred in not appreciating that The Appellant is liable to pay DDT at the beneficial rate of 10% (as per India-Swiss DTAA) as against 16.995% (as per section 115-O of the Act.).*

6.1 *On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in not granting refund with respect to DDT paid in excess of 10% amounting to Rs. 1,88, 86,500 (i.e. Rs.27,00,00,000 @ 6.995%).*

**Penalty:**

7. *On the facts and in the circumstances of the case and in law, the AO erred in initiating penalty proceedings under Section 271(1)(c) of the Act and The learned CIT(A) erred in not adjudicating on the said ground.*

**Relief**

*Your appellant, therefore, respectfully prays to direct the learned AO to:*

- a) Modify the assessment order to the above extent and*
- b) Grant other relief deemed necessary;*

*The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.*

22. The first issue that came up for our consideration from ground No. 1, 2 and 4 of the assessee appeal is disallowances of IVTC service charges and consequent disallowances of reimbursement of expenditure u/s 40(a)(i) of the I.T.Act, 1961 for failure to deduct tax at source u/s 195 of the Act, 1961. We find that an identical issue has been considered by us in assessee own case for AY 2008-09 in preceding paragraphs in ITA No.6974/Mum/2014. The reasons given by us in preceding paragraph in ITA No.6974/Mum/2014 shall mutatis mutandis apply to this appeal also. Therefore, for similar reasons, we direct the Ld.AO to delete additions made towards disallowance of IVTC service charges and consequent reimbursement of expenses u/s 40(a)(i) for failure to deduct tax at source u/s. 195 of the act, 1961.

23. The next issue that came up for our consideration from ground No.5 of assessee appeal is restriction of disallowances of IVTC services and reimbursement charges relating to IVTC services to 30% of amount paid during the financial year and balance amount payable is not liable for disallowance. We find that an identical issue has been considered by us in IT(TP)A. No. 2572/Mum2017 for AY 2009-10. The reasons given by us in preceding paragraph in IT(TP)A. No. 2572/Mum2017 shall mutatis mutandis apply to this

appeal also. Therefore, for similar reasons, we decide the issue against the assessee.

24. The next issue that came up for our consideration from ground No.6 of assessee appeal is denying the benefit of Article 10 of the India-Switzerland DTAA, in respect of dividend distribution tax payable. We find that an identical issue has been considered by us for AY 2009-10 in IT(TP)A. No. 2512/Mum/2017. The reasons given by us in preceding paragraph IT(TP)A No. 2512/Mum/2017 shall equally applicable to this appeal also. Therefore, for similar reasons, we set aside the issue to the file of the Ld.CIT(A) for fresh adjudication, in light of the findings of the Tribunal in assessee's own case for AY 2008-09.

25. In the result, appeal filed by the assessee is partly allowed for statistical purpose.

26. As a result, appeal filed by the assessee ITA No.6974/Mum/2014 for AY 2008-09 is allowed in terms of our observations given hereinabove in said appeal and appeals filed by the assessee IT(T.P)A.No.2512/Mum/2017 for AY 2009-10 and ITA. No. 2513/Mum/2017 for AY 2010-11 are partly allowed for statistical purposes.

Order pronounced in the open court on this 28 /11/2019

**Sd/-**  
**( C.N.PRASAD )**  
JUDICIAL MEMBER

**Sd/-**  
**(G. MANJUNATHA)**  
ACCOUNTANT MEMBER

Mumbai; Dated 28 /11/2019  
Thirumalesh Sr.PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai