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

BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER) AND
SHRI AMARJIT SINGH (ACCOUNTANT MEMBER)

ITA No. 961/MUM/2016
Assessment Year: 2012-13

The Deputy Commissioner of Income Tax (IT)-Circle-3(2)(2), 1st floor, Air India Building, Nariman Point, Mumbai-400021.	**Vs.**	Stantee UK Ltd., (formerly known as MWH UK Ltd.), C/o Deloitte Haskins & Sells LLP One International Centre Tower 3, 28th Floor, Senapati Bapat Marg, Prabhadevi (West), Mumbai-400013. **PAN No. AAHCM 3429 K**
Appellant		**Respondent**

ITA No. 2096/MUM/2016
Assessment Year: 2012-13

Stantee UK Ltd., (formerly known as MWH UK Ltd.), C/o Deloitte Haskins & Sells LLP One International Centre Tower 3, 28th Floor, Senapati Bapat Marg, Prabhadevi (West), Mumbai-400013. **PAN No. AAHCM 3429 K**	**Vs.**	The Deputy Commissioner of Income Tax (IT)-Circle-3(2)(2), 1st floor, Air India Building, Nariman Point, Mumbai-400021.
Appellant		**Respondent**

ITA No. 2543/MUM/2017
Assessment Year: 2013-14

Stantee UK Ltd., (formerly known as MWH UK Ltd.), C/o Deloitte Haskins & Sells LLP One International Centre Tower 3, 28th Floor, Senapati Bapat Marg, Prabhadevi (West), Mumbai-400013. **PAN No. AAHCM 3429 K**	**Vs.**	The Deputy Commissioner of Income Tax (IT)-Circle-3(2)(2), 1st floor, Air India Building, Nariman Point, Mumbai-400021.

Appellant	**Respondent**

Assessee by	:	Mr. J.D. Mistry, Sr. Advocate
Revenue by	:	Mr. Milind Chavan, DR
Date of Hearing	:	01/12/2021
Date of pronouncement	:	29/12/2021

ORDER

PER AMARJIT SINGH, A.M.

ITA No. 2096/MUM/2016
Assessment Year: 2012-13

This appeal of the assessee is directed against the order of the Dispute Resolution Panel-3, Mumbai (in short 'DRP') u/s 144C(5) of the Act dated 28.12.2015. The ground of appeal filed by the assessee are as under :

"1:0 Re: Taxing reimbursement of hank guarantee commission to the Appellant as "Royalty":

1.1 The Assessing Officer / Dispute Resolution Panel has erred in taxing the amount of ₹6,99,223/- received by the Appellant during the year under consideration as royalty.

1: 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the bank guarantee commission reimbursed to the Appellant cannot be treated as its income and the stand taken by the Assessing Officer/Dispute Resolution Panel in this regard is misconceived, illegal, erroneous and incorrect.

1:3 The Appellant submits that the Assessing Officer be directed to delete the addition of Rs.6,99,223/- so made by him and to re-compute its total income and tax thereon accordingly.

2: 0 Re: Amounts paid by the Appellant by the way of re-imbursement of expenses treated as income and taxed as "royalty":

2:1 The Assessing Officer / Dispute Resolution Panel has erred in taxing the amount of Rs.76,32,497/- paid by the Appellant during the year under consideration as re-imbursement of expenses paid as the income of the Appellant and taxed as royalty income.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the amount of Rs.76,32,497/- paid by it cannot be treated as its income and hence the stand taken by the Assessing Officer in this regard is illegal, incorrect, erroneous and misconceived.

2.3 The Appellant submits that the Assessing Officer be directed to delete the addition of Rs.76,32,497/- so made by her and to re-compute its total income and tax thereon accordingly.

Without prejudice to the foregoing:

3. Re.: Incorrect tax rate applied:

3.1 The Assessing Officer has erred in not taxing the alleged fees for technical services at the rate of 10% u/s. 115A of the Income-tax Act, 1961.

3.2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the amounts received / paid by the Appellant even if taxable as 'fees for technical services ought to be taxed at the rate of 10 % in terms of section 115A of the Income-tax Act, 1961 and the stand taken by the Assessing Officer in this regard is misconceived, illegal, erroneous and incorrect.*

3: 3 The Appellant submits that the Assessing Officer be directed to re-compute the total income and tax liability of the assesse accordingly.

4. Re.: Credit for tax deducted at source amounting Rs.62.58,843/- not granted:

4.1 The Assessing Officer has erred in not granting the Appellant credit for tax deducted at source of Rs. 62,58,843/-.

4.2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject it is entitled to full credit for Rs. 62,58,843/- being tax deducted at source from its income for the year.

4.3 The Appellant submits that the Assessing Officer be directed to delete the entire interest so levied by him and accordingly re-compute its tax liability accordingly.

5. Re.: Levy of interest u/s 234B of the Income-tax Act, 1961:

5.1 The Assessing Officer has erred in levying interest u/s. 234B of the Income-tax Act, 1961 on the Appellant.

5.2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject no interest w/s. 234B is leviable and the stand taken by the Assessing Officer in this regard is misconceived, incorrect, erroneous and illegal.

5.3 The Appellant submits that the Assessing Officer be directed to delete the interest u/s 234B so levied on it and o re-compute its tax liability accordingly."

2. The fact in brief is that return of declaring income of ₹Nil was filed on 29.11.2011. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 11.02.2015. The assessee is a foreign company formed and incorporated in the United Kingdom and it is a tax resident of the UK and eligible to claim benefit under the Double Taxation Avoidance Agreement (DTAA) entered into and subsisting between India and United Kingdom (India UK DTAA). The assessee had entered into international transactions with its associated concerns, M/s MWH India Pvt. Ltd. and M/s MWH ResourceNet (India) Pvt. Ltd. (India branches) for the period April 2011 to March 2012 relevant for assessment year 2012-13. Further, facts are discussed while adjudicating the grounds of appeal.

Ground No. 1& 2 as below :

"1:0 Re: Taxing reimbursement of hank guarantee commission to the Appellant as "Royalty"

2: 0 Re: Amounts paid by the Appellant by the way of re-imbursement of expenses treated as income and taxed as "royalty"

3. During the course of draft assessment, the AO noticed that in the computation of income in note 2 MWH India Pvt. Ltd. has paid sum of ₹9,76,650/- and MWH Resource India Pvt. Ltd. has paid sum of ₹76,32,497/- to MWH UK Ltd. towards reimbursement of bank guarantee charges. The assessee claimed the same as exempt being of the nature of reimbursement. However, the AO stated that the assessee has not furnished any relevant documentary evidences to substantiate their claim that the amount of ₹9,76,650/- paid by M/s MWH India Pvt. Ltd. and the amount of ₹76,32,497/- paid by MWH Resourcenet

India Pvt. Ltd. was only in the nature of reimbursement. Therefore, the AO rejected the claim of the assessee that these expenses were of the nature of reimbursement and added to the total income of the assessee treating the same as royalty as per Article 13 of the India UK DTAA and taxed @ 15%.

4. The assessee filed objection before the DRP in respect of variations proposed to be made by the Assessing Officer in the draft order. The DRP in their finding on the issue of taxing amount of ₹9,76,650/- paid by MWH India Pvt. Ltd. to the assessee as royalty, held that as per invoices submitted before the Assessing Officer by the assessee vide its submission dated 25.05.2015 an amount of ₹2,77,427/- has been reimbursed to the assessee. Therefore, the DRP has given partly relief to the assessee by treating the amount of ₹2,77,427/- as reimbursed of expenses.

During the course of appellate proceedings before us, the Ld. counsel vehemently contended that the assessee is a non-resident company and it had arranged for bank guarantee from the Barclays Bank-UK for MIPL and had paid the bank guarantee commissions to the Barclays Bank-UK and the said commissioner was recovered by the assessee from MIPL by raising invoices on a cost to cost basis without any mark-up. The Ld. counsel submitted the copies of invoices demonstrating that the nature of amount received by the assessee-company was the reimbursement of bank guarantee commission by MIPL to the assessee. However, neither the Assessing Officer nor the DRP has considered the copies of invoices submitted in support of claim of the assessee. In this regard, the Ld. counsel has referred page No. 173 and other pages of the Paper Book along with copies of invoices in support of its claim that amount received was purely reimbursement of expenses as claimed by the assessee. On the other

hand, the Ld. DR submitted that no invoices were submitted by the assessee before the lower authorities. In this regard, he has relied on the order of the lower authorities.

5. Heard both the sides and perused the material on record. The assessee claimed an amount of ₹9,76,650/- being reimbursement of bank guarantee, however, the Assessing Officer has treated the same as royalty. The assessee is a non-resident company formed incorporated in accordance with the corporate law of the United Kingdom and it had arranged for bank guarantee from the Barclays Bank-UK for MIPL and had paid the bank guarantee commissions to the Barclays Bank – UK. The said commission was recovered by the assessee from MIPL by raising invoices on cost to cost basis without any mark-up. The assessee claimed that during the course of assessment proceedings, it has filed copies of invoices raised by the assessee on MIPL for reimbursement of bank guarantee commission along with supporting document. However, the Assessing Officer has simply stated in the assessment order that no supporting detail of invoices were furnished by the assessee-company. In their finding, the DRP has categorically stated that the amount received by the assessee were not in connection with right to use any patent, trade-mark, design etc. and it was pure reimbursement of bank guarantee commission, the DRP has restricted the claim to the amount of ₹2,77,427/- towards reimbursement of bank guarantee expenses incurred by it on the basis of copies of invoices. During the course of appellate proceedings before us, the Ld. counsel has furnished the Paper Book comprising copies of various invoices furnished before the authority below in support of its claim that documentary evidences submitted were not fully considered. In view of the above facts and circumstances, we are of the view that

it will be appropriate to restore this issue to the file of Assessing Officer for deciding *de-novo* after examination/verification of the copies of invoices and documentary evidence filed in support of claim as reimbursement of expenses. Accordingly, the ground No. 1 of appeal of the assessee is allowed for statistical purposes.

6. Regarding Ground No. 2 of the assessee on the issue that Assessing Officer has treated the amount of ₹76,32,497/- being reimbursement of bank guarantee commission as royalty, the Ld. counsel submitted that in the statement showing computation of total income the assessee had inadvertently mentioned that a sum of ₹76,32,497/- being reimbursement of bank guarantee charges were reimbursed to the assessee by MWH Resourcenet (India) Pvt. Ltd., this amount of ₹76,32,497/- was actually a payment made by the assessee to its associate concern during the year under consideration. With the assistance of Ld. Representative, we have perused page No. 336 of the Paper Book referred by the Ld. counsel, wherein on serial No. 7 it was shown that assessee has made reimbursement travelling car hire lodging charges etc. of the same amount to MWH Resourcenet (India) Pvt. Ltd. The Ld. counsel has also referred page No. 66 to 69 of the Paper Book pertaining to the copies of account of the assessee company showing that actually sum of ₹76,32,497/- was the payment made by the assessee to its associate concern during the year under consideration, however, in the notes to the accounts inadvertently it was mentioned that assessee company had received the same amount towards reimbursement of bank guarantee charges. After taking into consideration the contention of both the parties and material on record, we are of the view that this issue is required to be considered afresh after examination and verification of the supporting

document and relevant material referred by the assessee. Therefore, we restore this issue also to the file of the Assessing Officer for deciding afresh as directed above. Therefore, ground No. 1 & 2 of the assessee are allowed for statistical purposes.

Ground No. 3

3. Re.: Incorrect tax rate applied:

7. In this ground of appeal, the assessee submitted that considering the facts and circumstances of the its case even if taxable as "fees for technical services" the same to be taxed @ 10% in terms of section 115A of the IT Act. Whereas, the AO has applied the rate of tax @ 15%.

8. Heard both the sides on this issue and perused the material on record. It is noticed that the DRP in the direction issued on 28th December 2014 has already directed the Assessing Officer to apply rate of tax as per the provisions of section 115A of the Income Tax Act, 1961.

Accordingly, the AO is directed to follow the direction of the DRP. Therefore, the ground of appeal is allowed for statistical purposes.

Ground No. 4

Re.: Credit for tax deducted at source amounting Rs.62,58,843/- not granted:

9. The Assessing Officer has not granted the credit of tax deducted at source of ₹62,58,843/- while computing the tax liability in the year under consideration. Before the DRP, the assessee had filed copies of the certificate evidencing the tax deducted at source.

During the course of appellate proceedings before us the Ld. counsel also submitted a copy of rectification application dated 18 November 2016 filed with the Assessing Officer on 22 November 2016.

10. Heard both the sides on this issue and it is noticed that as per para 8.4 of direction of the DRP, the Assessing Officer has already been directed to verify claim of the assessee and grant the credit of tax deducted at source as per provisions of the law. Accordingly, we direct the Assessing Officer to make compliance with the direction of the DRP without any further delay and grant the credit of tax deducted at source as per provisions of law. Therefore, this ground of appeal is allowed for statistical purposes.

Ground No. 5

Re.: Levy of interest u/s 234B of the Income-tax Act, 1961:

11. During the course of appellate proceedings before us the Ld. counsel has contended that interest u/s 234B cannot be levied on a foreign company and placed reliance on the decision of Hon'ble Jurisdictional High Court of Bombay in the case of *DIT(IT) v. NGC Network Asia LLC* (2009) 313 ITR 187 and the decision of the Hon'ble Supreme Court in the case of Director of Income Tax v. Mitshbishi Corporation (Civil Appeal No. 1262 of 2016).

12. Heard both the sides and perused the judicial pronouncement referred by the Ld. counsel. Hon'ble Bombay High Court in the case of Director of Income Tax v. NCG Network Asia Ltd. held that on failure of the payer to deduct tax at source no interest can be imposed on the assessee u/s 234B of the Act.

The Hon'ble Supreme Court in the case of Director of Income Tax v. M/s Mitshbishi Corporation held that prior to the financial year 2012-13, the amount of income tax which is deductible or collectible at source can be reduced by the assessee which calculating advance tax, the respondent cannot be held to have defaulted in payment of its advance tax liability.

We consider that the position has changed since the financial year 2012-13 in view of the proviso to section 209(1)(d) pursuant to which if the assessee receive any amount, including the tax deductible at source on such amount, the assessee cannot reduce such tax which computing its advance tax liability. Since the case of the assessee is pertained to FY 2011-12 therefore considering the judicial finding as supra, the assessee is not liable for payment of interest u/s 234B of the Act. Therefore, this ground of appeal of the assessee is allowed.

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13. The solitary ground of appeal of the Revenue is directed against the order of DRP dated 28th December 2015 in holding that services rendered by the assessee-company are broadly in the nature of "managerial services" which are not covered within the scope of definition of the term "fees for technical services" as per Article 13 of India-UK DTAA. During the course of draft assessment, the AO observed that the assessee-company has received a sum of ₹5,33,30,236/- from MWH India Pvt. Ltd. and MWH Resourcenet (India) Pvt. Ltd. as technical services fees and claimed as exempt. On query, the assessee explained that the technical services should not qualify as "fees for included services" under Article of the Indo-UK Taxation treaty and should not be liable to tax in India. During the course of assessment, the assessee has submitted the

copies of agreement entered into with the associated enterprises, copies of invoices raised for the services, the details of their personnel visiting India for rendering the services and other supporting documents. The AO observed that during the year under consideration, the assessee has provided various consultancy/technical/managerial services to MWH India Pvt. Ltd. and MRPL as under :

- *Corporate Planning and Development*
- *Corporate accounting, tax, finance and treasury function*
- *Corporate legal services and risk management*
- *Corporate Human Resource Management*
- *Global Professional Indemnity Insurance*
- *Corporate Communications*
- *Global IT Networks*

14. The Assessing Officer was of the view that fees for technical services is an income of the non-resident entity and is therefore deemed to accrue or arise in India u/s 9(1)(vii) r.w.s. Explanation 2 of the Income Tax Act, 1961. The AO has also stated that as per para 13 of DTAA between India and UK the fees for technical services are taxable as under :

"***Article 13(4)(c)***

The term "fees for technical services" for the purpose of paragraph 2 of this Article means payments of any kind to any person in consideration for rendering of any technical or consultancy services (including the provisions of services of technical or other personnel) which

c) make available technical knowledge, experience, skill, knowhow or processes, or consist of the development and transfer of a technical plan or technical design."

15. The AO stated that as per Article 13 of the Indo-UK Treaty with special reference to para 4 in the "fees for technical services" means payments to any person in consideration for the rendering of any technical or consultancy

services. M/s MWH India Pvt. Ltd. MRPL are providing technical/engineering/consultancy services. Therefore, the amount paid by M/s MWH India Pvt. Ltd. and MWH Resourcenet (India) Pvt. Ltd. will be covered under "fees for technical services". The AO further stated that the technical knowledge, experience, skill processed by the assessee-company with regard to various aspect was made available in the form of advice or service which were finally used in the decision making process of matters concerning not only in management but also in financial, legal, treasury, planning communication and human resources. Accordingly, the fees received by the assessee on account of corporate services were treated as fees for technical services as per Article 13 of the Indo-UK DTAA.

16. The DRP in its finding held that on perusal of the agreement it is evident that the services rendered by the assessee-company were broadly in the nature of managerial services which were not covered within the scope of evidences of the term "fees for technical services" as per Article 13 of the India-UK DTAA. The assessee-company has rendered various corporate services to its Indian entity which does not fall within the scope of term "fees for technical services" as defined under Article 13 of the India-UK DTAA. The relevant finding of the DRP are reproduced as under :

> *"6.14 We have considered the facts of the case and the submissions of the assessee. On perusal of the service agreement it is evident that the following services have been provided by the assessee company to its Indian entity.*
>
> - *Corporate planning and development*
> - *Corporate legal services and risk management*
> - *Corporate human resource management*
> - *Global professional indemnity insurance;*
> - *Global IT networks*

6.15 The various components of the services rendered in each of the aforesaid broad heads has been detailed in the Appendix 1 to the Agreements which is reproduced hereunder:

Services rendered	***Components***
Corporate Planning and Development	*Laying down strategies, forecasting and planning, assistance in marketing, arranging finance, etc.*
Corporate legal services and risk management	*For the work performed by the Counsel of the group which benefits the regional operations.*
Corporate human resource management	*Majorly in the nature of compensation co-ordination and review; development of expatriate policies etc.*
Global professional indemnity insurance	*Professional indemnity insurance is effected and maintained by MWH Global Inc. and covers every subsidiary within the group. As a result of arranging insurance globally every subsidiary benefits from a lower premium cost and wider coverage as the group takes advantage of economies of scale and greater purchasing power.*
Global IT Network	*Support for IT systems and processes.*

6.16 Before arriving al the tavabily of the services as performed by the assessee company it is pertinent that one understands the meaning of the term fees for technical services" as defined in the Income-tax Act, 1961 and Article 13 of the India - UK DTAA.

i) In terms of provisions of section 9(1)(vi) of the Income-tax Act, 1961 if the consideration paid for rendering technical services constitutes income by way of fees for technical services, it is taxable - The term "fees for technical services" has been defined to mean any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services in terms of Explanation 2 to section 9(1) (vi). The said Explanation reads as under:

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

ii) As per Article 13 of India - UK DTAA "fees for technical services" means the payment of any amount to any person in consideration for rendering of any technical services only, if such services make available technical knowledge,

expertise, skill, know-how or processes. If the technical knowledge expertise, skill, know how or process is not made available by the service provider, who has rendered technical service for the purpose of Article 13 of DTAA it would not constitute fees for technical services. To that extent the definition of fee for technical services found in the DTAA is inconsistent with the definition of fees for technical services provided in Explanation 2 to clause (vii) of sub-section (1) of section 9.

6.17 On a conjoint reading of section 9(1)(vin) and Article 13 of the India - UK DTAA, it emerges that "fees for technical service' is a consideration received in the hands of the recipient, provided such technical knowledge or know how etc. are 'made available' to the person who made the payment in lieu of those services. Broadly speaking, "make available means to allow somebody to make use of the know-how or knowledge.

6.18 The terms 'make available' means that the person receiving the services has been enabled to utilize that knowledge or the receiver has become wiser to utilize that knowledge independently. Mere rendering of services is not enough unless the person utilizing the knowledge is able to make use of that technical knowledge by himself for his own benefit independently i.e. without the guidance of the said service provider.

6.19 On perusal of the agreement it is evident that the services rendered by the assessee company are broadly in the nature of 'managerial services' which are not covered within the scope of definition of the term "fees for technical services as per Article 13 of the India-UK DTAA. The assessee company has rendered various corporate services to its Indian entity which in view of the discussion above does not fall within the scope of the term fees for technical services' as defined under Article 13 of the India - UK DTAA.

6.20 Accordingly, since none of the services rendered by the assessee company "make available" any technical knowledge, skill, etc., the same are not chargeable to tax in India. Further by applying the provisions of section 90(2) of the Income-tax Act, 1981 and consequently the Article 13 of the India - UK DTAA will apply since it is beneficial to the assessee company and hence the fees received by the assessee company is not liable to tax in India.

6.21 With regard to the judicial decisions relied upon by the learned Assessing Officer and the assessee company it is seen that the various High Courts and the Tribunals have now passed a number of judicial pronouncements wherein it was held that mere rendering of technical service would not amount to fees for technical service unless the person utilizing the service is able to make use of the technical knowledge, etc. by him in the future - some of the judicial decisions are mentioned below:

- *Decision of the Bombay High Court in the case of Diamond Services International P. Ltd v/s. Union of India (2008) 169 Taxman 201;*
- *Decision of the High Court of Delhi in the case of DIT v/s. Guy Carpenter and Co. Ltd. (2012) 346 ITR 504;*
- *Decision of the High Court of Karnataka in the case of CIT v/s .De Beers India Minerals (P.) Ltd. (2012) 346 ITR 457;*
- *Decision of the Authority for Advance Ruling in the case of Intertek Testing Services India Pvt. Ltd. (2008) 307 IT 418;*
- *Decision of the Delhi Bench of Income-tax Appellate Tribunal in the case of Sheraton International Inc. V/s. DDIT (2007) 10 SOT 542;*
- *Decision of the Mumbai Bench of Income-tax Appellate Tribunal in the case of Raymond Limited v/s. DCIT (2003) 86 ITD 791:*
- *Decision of the Mumbai Bench of Income-tax Appellate Tribunal ICICI Bank Ltd. V/s. DCIT (2008) 20 SOT 453*
- *Decision of the Delhi Bench of Income-tax Appellate Tribunal in the case of NQA Quality Systems Registrar Ltd. V/s. DCIT (2005) 92 TTJ 946*
- *Decision of the Bangalore Bench of the Income-tax Appellate Tribunal in the case of Filtrex Technologies Pvt. Ltd. Vs. ACIT reported in (2011) 13 taxmann.com 21*

6.22 In view of the above discussion, the action of the Assessing Officer is not considered to be justified and hence the Assessing Officer is directed to delete the proposed variation in the Draft Assessment Order.

17. During the course of appellate proceedings before us, the Ld. DR has referred para 4 of the draft assessment order stating that assessee has not produced the copy of agreement for rendering such services. The Ld. DR has also submitted that services provided by the assessee were not general in nature and were provided by professionals and services were highly technical, technical knowledge experience processed by the assessee-company was made available in the form of advice or service which were finally made or use by MWH India Pvt. Ltd. and MRPL in the decision making process.

18. On the other hand, the Ld. counsel has referred page No. 70 of the Paper Book a letter dated 27th March 2015 submitted before the Assessing Officer as per point No. 4 a photocopy of the agreement for the supply of corporate services entered into between the assessee-company and MIPL was furnished along with

appendix. The Ld. counsel has also referred Article 13 para 4 and sated that para (a), (b) & (c) are not applicable to the case of the assessee.

18.1 The Ld. counsel has also referred para 6.19 and 6.20 order of the DRP wherein the DRP after examination of the material on record, agreement of services and provision of Article 13 of the India-UK DTAA categorically held that the services rendered by the assessee-company were broadly in the nature of managerial services which were not covered within the scope of definition of the term "fees for technical services" as per Article 13 of the India-UK DTAA. The DRP at para 6.20 of the order has also stated that applying the provisions of section 90(2) of the Income Tax Act, 1961 and consequently the Article 13 of the India-UK DTAA would be applied and the fees received by the assessee-company was not liable to tax in India.

19. Heard both the sides and perused the material on record. During the course of assessment, the Assessing Officer has treated the amount of ₹5,33,30,236/- received by the assessee being corporate charges from its associate concerns as fees for technical services under Article 13 of the DTAA entered into and subsisting between India and the UK (India-UK DTAA) for the year under consideration. However, the DRP in their finding dated 28th December 2015 held that the services rendered by the assessee-company were broadly in the nature of managerial services which were not covered within the scope of definition of the term "fees for technical services" as per Article 13 of the India-UK DTAA. It was held that the assessee-company had rendered various corporate services to its India entity which does not fall within the scope of the term "fees for technical services" as defined under Article 13 of the Indo-UK DTAA. The DRP has also stated that none of the services rendered by the

assessee-company "make available" any technical knowledge, skill etc. and same were not chargeable to tax in India. Further, by applying the provisions of section 90(2) of the Income Tax Act, 1961 and the Article 13 of the India-UK DTAA the fees received by the assessee-company was not liable to tax in India. On perusal of the material on record, it is observed that during the year under consideration the assessee has provided various corporate services to its Indian entity MIPL and MRPL for which both the entities have paid corporate charges to the assessee. During the course of assessment, the assessee has made submissions stating that the corporate services provided by the assessee were for the internal management of the MWH Group as a whole and not for providing any services to the third parties. The kind of services provided by the assessee were consisting of procuring bank guarantees, forecasting, objecting evaluation, negotiations of global profession liability insurance policy arrangement and provisions of professional etc. It is also noticed that during the course of assessment proceedings, the assessee-company has submitted copies of agreement between the assessee-company and its Indian entity for the supplying of corporate services as placed at page 76 to 81 of the Paper Book. The assessee has also submitted copies of invoices raised by the assessee for corporate services as placed at page No. 82 to 172 of the Paper Book. In this regard, it is noticed that Assessing Officer has not referred to any of these documents/invoices/agreements filed during the course of assessment proceedings and has not dis-proved the facts reported in these documents and agreements to the claim of the assessee that it has provided corporate services to its Indian entities for which it raised invoices from time to time as fees for the corporate services rendered by it. The assessee has also given complete detail of nature of services performed by it during the year under consideration mainly

laying down strategy, financing and planning, assisting in marketing arranging finance etc. With the assistance of the Ld. Representative, we have also gone through the Article 13 of the India-UK DTAA. The relevant extract of the said is reproduce as under :

> *(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and*
>
> *(b) payment of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.*
>
> *4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which*
>
> *a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received ; or*
> *b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received ; or*
> *c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.*

It is clear from the terms of the Article 13 referred above that for a payment to fall within the definition of the term fees for technical services under Article 13 of the India-UK DTAA the following conditions are required to be fulfilled concurrently:

- *Firstly, the payment is to be made by way of consideration for services of a managerial, technical or consultancy nature, and*

- *Secondly, such services should 'make available' technical knowledge, skill, experience, etc. to recipient of the services.*

The term "make available" is used in the India-UK DTAA which means that the Indian entity is enabled to use the technical knowledge, experience, skill etc. independently in future without any recourse to the assessee-company. The Assessing Officer has not demonstrated in his finding that how the services in question make available any technical knowledge, skill etc. to the associate concerns and how the same were made available to the third parties. We have also perused the following judicial pronouncement referred by the Ld. counsel:

1. ***"ITO v. Veeda Clinical Research Pvt. Ltd. (ITA No. 1406/Ahd/2009)"***

The Tribunal held that unless there is a transfer of technology involved in provision of technical services extended by the UK company, the 'make available' clause is not satisfied and accordingly the income cannot be brought to tax under article 13(4) of the DTAA.

2. ***DCIT v. Boston Consulting Group Pte. Ltd. 94 ITD 31 (Mum)***

It is held that payment for services which are non-technical in nature, or, in other words, payments for services not containing any technology, are required to be treated as outside the scope of 'fees for technical services'.

3. ***Exxon Mobil Company India Pvt. Ltd. v. ACIT 92 taxmann.com 5 (Mum)***

The Tribunal on a perusal of the agreement between the parties noted that as per the terms of the agreement, the Singapore company would provide management consulting, functional advice, administrative, technical, professional and other support services to the assessee but there was nothing in the agreement to conclude that in the course of such provision of service, the Singapore company had made available any technical knowledge experience, skill, knowhow, or process which enabled the assessee to apply the technology contained therein on its own without the aid of the Singapore company.

4. ***DCIT v. Hyva Holdings BV 106 taxmann.com 24 (Mum)***

The Tribunal held that the services did not make available any technical knowledge, skill, etc. since the Assessing Officer had failed to demonstrate through any material brought on record that while rendering services, the assessee has made available

any technical knowledge, experience, know-how, skill, etc. enabling the recipient to apply such technology.

5. DDIT v. Tetra Pak India Pvt. Ltd. 111 taxmann.com 205 (Pune)

The Tribunal held that the authorities below had not come to any finding that training imparted by associated enterprises to the employees of the assessee made available any technology and in the absence of the same, payments made to the entities resident of countries of third category were not exigible to tax deduction at source.

In the light of the above facts and findings, we do not find any infirmity in the direction of the DRP, therefore, this ground of appeal filed by the Revenue stand dismissed.

ITA No. 2543/MUM/2017
Assessment Year: 2013-14

20. The Amended ground of appeal :

1. Re: Taxation of fees received for services rendered as "fees for technical services"

1.1 The Assessing Officer/Dispute Resolution Panel has erred in taxing the amount of 5,37,59,212/- received by the Appellant during the year under consideration for services rendered as "fees for included services'

1.2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the fees received by the Appellant do not fall within the purview of the term 'fees for included services as per the applicable Indo-US DTAA and the stand taken by the Assessing Officer/Dispute Resolution Panel in this regard is misconceived, Illegal, erroneous and incorrect.

1.3 The Appellant submits that the Assessing Officer be directed to delete the addition of Rs.1,47,38,818/- so made and to re-compute its total income and tax thereon accordingly.

2. Re: Amounts paid by the Appellant by the way of re-imbursement of expenses treated as income and taxed as "fees for technical services":

2.1 The Assessing Officer/Dispute Resolution Panel has erred in taxing the amounting of ₹4,46,90,322/- received by the Appellant during the year under consideration as reimbursement of expenses as the income of the Appellant.

2.2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the amount of Rs. 4,46,90,322/- received by it cannot be treated as its income and hence the stand taken by the Assessing Officer/Dispute Resolution Panel in this regard is illegal, incorrect, erroneous and misconceived.

2: 3 The Appellant submits that the Assessing Officer be directed to delete the addition of Rs. 4,46,90,322/- so made and to re-compute its total income and tax thereon accordingly.

21 During the course of appellate proceedings before us, at the outset, the Ld. counsel has submitted that facts and issues involved in the appeal of the assessee are similar and identical to the appeal of the Revenue for AY 2012-13 vide ITA No. 961/Mum/2016.

22. Heard both the sides and perused the material on record. We have adjudicated the similar issue on identical facts vide ITA No. 961/Mum/2016 for AY 2012-13 in favour of the assessee by rejecting the appeal of the Revenue. The DRP has adjudicated the similar issue on identical facts in favour of the assessee for AY 2012-13, however, during the year under consideration without giving any finding, the DRP has simply uphold the order of the AO stating that the Department has filed appeal against the order of the DRP. We consider the decision of the DRP is not justified.

23. Since, we have already adjudicated the similar issue on identical facts for AY 2012-13 vide ITA No. 961/M/2016 as supra in favour of the assessee. Therefore, applying the findings of the same this appeal of the assessee is allowed.

Ground No. 2

2. Re: Amounts paid by the Appellant by the way of re-imbursement of expenses treated as income and taxed as "fees for technical services":

24. Since, we have allowed the ground No. 1 of the assessee as supra, therefore, this ground of appeal was become infructuous. The same stand dismissed.

25. In the result, the appeal filed by the Revenue in ITA No. 961/M/2016 is dismissed whereas the appeals filed by the assessee in ITA No. 2096/M/2016 is partly allowed for statistical purposes and ITA No. 2543/M/2017 is allowed.

Order pronounced in the open Court on 29/12/2021.

Sd/-	Sd/-
(KULDIP SINGH)	(AMARJIT SINGH)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 29/12/2021
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai