IN THE INCOME TAX APPELLATE TRIBUNAL
"C'' BENCH: BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

IT(IT)A No.1444/Bang/2019
Assessment Year: 2014-15

M/s. ABB AG C/o ABB India Limited World Trade Centre Brigade Gateway No.26/1, Dr. Rajkumar Road Malleshwaram West Bangalore-560 055. **PAN NO : AAFCA9551N**	**Vs.**	Deputy Commissioner of Income-tax (International Taxation(Circle-1(1) Bengaluru
APPELLANT		**RESPONDENT**

Appellant by	**:**	Shri Nageswar Rao, A.R.
Respondent by	**:**	Smt. R. Premi, D.R.

Date of Hearing	**:**	24.11.2020
Date of Pronouncement	**:**	24.11.2020

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the order dated 30.3.2019 passed by Ld. CIT(A)-12 Bengaluru and it relates to the assessment year 2014-15.

2. At the time of hearing, the Ld. A.R. submitted that the ground Nos.1 & 2 are general in nature and ground nos.4 & 5 are consequential. Accordingly, he advanced his arguments on ground No.3, which reads as under:

"*Ground No.3 The learned A.O. and the learned CIT(A) have erred in law and facts, in making an addition of an amount of INR 90,21,347 to the returned income by treating the amount as Fees for Technical Services on accrual basis. The learned AO and the learned CIT(A) have erred in law and facts in not considering the Appellant's submission and by taxing the aforesaid amount twice – once in AY 2014-15 and again in AY 2015-16."*

3. The facts relating to the issue are discussed in brief. The assessee is a company incorporated and operating in Germany. The assessing officer noticed from Form No.3CEB that the assessee has received a sum of Rs.90,21,347/- towards testing and inspection charges, which are in the nature of "Fee for Technical Services".. The A.O. noticed that the assessee has not offered the same as income. The A.O. also noticed that M/s. ABB India Limited, by whom the above said amount was payable, had created a provision in its books of accounts. Hence the AO proposed to assessee the above said amount as income of the assessee.

4. The Ld. A.R. submitted that the assessing officer has erroneously stated that the assessee has received the above said amount. He submitted that the assessee has not received the above said amount during the year under consideration.

5. Before the A.O., the assessee submitted that the above said amount is taxable as "Fee for technical services". It was further submitted that the assessee has not raised any invoice for the above said amount to M/s. ABB India Ltd. and hence there was no necessity to declare this income as FTS. The assessee also submitted that the FTS is taxable only in the year in which it was received.

6 The A.O. did not accept the contentions of the assessee. He took the view that, under sec. 9(1)(vii) of the Income Tax Act, FTS income is charged on accrual basis and not on payment basis. In

this regard, the A.O. took support of the decision rendered by Hon'ble Supreme Court in the case of Standard Triumph Motor Company Ltd. Vs. CIT (1993) 201 ITR 391 (SC), wherein it was held that the credit entry to the account of the assessee in the books of the Indian company does amount to receipt by the assessee and is accordingly taxable and that it is immaterial when it did actually receive it in the U.K. The A.O. also observed that the assessee has failed to substantiate that the above said FTS income have been offered by it in the subsequent year. Accordingly, the A.O. assessed the above said amount of Rs.90,21,347/- as income of the assessee. The Ld. CIT(A) also confirmed the same and hence the assessee has filed this appeal before us.

7. The Ld. A.R. submitted that the decision rendered by Hon'ble Supreme Court in the case of Standard Triumph Motor Company Ltd. (supra) was related to a case where no Double Taxation Avoidance Agreement was available between India and the other country. In the instant case, Double Taxation Avoidance Treaty was entered by India with Federal Germany Republic as per notification dated 26.8.1985. Hence, the provisions of DTAA shall override the provisions of Income Tax Act, if it is beneficial to the assessee. The Ld. A.R. submitted that, as per the provisions of DTAA, the FTS income is taxable on "receipt basis". The Ld. A.R. further submitted that the assessee is also following cash system of accounting and hence there was no occasion for the assessee to offer the impugned income on accrual basis. In support of this submission, the Ld. A.R. took us through the copies of returns of income filed for assessment years 2013-14 to 2015-16, wherein the method of accounting has been stated as "cash system". Accordingly he submitted that the tax authorities are not justified in assessing the impugned income on accrual basis. The Ld. A.R. further submitted that the impugned amount was received

by the assessee in the year relevant to the assessment year 2015-16 and was offered to tax.

8. The Ld. A.R. placed his reliance on the following case laws in support of his submissions:

a) DCIT Vs. UHDE GMBH (1996) 54 TTJ 355 (Bom.)

b) DIT (International Taxation) Vs. M/s. Siemens Aktiengesellschaft (Income Tax Appeal No.124 of 2010 dated 22.10.2012) (Bom.)

c) Johnson & Johnson Vs. ADIT (International Taxation) (2013) 32 taxmann.com 102 (Mum Trib)

9. We heard Ld. D.R. and perused the record. There is no dispute with regard to the fact that India has entered into a Double Taxation Avoidance Treaty with Federal Germany Republic as per notification dated 26.8.1985. It is also settled proposition of law that the DTAA provisions shall override the Income tax provisions unless the provisions of Income tax Act is beneficial to the assessee. Article 12 of DTAA is concerned with taxability of Royalties and fees for technical services. Article 12 (1) reads as under:

"1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State."

The Mumbai Bench of Tribunal in the case of UHDE GMBH (supra) has examined the issue as to whether the royalties of FTS is taxable on receipt basis or accrual basis. For the sake of convenience we extract below the operative portion of the order:-

"3. The AO, inter alia, relying on the Madras High Court decision in the case of CIT vs. Standard Triumph Co. Ltd. (1979) 119 ITR 573 (Mad), had held that the income by way of fees for technical services was liable to be taxed on accrual basis and not on receipt basis. When the matter was carried in Appeal, the CIT(A) relying on art. VIIIA of the Agreement for the

Avoidance of Double Income-tax between India and the Federal Republic of Germany, held that the same was liable to be taxed on receipt basis. It is, this controversy, we are required to resolve in this appeal.

4. After hearing the parties to the dispute, we are of the view, that the order passed by the CIT(A) does not suffer from any legal infirmity. There cannot be any dispute that where there is a conflict between the agreement for avoidance of double taxation and the domestic laws relating to taxation of income arising in the Contracting State, the former has to prevail. We have also been informed by the assessee, that in the past, fees for technical services were not at all taxed in India as the assessee did not have a permanent establishment in India and the fees received were in the nature of an industrial and commercial profit. Income of this nature require to be taxed in India only because of the new treaty entered into between India and the Federal Republic of Germany. The relevant provisions governing the ambit of taxation of such income are contained in art. VIIIA of the agreement for the avoidance of double taxation. In cl. 2 of the said agreement, fees for technical services, could be taxed in the Contracting State in which they arose and according to the law of that State. The term "fees for technical services" has been defined in cl. 4 of the said article in a wide manner so as to include payments of any kind to any person. If we read cl. 3, which defines the term "royalties" and cl. 4, as observed earlier, which defines the term "fees for technical services" together, there cannot be any doubt that what is taxable is payment received by a person of the other Contracting State. Though under s. 5(2)(b) of the IT Act, in the case of a non-resident, income which accrues or arises or deem to accrue or arises to him in India is taxable, in view of the specific provisions of Art. VIIIA, what could be taxed, is only a payment to him. This presupposes, that the liability to tax arises only on the non-resident receiving such payment. The same is not liable to be taxed on an accrual basis as has been laid down under s. 5 of the IT Act. The order of the CIT(A) which is to this effect, is not, therefore, open to any challenge. The reliance by the Revenue on the decision of the Madras High Court reported in (1979) 119 ITR 573 (Mad) (supra), is of little help. The decision, no doubt, is an authority for the proposition that income accruing to a non-resident assessee is liable to tax even if the assessee is keeping its account on the cash basis in regard to its income. This decision has not taken into consideration the double taxation avoidance agreement between India and the Federal Republic of Germany, as there was no occasion to do that. It has merely explained the scope of s. 5(2)(b) of the IT Act and we have already observed earlier that there is apparent conflict between the provisions of s. 5(2)(b) of the IT Act and art. VIIIA of the treaty for avoidance of double taxation and we have also adverted to the accepted principle of interpretation that when there is such a conflict, the provisions of the treaty would have to prevail. In the light of this discussion, what emerges is that in the case of a non-resident, who is a resident of Germany, income arising to him in India by way of ***royalties or technical charges could be taxed in India but that could be only on the receipt basis."***

10. The Hon'ble Bombay High Court has also considered an identical issue in the case of M/s. Siemens Aktiengesellschaft (supra) and it was held as under:

> *2. As regards first question is concerned, the Income Tax Appellate Tribunal referring to para 1 to 3 under Article XII –A of the Double Taxation Avoidance Treaty with the Federal Germany Republic as per notification dated 26th August 1985 held that the assessment of royalty or any fees for technical services should be made in the year in which the amounts are received and not otherwise. Counsel for the Revenue relied upon the Special Bench decision of the Tribunal in the assessee's own case, which in our opinion, has no relevance to the facts of the present case, as it relates to the period prior to the issuance of Notification dated 26th August 1985. In this view of the matter the decision of the Income Tax Appellate Tribunal in holding that the royalty and fees for technical services should be taxed on receipt basis cannot be faulted.*

The Mumbai bench of Tribunal has followed the above said decision of Hon'ble Bombay High Court in the case of Johnson & Johnson and held that the royalty is taxable on receipt basis as far as the recipient is concerned who is a resident of the other contracting state as per DTAA.

11. In view of the above said decisions, we are of the view that there is merit in the submissions of the assessee that the FTS is taxable only in the year of receipt as per the provisions of DTAA. Accordingly, we are of the view that the tax authorities are not justified in assessing the impugned income on accrual basis. Accordingly, we set aside the order passed by Ld. CIT(A) and direct the A.O. to delete the impugned addition.

12. It is the submission of the Ld A.R that the impugned income has been offered to tax in the year relevant to the assessment year 2015-16. However, we notice that no material was placed either

before the A.O. or before us to substantiate the above said submission. In fact, the AO has specifically mentioned in the assessment order that the assessee has not proved its submissions. The Ld. A.R. submitted before us that the assessee has received several payments and the impugned income would form part of any of those payments. Since the Ld. A.R. also could not also exactly pinpoint with evidence that the impugned income was offered to tax in assessment year 2015-16, he agreed that this fact may be verified by the assessing officer. Accordingly, we restore this issue to the file of A.O. for limited purpose of satisfying himself that the impugned amount has been offered to tax by the assessee in A.Y. 2015-16 or in any other assessment year.

13. In the result, the appeal filed by the assessee is treated as allowed.

Order pronounced in the open court on 24th Nov, 2020.

Sd/-	**Sd/-**
(N.V. Vasudevan)	**(B.R. Baskaran)**
Vice President	**Accountant Member**

Bangalore,
Dated 24th Nov, 2020.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.