INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
(Through Video Conferencing)

BEFORE
SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 6494/Del/2016
Asstt. Year 2011-12

Ecorys Nederlands B. V. C/o Kapil Goel Adv. F-26/124, Sector 7, Rohini Delhi 110 085 PAN AACCE4314Q	Vs.	ADIT (International Taxation) Circle 1 (2) New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Kapil Goel, Advocate
Department by :	Shri Satpal Gulati, CIT (DR)
Date of Hearing	05/10/2020
Date of pronouncement	11/11/2020

O R D E R

PER R.K. PANDA, AM

This appeal filed by the assessee is directed against the order dated 15th March 2016 of the Ld. CIT(A)-42 New Delhi relating to assessment year 2011-12.

2. Grounds No. 1 to 1.6 raised by the assessee are as under :-

"1. That on the facts and in the circumstances of the case and in law the Ld. CITA-42, New Delhi (hereinafter called as "C1TA "), erred in sustaining the addition of Rs. 73,17,159/-made on account of alleged non deduction of tax at source in gross non appreciation of written submissions and precedents cited.

1.1 That on the facts and in the circumstances of the case and in law the the Ld. CITA while sustaining the addition of Rs. 73,17,1597- in para- 6.3 to 6.5 of impugned order returned perverse finding against the records in as much as it was not appreciated that no payment is made from India to the employees of Head Office.

1.2. That on the facts and in the circumstances of the case and in law the Ld. CITA while sustaining the addition of Rs. 73,17,1597- did not appreciated applicability of section -9(1)(ii), which limitedly taxes ***salary earned India.***

1.3 That on the facts and in the circumstances of the case and in law the Ld. CITA while sustaining the addition of Rs. 73,17,159/- did not appreciated that since no payment is made by assessee in India within the meaning of section-192, there can be no occasion to

apply section- 40(a) (i)/ 40(a) (iii).

1.4 That on the facts and in the circumstances of the case and in law the Ld. CITA while sustaining the disallowance of Rs. 73,17,159/- did not objectively considered non- discrimination article in India-Netherland's DTAA (Direct Taxation Avoidance Agreement), which immunizes the disallowance of salary expense because similar provision was not there u/s 40(a)(ia), which in the period under consideration excluded salary expenses.

1.5 That on the facts and in the circumstances of the case and I n law the Ld. CITA while sustaining the disallowance of Rs. 73,17,159/- did not appreciated that disallowance provisions u/s 40 of Business Head of taxation do not embrace transactions between project office and Head office.

1.6. That on the facts and in the circumstances of the case and in law the Ld. CIT(A) while sustaining the disallowance of Rs. 73,17,159/- did not appreciated that assessee was under bonafide belief, which is good ground not to make any disallowance."

3. Facts of the case, in brief, are that the assessee is a company registered in Netherlands and it has established project office (PO) in India after it was awarded the contract with Punjab Road and Bridges Development

Board in the financial year 2009-10. It filed its return of income on 29th September , 2011 declaring total loss of Rs. 8,47,267/- and claimed refund amount of Rs. 11,59,015/- from its operations of project office situated in Chandigarh , India. During the course of assessment proceedings the AO noted that assessee has claimed an amount of Rs. 73,17,159/- as salary expenses and assessee has not deducted tax on the same. On being questioned by the AO it was submitted that the salary of the employees which is attributable and is charged to profit and loss account of the project office is not chargeable to tax in India on account of following :-

"1. Employees did not come/stay in India for providing the said services exceeding more than 183 days as defined in DTAA between the two countries. In fact, no separate salary is paid to them in relation to these services neither in India nor in Netherlands.

2. The payment is not received by them in India nor from any source in India. It is paid by the Head Office of the assessee situated in Netherlands to the consultants in Netherlands.

3. Only the time cost of employees as is attributable, as per proportionate hourly charge of the employees is charged to the profit & Loss A/c of project office. Thus in absence of accrue or arise in India, the tax has not

been deducted from their salary. In essence the salary is time cost apportioned to and attributable to project office.

Basically this deduction of salary is taken only on the base of time cost attributable to the project office and following article 7 of the DTAA. "

4. However, the AO was not satisfied with the explanation given by the assesee on the ground that as per the contract, employees of the assessee have provided their services from India itself. Therefore, the salary paid to the employees would be taxable in India as it accrues or arises in India. Therefore, the assessee should have deducted TDS on salary as per provisions of section 40(a)(i) of the Act. Since the assessee failed to do so the AO disallowed the amount of Rs. 73,17,159/- claimed as salary expenses and added the same to the total income of the assessee.

5. Before the Ld. CIT(A) the assessee relying on various decisions submitted that the AO has applied incorrect provision of law for disallowing the salary expenses. Referring to various provisions of DTAA between India and Netherelands and relying on various decisions, it was argued that since salaries did not accrue or arise in India , the same was not chargeable to tax.

6. However the Ld. CIT(A) was also not satisfied with the arguments advanced by the assessee and upheld the action of the AO by observing as under :-

FINDINGS

"6.3. In terms of Article 15 of India-Netherlands DTAA, the taxation of dependent personnel services is governed as under:

"DEPENDET PERSONAL SERVICES

1. Subject to the provisions of Articles 16, 18, 19, 20 and 21, salaries, wages and other similar remuneration derived by a resident of one of the States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other State. If the employment is so exercised, such remuneration as is derived there from may be taxed in that other State.

2. Notwihtstanding the provisions of paragraph I, remuneration derived by a resident of one of the States in respect of an employment exercised in the other State shall be taxable only in the first-mentioned State if:

(a) The recipient is present in the other State for a periods not exceeding in the aggregate 183 days in the fiscal year concerned, and
(b) The remuneration is paid by, or on behalf of, an employerwho is not a resident of the other State, and
© The remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State."

6.4. In the case of the appellant, an amount of Rs. 73,17,159/- was booked towards the payment of remuneration to 10 employees in the

account of the PE of the appellant in India. In the case of the appellant, in terms of the agreement dated 11.08.2009 between Punjab State Road and Bridge Development Board (PSRBDB) and M/s Ecorys Management Consulting Services Ltd., India and M/s DHV India Pvt. Ltd. and the appellant (Joint Venture), certain consultancy services were to be provided to PSRBDB. For this purpose, consultancy services were to be provided at specified locations. For this purpose, the appellant has set-up a project office for this purpose and two of its key professionals, namely, Dr. Adnan Rahman and Mr. Arnold Galavazi were assigned specific task relating to the project. It was informed that the following employees had contributed to the project, in respect of whom proportionate cost was booked in the P&L a/c of the PE.

Name of employees	*Amount (Rs.)*
1. Robert Osservoort	*3042522.153*
2. Rahman	*2810418.891*
3. Bax IR	*415374.0832*
4. Uil Drs	*202686.8892*
5. Laparidou	*499282.49*
6. Toledo	*149691.5387*
7. Koppert	*7760.875*
8. Kujit ACJ	*48361.6*
9. Hovens	*74869.8125*
10. Tahmasseby	*66190.53056*
	7317158.863

6.5 The Id. counsel informed that only Dr. Adnan Rahman (95 days), Mr. Robert Ossevoort (27 days) and Uil Drs (16 days) had visited India for the limited period, which is less than 183 days and worked on the project. It is evident that the above employees have

contributed to the project, for which services were rendered in India through the PE of the appellant in the form of the project office. Further, since in terms of the above mentioned agreement, the appellant was to provide consultancy services for preparing and finalizing State transport policy and strategy through a consultative process,it is evident that even if some of the employees may have worked from Netherlands, the services by the appellant were rendered in India. The appellant does not get benefit of paragraph 2 of Article 15 as all were 3 conditions were not cumulative satisfied. In particular, the condition at paragraph 2(c) stating that the remuneration is not borne by a PE is not satisfied. In view of this, I -uphold the action of the AO of making disallowance u/s 40(a)(i) as such salary income was taxable in India and the appellant failed to deduct tax thereon. Accordingly, the Ground No. 1 is dismissed."

7. Aggrieved with such order of the Ld. CIT(A) assessee is in appeal before the Tribunal.

7.1 Ld. Counsel for the assessee strongly challenged the order of the CIT(A) in confirming the disallowance made by the AO on the ground that such salary which is charged back to Indian PO is chargeable to tax in India both under the

provisions of the Act and DTAA. He submitted that such salary is a chargeback reimbursed to Head Office by the Indian Project office, where said non resident employees were paid by head office in Netherlands being their employee only, without those employees being employed in India u/s 9(1)(ii) nor they were dedicated to Indian PO. He submitted that since it was a genuine reimbursement and charge back to Head Office where employees never rendered their services in India as they were rendering services from Netherlands only and since they were employed with the Head Office therefore the AO has made incorrect disallowance by applying wrong provisions of law and the Ld. CIT(A) has wrongly sustained the same disallowance. . He submitted that both the AO and Ld. CIT(A) have incorrectly referred / relied on section 40(a)(i) whereas applicable provision to test assessee's case on this aspect could have been section 40(a)(iii), if at all, read with section 9(i)(ii) of the Act. He submitted that it is not a mere fortuitous mention about section 40 (a)(i) as it is consciously applied by the AO as well as by the Ld. CIT(A) without even cursory look to underlying section 9(i)(ii) which only applies to decide salary taxability under the Act in hands of non resident. He submitted that the provision of section 292 B can not cure the defect made by the AO and Ld. CIT(A).

8. Referring to the statement of facts and grounds of appeal before the Ld. CIT(A) the Ld. Counsel for the assessee drew the attention of the bench to same and submitted that the Ld. CIT(A) has on wrong appreciation of facts decided the issue against the assessee.

9. Referring to the decision of Hon'ble Delhi High Court in the case of Mother Dairy Fruit, Vegetables (P) Ltd. vs. CIT in ITA No. 980/2009 order dated 19th October, 2010 Ld. Counsel for the assessee submitted that on identical circumstances the Hon'ble High Court has held that if the employees outside India, who are non-residents, have received salary even from Indian company, said salary will not be chargeable to tax in India. Clause (2) authoritatively mandates that the remuneration of resident of one of the States in respect of employment exercised in the other State shall be taxable only in the first-mentioned State if the conditions mentioned in sub Clause (a), (b) (c) are fulfilled. It was accordingly held that provision of Section 40(a) (i) would not apply for such non deduction of tax. He submitted that the above decision of the Hon'ble Delhi High Court is squarely applicable to the facts of the present case. Therefore disallowance made by the AO and sustained by the Ld. CIT(A) should be deleted.

10. Ld. DR on the other hand heavily relied on the order of the AO and Ld. CIT(A). Referring para 6.5 of the Ld. CITA() Ld. DR submitted that he has given a categorical finding that three of the employees have visited India for less than 183 days and have contributed to the project for which services were rendered in India through the PE of the assessee in the form of the project office. He has given a categorical finding that the assessee does not get benefit of paragraph 2 of Article 15 as all 3 conditions were not cumulatively satisfied. He has given a finding that the condition at paragraph 2(c) stating that the remuneration is not borne by the PE is not satisfied. He accordingly submitted that since the order of the Ld. CIT(A) is in accordance with law, therefore, should be upheld and the grounds raised by the assessee should be dismissed.

11. We have considered the rival arguments made by both the sides, perused the orders of the AO and Ld. CIT(A) and the paper book filed on behalf of the assesee. We have also considered the various decisions cited before us. We find the AO in instant case has disallowed a sum of Rs. 73,17,158/- being salary paid by the assessee on which no tax has been deducted. We find the Ld. CIT(A) upheld the action of the AO, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the Ld. Counsel for the asseseee that the salary has been paid abroad by the foreign

company to its employees and the head office has apportioned a part of the salary expenses to the assessee which the assesseee has debited and has reimbursed the Head Office without any mark up. Therefore, the provision of section 40(a)(i) are not applicable and if at all any provision is applicable the same is provision of section 40 (a)(iii) . We find the provision of section 40(a)(i) and 40 (a)(iii) read as under :-

"40. Notwithstanding anything to the contrary in section 30 to [38] the following amounts shall not be deducted in computing the income chargeable under the head 'Profits and gains of business or profession :-

(a) in the case of any assesssee –

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938) royalty, fees for technical services or other sum chargeable under this Act, which is payable –

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company,

On which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid [on or before the due date specified in sub-section (1) of section 139] :

*[**Provided** that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid:]*

*[**Provided further** that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub- section (1) of section 201, then, for the purposes of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the payee referred to in the said proviso]*

Explanation – For the purposes of this sub- clause –

(A) 'royalty' shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(B) "fees for technical services' shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9:

.....

(iii) any payment which is chargeable under the head " Salaries", if it is payable –

(A) outside India: or

(B) to a non-resident,

and if the tax has not been paid thereon nor deducted therefrom under Chapter XVII-B]."

12. We find the assessee before the Ld. CIT(A) in its grounds of appeal has mentioned as under :-

"Learned AO has erred in law in facts and has quoted incorrect section of law for disallowing this salary expense, he has quoted section 40(a)(i), which does not cover salary expense. To correct this, the relevant section is 40(a)(iii).

Since assessee was eligible for charging the expenses against its income accrued/arose in India, it duly charged the time costs proportionate and attributable to Project Office and professional charges to its Profit & Loss A/c."

13. Further the following submission of the assessee before the Ld. CIT(A) remained uncontroverted

"6. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

- *These expenses were purely costs attributable to this Project office and eligible to be written off against the income of project office income. But these expenses were not separately payable to employees. Neither the employees came to India nor they were separately paid for this project. In fact, there was no income accruing or arising to them from India due*

to this project because salary was liable to be taxed in India and employees rendered the work sitting there in Nederlands.

- *Principally no amount of salaries was even remitted from India and thus there was no base for calculation and deduction of TDS from such attributable time costs named as salaries in Profit & Loss A/c.*

- *We like to quote the recent judgment in case of Mother Dairy Fruit Vegetable Private Ltd. vs. CIT Delhi, where the salaries were paid outside India without accruing arising in India and without withholding of taxes in similar acenarios. The base of this case was also that since non residents rendered services outside and were even paid outside India.*

- *As per Section 9(ii), salaries accrue or arise in India:*

  (ii) Income which falls under the head "Salaries", if it is earned in India.

  Since salaries did not accrue or arise in India, those were not chargeable to tax."

14. We find identical issues had come up before the Hon'ble Delhi High Court in the case of Mother Dairy Fruit, Vegetables (P) Ltd. (supra). In that case the following substantial question of law had arose :-

"Whether the Income Tax Appellate Tribunal was justified in law in reversing the order of the Commissioner of Income Tax (Appeals) and thereby upholding the disallowance of ` 1,929,632/- made by the assessing officer under Section 40 (a) (iii) of the Act, representing the amount of salaries paid in foreign currency to the employees at Netherlands, who were non-residents, without appreciating the same was not chargeable to tax under the provisions of the Income Tax Act 1961 by virtue of Article 15 of the Double Taxation Avoidance Agreement (DTAA) between Indian and Netherlands?"

14.1. In that case the AO had made disallowance of Rs. 19,29,632/- being salary paid to non resident outside India i.e. Netherlands u/s 40(a)(iii) of the Act which the Ld. CIT(A) deleted on the ground that the provision of TDS would not be applicable when the basic requirement is not fulfilled i.e the sum paid should have been chargeable to tax in India in accordance with provision of section 40(a)(iii) of the Act read with section 5(2) and section 9(i)(iii). The revenue challenged the order of the Ld. CIT(A) before the Tribunal and the

Tribunal allowed the appeal of the revenue holding that the provision of section 40(a)(i) and 40(a)(iii) are analogous and therefore the assessee was required to deduct tax at source. The contention of the assessee that if the payment of the salaries made outside India were not liable for taxation and the assessee was not liable to deduct tax at source and no disallowance could be made u/s 40(a)(iii) of the Act was rejected by the Tribunal. On further appeal by the assessee the Hon'ble Delhi High Court decided the issue in favour of the assessee by observing as under :-

> "*14. After hearing the counsel for the parties we are of the opinion that the Tribunal has committed a manifest error in law in reversing the order of the CIT (A). The admitted facts are that the salaries were paid in foreign currency to the employees who are in foreign country i.e. in Netherlands and even these employees are non-residents. It is also admitted at the Bar that the salary paid to these employees were exigible to tax in Netherlands and accordingly, they had paid tax as per the Income-Tax laws of that country. The question is as to whether the salary paid to them was to be taxed in India as well? Answer has to be in the negative having regard to the provisions of Double Taxation Avoidance*

Agreement between India and Netherlands. Clause (1) and (2) of Article 15 of the DTAA between India and Netherlands clearly provide accurate answer and these are reproduced below:-

"1. Subject to the provisions of Articles 16,18,19,20 and 21, salaries, wages and other similar remuneration derived by a resident of one of the States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other State. If the employment is so exercised, such remuneration as is derived there from may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of one of the States in respect of an employment exercised in the other State shall be taxable only in the first-mentioned State if:

(a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the fiscal year concerned; and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

(c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State."

15. It is clear from the above that if the employees outside India, who are non-residents, have received salary even from Indian company, said salary will not be chargeable to tax in India. Clause (2) authoritatively mandates that the remuneration of resident of one of the States in respect of employment exercised in the other State shall be taxable only in the first-mentioned State if the conditions mentioned in sub Clause (a), (b) (c) are fulfilled. All these conditions are applicable in the instant case. The employees whom the salaries were paid were non-resident as per Section 6(1) (a) of the Act, as none of them were in India for a period of 182 days or more. The remuneration is also paid by an employer i.e. the respondent assessee who is not a resident of other State i.e. Netherlands. Further, there is no permanent

establishment of the respondent assessee in Netherlands which had borne the remuneration.

16. In view of the above, provisions of Section 40 (a) (iii) of the Act were not applicable in the instant case. As per that Section certain amounts are not allowed as deductions in computing the income chargeable under the head „profits and gains of business or profession. Sub Clause (iii) of clause (a) of Section 40 includes those payments which are chargeable under the head „salaries" if the same is payable outside India and if the tax is payable thereon, there is no question of deducting tax therefrom under Chapter XVII-B. Chapter XVII relates to tax deduction at source. Those provision would be applicable only when the salary paid is chargeable to tax in India and the question of deduction of tax at source arises. The question as to whether such salary paid outside India is exigible to tax in India or not would be governed by Section 5 of the Act. This provision reads as under:-

> *"5. SCOPE OF TOTAL INCOME. …(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident*

includes all income from whatever source derived which-

(a) Is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) Accrues or arises or is deemed to accrue or arise to him in India during such year..”

17. To cover the case under this provision it is necessary for the department to establish that the employees to whom the said salaries were paid have received their income, either on actual or deemed basis in India or the income in question accrues or arises in India either on actual basis or deemed basis. The non-residents who never worked in India, never received salary from permanent establishment; were non-residents and were paid their remuneration in foreign exchange in a foreign country, would not be required to pay any tax in India as provision of Section 5 would not apply. This conclusion would be clear from the reading of Section 9 (1) (ii) of the Act which enumerates the income deemed to accrue or arise in India that falls under the head „Salary“. Explanation to this provision provides the following answer:-

"ii) income which falls under the head "Salaries", if it is earned in India.

Explanation- For the removal of doubts, it is hereby declared that income of the nature referred to in this clause payable for-

(a) Service rendered in India, and

(b) The rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment,

Shall be regarded as income earned India."

18. Reading of this provision makes it clear that the salary payment can be said to be earned in India only if the corresponding services are rendered in India. In other words, if the services are rendered outside India, for which salary has been paid, then the income cannot be said to accrue or arise in India. Further, since in the instant case services are rendered outside India in respect of which the employees received salary outside India, it cannot be said that the same accrue or arise in India.

19. We may record here that Mr. C.S. Aggarwal, learned Sr. Counsel appearing for the appellant had referred to the judgment of Bombay High Court in the case of ***CIT*** *Vs.* ***Avtar Singh Wadhawan,*** *247 ITR 260. That was a case where the assessee had worked outside the India; he received salary outside India from an Indian employer namely Shipping Corporation of India, the Bombay High Court on these facts held that since the place where the services are rendered is relevant for determining chargeability of the tax, no tax would be payable on the salary received on the services rendered outside India. While laying down this principle, the court made following pertinent observation:-*

> *"On the other hand, Section 5(2) indicates the meaning of accrual of income. It states, inter alia, that the total income of any previous year of a non-resident shall include all income from whatever source derived which is received by him in India or which accrues to him in India. In other words, broadly, in the case of a resident Indian all income*

which accrue to him whether in or outside India is taxable whereas in the case of a non-resident only income which accrues to him in India or which is received by him in India is taxable. Therefore, consequently, in the case of a non-resident if income accrues outside India, the same is not taxable. Section 6 indicates the meaning of residence in India. Section 6 lays down that for the purposes of the Income-tax Act, an individual is said to be a resident in India if he is in India for a prescribed period. Therefore, Section 6 emphasises physical presence of the person in India. Under Section 9(l)(ii), it is laid down as to what type of income shall be deemed to accrue or arise in India. The above section states that where the salary is earned in India it shall be regarded as income arising in India. There is an Explanation also to the above section which, inter alia, declares that income of the above nature payable for

services rendered in India shall be regarded as income earned in India. This Explanation clearly indicates that where salary is payable for services rendered in India, the same shall be regarded as income earned in India. Therefore, the relevant test to be applied is where the services have been rendered".

20. We are quite in agreement with the aforesaid view taken by the Bombay High Court which is squarely applicable here as well.

21. In so far as judgment of the Tribunal in ***Van Oord ACZ*** *(supra) is concerned, that is a case where the provisions of section 40 (a) (i) of the Act came into play whereas we are concerned, in the present case, with the applicability of Section 40 (a) (iii) of the Act. We thus answer the question in favour of the assessee and against the Revenue, as a result, this appeal is allowed and order of the Tribunal is set aside. "*

15. Since the facts of the instant case are identical to the facts of the case decided by the Hon'ble Delhi High Court cited (supra) therefore, respectfully following the said decision we hold that the assesee is not liable to deduct tax at source from the salary paid to the non resident and has not committed any default in not deducting tax at source from the reimbursement to the head office on account of salary expenses. Accordingly the order of the Ld. CIT(A) is set aside and the grounds raised by the assessee are allowed.

16. Grounds of appeal No. 2 to 2.5 are as under :-

"2. That on the facts and in the circumstances of the case and in law the Ld. CITA while sustaining the disallowance of Rs. 48,34,6697- in paragraph no. 7.3 to 7.5 of the impugned order, made on account of alleged non deduction of tax at source, on professional fees etc., ignored submissions and arguments of the appellant company.

2.1 That on the facts and in the circumstances of the case and in law the Ld. CITA while sustaining the disallowance of Rs. 48,34,669/-did not appreciated that payment being reimbursement of technical expenses, in turn remitted to foreign professionals located outside India, paid outside India was exempt from taxation under Article of 14 of India- Netherlands DTAA.

2.2.That on the facts and in the circumstances of the case and in law the Ld. CITA while sustaining the disallowance of Rs. 4 8,34,669/- did not appreciated that at the time when foreign professionals give their services u/s 195, payments made outside India were not included as clarified by apex court in Vodafone's case (341 ITR 1).

2.3 That on the facts and in the circumstances of the case and in law the Ld. CITA while sustaining the disallowance of Rs. 48,34,669/- did not appreciated that unamended Article 12 (or Article 14) of India- Netherland's DTAA, only taxed services rendered in India.

2.4 That on the facts and in the circumstances of the case and in law the Ld. CITA while sustaining the disallowance of Rs. 48,34,669/- did not appreciated that transactions between Head Office and Project office, in present case proportionate expenses being charged back by Head Office to Project Office, did not fall u/s 195/40(a)(i).

2.5. That on the facts and in the circumstances of the case and in law the Ld. CITA while sustaining the disallowance of Rs. 48,34,669/- did not appreciated that assessee was under a bonafide belief for alleged non deduction of tax at source on professional services rendered from abroad."

17. Facts of the case, in brief, are that AO during the course of assessment proceedings noted that assessee has paid professional charges of Rs.48,34,669/- to two non resident professionals i.e Mr. Vanden Broek Rs. 33,39,366/- and Mr. Vogelarr Rs. 14,95,303/- on which no tax has been deducted at source as per provision of section 40(a)(i). The submission of the assessee that both these professionals are located outside India and had rendered services towards project office outside India and were paid outside India was rejected by the AO.

18. Before the Ld. CIT(A) it was submitted that the above professionals were foreign professionals who were providing engineering consultancy services and had visited India a few time for the project. They had only done data collection and data analysis work which does not get covered under the 'make available' clause. It was submitted that the total period of their visit was less than 180 days. Further the payment was made to them by assessee's Head Office in foreign currency and only proportionate expenses were charged in the project account. Since these professionals did not have any PE in India, the professional fee received by them was not taxable in India. Article 12 of the India-Netherlands treaty was brought to the notice of the Ld. CIT(A) and it was argued that since the 'make available' clause was not satisfied, therefore,

it can not be held that technical services were rendered by the professionals. Article 14 of the said agreement (Independent Personnel Service) was also brought to his notice and it was submitted that since these professionals stayed in India for less than 180 days such payment was not covered under Article 14 either. It was submitted that the same also cannot be taxed in the hands of the assessee under Article 7 of the India Netherlands DTAA. The decision of Hon'ble Supreme Court in the case of Vodafone International Holdings BV reported in 341 ITR 1 (SC) and the decision of the Bangalore Bench of the Tribunal in the case of ITO vs. Cepha Imaging Pvt. Ltd. (2009-TIOL-558-ITAT-BANG) was also relied upon. It was further submitted that in terms of Article 12, clause 5 such services cannot be held as technical or consultancy services since such services were ancillary and subsidiary to the application of enjoyment of any right property or information for which the payment was made.

19. However Ld. CIT(A) was not satisfied with the arguments advanced by the assessee and upheld the action of the AO by observing as under :-

> *"7.3 I have carefully considered the facts of the case in the light of submission made by the appellant and the applicable provisions of*

India-Netherlands DTAA. The appellant undisputedly provided consultancy services to PSRBDB in terms of the agreement dated 11.08.2009. In terms of the said agreement, the scope of the services rendered by the appellant is as under:

> *"The consultants shall support and assist the Government in preparing and finalizing a State transport policy and strategy, and strategic investment plans through a consultative process, based on the transport demand of the subsectors, infrastructure shortfall, resource requirement and constraints, governance aspects, and institutional capacity. The study should provide the decision-makers in the Government sufficient information to justify the acceptance, modification or rejection of the proposed transport sectoral policy and strategy."*

For this purpose, specified professional staff of the appellant were assigned. At the same time, the appellant was free to engage independent professionals to achieve various outcomes. The two professionals Mr. Vanden Broek and Mr. Vogelaar had undoubtedly provided the professional services to the appellant for this purpose. The Article 12 of India-Netherlands DTAA dealing with FTS reads as under:

"5. For purpose of this Article, "fees for technical services" means payment of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such service (including through the provision of services of technical or other personnel) if such services:

(a) *are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received; or*

(b) *make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.* [2]*[*

6. Nothingstanding paragraph 5, "fees for technical services" does not include amounts paid:

(a) *For services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property;*

(b) *For services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or*

aircraft in international traffic;

(c) *For teaching in or by educational institutions;*

(d) *For services for the personal use of the individual or individuals, making the payment; or*

(e) *To an employee of the person making the payments or to any individual or partnership for professional services defined in Article 14 (Independent Personal Services) of this Convention.]*

7. The provisions of paragraphs 1 and 2 shall not apply it the beneficial owner of the royalties or gees for technical services, being a resident of one of the States, carries on business in the other State, in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for technical services are effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 14, as the case may be, shall apply."

7.4 In the case of the appellant, it is evident that the appellant had a project office providing consultancy services to PSRBDB. Through that project office the appellant participated in the steering committee meeting of the project, consulted various stockholders, and which provided fixed base to its professional staff and professional consultants. The outcome of the consultancy services is to help the client in preparing and finalizing State transport policy and strategy based on the best international practices. Therefore, once the professional consultancy services were rendered to the client, the client shall be able to use such services for developing an integrated transport policy. In the case of the appellant, it is evident that the professional services rendered by the two professionals were 'ancillary and subsidiary' to the application of right, property, information, for which the payment was made. The appellant provided a detailed report, for which the inputs from the two professionals were used as ancillary and subsidiary inputs. However, as the professionals services .were only a part of the consultancy report provided by the appellant, the services rendered by these professionals cannot be-held as 'inextricablv and essentiallv linked' to the sale of property. The appellant has pleaded that 'make available' clause was not satisfied through such professional services. However, the 'make available clause' is only one of the two alternative conditions provided in

paragraph 5. In the case of the appellant, it is evident that the professional services were 'ancillary and subsidiary' in terms of clause (a) and, therefore, the emphasis of the appellant on the satisfaction of 'make available' clause alone is in clause (b) does not help it. In view of this, the performed services rendered by both professionals are held as FTS under clause (a) & (b) both.

7.5 It is seen that the in the case of the appellant, the project office served as the PE, for which the expenses have been separately booked by the appellant including the payment made to the two professionals. In view of this, keeping in view the provisions of paragraph 5 & 7 of Article 12, it is held that the AO had rightly treated such payment as FTS in respect of 2 professionals, who had visited India from time to time for this purpose. The appellant's reliance on the Article 14 in this regard is clearly misplaced. Accordingly, Ground No. 2 *is also dismissed."*

20. Aggrieved with such order of the Ld. CIT(A), the assessee is in appeal before the Tribunal.

20.1 Ld. Counsel for the assessee strongly challenged the order of the Ld. CIT(A). He drew the attention of the bench to para 6 of Article 12 of the India Netherlands Agreement which reads as under :-

ARTICLE 12

ROYALTIES AND FEES FOR TECHNICAL SERVICES

……

"6. Notwithstanding paragraph 5, "fees for technical services" does not include amounts paid :

(a) For services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property:

(b) For services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(c) For teaching in or by educational institutions;

(d) For services for the personal use of the individual or individuals, making the payment ; or

(e) *To an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 14 (independent Personal Services) of this Convention."*

21. He submitted that the professional charges having paid to independent professionals for their engineering professional services and the payment has

been made outside India by the Head Office and has been debited in the Profit and Loss Account of the assessee as attributed to Indian Head Office. He submitted that in view of clause 6 of Article 12 the same does not constitute fees for technical services and therefore, the assessee is not liable to deduct any tax on the same and the lower authorities have wrongly invoked the provision of section 40(a)(i) . Further Ld. CIT(A) has applied the provision of paragraph 5 and 7 of Article 12 but forgot to consider paragraph 6 of the Article 12.

22. Referring to the decision of the coordinate bench of the Tribunal in the case of M/s. Poddar Pigments Ltd. vs. DCIT and the bunch of appeals vide order dated 23rd August, 2018 Ld. Counsel for the assessee drew the attention of the bench to para 14 to 17 of the said order and submitted that on identical circumstances the Tribunal has deleted the disallowance made by the AO and upheld by the Ld. CIT(A) for non deduction of tax u/s 195 of the Act and therefore no disallowance u/s 40 (a)(i) can be made.

23. Referring to the decision of the Tribunal in the case of ACIT vs. M/s. Grant Thornton India LLP of ITA No. 6489/del/2016 vide order dated 25th July,

2019 for assessment year 2012-13, he submitted that here also the Tribunal has upheld the decision of Ld. CIT(A) in deleting the disallowance made by the AO wherein the Ld. CIT(A) has deleted the disallowance holding that in absence of not making available, the technical knowledge to the assessee, in view of Article 13 of the respective DTAA, the payment for services cannot be held as fee for technical services under the provision of the respective DTAA. He accordingly submitted that the assessee is not liable to deduct any tax from the payments made to independent professionals.

24. Ld. DR on the other hand heavily relied on the order of the Ld. CIT(A).

25. We have considered the rival arguments made by both the sides, perused the order of the AO and Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO invoking the provisions of section 40(a)(i) made disallowance of Rs. 48,38,669/- being the amount paid to professionals without deduction of tax as according to him the said services are fees for technical services (FTS) in the hands of the recipient in view of section 9(1)(vii) of the Act and provisions of India Netherlands DTAA. We find the Ld. CIT(A) sustained the disallowance made by the AO the reasons of which has already been reproduced in the preceding paragraphs. It is the submission of the Ld. Counsel for the assessee that the payment of consultancy charges is nothing

but reimbursement of technical expenses which have been remitted to foreign professionals located outside India and is exempt from taxation under Article 14 of India Netherlands DTAA. It is also his submission that in view of clause 6 of Article 12 fee for technical services does not include amount paid to any individual for professional services as defined in Article 14. We find Article 14 of the India Netherlands DTAA read as under :-

ARTICLE – 14

INDEPENDENT PERSONAL SERVICES

1. *"Income derived by a resident of one of the States in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other State :-*

   (a) If he has a fixed base regularly available to him in the other State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or

   (b) If his stay in the other State is for a period or periods amounting to or exceeding in the aggregate 183 days in

the fiscal year concerned ; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

2. The term 'professional services' includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants."

26. The submission of the assessee before the lower authorities that since in the instant case the amount has been paid outside India to independent professionals therefore Article 14 of the India Netherland DTAA will be applicable and the assessee is not liable to deduct any tax on such payment was not considered in the right perspective.

27. We find identical issue has been decided by the Delhi Bench of the Tribunal in the case of ACIT vs. Grant Thornton India LLP (supra) where the Tribunal while deciding an identical issue held as under :

"3.3 We have heard the rival submissions and perused the relevant material on record. We find that the Ld. Assessing

Officer has rejected the contention of the assessee that services rendered by the 6 non-resident entities are not in the nature of independent personal services. The Ld.CIT(A) has mentioned that those parties have rendered professional services pertaining to the field of lawyering (giving reviews and opinions) and accounting e.g. SAS70 engagement, review and filing of form number1120, due diligence, review of US GAAP financials etc. We note that there is no dispute as far as the nature of services rendered. The only dispute which has been raised by the Revenue is that the benefit of Article 15 of relevant DTAAs can be availed by the individual nonresidents, whereas in the instant case the nonresident parties are limited liability partnership firms. We note that this objection of the Revenue has been analysed in detail by the Ld. CIT(A) after referring DTAA with UK, observing as under:

> *"4.2.2 Thus, it can be seen from the above DTAAs that an income derived by an individual or a partnership firm by rendering of professional services is taxable in the Country / State of his / its residence. If DTAA of UK is considered for illustration, income of a UK firm for rendering professional services in UK will be taxable in UK. However, such income may also be taxable in India if the individual or any partner of the professional firm is*

present in India up to 90 days in a previous year or the person / firm has a fixed base regularly available to him / it in India for performing his / its activities. However, in this case, none of the members / employees of M/s Grant Thornton UK LLP came to India. It is categorically submitted that there is no fixed base or office or permanent establishment (PE) of the said UK LLP in India. Therefore, in the absence of a PE / fixed base of the recipient (i.e., M/s Grant Thornton UK LLP) in India and on account of the fact that no one from the said firm had even a single day stay in India, professional fees for rendering services in UK will be taxable only in UK and not in India."

3.4 The Ld. CIT(A) has further analysed the Article 15 of DTAA in respect of USA, Netherland, and France as under:

"4.2.4 It must be appreciated that the explanation of the appellant that the impugned professional services were covered under the Article on "Independent Personal Services" of DTAAs with UK and other countries was rejected by the Assessing Officer on a flimsy ground that the said Article is applicable for professional fees paid to an individual only, whether in his own capacity or as a member of a partnership, and

since the recipients of professional fees in this case are Limited Liability Partnership firms (LLPs), the said Article under the relevant DTAAs did not apply in this case.

4.2.5 Needless to point out that in the case of DTAAs with USA, UK and France, it is unambiguously written in the said Article on "Independent Personal Services" itself that it is applicable on Income derived by a person who is an individual or firm of individuals; or by an individual, whether in his own capacity or as a member of a partnership; or by an individual or partnership of individuals.

4.2.6 In the case of Netherlands, the word 'resident' is used in Article 14 on 'Independent Personal Services', and it has been explained by Clause 1 of Article 4 of the said DTAA as: "For the purposes of this Convention, the term 'resident of one of the States' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature." Further, 'person' has been defined by Clause 1(e) as: "the term 'person' includes an individual, a company, any other body of persons and any other entity which is

treated as a taxable unit, under the taxation laws in force in the respective States."

4.2.7 Thus, even in this case, Article 14 on 'Independent Personal Services' is definitely applicable on the income derived by a partnership firm or an LLP.

4.2.8 Accordingly, the only contention of the AO in refusing to accept the applicability of Article on 'Independent Personal Services' in respect of professional fee paid to various foreign parties by the appellant on the ground that it is applicable only if the recipient of income is an 'individual' and not a 'Limited Liability Partnership firm' has no legs to stand.

4.2.9 Moreover, in each of these DTAAs the term "professional services" includes the independent activities of 'lawyers' and 'accountants' amongst other such professional. The appellant is undisputedly engaged in rendering accounting and advisory services of international standards to various clients in India and abroad. Photocopies of the bills raised by the said parties towards rendering of services along with

photocopies of form no. 15CA and 15CB filed are enclosed. Interestingly, the AO has also admitted vide para no. 5 at page 17 of the assessment order that "it is important to point out that the same 'professional fees' paid by the assessee within India is covered for deduction of tax u/s 194J of the Income-tax Act, 1961. Accordingly, the payment of professional fees made abroad to the parties referred to in the foregoing paras is also covered u/s 195 of the Income-tax Act, 1961..."

4.2.10 Therefore, it cannot be doubted that the impugned professional fees paid are squarely covered by the provisions of Article on "Independent Personal Services" of the said DTAAs. Furthermore, it has been held in Maharashtra State Electricity Board Vs. Deputy Commissioner of Income Tax (supra) that the provisions of Article 15 being specific provisions for professional services will override the relatively general provisions of Article 13 which apply to broader category of 'managerial, technical or consultancy services'.

4.2.11 In view of the above submissions, the impugned professional fees received by the foreign Grant Thornton LLPs from the appellant is not taxable in India as per

Articles on "Independent Personal Services" of the relevant DTAAs with those countries and, therefore, the same is not liable to tax deduction at source in terms of section 195 of the Act, and accordingly no disallowance of the same can be made u/s 40(a)(i) at all.

3.5 The Ld. DR could not controvert the finding of the Ld. CIT(A) that the article on " independent personal services" is applicable on income derived by a person who is an individual or firm of individuals or by an individual, whether in his own capacity or any member of a partnership firm. Further in the DTAA with Netherland, the word resident has been used for the benefit of independent personal services, which is wider than individual and the firm, who has rendered services is entitled to benefit of said provision. In view of above, we do not find any error in the order of the Ld. CIT(A) on this issue.

3.6 Further the Ld. CIT(A) has also analysed in view of the various DTAAs that the services rendered by the those non-resident parties are not Fee for Technical Services. The relevant finding of the Ld. CIT(A) is reproduced as under:

"4.3.7 Furthermore, paragraph 4(c) of Article 13 of DTAA states that the rendering of technical and

consultancy services includes making available of the technical knowledge, experience or skill in India or development and transfer of a technical plan or technical design.

4.3.8 The appellant is engaged in rendering of advisory and consultancy services in lawyering and accounting fields. These services are purely individual-based services of professionals. It is not a production or manufacturing concern where technical designs or processes are involved or required. Thus, there is question of 'transfer or development of any technical plan or technical design' being involved in this case. Even the AO has not mentioned about any such technical plan or design anywhere in the assessment order. Thus, the second limb of clause (c) above is not applicable in this case.

4.3.9 Now there remains only the first limb of clause (c) above as per which the technical knowledge, experience or skill should be made available in India. For this purpose it is necessary to examine the meaning and concept of "make available" in India.

4.3.10 "Make available" implies that the technical knowledge, skill, etc. remains with the person utilizing the services even after the particular transaction is over. In other words, it means that the technical knowledge, skills, etc. must remain with the person receiving the services even after the particular contract comes to an end. The recipient of service must be able to absorb and apply the technology on its own in its future activities. ……"

3.7 The Ld. CIT(A) in support of his finding, has relied on following decisions: a) Cushman & Wakefiled (S) Pte., reported in (2008) 305 ITR 208; b) Sandvik Australia Pty. Ltd. Vs. DDIT (International Taxation),reported in (2013) 141 ITD 598 (Pune); c) CIT Vs. De Beers India Minerals Pvt. Ltd., reported in (2012) 346 ITR 467 (Karn.) d) ISRO Satellite Centre (ISAC), (2008) 307 ITR 59 (AAR) e) Intertek Testing Services India (P) Ltd., reported in Authority for Advance Rulings (2008) 307 ITR 418; f) BhartiAxa General Insurance Co. Ltd., reported in (2010) 326 ITR 477 (AAR); g) Cable & Wireless Networks India Pvt. Ltd., reported in (2009) 315 ITR 72; h) Invensys Systems Inc., reported in (2009) 317 ITR 438; i) Guy Carpenter & Co. Ltd. Vs. ADIT, reported in (2012) 18 ITR (Trib.) 414 (Del.) j) WNS North America Inc. Vs. ADIT

(International Taxation), reported in (2013) 25 ITR (Trib.) 582 (Mum.); and k) Ernst & Young Pvt. Ltd., reported in (2010) 323 ITR 184

3.8 Before us, the Learned DR could not establish that any technical knowledge was made available in the process of providing services by the non-resident parties to the assessee. In absence of not making available, the technical knowledge to the assessee, in view of the Article 13 of the respective DTAAs, the payment for services cannot be held as fee for technical services under the provisions of the respective DTAAs. We do not find any error in the order of the Ld. CIT(A) on this issue also.

3.9 The Ld. CIT(A) has further observed that Article 13 of DTAAs provisions defining Fee for Technical Services being more favourable to the assessee as compared to the provisions of section 9(1)(vii) of the Act which has defined Fee for Technical Services, and thus the assessee was having option of choosing more favourable provisions of the DTAAs. In our opinion, the finding of the Ld. CIT(A) is in accordance with the established legal position on the issue.

3.10 Further the Ld. CIT(A) in view of the decision of the Hon'ble Delhi High Court in the case of Van Oord ACZ India (P) Ltd versus CIT (2010) 323 ITR 130 (del) has held that the sum payable to the nonresidents was not chargeable to income tax in their hands and thus the assessee was not liable for deduction of tax at source on such payment under the provisions of section 195 and no disallowance under section 40(a)(i) could be made.

3.11 We find that the order of the Ld. CIT(A) on the issue in dispute is well reasoned and we do not find any infirmity in the same. Accordingly, we uphold the same. The grounds of the appeal of the Revenue are, accordingly, dismissed."

4. We also find that there is no material change in the facts pertaining to this ground in the appeal before us. The ld. DR could not bring anything controverting the facts on record. Hence, based on the order of this Tribunal in the assessee's own case and the rationale of the Tribunal given above, the appeal of the Revenue for this year is hereby dismissed.

5. In the result, the appeal of the Revenue is dismissed.-"

28. Since the assessee has made the payment outside India to independent professionals, therefore, in view of Article 14 of India Netherlands DTAA the assessee is not liable to deduct any tax from such payment. Therefore, the order of the Ld. CIT(A) is set aside and the grounds raised by the assessee are allowed.

29. Ground of appeal No.3 reads as under :-

"3. That on the facts and in the circumstances of the case and in law the Ld. CIT(A) while sustaining the addition of Rs. 12,00,414/- did not appreciated that :-

a. ***That no project office was opened for DMIC Project and the appellant received payment from another Netherlands co., namely, Kniper outside India.***
b. ***That payment by one Dutch co. to another without involvement of local Project office is not taxable in India.***
c. ***That the payment was made by the Dutch co. to the appellant outside India.***
d. ***At no stage Indian Project office was involved in stated transaction i.e. Article 7 Para- 1 of India- Netherland's DTAA, do not allow making of subject addition.***

3.1. That on the facts and in the circumstances of the case and in law the Ld. CITA while sustaining the addition of Rs. 12,00,414/- u/s 9(l)(vii)

r/w Article 12 Paragraph 5, in paragraph 8.2 to 8.4, grossly erred in arbitrarily treating the services as FTS (Fess for Technical Services) within the limited purview of Article 12 of India-Netherland's DTAA, which requires make available criteria to be satisfied.

3.2. That on the, facts and in the circumstances of the case and in law the Ld. CITA while sustaining the addition of Rs. 12,00,414/- has conveniently ignored that there is force of attraction principle in Article-7, para-1 of India-Netherlands DTAA, even otherwise there is no business connection much less effective business connection in stated transaction in India within the meaning of section 9 (1(ii) of the Act."

30. Facts of the case, in brief, are that AO during the course of assessment proceedings noted that assessee entered into a Joint Venture agreement with Kuiper CompagnonRuintellike and DHV BV for preparation of development plant for Rajasthan Dub region of Delhi-Mumbai Industrial Corridor (DMC) and Kuiper CompagnonRuintelike made payments of Rs. 12,00,414/- to the assesee during the year under consideration for the consultancy services provided.

31. On being confronted by the AO assessee submitted as under :-

"The joint venture in question (in connection with preparation of Development plan for Kushkhera Bhiwadi Neewana in Rajasthan) was entered between :

- *Kuiper compagnon Ruintelike Oldening Stendenbouw Archectur Landschap BV*
- *DHV BV*
- *Ecorys NEderlands BV*

There was no Indian Party involved in fact.

As per the RBI As per the RBI regulations, under which the permission of opening this project office was *granted by RBI, the project office can be opened on condition of grant of project by an Indian company. In this case, it* was *granted by one Netherlands company to another Netherlands Company. So it was not possible to open another project office for this project and tax profits of this as such.*

But ecorys nederlands BV did not receive any amount from an Indian company, instead it provided services to Kuiper compagnon Ruintelijke Oldening Stendenbouw Archectur Landschap BV, which is a Netherlands company, so the amount was paid for services by a Netherlands

company to another Netherlands company, without involvement of project office.

Had it been taxable in India, the amount remitted to Netherlands would also have been subject to TDS and payer should have deducted the same.

No services were provided using the staff/professional services from project office."

32. It was further submitted that since assesssee has received the amount from Neetherlands Company to another Netherlands Company and the payment did not belong to the project office which is permanent establishment in India nor the services of this project office were used to complete the project billed to Kuiper, therefore, the amount are not taxable as foreign technical services u/s 9(1)(vii).

33. However, the AO was not satisfied with the arguments advanced by the assessee by observing as under :-

"8.1 The submissions of the Assessee Company have been considered and found unacceptable, 'as any amount received by the assessee for the services provided by the assessee is taxable in India, if the services provided by the assessee are being utilized for the business in India and it is an undisputed fact that the consultancy services provided by the assessee are being utilized by Kuiper CompagnonRuintelijke for its business activities as per the Joint Venture agreement for preparation of development plant for Rajasthan Dub region of Delhi-Mumbai industrial Corridor (DMIC). Therefore, within meaning of section 9{1)(i) of the Act, the assessee has business connection in India for this purpose also. Further, as it is the receipt in the hands of the assessee for the consultancy services provided by it directly to Kuipe r CompagnonRuineiijke and not through its project office, the same are assessed to tax as Fee for Technical Services within meaning of section 9(1)(vii) of the Act. Further, the consultancy service provided to Kuiper CompagnonRuintelijke by assessee's Head Office directly has been made available to Kuiper CompagnonRuintelijke in view of the fact that such consultancy .service has been used by Kuiper CompagnonRuintelijke to prepare development plant for Rajasthan Dub region of DMIC and accordingly the income from Kuiper CompagnonRuintelijke is also

taxable as per DTAA, The assessee did not duly disclose this income in its return of income filed for A.Y.2011-12, therefore, satisfaction is hereby recorded for initiation of penalty u/s 271(1)(c) of the Act for concealing particulars of income."

34. Before Ld. CIT(A), it was submitted that assessee filed a copy of joint venture agreement between Kuiper , the assessee and DHV BV dated 15th June, 2010 by which the joint venture was to provide professional consulting services to DMIC. It was submitted that the assessee served as a joint venture partner for the above project. It was submitted that no project office was opened for this project and the assessee received payment from another Netherlands company, namely, Kuiper outside India. It was accordingly submitted that since the payment was made by one Dutch company to the outside India without involvement of local project office, therefore, the same would be taxable in India.

34.1 However, the Ld. CIT(A) was not satisfied with the arguments advanced by the assessee and upheld the action of the AO by observing as under :-

"8.2. I have carefully considered the facts of the case in the light of submission made by the appellant. For the purpose of deciding the issue, I had asked the AR to provide the details of key professional

staff/consultants who had worked on the DMIC Project. The appellant was also asked to explain whether services were rendered from the existing project office for the PSRBDB. In support of the appellant's plea, the TDS was already deducted by the payer in the hands of the Kuiper evidence in the form of 26AS statement or TDS certificate was required. The appellant was asked to explain the manner, in which the services were rendered to the DMIC project and to furnish a break-up of expenses in DMIC project. The Id. counsel of the appellant failed to furnish the details despite several opportunities were rendered in this regard.

8.3. On careful perusal of the agreement, it is seen that Mr. Adnan Rahman, the professional staff of the appellant had furnished services for this assignment also. Since the appellant had booked the expenses of Mr. Adnan Rahman in the accounts of PSRBDB project, it is evident that the technical services were provided to DMIC by the appellant from its PE in India. The appellant's plea that the payment was made to the appellant outside India is not relevant for this purpose. Further, the appellant's plea that the payment was made by one Dutch company to the appellant, the

other Dutch company, is also irrelevant as both the companies, namely, Kuiper and the appellant were joint venture partners, for which the payer was DMIC an Indian company. In view of this, the proportionate share of consultancy income of Rs. 12,00,414/- received by the appellant is clearly taxable as FTS in the hands of the appellant company, as appellant had provided services in India to DMIC as a joint venture partner. Keeping in view the provisions of section 9(l)(vii) read with the provisions of Article 12(5) of India-Netherlands treaty, such receipt is taxable as FTS in India.

8.4 Further, keeping in view the provisions of paragraph 7 of Article 12, as such services are held to be provided through a fixed base, which was made available to it through the project office for PSRBDB project through which one of the professional staff Mr. Adnan Rahman had provided services, such services are taxed as business profits and accordingly, taxed at the applicable rate. The AO had taxed them at the flat rate of 10%, however, such receipts are taxed as business profits against which expenses booked in the accounts of the PE will be allowed. However, if such expenses have

been already booked by the appellant in the accounts of the PE, no further allowance of such expenses is needed."

35. Aggrieved with such order of the Ld. CIT(A) assessee is in appeal before the Tribunal.

36. Ld. Counsel for the assessee strongly challenged the order of the Ld. CIT(A). He submitted that nowhere the Indian PO as assessed is involved in stated activities and nowhere there is assessee's any other business connection / permanent establishment qua this sum in India within the meaning of Section 9 (1) r.w. article 5 of DTAA. He submitted that it was the income of the joint venture having nothing to do with taxability of Indian PO / assessee company in India. He submitted that the lower authorities have wrongly invoked the provisions of section 9 (1)(vii) and Article 12(5) of India Netherlands Treaty. Referring to para 8.2 of the order of the Ld. CIT(A) he submitted that the finding of the Ld. CIT(A) that technical services were provided to DMIC by the assessee from its PE India is patently erroneous. Ld. Counsel for the assessee drew the attention of the bench to ground No. 3 raised before the Ld. CIT(A) wherein it was sated that this contract was given to different consultants. He referred to the contents of Article 7 read with

Article 5 and 12 of the India Netehrlands DTAA. He further submitted that there is no force of attraction clause as per Article 7 of the Treaty. He accordingly submitted that the disallowance made by the AO is uncalled for. In his alternative arguments, he submitted that in case the same is brought to tax then the global profit rate of 1% can be applied to the said income and the entire income can not be taxed.

37. Ld. DR on the other hand heavily relied on the order of the Ld. CIT(A).

38. We have heard the rival arguments made by both the sides, perused the order of the Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find that AO in the instant case made addition of Rs. 12,00,414/- being income on account of consultancy services as FTS u/s 9(1) (vii) r.w. Article 12(5) of subject DTAA and taxed the same at 10% . We find Ld. CIT(A) upheld the action of the AO which has already been reproduced in the preceding paragraphs. It is the submission of the Ld. Counsel for the assessee that no project office was opened for this project and the assessee received payment from another Netherlands Company, namely, Kuiper outside India. It is also his argument that this income belongs to the joint venture having nothing to do with taxability of Indian P.O/ assessee company in India. However, a perusal of the order of CIT(A) shows that despite his asking to provide the details of key professional

staff/consultants who had worked on the DMIC Project and to explain whether services were rendered from the existing project office for the PSRBDB and the manner in which the services were rendered to the DMRC Project and to furnish the breakup of expenses in the said project, the assessee failed to produce the same before the CIT(A). Considering the totality of the facts of the case and in the interest of justice we deem it proper to restore the issue to the file of the CIT(A) with a direction to give one more opportunity to the assessee to file the above documents and to decide the issue afresh and in accordance with law after giving due opportunity of being heard to the assessee. While doing so, he shall also keep in mind the alternate argument of Ld. Counsel for the assessee to tax the receipt @ global profit rate and not the entire amount as added by the AO and upheld by CIT(A). The grounds raised by the assessee are accordingly allowed for statistical purposes.

39. In the result the appeal filed by the assessee is allowed for statistical purposes in the terms indicated above.

Order pronounced on 11th November, 2020.

sd/- **sd/-**

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 11/11/2020

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi