IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "D": NEW DELHI]

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER,
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA. No. 7418/Del/2019

Assessment Year: 2015-16.

Shri Hariharan Subramaniam, Subramaniam& Associates Attorneys-at-Law, Centra Square Attorneys-at-Law, Centra Square Manohar Lal Khurana Marg, Bara Hindu Rao (off Jhanshi Road New Delhi 110006 Pan AABPH0358K (Appellant)	Vs	The Assistant Commissioner of Income Tax Circle 61(1) New Delhi Respondent

Assessee by	Shri Ajay Vohra, Sr. Advocate; Shri Neeraj Jain, Advocate; Sh. Aditya Vohra, Adv. & Sh. Arpit Goyal , C.A.
For Revenue	Shri Satpal Gulati CIT DR Shri G Jhonson Sr DR

Date of hearing	09/1/2020 & 7/8/2020
Date of Order	06.11.2020

ORDER

PER PRASHANT MAHARISHI, A.M.:

01. This appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-44, New Delhi,[The ld CIT (A)] dated 23.08.2019 for assessment year 2015-16 wherein he upheld the disallowance of Rs 3,70,95,299/- made by the ld AO u/s 40 a(i) of The Income tax Act [the Act] for non deduction of tax at source on payments made by assessee of professional charges to counsel/ lawyers outside India. Also disallowance of foreign travel expenses was confirmed.

02. The facts of the case shows that assessee is an Advocate by profession, filed his return of income on 30.09.2015 declaring an income of Rs. 3,51,18,400/- The learned Assessing Officer passed an order under Section 143(3) of the Income Tax Act, 1961 (the Act) on 29.12.2017 at Rs. 7,33,37,010/-.

03. The learned Assessing Officer made disallowance under Section 40a(i) of the Act of Rs. 3,70,95,299/- for non-deduction of tax at source of payment made of professional charges and official fees to the foreign associates holding that under the provisions of the Income Tax Act Income Tax should have been deducted on these payments u/s 195 of The Act.

04. The second addition of Rs. 11,23,312/- was made on account of foreign travel expenditure being 10 per cent of the total expenditure amounting to Rs. 11,23,312/-.

05. Against this order, assessee preferred an appeal before the Ld CIT (A)-44, New Delhi, who passed an order on 23.08.2019 confirming the order of the Assessing Officer with respect to disallowance under Section 40a(ia) of the Act and further disallowance @ 10% out of foreign travel expenditure. Therefore, assessee is in appeal before us, raising the following grounds of appeal:

"1. That the Commissioner of Income-tax (Appeals) ("CIT(A)"] erred on facts and in law in upholding the order of the assessing officer assessing the income of the Appellant at Rs.7,33,37,010 against Rs.3,51,18,400 returned by the Appellant.

2. That the CIT(A) erred on facts and in law in upholding disallowance of expenditure of Rs.3,62,45,557, being payments made to non-resident entities towards legal services, invoking section 40(a)(i) of the Income-tax Act, 1961 ("the Act") for the alleged failure of the Appellant to deduct tax at source therefrom under section 195 of the Act.

2.1. That the CIT(A) erred on facts and in law in upholding the allegation of the assessing officer that payments made by the Appellant to the foreign law firms were towards legal services involving special knowledge and experience of the relevant laws of the respective countries which partake the nature of consultancy and, therefore, were to be regarded as Fees for Technical Services ("FTS").

2.2. That the CIT(A) grossly erred on facts and in law in not appreciating that the said payments were in the nature of 'professional fee' for professional services rendered by the foreign law firms, which is separate and distinct from FTS, and is not taxable in the source country both under the Act and the applicable Double Taxation Avoidance Agreements and therefore, not liable for deduction of tax at source under section 195 of the Act.

3. That the CIT(A) erred on facts and in law in upholding ad-hoc disallowance of Rs.11,23,312 made by the assessing officer, being 10% of total foreign travelling expenses which were claimed as deduction under section 37(1) of the Act by the Appellant.

3.1 That the CIT(A) erred on facts and in law in upholding the said ad-hoc disallowance on the alleged ground that full and proper supporting documents regarding incurring of such expense were not furnished by the Appellant."

06. Ground number 1 of the appeal is general in nature, no specific arguments were advanced, and therefore, same is dismissed.

07. The second ground of appeal is against the disallowance confirmed by the learned CIT – A u/s 40 (a) (i) of the act of fees for professional services rendered by foreign practitioners on which no tax is deducted by the assessee. The Appellant, during the relevant previous year, in the course of rendering legal services in the field of IP Laws, availed services of foreign legal practitioners being individual lawyers/ law firms, on behalf of its clients located in India for filing of patent applications in such foreign countries. In respect of the aforesaid services, the Appellant made payments aggregating to Rs. 8,73,50,448 for

availing legal services on behalf of its clients, to non-residents, including individual lawyers/ law firms/ companies. The assessing officer disallowed payments amounting to Rs. 3,62,45,557 made to the foreign law firms/ legal practitioners for the aforesaid professional services, invoking provisions of section 40(a)(i) of the Act, allegedly holding that the said payments were in the nature of Fees for Technical Services ("FTS") and therefore, were chargeable to tax in India. Details of such payment of fees specifying the name of the country and the status of the recipient is tabulated as Under:-

S. No.	Country	Recipient of professional fee	Legal status of recipient	Amount (Rs.)
1	Australia	Davies Collison Cave	Partnership Firm	5,45,595
		Griffith Hack	Partnership Firm	6,79,205
		Lesicar Murray Trento	Partnership Firm	12,646
		Lesicar Perrin	Partnership Firm	29,615
		Lesicarf Maynard Andrews Pty Ltd	Company	62,158
		Pizzeys	Company	23,003
2	Brazil	Martinez & Associados	Partnership firm	12,66,391
3	China	Kangxin Partners, P.C.	Company	2,15,389
		Lehman, Lee & Xu	Partnership firm	77,976
		Unitalen	Partnership	18,41,572

			firm	
4	Colombia	Clarke, Modet & Co	Company	99,682
5	Czech Republic	Patentservis	Company	40,983
6	Denmark	Zacco Denmark	Partnership firm	15,25,359
7	Indonesia	Amr Partnership	Partnership firm	23,426
		George Widjojo & Partners	Partnership firm	1,33,421
8	Japan	Seiwa Patent & Law	Partnership firm	10,24,465
		Shiga International Patent Office	Partnership firm	20,56,746
		Shimizu Patent Office	Proprietorship / Individual	9,84,308
9	Luxembourg	Dennemyer & Co.	Company	61,85,901
10	Malaysia	Advanz Fidelis SDN.BHD.	Company	1,00,296
		Marks & Clerk LLP.	Partnership firm	2,51,428
		RamRais & Partners	Partnership firm	13,577
11	Mexico	Baudelio & Cia	Company	21,00,913
12	New Zealand	Baldwins	Partnership firm	13,68,129
13	Norway	Hamso Patentbyra	Partnership firm	2,11,339
14	Philippines	Angara Abello Concepcion Regala & Cruz	Partnership firm	4,64,877
15	Republic of	Y.S. Chang &	Proprietorship	20,518

	Korea	Associates	/ Individual	
		First law PC	Partnership firm	7,10,446
		Hanyang International Patent & Law Firm	Partnership firm	5,19,585
		Muhann Patent & Law Firm	Partnership firm	5,95,968
		Y.P. Lee, Mock & Partners	Partnership firm	6,81,006
16	Russia	Gorodisskey & Partners	Partnership firm	30,99,452
17	Sebia	Ristic & Malesevic of Patent Bureau	Government organization	51,511
18	South Africa	D.M. Kisch. INC.	Company	46,99,667
		Edward Nathan Sonnenbergs Inc.	Company	8,762
		Von Seidels	Partnership firm	1,09,423
19	Sri Lanka	Murugesu & Neelakandan	Partnership firm	37,073
		Neelakandan & Neelakandan	Partnership firm	83,363
20	Thailand	Tilleke & Gibbins International Limited	Company	2,82,736
21	UAE	United Trademark & Patent Services	Partnership firm	36,32,983
22	Vietnam	Tran H. N. & Associates	Company	3,74,665
Total				3,62,45,558

08. Contesting the above disallowance learned Authorised Representative referred to the facts of the case and made broad proposition as under:

i. That the services received by the appellant are not in the nature of managerial, technical or consultancy services but are purely professional services. He referred to the nature of the services and submitted that tax is required to be deducted at source only on payments which are chargeable to tax in India. He stated that as the payments made by the appellant were for the availing of professional services and was not in the nature of fees for technical services, thus, not chargeable to tax u/s 4 read with Section 5 and Section 9 of the income tax act. He submitted that to fall those services within the chargeable ambit of the Indian income tax act, they should satisfy the definition of 'managerial, technical or consultancy services'. He referred to the many judicial precedents to support his contentions. He referred to the provisions of Section 194J of the act which requires deduction of tax in payment is made to a resident and submitted that 'professional services' is a separate category of services recognised as distinct from 'fees for technical services'. His argument was that if 'fees for technical services' were to include 'professional services' it would not have been necessary to refer to the later specifically in explanation (a) to Section 194J of the act and explanation (b) to that Section would have been sufficient. Thus it is stated that the services received by the appellant from the

foreign attorneys/law firm/companies were purely in the nature of 'professional services' which is a separate category of services as compared to 'fees for technical services'. As no element of technical, consultancy or managerial services was provided by the foreign entities, the payments were not in the nature of 'fees for technical services' and the assessee was under no obligation to withhold the taxes there from.

ii. He submitted that since the payments are made by the assessee who is a resident to a non-resident for the purpose of earning income from a source outside India, the same are also excluded from the purview of 'fees for technical services' in terms of Section 9 (1) (vii) (b) of the Act. He submitted that the source of income in this case is the filing of patent application by the foreign law firms, legal practitioners in the respective jurisdictions outside India.

iii. Without prejudice to the above proposition, he submitted that the professional services received by the assessee are in the nature of 'independent personal services" not liable to tax in India. He submitted that even under the Double Taxation Avoidance Agreement the services in the nature of "legal services" are covered within the scope of "professional services" and not as "fees for technical services". He referred to article 14 of Double Taxation Avoidance Agreement and also stated that similar definitions of professional services are also provided in many other Double Taxation Avoidance Agreements. He

further referred to the decision of the coordinate bench dated 10 October 2019 case of DLF Ltd versus ITO ITA number 3253 – Delhi – 2012 wherein it has been held that the payment made to a non-resident law firm for professional services rendered as international counsel shall partake the nature of "independent personal services" and not "fees for technical services". He therefore submitted that in absence of any fixed base of the recipient in India, income was not chargeable to tax in India and thus withholding tax was not required to be deducted on such payment u/s 195 of the act and consequently no disallowance u/s 40 (a) (i) of the act can be made.

iv. He further submitted that in the present case there are payments made in 12 different jurisdictions. He submitted that for this entire jurisdiction the "independent personal services" covers payments made to a resident. He submitted that though the status of the foreign entity for all these jurisdictions are partnership firm, company etc the payment of Rs 122,63,090 made by the assessee to those jurisdictions does not require any withholding tax as it was a payment made to the resident of that country and same is chargeable to tax in those countries. So tax is not required to be deducted at source in India. Similarly with respect to the payment made to Australia he submitted that "independent personal services" covers payment made to individuals or firm of individuals in those countries therefore the payment of ₹ 1,267,060 made in Australia to a

partnership firm also does not require any withholding tax in India. He further submitted that with respect to payment of ₹ 20,518 made by the assessee to a proper ship concern in Republic of Korea tax is not required to be deducted at source as it relates to 'independent personal services" and payments made to individuals only and it is chargeable to tax in the other country.

v. Therefore summarising his arguments he submitted that the learned assessing officer has disallowed the sum of ₹ 36,245,557 in respect of non-deduction of tax on professional fees paid by the assessee outside India to various foreign law firms/attorneys. Out of the above payment sum of Rs 122,63,090 relates to the payment to the countries having Double Taxation Avoidance Agreement with India and The Independent Personal Services article covering payments to the Resident of the contracting states on which no tax is required to be deducted. Therefore the disallowance cannot be made.

vi. He submitted that a sum of ₹ 1,267,060 has been made to countries having Double Taxation Avoidance Agreement with Independent Personal Services article covering payments to Individuals Or Firm of individuals and therefore same is also not chargeable to tax in India and hence no tax is required to be made, therefore, no disallowance can be made.

vii. He submitted that sum of ₹ 20,518 relates to the payment to the countries having Double Taxation Avoidance with

Independent Personal Services article covering payments to Individuals and therefore on this sum no tax is required to be deducted as it is chargeable to tax in those countries and not in India and therefore the disallowance for non-deduction of tax at source cannot be made.

viii. He further stated that a sum of ₹ 22,694,889 relates to the payments to the countries having Double Taxation Avoidance Agreement having "independent personal services" article covering payments to individuals but the status of foreign associates is non-individual but the income to be characterised as business profits and not chargeable to tax in India in absence of permanent establishment in India.

ix. Therefore in nutshell his argument is that no tax is required to be deducted at source on payment made by the assessee and therefore the disallowance requires to be deleted

09. In response to this the learned departmental representative vehemently supported the order of the learned assessing officer and the learned CIT – A. It was submitted that the professional fees paid by the assessee is chargeable to tax in India in terms of the provisions of Section 4, 5 and Section 9 of the act. Therefore the tax is required to be deducted thereon u/s 195 of the act. He submitted that the learned CIT – A has correctly dealt with whole issue in its completeness. He further extensively read the assessment order as well as the appellate order on this issue.

10. Subsequently, the matter was fixed for clarification on 7/8/2020, at that particular time, the learned departmental representative submitted that the issue is squarely covered in favour of the

revenue by the decision of the coordinate bench in case of ACIT V Subhatosh Majumdar (ITA number 2006 – KOL – 2017 dated 9/1/2020) wherein on identical facts and circumstances it has been held that the tax is required to be deducted. The learned departmental representative read the judgement of the coordinate bench to show that the facts and circumstances of the case are similar.

11. The learned authorised representative objected and stated that above decision does not cover the case of the assessee and there are certain basic differences. The learned authorised representative at that particular point submitted that he would like to distinguish the facts of this case with the case decided by the coordinate bench. The later on, he submitted a detailed note on this.

12. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also perused the various judicial pronouncements read before us by both the parties. The fact shows that the assessee is a lawyer by profession and derived income from business or profession and income from other sources. He filed his return of income on 30/9/2015 declaring total income of ₹ 35,118,400. During the course of assessment proceedings assessee was asked to file list of countries with which DTAA is in force and also asked to submit the Ledger of professional fees paid to foreign associate. Assessee submitted a chart according to which he has paid gross professional fees during the impugned financial year ended on 31st of March 2015 of ₹ 160,974,697/–. Out of which ₹

73,624,248 was for official fees and reimbursement. Thus out of net professional fees of ₹ 87,350,448/–, he submitted that professional fees of ₹ 77,360,542 are not taxable in India. Thus Rs 99,89, 905/– was professional fees taxable in India out of which assessee has deducted tax at source on professional fees paid of ₹ 9,140,163/–. Thus ₹ 849,742/– was submitted by the assessee is taxable professional fees in India on which tax is not deducted at source and same is to be disallowed u/s 40 (a) (i) of the act. The above amount is agreed by the assessee for disallowance due to non-deduction of tax at source on payment made to foreign entities in Taipei.

13. During the course of assessment proceedings, assessee submitted a note on the nature of payment made to foreign associates for professional charges and fees and its taxability under The Income Tax Act and Double Taxation Avoidance Agreement which India has entered into with various countries. The main contention of the assessee is that services were rendered by the foreign attorneys/law firms and the payment made do not fall within the scope of Fees For Technical Services [FTS] as defined under explanation 2 to Section 9 (1) (vi) of the act. It was further contested that that the fees paid on professional services are do not fall into the definition of fees for technical services. Assessee drew support from the provisions of Section 194J of the act.

14. The learned assessing officer noted that the payments made to overseas firms can be bifurcated into two segments

i. the component that reimburses the forms for any official/statutory payments that needs to be paid to the

patent offices or other authority/agencies of the government,

ii. The component for compensating the firm for the services rendered by them.

He noted that the first category of the fees are in the nature of the reimbursement which is to be passed on by the firm to the government of the other country, however, professional fees received by the foreign firms needs to be examined to ascertain whether this constitutes income in the hands of the foreign firms as fees for technical services and tax is required to be deducted thereon or not. The learned AO noted that these non-resident entities are working in a highly specialised field of legal services. These kind of legal services required not just comprehensive and precise knowledge of the law but also require experience with the procedural aspects and the rules in the respective countries. Therefore according to him it goes without saying that the rendering of the services entails constant interactions between the assessee and the foreign firm and especially regular feedback and advice to the assessee. He noted that when the firm is filing the application for initial registration of the patent with the government agency, it cannot be simple case of submitting a few documents or mere deposit of some fees as is being submitted by the assessee. The foreign firm will help to examine each case in the light of its special knowledge and experience of the relevant laws of the respective jurisdiction. It cannot be the case of the assessee that the documents are sent by it on behalf of its Indian

client to the foreign firm and these documents are simply filed with the government of the other country. After a preliminary look at the case, the non-resident firm will help to get back to the assessee for advising him about the basic deficiencies in the documentation, in accordance with special knowledge about the law of that land. Once these basic deficiencies are plugged, the firm to again apply itself to the case and this would engender further advising the assessee as to in what manner the case is to be presented before the respective government so that there are none of the impediments to the application filing process. According to AO, all these require providing advisory / consultation by the foreign firm to the Indian assessee utilising it specialised knowledge and skill sets that they possess. Similar sequence of the process would again be carried out while opposing IPR/Patent application by competitors except that in that scenario the element of the two-way communication and specialised advice from the foreign firm to the assessee would be in a higher proportion then when an application is being filed. Therefore, he noted that it is clear that this definitely involves foreign firms advising the assessee about the feasibility of success in litigation and advising it about the manner in which the litigation is to be carried out. The proportion of advice and consultancy services can only become more acute during pleading and representing in the court of law. Therefore, he held that the services provided by the overseas firms/entities partakes the character of 'consultancy' under the Indian income tax act 1961. He further noted that the payments are made to various residents of different countries with whom India

has signed double Taxation Avoidance Agreements. Thereafter he examined the relevant DTAA and the provisions of the act and agreed with the assessee that the payments made by the assessee to foreign attorneys/law firms in United Kingdom, USA, Canada and Singapore are eliminated from the ambit of taxability in India due to the presence of "make available" clause {Though we do not agree with this finding of the ld AO, further that is not the issue before us now}. Hence the services rendered were considered outside the scope of fees for technical services and held that assessee was not liable to withhold any tax on these payments. Further, he also considered the argument of the assessee that in case of payments made to parties in France, Israel, Hungary and Belgium, assessee is eligible to take the benefit of "Most-Favoured-Nation" clause by the protocols annexed to the Double Taxation Avoidance Agreements. Accordingly, the payment made to the above country residents was not subject to withholding tax in India. However, even after excluding the above countries, he found that assessee has not deducted the tax at source on payment made to foreign firms/ professionals in other countries. The assessee also submitted before the learned assessing officer that DTAA of many countries contains an article dealing with services of Independent Personal Services (IPS) clause and income from business profit respectively in Double Taxation Avoidance Agreement between India and the specified country and therefore same is chargeable to tax in those countries where the permanent establishment of the recipients exist. The learned assessing officer did not agree with the view of the assessee that the nature of the

services provided is in the nature of Independent Personal Services stating that the argument of the assessee clearly shows that the services rendered by the foreign professionals in those countries is Fees For Technical Services and it cannot be considered as income under Independent Personal Services clause or Business Profits.

15. Ld AO also rejected the argument of the assessee that in order to attract taxability in India the services must be also rendered in India as according to him utilisation of the services in India is enough to attract its taxability in India.

16. Therefore, he determined sum of ₹ 36,245,557 over and above a sum of Rs 849,742/– (which is tendered by the assessee) as taxable as Fees for Technical Services in terms of Section 9 (1) (vii) of the act. As assessee has failed to deduct tax at source u/s 195 of the act, he disallowed it u/s 40 (a) (i) of the act a sum of ₹ 37,095,299/–.

17. On appeal before the learned CIT – A, he confirmed the above disallowance holding that the learned assessing officer has considered the nature of services correctly as well as the provisions of Double Taxation Avoidance Agreement to hold that the sum is chargeable to tax as Fees For Technical Services and tax should have been deducted thereon u/s 195 of the act and therefore the disallowance of Rs. 36,245,557/– was correctly made.

18. The first issue that arises before us that the disallowance made by the learned Assessing Officer under Section 40(a)(i) of the Act is

sustainable in law with respect to 22 countries where there is no "Make Available Clause" and 'Most favoured nation" Clause does not apply. The facts show that the assessee is an Advocate, engaged in the course of rendering legal and professional services in the field of Intellectual Properties Laws. During the course of provision of service to his clients', assessee obtained services of certain foreign legal professionals, such as individuals, law firms/companies for filing of various patent applications in various foreign countries. The assessee made payment to such foreign associates amounting to Rs.8,73,50,448/-. The Assessing Officer held that in case of 22 countries where the aggregate payment made by the assessee to such countries amounting to Rs. 3,62,45,557/- is in the nature of Fees for Technical Services. Such sum is chargeable to tax in India and, therefore, assessee should have deducted tax at source under Section 195 of the Income Tax Act, which assessee has allegedly failed to, therefore, invoking the provisions of Section 40(a)(i) of the Act the above sum was disallowed. The claim of the assessee is that same is not chargeable to tax in India and, therefore, provisions of Section 195 of the Act do not apply. There is no dispute that tax is required to be deducted at source only on payments which are chargeable to tax in India. Same is the provision of law and direction of the Hon'ble Supreme Court in the case of G.E. Technology Centre Pvt. Ltd. Vs. CIT (2010) 327 ITR 456 (SC). According to the provisions of Section 4 of the Act the Income Tax shall be chargeable in respect of total income of the previous year of every person at the rate prescribed for assessment year.

Section 5 (2) defines the scope of the total income and in respect of Non residents the total income includes all income from any source received or deemed to be received in India by or on behalf of such person and accrues or arises or deemed to accrue or arise to him in India during such year. The income deemed to accrue or arise in India is defined under Section 9 of the Income Tax Act. The claim of the learned assessing officer is that such sum which is paid by the assessee to the foreign law firms, attorneys, companies etc falls within the definition of Fees For Technical Services and therefore the same is deemed accrues or arises in India in terms of the provisions of Section 9 (1) (vii) of the act as it is an income by way of fees for technical services. Explanation [2] to Section 9 (1) (vii) defines the fees for technical services as Under:-

Explanation [77][2].—For the purposes of this clause, "fees for [78]technical services" means any consideration (including any lump sum consi-deration) for the rendering of any managerial, technical or consultancy[78] services (including the provision of services of technical or other personnel) but does not include consideration for any construction[78], assembly, mining or like project undertaken by the recipient[78] or consideration which would be income of the recipient chargeable under the head "Salaries";]

Therefore, rendering of any managerial, technical or consultancy services subject to certain exceptions would fall into the compass of fees for technical services.

19. To understand whether the nature of the services rendered by the recipient of the professional fees to the assessee whether is in nature of 'fees for technical services", it is necessary to understand that what the specific services are rendered by them to the assessee. The nature of services so rendered are:-

(i) For receiving instructions from the Appellant and filing application at the local Patent Office and reporting the filing to the Appellant.

(ii) Reporting Examination report issued by the local Patent Office to the Appellant along with due date for filing a response.

(iii) Receiving instructions from the Appellant and preparing and filing responses to the Examination Report issued by the local Patent Office

(iv) Undertaking trademark searches in the records of the Intellectual Property offices in respective jurisdictions to ascertain availability of trademarks in question;

(v) Maintenance of grant/ registration of Intellectual Property or services in relation thereto, as required under law, like towards annuity payment, renewal fee, restoration of patent, etc.;

(vi) Maintaining records and forwarding documents of grant or refusal received from the Intellectual Property offices;

(vii) Facilitating translation, processing and typing of relevant documents.

20. The claim of the assessee is that these services are not in the nature of "managerial, technical or consultancy services" but are purely "professional services". However, and the time of hearing the learned departmental representative submitted that the above services are "consultancy services" in nature and therefore they clearly fall within the definition of "fees for technical services". For this proposition he has relied upon the decision of the coordinate bench in ACIT, Circle 25, Kolkatta V Shri Subhatosh Majumder [ITA no 2006/Kol/2007] dated 26/2/2020 wherein identical issue has been decided. The coordinate bench in paragraph number 17 – 19 has dealt with this issue as Under:-

> *"17. In our considered view, the moot point to be adjudicated in the present appeal therefore is whether the legal services rendered by the foreign attorneys could be classified as 'consultancy services' so as to bring these payments within the ambit of Section 9(1)(vii) of the Act. In this regard, we note that the term 'consultancy' service is not defined in the Act. In the circumstances one must understand the term as understood in normal commercial parlance. As per Oxford Dictionary, the meaning of the*

word 'consultancy' is "a professional practice that gives expert advice within a particular field". Further, Wikipedia defines 'consultant' as a professional who provides expert advice in a particular area such as security (electronic or physical), management, education, accountancy, law, human resources, marketing (and public relation), finance, engineering, science or any of many other specialised fields." Applying these definitions, we note that the assessee's services were engaged by his clients having regard to his specialized knowledge and experience dealing with IP laws as well as procedures involved in obtaining IPR registrations. The IP laws of each country contain special provisions and the regulations there under prescribe detailed technical and bureaucratic procedures which need to be complied with before Patent or IPR registrations are granted. It is a well-established fact that the Patents or IP registrations once granted by the authority, confer on the holder very valuable intangible rights which substantially add to the value of the business carried on by the holder. Since the laws conferring IP rights on the parties are complex in nature, rendering of services in the field of IP laws, constitutes specialized branch in the field of legal service. We therefore find that the assessee as well as the foreign associates appointed by him enjoyed expertise and specialized knowledge in the field of IP laws and procedures associated with obtaining legal protections or registrations under the relevant laws governing IP rights in

the respective countries. It is with the use and aid of the advice given by the foreign patent attorneys that the assessee and/or his clients were able to prepare technically intricate documentation, necessary for filing Patents and other IP rights applications in the foreign countries in compliance with their respective IP laws. The foreign attorneys not only advised the assessee in preparing the documentation necessary for submission of applications but also represented the applicants before the Patent/IP authorities and provided clarifications and explanations necessary for grant of registration. We therefore note that on the given facts of the case, but for the consultancy or advisory services rendered by foreign attorneys, the assessee or his clients would not have been able to obtain the Patents or IP registrations in the foreign countries.

18. We also find it relevant to hold that the Ld. CIT, DR rightly relied on the judgment of the Hon'ble Supreme Court in the case of GVK Industries Ltd Vs ITO (supra), wherein meaning of the term 'consultancy service' for the purposes of Section 9(1)(vii) after its amendment in 2010 was explained by the Hon'ble Supreme Court. In the said judgment the Hon'ble Court observed as follows:-

> *"34. In the case at hand, we are concerned with the expression "consultancy services". In this regard, a reference to the decision by the Authority for Advance*

Ruling P. No. 28 of 1999, In re [2000] 242 ITR 208/[1999] 105 Taxman 218 (AAR - New Delhi), would be applicable. The observations therein read as follows: "By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it.

" 35. In this context, a reference to the decision in CIT v. Bharti Cellular Ltd. [2009] 319 ITR 139/[2008] 175 Taxman 573 (Delhi), would be apposite. In the said case, while dealing with the concept of "consultancy services", the High Court of Delhi has observed thus: 'Similarly, the word "consultancy" has been defined in the said Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said

Dictionary as "ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval from for a proposed action". It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant.'

36. In this context, we may fruitfully refer to the dictionary meaning of 'consultation' in Black's Law Dictionary, Eighth Edition. The word 'consultation' has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It means a meeting in which a party consults or confers and eventually it results in human interaction that leads to rendering of advice.

37. As the factual matrix in the case at hand, would exposit the NRC had acted as a consultant. It had the skill, acumen and knowledge in the specialized field i.e. preparation of a scheme for required finances and to tie-up required loans. The nature of activities undertaken by the NRC has earlier been referred to by us. The nature of service referred by the NRC, can be said with certainty would come within the ambit and sweep of the term 'consultancy service' and, therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be taxable under the head 'fee for technical service'. Once the tax is

payable/paid the grant of 'No Objection Certificate' was not legally permissible. Ergo, the judgment and order passed by the High Court are absolutely impregnable."

19. Applying the ratio laid down in the judgment (supra), we are of the view that the services which the foreign attorneys rendered to the assessee squarely came within the ambit of Section 9(1)(vii) of the Act. In his rebuttal, the ld. AR sought to distinguish the judgment of the Hon'ble Supreme Court stating that the facts of the assessee's case were distinguishable because unlike in the case before the Hon'ble Apex Court, the non-resident attorneys had merely performed executionary functions which were rendered abroad and also utilized outside India. We are however unable to persuade ourselves to agree with the contention put forth by the Ld. AR of the assessee. In the first instance, the Hon'ble Supreme Court in the case of GVK Industries Ltd (supra) defined the expression 'consultancy services' in the context of Section 9(1)(vii) and the services rendered by foreign attorneys squarely come within the ambit of such definition. This point has not been negated by the Ld. AR in his submissions. Instead the case made out by the Ld. AR is that the services were rendered abroad and utilized abroad and therefore fell within the exception carved out within Section 9(1)(vii)(b) of the Act. We therefore hold that the ratio laid down in the said judgment is very much relevant in deciding the present appeal."

21. The argument of the learned authorised representative is that the coordinate bench did not appreciate that the payment towards the same would constitute “fees for professional services“ and not “fees for technical services” and further as this was not argued before that bench, the coordinate bench had to consider the same. It is submitted that the services rendered by the service providers is not fees for technical services but are purely professional services of a lawyer. It was further stated that as in the case before the coordinate bench in that case, the foreign attorneys did not render any clerical and execution services. According to him, services rendered in the present case by the foreign attorneys are highly specialised legal services which partakes the character of ”fees for professional services”. He further stated that the coordinate bench in case of NQA quality systems registrar’s Ltd versus DCIT (2005) 92 TTJ 946 (Delhi) has clearly make a difference between “fees for technical services” and “fees for professional services”. He further put to our attention that the provisions of Section 194J clearly carved out the difference between “fees for technical services” and “fees for professional services”. He therefore submitted that, if the distinction between the two kinds of the payments i.e. fees for technical services and fees for professional services is a blurred and not judicially recognised, it would lead to an anomalous situation as payment for obtaining legal opinion from an advocate/law firm would constitute fees for technical services being advisory in nature, whereas payment for litigation services by the same advocate/law firm would constitute fees for professional services, requiring

deduction of tax at source u/s 194J of the act at different rates, even though both of the above services would undoubtedly be rendered by the advocate/law firm "in the course of carrying on legal profession".

22. We have carefully given our considered thoughts to the above argument. Firstly the reliance upon the decision cited by the learned departmental representative clearly clinches issue in favour of the revenue that services rendered by the foreign attorneys clearly falls into the definition of fees for technical services as defined in explanation 2 to Section 9 (1) (vii) of the act. Merely because there are no clerical and executionatiory tasks not mentioned, it does not change the nature of services rendered in its substance. Therefore, the above payment clearly falls as income chargeable to tax u/s 5 read with Section 9 (1) (vii) of the act as 'Fees for technical services so for the Income tax Act 1961 is concerned. Coming back to the decision cited before us by the learned authorised representative in NQA quality systems registrar's Ltd versus DCIT (2005) 92 TTJ 946 (Delhi), we find that the learned authorised representative relied upon the para number 17 of that decision where the coordinate bench in that case examines the applicability of article 15 of the Indo UK DTAA a relating to independent personal services where the professional services are specifically defined. However here we are supposed to examine The Income Tax Act, 1961 to examine the chargeability of the above sum under the Income Tax Act. Therefore, the reliance placed by the assessee on the decision of 92 TTJ 946 is misplaced. We hastened to add that

when we reach at applicability of respective Double taxation Agreement, we are conscious about distinction between FTS and Independent personal Service when applying articles of respective DTAA.

23. LD AR also invited our attention to section 194J of the Act which deals with tax deduction at source in respect of "Fees for professional or technical services". It is submitted that the distinction between "Fee for professional services" and "FTS" is statutorily recognised, in as much as, under the aforesaid section, Legislature in its wisdom has created two separate classes of income, viz., "Fees for professional services" and "Fees for technical services". The said expressions have also been separately defined in Explanation to section 194J of the act, Referring to that provisions it is submitted that it is clear as crystal that "professional services", which includes legal services, is a separate category of services, recognized as distinct from FTS, which is primarily "managerial, technical or consultancy" services as referred to in section 9(1)(vii) of the Act, by the Legislature itself. If "FTS" as defined in Explanation 2 to section 9(1)(vii) were to include "professional services" as referred to in section 44AA, it would not have been necessary to refer to the latter specifically in Explanation (a) to section 194J of the Act, and Explanation (b) to that section would have been sufficient. It was also submitted that It may not be out of place to mention that section 28 of the Act refers to the income head "profits and gains of business or profession", which, too, demonstrates that profession is distinct from business. Even under the Double

Taxation Avoidance Agreements which India has entered into with various countries, there are separate Articles/ provisions relating to taxation of "Fee for Technical Services" and "Independent Personal Services" ("IPS"), like that of lawyer, doctors and other professionals and the special provisions relating to taxation of professionals, it is submitted, override the general provision relating to taxation of FTS. He submitted that the reason for the aforesaid is also not far to seek. A professional service provider is registered with the respective regulatory body or institutions and is permitted to render professional services in the jurisdiction of his respective country. A person registered as a professional for providing professional services, therefore, can earn income from such professional services only in his country, where he is registered to exercise his profession. In other words, a professional service provider by definition cannot earn income in any country other than where he is resident and is registered to practice. For the aforesaid reason, universally, under the domestic tax laws, e.g., under the Income-tax Act, 1961 and also under the respective DTAAs, professional services are subjected to taxation in the country of residence of such professional service provider. For that reason, it would be appreciated that under the Income-tax Act, 1961, while, payment made for professional services to residents is subjected to deduction of tax at source under section 194J of the Act, in case of non-residents, such payments are not regarded as income accruing or arising in India under section 9(1)(vii) of the Act and therefore, not subjected to tax withholding under section 195 of the Act. The

aforesaid position is also in line with the position under the DTAAs.

24. We have given on careful thought to the above argument. However for the purpose of holding that professional services should be considered differently then fees for technical services for the purpose of taxation u/s 9 (1) (vii) of the act, we are not impressed with the same. Our reasons are that provisions of Section 194J is applicable only to the payment made to resident therefore it cannot be extended to the payment made to non-resident. Therefore, in our view the definition and distinctions made between the fees for technical services and professional services u/s 194J does not have any implication to decide whether same is subject to tax as per the income tax act 1961 when the payment is made to a non-resident. If that be the case then Legislature would also have given a thought to include professional fees separately u/s 9 (1) (vii) of the act. That is not the intention of the law so far as the payments are made to non residents. In fact the provisions of Section 9 include certain income which shall be deemed to accrue or arise in India though in fact it neither accrues nor arises in India. It is a deeming fiction specifically made in the income tax act for the purpose of non residents. It in fact enlarges the scope of taxability of certain income of non-resident. Even otherwise the language of the provisions of Section 9 (1) is clear and therefore it is also not necessary to look into any other provisions of the income tax act which does not apply to non residents. Therefore drawing the distinction made u/s 194J between professional fees and fees for

technical services does not help the case of the assessee and is unwarranted. Even otherwise, whole scheme of the Income tax Act deals with taxation of Non resident and taxation of resident differently.

25. Further the distinctions made between the characterisation of two different income in the Double Taxation Avoidance Agreement also cannot be incorporated or interpreted in the income tax act for the reason that Double Taxation Avoidance Agreement is basically an agreement negotiated between the two countries country of source of income and country of residence of recipient, for sharing of the revenue of taxes out of one stream of income. That would be certainly applicable when the case of the assessee would be considered regarding applicability of the Double Taxation Avoidance Agreement and various articles therein.

26. Next argument of the ld AR is that even otherwise since the payments are made by the Appellant, who is a resident, to non-residents for the purposes of earning income from a Source Outside India, the same are excluded from the purview of FTS in terms of section 9(1)(vii)(b). The source of income, in the present case, is the filing of patent applications by the foreign law firms/ legal practitioners in the respective jurisdictions outside India. We have carefully considered this argument and find that source of the income is not the filing of the patent applications by the foreign law firms of the clients in India but the assessee himself who pays to the foreign law firms/professionals. This issue has

also been discussed by the coordinate bench in case of Subhatosh Majumder (supra) as under:-

> *"24. The Ld. AR further sought to avail the benefit of the exception carved out in Section 9(1)(vii)(b) of the Act on the premise that by obtaining patents/IPR registrations abroad, the clients of the assessee created sources of income outside India and since the services were rendered by the foreign attorneys in connection with such foreign source, the income did not deem to accrue or arise in India warranting deduction of tax u/s 195 of the Act. As we observed in the preceding paragraph 20, the services of the foreign attorneys were not engaged by the assessee's clients in whose favour the patents or IPRs were registered in foreign countries. Instead the services were engaged by the assessee while in discharge of his professional obligations in India. As such, the source of income in connection with which the services of foreign attorneys were used, was located in India. We also note that the mere fact that the Patents or IPs registrations in foreign countries granted protection to the Indian clients within the foreign territories, did not create any 'source of income' for such clients outside India. The protection under the foreign IP laws did not by itself ITA No. 2006/Kol/2017 A.Y 2011-12 Sri Subhatosh Majumder constitute "source" of any income in a foreign country. Nothing has been brought on record by the assessee to show that the clients on whose behalf this Patents/IP were registered had established PEs/branch etc.*

in such foreign countries so as to hold that the payments were made in relation to source of income located outside India. Viewed from any angle therefore we are unable to agree with the Ld. AR's submissions that the payment made to foreign attorneys fell within the exception carved out Section 9(1)(vii)(b) of the Act."

Hence, we reject this argument of the assessee.

27. Alternatively, the learned authorised representative argued that it is a settled principle of law that where the Government of India has entered into DTAAs with foreign countries for granting relief in respect of avoidance of double taxation, the provisions of the DTAA override the provisions of the Act to the extent beneficial to the assessee. It is submitted that even under the DTAAs, the services in the nature of legal services are covered within the scope of "professional services" and not FTS, taxation whereof is dealt with separately under a different Article specifically governing taxability of such professional services, viz., Independent Personal Services. He referred to article 14 of the India Russia Double Taxation Avoidance Agreement and also the decision of the coordinate bench dated 10 October 2019 in the case of DLF Ltd versus ITO (ITA number 3253/del/2012) wherein it was held that the payment made to a non-resident law firm for professional services rendered as international counsel shall partake the nature of independent personal services and not fees for technical services. He also referred to the decision of the coordinate bench in Maharashtra state electricity board versus Deputy Commissioner Of Income Tax (90 ITD 793 (MUM)). The

learned authorised representative also submitted that provisions relating to the taxability of independent personal services are not identical in all Double Taxation Avoidance Agreements as each Double Taxation Avoidance Agreement specifies the category of service provider who can avail the benefit provided therein. He submitted a table to show that agreement with some of the countries the relevant article dealing with the independent personal services covered payment being made to a resident on such payment for professional services are taxable only in the country where the service provider is resident.

S. No.	Country	Foreign entity	Status of foreign entity	Amount
1.	Brazil	Martinez & Associados	Partnership firm	12,66,391
2.	China	Kangxin Partners, P.C.	Company	2,15,389
3.		Lehman, Lee & Xu	Partnership firm	77,976
4.		Unitalen	Partnership firm	18,41,572
5.	Czech Republic	Patentservis	Company	40,983
6.	Japan	Seiwa Patent & Law	Partnership firm	10,24,465
7.		Shiga International Patent Office	Partnership firm	20,56,746
8.		Shimizu Patent Office	Proprietorship/ Individual	9,84,308
9.	Philippines	Angara Abello Concepcion Regala &	Partnership firm	4,64,877

		Cruz		
10.	Thailand	Tilleke & Gibbins International Limited	Company	2,82,736
11.	UAE	United Trademark & Patent Services	Partnership firm	36,32,983
12.	Vietnam	Tran H. N. & Associates	Company	3,74,665
Total				**1,22,63,090**

28. It is further submitted that in case of payment made to residents of Australia, the Double Taxation Avoidance Agreement between India and Australia with respect to the independent personal services article covers payment made to individuals or firm of individuals. He submitted that the payment made to such parties amounting to ₹ 1,267,060/– is as Under:-

S. No.	Country	Foreign entity	Status of foreign entity	Amount
1.	Australia	Davies Collison Cave	Partnership firm	5,45,595
2.		Griffith Hack	Partnership firm	6,79,205
3.		Lesicar Murray Trento	Partnership firm	12,646
4.		Lesicar Perrin	Partnership firm	29,615
Total				**12,67,060**

29. He further submitted that assessee has made payment to an individual resident of Republic of Korea which is also covered by independent personal services article of the DTAA between India

and Korea wherein it is provided that if the payment is made to individual then it shall be taxable in that country only. Such payment was of ₹ 20,518/– as under :-

Treaties wherein Article relating to IPS covers payments made to 'individuals' only					
S. No.	Country	Recipient of professional fee	Legal status of recipient	Amount (Rs.)	IPS Article
1	Republic of Korea	Y.S. Chang & Associates	Proprietorship/ Individual	20,518	Article 14
	Total			20,518	

30. It is also submitted that in following cases the payments have been made to non-individuals of different countries amounting to ₹ 2,26,94,889/-, though it is not covered by the provisions of the Double Taxation Avoidance Agreement relating to the Independent Personal Services, it does not automatically become and falls into the article of Fees For Technical Services. He submitted that income derived from professional services in such cases shall be covered under the article governing "business profit" as that provider of services providing legal services to their clients in the course of their business. In absence of such non-resident legal practitioners having the permanent establishment in India in terms of article 5 of the respective Double Taxation Avoidance Agreement. It is submitted that no part of the business profits arising to a non-resident entity from the appellant would be taxable in India. He submitted that those parties do not have any permanent establishment or any fixed

place of business in India and therefore same would also not be taxable in India in terms of article 7 read with article 5 of the respective Double Taxation Avoidance Agreement. He submitted the list of such payments as under :-

S. No.	Country	Recipient of professional fee	Legal status of recipient	Amount (Rs.)	IPS Article
1	Norway	HamsoPatentbyra	Partnership firm	2,11,339	Article 14
2	Denmark	Zacco Denmark	Partnership firm	15,25,359	Article 15
3	Sri Lanka	Murugesu&Neelakandan	Partnership firm	37,073	Article 14
		Neelakandan&Neelakandan	Partnership firm	83,363	
4	Malaysia	Advanz Fidelis SDN.BHD.	Company	1,00,296	Article 15
		Marks & Clerk LLP.	Partnership firm	2,51,428	
		RamRais& Partners	Partnership firm	13,577	
5	Russia	Gorodisskey& Partners	Partnership firm	30,99,452	Article 14
6	Luxembourg	Dennemyer& Co.	Company	61,85,901	Article 14
7	Australia	Lesicarf Maynard Andrews Pty Ltd	Company	62,158	Article 14
		Pizzeys	Company	23,003	
8	Republic of Korea	First law PC	Partnership firm	7,10,446	Article 14
		Hanyang International Patent & Law Firm	Partnership firm	5,19,585	
		Muhann Patent & Law Firm	Partnership firm	5,95,968	
		Y.P. Lee, Mock & Partners	Partnership firm	6,81,006	
9	South Africa	D.M. Kisch. INC.	Company	46,99,667	Article 14

		Edward Nathan Sonnenbergs Inc.	Company	8,762	
		Von Seidels	Partnership firm	1,09,423	
10	New Zealand	Baldwins	Partnership firm	13,68,129	Article 14
11	Mexico	Baudelio& Cia	Company	21,00,913	Article 14
12	Indonesia	Amr Partnership	Partnership firm	23,426	Article 14
		George Widjojo& Partners	Partnership firm	1,33,421	
13	Colombia	Clarke, Modet& Co	Company	99,682	Article 14
14	Serbia	Ristic & Malesevic of Patent Bureau	Government organization	51,511	Article 14
		Total		**2,26,94,888**	

31. On careful consideration of the arguments of the ld AR, we are of the view that the services are definitely qualifying as "independent Personal services". Therefore wherever in DTAA there is clause of Independent personal services and, if the recipient qualifies i.e. he does not have fixed base regularly available to him in source country and he does not reside for N number of days in source country, for benefit of that particular clause of DTAA, then, such income shall be taxed in the country of residence of the provider of the services and same shall not be chargeable to tax in India. Then on such payments there is no requirement of withholding tax u/s 195 of the act.

32. Assessee has made payment of Rs 1,22,63,091 to the recipient of fees in Brazil, China, Chez Republic, Japan, Philippines,

Thailand (article 14 of Double Taxation Avoidance Agreement of India with those countries) and Vietnam (article 15 of Double Taxation Avoidance Agreement). According to the Double Taxation Avoidance Agreement of India with these countries Independent Personal Services, if paid to resident of those countries, shall be taxable in those countries subject to certain exceptions. Who are resident of those countries are already specified as per article 4 of those agreements. He shall be "liable to be taxed" in those country of residence. Therefore, assessee is directed to produce necessary evidences before the learned assessing officer that those residents are 'liable to tax' in those respective countries of the residence. Therefore, the learned assessing officer is directed to examine the evidence produced by the assessee that recipient of the above payment are 'resident' of those countries and 'liable to be taxed' in those countries. If, the learned assessing officer finds that recipient of the income are resident according to article 4 (1) of the respective Double Taxation Avoidance Agreement and they do not fall into the exceptions of taxability of Independent Personal Services i.e. they do not have any fixed place of business in India, or of stay of number of days in India, then, it is to be held that no tax is required to be deducted at source on such payment made by the assessee to those parties. Accordingly after examination, the learned assessing officer may delete the disallowance if found in accordance with the law and the terms of the agreement.

33. With respect to payment of ₹ 1,267,061 made to partnership firm of resident of Australia where independent personal services

according to article 14 of the Double Taxation Avoidance Agreement, an individual or a firm of individuals (other than a company) who is a resident of Australia subject to certain exceptions covered therein shall be taxable only in Australia. The only condition is to be seen that according to article 4 (1) such individuals or form of individuals are resident of that country, liable to tax therein. The assessee is directed to produce before the assessing officer necessary details with respect to their residential status. If same is found that those parties are resident of Australia according to article 4 (1) of the Double Taxation Avoidance Agreement and the necessary conditions of article 14 are satisfied, then assessee is not required to deduct tax at source on such payment. Accordingly, after examination, the learned assessing officer may delete the disallowance, if found in accordance with the law in terms of the agreement.

34. Similarly assessee has made payment of ₹ 20,518/- to an individual of Republic of Korea. According to article 14 of The Double Taxation Avoidance Agreement if the payment is made to an individual who is a resident of Korea and does not have a fixed base available to him regularly or number of days stayed in India is less than specified, then same shall be taxable only in Republic of Korea. The assessee is directed to produce evidence that the recipient of the income is an individual and also resident according to article 4 (1) of the act and does not satisfy the necessary conditions of availability of regular fixed base as well as stay of number of days, the learned assessing officer may verify the same and if found correct then assessee is not required

to deduct any tax at source u/s 195 of the income tax act. Accordingly the learned assessing officer may delete the disallowance.

35. Further assessee has made payment of ₹ 22,694,888/– to the various parties of Norway, Denmark, Sri Lanka, Malaysia, Russia, Luxembourg, Australia, Republic of Korea, South Africa, New Zealand, Mexico, Indonesia, Colombia and Serbia. The recipients of the above payment do not qualify for the benefit of taxation in the country of their resident of the above sum as per article 14 or 15 as the case may be of Independent personal services because of either that are not individuals. However the services rendered by them specifically falls under the services characterised under the clause of independent personal services of Double Taxation Avoidance Agreement with those countries. We do not agree with the argument of the learned authorised representative that they shall be taxable as business income under article 7 of the respective Double Taxation Avoidance Agreement. The reason being that there are two separate clauses of taxability of business income of non-specified activities which is covered as per article 7 of those Double Taxation Avoidance Agreement and if they're qualified as Independent Personal Services then Under article 14 or article 15 of the respective Double Taxation Avoidance Agreement. These are two different articles negotiated between the countries for taxability of two different types of business activities. Therefore there is a strict compartment between the incomes received by the recipient residents of those countries in these two different articles. It

cannot be said that if an assessee fails to claim non taxability in the source country as per article 14 or 15 of the Double Taxation Avoidance Agreement automatically he can claim the benefit under article 7 of the Double Taxation Avoidance Agreement. Therefore, according to us, the income of the assessee is correctly characterised as professional services under article of Independent personal services under DTAA. But because of some reason it fails to qualify for exemption from taxation in source country. Therefore same becomes income taxable in the sources country, Source country gets right to tax such income of non residents. Therefore, we hold that assessee should have deducted tax at source on the above payment of ₹ 22,694,888 u/s 195 of The Income Tax Act as the recipient of the income are not entitled to avail benefit of article 14 or article 15 of the respective Double Taxation Avoidance Agreements. To this extent, the disallowance made by the learned assessing officer cannot be found fault with. Accordingly disallowance u/s 40(a) (i) of the act to that extent of Rs 2,26,94,888/- is upheld for non-deduction of tax at source u/s 195 of the act.

36. Thus ground number two of the appeal is partly allowed with above directions.

37. The next ground is with respect to of ₹ 1,123,312 out of travelling expenditure. The assessee has incurred a sum of Rs 1,12,33,121/– on account of foreign travelling expenses. The assessee was asked to produce evidences and supporting documents to justify that the all the foreign travels were for the business purposes. The ld AR of the assessee did not produce complete vouchers for the

same therefore , in absence of such bills and vouchers, the learned assessing officer, to prevent the leakage of the revenue , on account of personal expenses , disallowed 10% out of total expenses of Rs 112,33,121 worked out disallowance of ₹ 1,123,312.

38. On appeal before the learned CIT – A the above disallowance was confirmed giving the reason that appellant could not provide any documentary evidences in support of its contentions and further during the appellate proceedings also no documentary evidences have been submitted.

39. The learned authorised representative submitted that assessee has incurred this expenditure for the purposes of the business and therefore same are allowable. He also submitted that complete details of expenses are provided.

40. The learned departmental representative supported the orders of the lower authorities.

41. We have carefully considered the rival contentions and perused the orders of the learned lower authorities. In the present case undoubtedly the assessee has incurred foreign travel expenditure and the learned assessing officer has disallowed an ad hoc amount applying the ratio of 10% to prevent any leakage as assessee could not produce the relevant evidences holding that those expenditures have not been incurred for the purposes of the business. We do not subscribe to the view of the learned lower authorities. The learned assessing officer should have disallowed only the sum for which no evidences have been produced by the assessee. Applying an ad hoc percentage of 10% without any

finding about the amount of expenditure for which no evidences were furnished by the assessee is not in accordance with the law. Accordingly we direct the learned assessing officer to delete the above disallowance. Accordingly ground number 3 of the appeal is allowed.

42. Accordingly appeal of the assessee is partly allowed.

Order pronounced in the open court on : **06/11/2020**

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	**(PRASHANT MAHARISHI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

DATED : 06/11/2020.

MEHTA

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI

Date of dictation	06.11.2020
Date on which the typed draft is placed before the dictating Member	06.11.2020
Date on which the typed draft is placed before the Other Member	06.11.2020
Date on which the approved draft comes to the Sr.PS/PS	06.11.2020
Date on which the fair order is placed before the Dictating Member for pronouncement	06.11.2020
Date on which the fair order comes back to the Sr.PS/PS	06.11.2020
Date on which the final order is uploaded on the website of ITAT	06.11.2020
Date on which the file goes to the Bench Clerk	06.11.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	