

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No.2898/Bang/2018 & IT(TP)A No.2387/Bang/2019
Assessment Years: 2014-15 & 2015-16

M/s. Tesco Bengaluru Private Limited 81 & 82, EPIP Area, Whitefield Bangalore 560 066.  <b>PAN NO : AABCT8915B</b>	<b>Vs.</b>	JCIT Special Range-7 Bengaluru
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri T. Suryanarayana, Sr. A.R.
<b>Respondent by</b>	:	Shri Sumer Singh Meena, D.R.

<b>Date of Hearing</b>	:	01.08.2022
<b>Date of Pronouncement</b>	:	04.08.2022

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

These two appeals by assessee for the assessment years 2014-15 & 2015-16 are directed against the different assessment orders passed by JCIT Special Range-7, Bengaluru. First we will take up IT(TP)A 2898/Bang/2021 for the assessment year 2014-15 for adjudication.

**IT(TP)A No.2898/Bang/2018:-**

2. Ground Nos.1 to 7:- These grounds are withdrawn pursuant to the signing of advance pricing agreement with regard to which assessee filed letter dated 19.9.2019 before us vide inward No.1777 dated 25.9.2019. Accordingly, these grounds are dismissed as withdrawn.

3. Ground No.8 is with regard to disallowance of sub-contracting expense.

3.1 Ld. A.R. submitted that the assessee has created net provision towards sub-contracting expenses amounting to Rs.7,93,11,624/- which it claimed as a deduction in the assessment year under consideration. In the subsequent year, the same was reversed and offered to tax. However, the AO disallowed the same holding it to be mere provision. The Ld. DRP affirmed the disallowances made on the ground that it is an unascertained liability and the assessee had not deducted tax at sources. The contention of the Ld. A.R. is that the expenses claimed in this assessment year is reversed in the subsequent year and offered to tax and therefore no disallowance is warranted in the year under consideration.

3.2. The Ld. D.R. relied on the order of the lower authorities.

3.3. We have heard the rival submissions and perused the materials available on record. The assessee in this assessment year following the mercantile system of accounting made provisions for expenses on which there was no deduction of TDS. The assessee was liable for deduction of tax, since the assessee not deducted TDS, the said expenditure cannot be allowed as a deduction in the assessment

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year under consideration. The liability of the assessee to deduct TDS arises on making the provisions even on debiting the same to suspense account or any other account by whatever name called, which will also include a “provision” created in the books of account of the assessee. Therefore, it is not possible for the assessee to argue that there was no accrual of expenditure in accordance with the mercantile system of account followed by assessee. Therefore, TDS obligation do catch triggered. In view of this, we are of the opinion that the expenditure cannot be allowed in the assessment year under consideration.

3.4 However, assessee made alternative argument that the provision was reversed in the next year in its books of accounts and same was offered to tax and disallowance of this assessment year amounts to double taxation in this assessment year as well as in the next subsequent assessment years. We find force in the argument of the assessee’s counsel. We direct the AO that if the provisions has been disallowed in the assessment year 2014-15, and the reversal of the same in the next assessment year, the same cannot be taxed to that extent on reversal of provisions. Being so, we direct the AO to take note of this in AY 2015-16 in which the assessee made reversal of the provisions. This ground of assessee is disposed of as above.

4. Next ground No.9 is with regard to disallowance of professional consultancy charges paid to Homeplus Company Ltd.

4.1 Ld. A.R. submitted that during the year under consideration, the assessee had paid Rs. 1,34,46,918/- to Homeplus Co. Ltd. (“Homeplus”), in consideration for the said entity providing training for the assessee’s incumbent directors and candidates. Since no

income chargeable to tax in India accrued/arose to Homeplus in India, the assessee did not deduct tax at source.

4.2 The Assessing Officer made a disallowance under Section 40(a)(ia) of the Act by merely holding that the submissions made by the Assessee is not satisfactory. The Ld. DRP upheld the disallowance made. In order for the payments to be in the nature of fees for technical services, in terms of Article 12(3)(b) of the India-Korea DTAA, the payments ought to be in consideration for technical, managerial or consultancy services. In this regard, it is submitted that undisputedly, **the payments made are towards training services**. The training services are not technical, managerial or consultancy in nature, and therefore, the payments made are not taxable under the DTAA or the Act. Reliance in this regard is placed on the following decisions:

**Lloyds Register Industrial Services (India) (P.) Ltd. v. ACIT** (reported in [2010] 36 SOT 293 (Mum.)- and

**Sandvik AB v. DCIT** (Order dated 06.01.2021 passed by the Pune Bench of the Hon'ble Tribunal in ITA No. 2524/Pun/2017)-

4.3. The Ld. D.R. relied on the order of lower authorities.

4.4. We have heard the rival submissions and perused the materials available on record. In our opinion, in this case, AO treated the payment of professional charges to Home Plus Company Ltd. as fees for technical services. In the present case, the payment has been made towards training services and the training services cannot be treated as technical, managerial or consultancy in nature, in terms of DTAA between India and Korea. The order of coordinate Mumbai Bench of Tribunal in the case of Lyods Registered Industrial

Services (India) Pvt. Ltd. Vs. ACIT 36 SOT 293 (Mum), is directly on the issue, wherein held that:

14. *We have considered the rival submissions carefully in the light of the relevant material on record as well as the decision cited by the parties. After careful perusal of various authorities relied on either side would show that they are quite distinguishable because none of the case law deals with the training expenses. In these cases some principles have been laid down. We further find that the decision relied on by the learned counsel for the assessee in the case of Ishikawajma-Harima Heavy Industries Ltd. (supra) is not applicable because that decision has been rendered in respect of section 9(1)(vii)(c) which is applicable in the case of non-residents where as clause (b) deals with residents. However, at the same time, common sense would tell us that training expenses cannot be called as "fee for technical services". For example, a student passes his examination of LLB, it does not mean he becomes fully equipped to deal with the cases in various fields. He needs further training under a Senior Lawyer in the chosen field say for example - taxation, service matters, civil matters or criminal matters, etc. In the modern days even these categories can be further sub-divided, for example - in the case of taxation, it can be direct taxes and indirect taxes and with further specialization, for example - say International taxation etc. Similarly, civil matters can be divided into various fields say property matters, family matters etc. What we mean to say is that a person is highly qualified by his law degree but still requires training for rendering practical aspects. Similarly, in the case before us surveyors were highly technically qualified but such persons, may need to learn practical aspects of examining various electrical and other equipments. Such training in our view is a continuous process because technology is changing very fast and one needs to keep touch with such technology and therefore, expenses incurred towards training cannot be termed as "fee for technical services". In any case, the case before us major amount has been paid by way of reimbursement for boarding and lodging arrangements also for which no separate claims have been made. Therefore, according to us, the training fee cannot be termed as "fee for technical services".*

4.5. In view of the above order of the Tribunal, we are inclined to hold that the assessee is not liable to deduct TDS on the payment

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made to Home Plus Company Ltd. towards fee for training service charges. This ground of appeal of the assessee is allowed.

5. Ground No.10 is with regard to disallowance of professional consultancy charges paid to Tesco Stores Ltd.

5.1 Ld. A.R. submitted that during the year under consideration, the Appellant had paid Rs. 93,86,896/- to Tesco Stores Ltd. ("Tesco Stores"), in consideration for the said entity providing the following services: (i) international finance; (ii) international human resources; (iii) international treasury; and (iv) international corporate affairs and corporate secretariat. Since no income chargeable to tax in India accrued/arose to Tesco Stores in India, the Appellant did not deduct tax at source. The Assessing Officer made a disallowance under Section 40(a)(ia) of the Act by merely holding that the submissions made by the Appellant is not satisfactory. The DRP upheld the disallowance made.

5.2 In this regard, Ld. A.R. submitted that in terms of Article 13(4)(c) of the India-UK DTAA, in order for a payment to be in the nature of fees for technical services, the services **ought to 'make available'** technical knowledge, experience, skill, know-how or processes, or consists of the development and transfer of a technical plan or technical design. Technology will be considered 'make available' when the person acquiring the service is enabled to apply the technology without depending on the provider. Reliance in this regard is placed on the decision of the Hon'ble High Court of Karnataka in the case of *CIT v. De Beers India Minerals (P.) Ltd.* (reported in [2012] 21 taxmann.com 214 (Karnataka) In the present case, the mandatory precondition of 'make available' is not satisfied, and therefore the payments are not in the nature of fees for technical

service. Therefore, disallowance under Section 40(a)(i) of the Act is not warranted.

5.3. Ld. D.R. relied on the order of the lower authorities.

5.4. We have heard the rival submissions and perused the materials available on record. In our opinion, this issue squarely covered by the judgement of Hon'ble Karnataka High Court in the case of CIT Vs. De Beers India Minerals Pvt. Ltd. 21 Taxmann.com 214 (Karn) wherein held that:-

*“From the statutory provisions of section 9 and relevant clauses of article 12 in the DTAA it is clear that there is marked distinction between royalty and fees for technical services. Explanation (2) to clause (vi) of sub-section (1) of section 9 defines royalty for the purpose of the said clause. It amounts to consideration for transfer of or any rights or imparting of information concerning the working of, or the use of a patent, invention, model, design, secret formula or process or trade mark or similar property. It also includes imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill. Further, the use or right to use any industrial, commercial or scientific equipment and transfer of all or any other rights and the intellectual properties mentioned therein or rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv) (iv)(a) and (v). Therefore fees paid for transfer of rights and services rendered in that regard constitutes royalty. Explanation 2 to clause (vii) of sub-section (1) of section 9 defines the phrase fees for technical services for the purpose of clause (vii). It is the consideration for the rendering of any managerial, technical or consultancy services. Here there is no question of any right. It is purely for the services rendered. So under the Indian law whether the consideration paid is for the transfer of a right in any Intellectual Property or for rendering of any services which are managerial, technical or consultancy Services, the liability to tax is attracted. In the case on hand it is not in dispute that the nature of services rendered is technical in nature. Therefore, it is liable to tax. But this liability arises under the Double Taxation Avoidance Agreement. Section 90 which deals With the Double Taxation relief provides that the provisions of the DTAA override the provisions of the Income-tax Act in the matter of ascertainment of chargeability to Income-tax and ascertainment of total Income-tax. [Para 12]*

*Under the Act if the consideration paid for rendering technical services constitutes income by way of fees for technical services, it is taxable. However, article 12 of the India Netherlands Treaty defines fees for technical services. As per article 12 of DTAA also 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 knowlDge, 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 12 of DTAA it would not constitute fees for technical services. To that extent the definition of fee for technical services found in the agreement is inconsistent with the definition of fees for technical services provided in Explanation 2 to clause (vii) of sub-section (1) of section 9. In view of section 90 the definition of fees for technical services contained in the agreement overrides the statutory provisions contained in the Act. In fact, the latest agreement between India and Singapore further clarifies this position, where they have explained the meaning of the word & apos; make available & apos;. According to the aforesaid definition fees for technical service means payments of any kind to any person in consideration for services of technical nature if such services make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the service to apply technology contained therein. [Para 13]*

*Therefore the clause in Singapore agreement which explicitly makes clear the meaning of the word & apos; make available & apos;, the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered & apos; made available & apos; when the person who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know-how or processes. To attract the tax liability, that technical knowledge, experience, skill, know-how or process which is used by service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know-how or processes so as to render such technical services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When the technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilizes for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know-how or process to the recipient of the technical service, in view of the clauses in the DTAA, the liability to tax is not attracted. [Para 14]*

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*From the aforesaid discussion it is clear that test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available. [Para 18]*

*It is in this background one has to look at the facts of this case, in order to find out whether the service provider has made available the technical knowledge to the assessee so as to foist the liability of payment of tax. [Para 21]*

*What is the meaning of & apos; make available & apos;. The technical or consultancy service rendered should be of such a nature that it & apos; makes available & apos; to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology & apos; making available & apos;, the technical knowledge, skills, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered & apos; made available & apos; when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b ). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as & apos; fee for technical/included services & apos; only if the twin test of rendering services and making technical knowledge available at the same time is satisfied. [Para 22]*

*The agreement entered into between the assessee and the Fugro makes it clear that the objective of the survey will be to provide high quality, high resolution geophysical data suitable for selecting probable kimberlite targets. The assessee acknowledges the Fugro to be an expert in all aspects of the air borne survey and subsequent data processing. All operations, tests and calibrations have to be carefully undertaken to ensure the highest possible data quality and to meet or exceed the specifications described in the agreement. It is the responsibility of the Fugro to take the appropriate action to maintain the level of data quality. Survey areas are also mentioned in the agreement. The contract provides that all helicopter charges for the entire survey will be the responsibility and cost of the assessee. [Para 23]*

*The Fugro air borne services provide four varieties of applications of advanced geophysical mapping technologies. They are Electromagnetic, Aeromagnetic, Airborne Gamma-Ray Spectrometry, Airborne Gravity. In the instant case, Fugro air borne surveys helicopter borne time-domain EM system known as DIGHEM was adopted to carry out the survey. A copy of the survey report is also placed on record. The said report discloses that survey was conducted in 8 blocks. The particulars are clearly set out. It also sets out that the air borne data acquisition system utilized on the project consists of the sub-systems which are set out therein. A Bell 206L helicopter registration VT-DAK was used for the survey. The helicopter pilots and aircraft engineers were contracted from Deccan Aviation Pvt. Ltd., by the assesseees. The DIGHEM compact system specifications are also provided. They have also set out the particulars such as EM Receiver and Logging Computer, GPS Receiver, Navigation System, Magnetometer, Altimeter, Radar Altimeter and Barometric Altimeter. They also provided Ground Data Acquisition Equipment, GPS Base Station System, Magnetic Base Station System and Equipment Calibrations and Monitoring. Data from the air craft and base stations were transferred to the field processing computer by flash disk. Preliminary processing and quality was carried out on a daily basis. Data quality was verified by the assesseees representatives in the field on a daily basis. Photographs are taken. Tests and Calibrations report are also furnished. Text file indicating survey information co-ordinating system, processing techniques and equipment specifications are also provided. [Para 24]*

*From the aforesaid material it is clear that Fugro conducted air borne survey using its specialized equipments. Helicopter for the survey was hired by the assessee. All the logistics of the survey such as flight schedule, re-flights survey lines, controls lines, positioning, etc., were set up by Fugro. Fugro deputed technical personnel for conducting the survey and the data collected from the survey was provided to the assesseees in a particular format. The consideration paid under the agreement with Fugro was essentially for providing specific data for which Fugro was required to conduct the airborne survey. Fugro undertook all the operations, test and calibrations in order to provide the assesseees with the highest possible data quality. Fugro has performed the surveys using substantial technical skills, knowledge and expertise. [Para 25]*

*Thus, in terms of the contract entered into with Fugro, they have given the data, photographs and maps. But they have not made available technical expertise, skill or knowledge in respect of such collection or processing of data to the assesseees, which the assessee can apply independently and \_ without assistance and undertake such survey independently excluding Fugro in future. The Fugro has not made available the aforesaid technology with the aid of which they were able to collect the data, which was passed on to the assesseees as a technical service. In other words, Fugro has rendered technical service to the assesseees. They have not made available the technical knowledge with which they rendered technical service. There is no transmission of technical knowledge, expertise, skill, etc., from Fugro along with technical services rendered by them. The assesseees are*

*completely kept in dark about the process and the technologies which the Fugro adopted in arriving at the information/data which is passed on to the assessee as technical service. The assessee is unable to make use of the said technical knowledge by itself in its business or for its own benefit without recourse to Fugro. In fact, the question whether along with rendering technical services, whether the technical knowledge with which that services was rendered was also made available to the assessee/customers is purely a question of fact which is to be gathered from the terms of the contract, the nature of services undertaken and what is transmitted in the end after rendering technical services. If along with technical services rendered, if the service provider also makes available the technology which they used in rendering services, then it falls with the definition of fee for technical services as contained in DTAA. However, if the technology is not made available along with the technical services and what is rendered is only technical services and the technical knowledge is withheld, then, such a technical service would not fall within the definition of technical services in DTAA and not liable to tax. [Para 26]*

*In the background of the aforesaid principles and facts of this case, it is clear that assessee acknowledges the services of Fugro for conducting aerial survey, taking photographs and providing data information and maps. That is the technical services which the Fugro has rendered to the assessee. The technology adopted by Fugro in rendering that technical services is not made available to the assessee. The survey report is very clear. Unless that technology is also made available, the assessee is unable to undertake the very same survey independently excluding Fugro in future. Therefore, that technical services which is rendered by Fugro is not of enduring in nature. It is a case specific. That information pertains to 8 blocks. The assessee can make use of the data supplied by way of technical services and put its experience in identifying the locations where the diamonds are found and carrying on its business. But the technical services which is provided by Fugro will not enable the assessee to independently undertake any survey either in the very same area Fugro conducted the survey or in any other area. They did not get any enduring benefit from the aforesaid survey. In that view of the matter, though Fugro rendered technical services as defined under section 9(l)(vii ) Explanation 2, it does not satisfy the requirement of technical services as contained in DTAA and, therefore, the liability to tax is not attracted. [Para 27]*

*Fugro is engaged in providing services relating to collection and processing of the data. The contract is for providing of services and not for supply of technical design or plan. Fugro compiles the data and processes them for error correction and delivers it to the assessee in a computer readable media. Using this raw input data provided by Fugro, the assessee using further process in software technology, which are not owned or provided by Fugro, generates a report to determine probable targets. The reports and maps are only additional mode of representation of data and it is not a technical plan or design as understood in law. Para 1.15 of*

*the agreement entered into between the assessee and the Fugro, makes it clear that the information and data to any site on which any work services are performed under the agreement shall belong exclusively to the assessee and its assigns and the Fugro shall keep such information strictly confidential. Therefore, the technical plan or design always belong to the ownership of the assessee. It never vested with Fugro. Under the terms of the agreement, the data collected is kept confidential under the supervision of the Government of India. Under the terms of the agreement, the ownership of the data collected or other documents vest with the assessee only and not with Fugro. Therefore, the Fugro was never the owner of the said data and, hence, the question of transfer of such data does not arise. It is because the assessee was given the licence for prospecting under the provisions of Mines & Minerals (Development and Regulation) Act, 1957. By virtue of the aforesaid licence, the assessee was given the right to undertake reconnaissance, prospecting or mining operations in any area except under and in accordance with the terms and conditions of reconnaissance permit or of a prospecting licence as the case may be of a mining lease granted under the Act and the rules made thereunder. Reconnaissance permit means permit granted for the purpose of undertaking the reconnaissance operations. Reconnaissance operations means any operations undertaken for preliminary prospecting of a mineral through regional, aerial, geophysical or geochemical surveys and geological mapping on a grid specified from time to time by the Central Government or sub-surface excavation. Prospecting operations means any operations undertaken for the purpose of exploring, locating or proving mineral deposits. [Para 28]*

*Rule 16 of Mineral Concession Rules, 1960 provides that licensee shall submit to the State Government a six monthly report of the work done by him stating that number of persons engaged and disclosing in full the geological, geophysical or other valuable data collected by him during the period. Further sub-rule (3) makes it clearly obligatory that while submitting the report under sub-rule (1) or (2), the licensee may specify that the whole or any part of the report or data submitted by him shall be kept confidential and the State Government shall thereupon, keep the specified portions as confidential for a period of two years from the expiry of the licence or abandonment of operations or termination of the licensee, whichever is earlier. [Para 29]*

*It is because of the statutory obligation imposed on the licensee in the contract entered into between the assessee and Fugro, it is specifically provided in clause (15) that all information and data relating to any site on which any work or services are performed under the agreement shall belong exclusively to the assessee and its assigns and the contractor shall keep such information strictly confidential. All information recorded in digital and analog form and all products derived from information are the property of the assessee. The contractor agrees not to divulge any information to any person or organization without the written permission of the assessee and only to be divulged to the assessee personnel who are specified*

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*by the assessee as appropriate persons to whom the contractor may provide information. Further clause (16) provides that the contractor shall not grant entry to any data site or aircraft to any person other than those authorized by the assessee and the contractor shall exercise all due care to preserve the integrity of all information. [Para 30]*

*Therefore, the assessee not being possessed with the technical know how to conduct this prospecting operations and reconnaissance operations, engaged the services of Fugro which is expert in the field. By way of technical services Fugro delivered to the assessee the data and information after such operations. The said data is certainly made use of by the assessee. Not only the said data and information was furnished in the digital form, it is also provided to the assessee in the form of maps and photographs. These maps and photographs which were made available to the assessee cannot be construed as technology made available. Fugro has not devised any technical plan or technical design. Therefore, the question of Fugro transferring any technical plan or technical design did not arise in the facts of these cases. The maps which are delivered are not of kind of any developmental activity. As such, earlier the information which is furnished to the assessee by way of technical services in the digital form is also given in the form of maps. Therefore, the case on hand do not fall in the second part of the aforesaid clause dealing with development and transfer of plans and designs. [Para 31]*

*In that view of the matter, there is no merit in instant appeal and, accordingly, it is dismissed. [Para 32]*

5.5 In view of the above binding decision of the jurisdictional High Court, since the facts are same, we allow the ground or appeal taken by the assessee.

6. Next ground Nos.11.1 to 11.3 are with regard to disallowance of reimbursement of salary cost.

6.1 Ld. A.R. submitted that during the year under consideration, certain employees were seconded to the Appellant by Tesco Stores SR A.S, Tesco International Services Ltd, Tesco Kipa Kitle and Tesco Polska S P Z O O. The seconded employees were performing duties for the Appellant. The secondees were under direct supervision of the Appellant and reported to the management of the Appellant. The

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Appellant was ultimately responsible for remunerating and bearing costs of the personnel during the assignment. For convenience purposes, the aforesaid entities which seconded the employees to the Appellant made payment of the salary, which the Appellant reimbursed to them on a cost to cost basis, without any profit element being involved in the transaction. Pertinently, taxes were deducted under Section 192 of the Act. Since there was no income chargeable to tax arising in the hands of the aforesaid entities, the Appellant did not deduct tax at source.

6.2 Ld. A.R. further submitted that the Assessing Officer held that the payments made partake the character of fees for technical services in terms of explanation 2 to Section 9(1)(vii) of the Act, and therefore in the absence of tax deduction at source, a disallowance under Section 40(a)(ia) is warranted.

6.3 The DRP affirmed the disallowance (Please see pages 56-61 of the DRP's directions).

In this regard, it is submitted that:

- The seconded employees were rendering services on behalf of the Appellant and for the operations of the Appellant;
- The seconded employees were under the direct supervision of the Appellant and report to the management of the Appellant;
- The Appellant was ultimately responsible for remunerating and bearing costs of the personnel during the assignment; and
- The reimbursement made is merely cost to cost reimbursement, without any income element.

6.4 Ld. A.R. placed reliance in this regard on the following decisions:

- *DIT v. Abbey Business Services India (P.) Ltd.* (reported in [2020] 122 taxmann.com 174 (Karnataka))
- *Flipkart Internet Pvt. Ltd. v. DCIT and Ors.* (Order dated 24.01.2022 passed by the Hon'ble High Court of Karnataka in W.P. No. 3619/2021) paras 37 and 38;
- *Toyota Boshoku Automotive India Pvt. Ltd. v. DCIT* (Order dated 13.04.2022 passed by this Hon'ble Tribunal in IT(TP)A No. 1646/Bang/2017)
- *Goldman Sachs Services Pvt. Ltd. v. DCIT* (Order dated 29.04.2022 passed by this Hon'ble Tribunal in IT(IT)A No. 362/Bang/2020 and Ors.).

6.5 Ld. A.R. submitted that in any event, taxes under Section 192 of the Act were deducted and remitted (page 56 of the DRP's directions) and therefore Section 40(a)(i) of the Act at the threshold has no application. Reliance in this regard is placed on the decision of this Hon'ble Tribunal in *ACIT v. Aon Specialist Services (P.) Ltd.* (reported in [2020] 116 taxmann.com 368 (Bangalore-Trib.)).

6.6 The Ld. D.R. relied on the orders of the lower authorities.

6.7 We have heard the rival submissions and perused the material available on record. After hearing both the parties, we are of the opinion that similar issue came for consideration before this Tribunal in the case of *Abbey Bus Services Pvt. Ltd.* reported in 122 Taxmann.com 174 (Karn) wherein held as under:-

*“From perusal of the relevant clauses of the agreement as well as the nature of services provided by the assessee under the agreement, it is evident that the assessee had entered into a secondment agreement for securing services to assist it in its business. The expenses*

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*incurred by the seconded employees which were reimbursed by the assessee is not liable to deduction to tax at source and the aforesaid amount could not be considered as 'fees for technical services'. It is also pertinent to note that secondment agreement constitutes an independent contract of services in respect of employment with assessee. From the perusal of the key features of the agreement, it is evident that the seconded employees have to work at such place as the assessee may instruct and the employees have to function under the control, direction and supervision of the assessee and in accordance with the policies, rules and guidelines applicable to the employees of the assessee. The employees in their capacity as employees of the assessee had to control and supervise the activities of another company. Therefore, the assessee for all practical purposes has to be treated as employer of the seconded employees and expenses incurred by the seconded employees which were reimbursed by the assessee is not liable to deduction to tax at source. There is no obligation in law for deduction of tax at source on payments made for reimbursement of costs incurred by a non-resident enterprise and therefore, the amount paid by the assessee was not to suffer tax deduction at source under section 195. Thus, substantial question of law is answered against revenue. [para 11]"*

6.8 Following the above decision of the Tribunal, we allow the ground taken by the assessee.

7. Ground No.12 is with regard to the re-computation of deduction u/s 10AA of the Act. In this regard, Ld. A.R. submitted that the Assessing Officer, while computing the eligible deduction, reduced certain expenses only from export turnover, without making a corresponding reduction from the total turnover. The Ld. DRP directed the Assessing Officer to reduce the expenses both from the export turnover as well as the total turnover. While doing so, the Assessing Officer did not give effect to the directions.

7.1 Ld. A.R. submitted that in view of the decision of the Hon'ble Supreme Court in the case of **CIT v. HCL Technologies Ltd.** (reported in [2018] 93 taxmann.com 33 (SC)), the expenses ought to be reduced from both the export turnover as well as the total

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turnover. Further any enhancement to total income, in so far as it relates to the income of the eligible unit, should be eligible for deduction under Section 10AA of the Act as per decision of the Hon'ble High Court of Karnataka in **CIT and Anr. v. Mpact Technology Services Pvt. Ltd.** (Order dated 11.07.2018 passed in ITA No. 228.2013).

7.2 Ld. D.R. relied on the orders of the lower authorities.

7.3 We have heard the rival submissions and perused the materials available on record. After hearing both the parties, we are of the opinion that this is squarely covered by the judgement of Hon'ble Supreme Court in the case of CIT Vs. HCL Technologies Ltd. reported in 404 ITR 719 wherein held as follows:

*“Neither section 10A nor section 2 of the Income tax Act, 1961 defines the term “total turnover”. The term “total turnover” is defined in clause (ba) of the Explanation to section 80HHC of the Act. Explanation 2(iv) to section 10A of the Act defines “export turnover” to mean the consideration that has been received for export of articles, things or computer software. Normally the consideration would include the freight, telecommunication charges and insurance which had been incurred to deliver the articles, things or computer software outside India. However, Explanation 2(iv) specifically seeks to exclude these three categories of expenditure incurred for delivering the export of articles, things or computer software. It also seeks to exclude expenses for providing technical service, etc. outside India. where an Indian technician goes abroad and receives fees for services, the foreign client will normally be required to reimburse the expenses as well. Therefore, out of the consideration received, the portion representing reimbursement of expenditure has to be excluded.*

*“Total turnover” has been defined in sections 80HHC and 80HHE only to exclude additional items given under section. But for this additional exclusion, there was no need to define “total turnover”. Export turnover is a component of total turnover. If the entire turnover represents export proceeds, then the export turnover and the total turnover are identical. It is clear that any exclusion in the*

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*export turnover in the numerator will automatically imply exclusion in the denominator as well because export turnover is always a component of total turnover.”*

7.4 In view of the above decision of Hon'ble Supreme Court, we allow the ground taken by the assessee.

8. Ground No.13 is with regard to non-grant of set off of accumulated Minimum Accumulated Tax ('MAT') credit. In this regard, assessee wants the direction to AO to grant accumulated MAT credit claimed in the return of income. We accede to the request of the assessee's counsel. Ordered accordingly.

9. Ground No.14 is with regard to levy of interest u/s 234A of the Act. Ld. A.R. stated that levy of interest u/s 234A of the Act is bad in law as the assessee has filed return of income in time and if it is charged u/s 234A of the Act, it has to be charged on returned income not on the assessed income. Accordingly, we remit this issue to the filed of AO for reconsideration for the purpose of computation of interest u/s 234A, if it is chargeable.

10. In the result, assessee's appeal in ITA No.2898/Bang/2018 is partly allowed for statistical purposes.

**ITA 2387/Bang/2019:-**

11. Now we take up ITA No.2387/Bang/2019 for the AY 2015-16 Ground No.2 (a) to (d) in this appeal are reproduced as under:-

a) *The Ld. AO erred in concluding that the assets worth INR 1,64,92,752, received from Tesco Stores Limited on a Free of Cost basis is 'benefit arising from the business' of the Appellant and chargeable to tax under Section 28(iv) of the Income-tax Act, 1961 [the Act']*

b) *The Ld. AO erred in making allegations which are based on speculations, conjectures and surmises.*

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- c) *The Ld. AO erred in relying on the decisions of Priyanka Chopra (2018) 89 taxmann.com 287 (Mumbai Tribunal) and Serval' Engineering Works (2016) 75 taxmann.com 82 (Chennai Tribunal), which are completely distinguishable on facts.*
- d) *Without prejudice to above, in case the above is considered as income under section 28(iv) of the Act, the Appellant should be eligible to claim depreciation under section 32 of the Act*

11.1 Facts of the case are that during the year under consideration, the Appellant received certain capital goods such as computers, scanners, hard disks, etc. from its Associated Enterprise on free of cost basis. The assets were received for usage in rendering services to the AE. The Assessing Officer treated the value of the assets of Rs. 1,64,92,752/- as being benefit arising to the Appellant from its business activities and made an addition under Section 28(iv) of the Act. The DRP affirmed the addition.

11.2 In this regard, Ld. A.R. submitted that pursuant to passing of the final assessment order, the Appellant entered into an Advance Pricing Agreement, covering the subject assessment year. In terms of the agreement, for the purpose of computing the operating profit margin, the **operating expense** is to include all costs incurred by the Appellant in relation to the covered transaction, **including depreciation and amortization expense relating to the assets used by the Appellant.** Therefore, since the depreciation on the assets is considered as a part of the operating expense for computing the operating profit margin arising from the transaction, the income from which is offered to tax, no addition under Section 28(iv) of the Act is warranted. It is submitted that since the item has already suffered tax pursuant to the APA, a separate addition would result in double taxation, which is unsustainable. In view of the above, the other contentions are not argued at the present stage and the

Appellant reserves liberty to argue the same at a future stage, if required.

11.3. The Ld. D.R. relied on the order of lower authorities.

11.4 We have heard the rival submissions and perused the materials available on record. We find force in the arguments of the assessee's counsel. If the depreciation on assets is considered as part of operating profit margin arising from the transaction, and the income from which it is offered to tax, no addition u/s 28(iv) of the Act is warranted, which is already subject to tax pursuant to APA and no further addition is necessary, otherwise it amounts to double taxation. Accordingly, we allow this ground taken by the assessee.

12. Ground No.3 is with regard to disallowance of consulting charges paid to DTZ International Property Advisors Pvt. Ltd.

12.1 Ld. A.R. submitted that the Appellant made certain payments to the above entity towards professional and consultancy charges, for obtaining a feasibility report. The Assessing Officer disallowed the expenditure by treating it to be capital in nature

12.2 The DRP affirmed the disallowance In this regard, Ld. A.R. submitted that the payment made is towards obtaining a feasibility report, for the purpose of the business. The expenditure incurred does not give rise to any enduring benefit. Reliance in this regard is placed on the following decisions:

- ***Hindusthan Aluminium Corpn. Ltd. v. CIT*** (reported in [1986] 26 Taxman 475 (Calcutta))- and

- **DCIT v. Assam Asbestos Ltd.** (reported in [2003] 132 Taxman 808 (Gauhati))-.

12.3 Moreover, it is further submitted by the Ld. A.R. that the project was later shelved by the Appellant, and therefore no benefit can arise (refer **Indo Rama Synthetics (I) Ltd. v. CIT** ([2009] 185 Taxman 277 (Delhi)).

12.4 The Ld. D.R. relied on the order of the lower authorities.

12.5 We have heard the rival submissions and perused the materials available on record. There is no dispute that the project for which feasibility report obtained for establishment of setting up of new project, which said to be Abdon project. If the project was not taken up and it was incurred for the conducting feasibility of that project and that expenditure to be allowed as a revenue expenditure as the assessee has not derived any enduring benefit on incurring of this expenditure. Accordingly, this issue is remitted to the file of AO to verify whether a project has been taken up or not and if it is not taken up, this expenditure to be allowed as revenue expenditure. Ordered accordingly.

13. Ground No.4 is with regard to disallowance of sub-contract expenditure.

13.1 Ld. A.R. submitted that the Appellant had created a net provision towards sub-contracting expenses amounting to Rs. 2,52,23,115/- which it claimed as a deduction. In the subsequent year, the same was reversed and offered to tax. However, the Assessing Officer disallowed the same holding it to be a mere provision.

13.2 The DRP affirmed the disallowance made on the grounds that it is an unascertained liability and that the Appellant had not deducted taxes at source. In this regard, Ld. A.R. submitted that the expense claimed in this year is reversed in the subsequent year and offered to tax, and therefore no disallowance is warranted in the year under consideration.

13.3 Without prejudice, if a disallowance is to be made, the same ought to be restricted to 30%, wherever applicable. Without prejudice, should the amount be disallowed in the current year, the same should be excluded/ reduced from total income in the subsequent year when the provision is reversed. Further, any amount disallowed in previous year (i.e. year ended 31 March 2014) should be excluded/ reduced from total income of the current year (i.e. year ended 31<sup>st</sup> March 2015) when the provision is reversed.

13.4 The Ld. D.R. relied on the orders of the lower authorities.

13.5 We have heard the rival submissions and perused the materials available on record. As discussed in earlier year in ground No.8, if no deduction has been made on this payment, this expenditure cannot be allowed in this assessment year under consideration. However, we make it clear that if it is reversed in the next assessment year, it cannot be treated as income on reversal. Ordered accordingly.

14. Ground No.5 is with regard to disallowance of professional consultancy charges paid to Home Plus Company Limited.

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14.1 Facts of the case are that during the year under consideration, the Appellant had paid Rs. 1,80,90,727/- to Homeplus Co. Ltd. ("Homeplus"), in consideration for the said entity providing training for the Appellant's incumbent directors and candidates. Since no income chargeable to tax in India accrued/arose to Homeplus in India, the Appellant did not deduct tax at source. The Assessing Officer made a disallowance under Section 40(a)(ia) of the Act. The DRP upheld the disallowance made.

14.2 Ld. A.R. submitted that in order for the payments to be in the nature of fees for technical services, in terms of Article 12(3)(b) of the India-Korea DTAA, the payments ought to be in consideration for technical, managerial or consultancy services (please see page 13 of the caselaw compilation). In this regard, it is submitted that undisputedly, **the payments made are towards training services**. The training services are not technical, managerial or consultancy in nature, and therefore, the payments made are not taxable under the DTAA or the Act. Reliance in this regard is placed on the following decisions:

**Lloyds Register Industrial Services (India) (P.) Ltd. v. ACIT** (reported in [2010] 36 SOT 293 (Mum.)- para 14; and  
**Sandvik AB v. DCIT** (Order dated 06.01.2021 passed by the Pune Bench of the Hon'ble Tribunal in ITA No. 2524/Pun/2017)- paras 12-16.

14.3 Ld. D.R. relied on the order of the lower authorities.

14.4 We have heard the rival submissions and perused the materials available on record. As discussed in in ground No.10, in earlier assessment year for AY 2014-15 in ITA No.2898/Bang/2018

this ground is decided accordingly and allow this ground of appeal of the assessee.

15. Ground Nos.6 & 7 are with regard to professional consultation charges paid to Tesco Stores Ltd. and disallowance of reimbursement of salary cost.

15.1 Ld. A.R. submitted that submitted that the same issues were subject matter of an order passed under Section 201 of the Act. It is submitted that the dispute arising in the order under Section 201 of the Act was settled by the Appellant under the Direct Tax Vivad Se Vishwas Act, 2020. Consequently, the Appellant is eligible for consequential relief in the present dispute under Section 40(a)(i) of the Act,

15.2 The Ld. D.R. relied on the order of the lower authorities.

15.2 We have heard the rival submissions and perused the materials available on record. After hearing both the parties, same issue came for consideration in this case in earlier AY 2014-15 as discussed in para 5.4 & 5.5 of this order, this issue is decided in favour of the assessee.

16. Ground No.8 is with regard to grant of foreign tax credit.

16.1 Ld. A.R. submitted that the Assessing Officer denied foreign tax credit claimed by the Appellant in respect of its units eligible for deduction under Section 10AA of the Act, on the ground that the effective tax payable in respect of the said unit being 'Nil', credit of foreign taxes cannot be claimed. Ld. A.R. submitted that in view of the decision of the Hon'ble High Court of Karnataka in the

case of **Wipro Ltd. v. DCIT** ([2015] 62 taxmann.com 26 (Karnataka) – (para 52), the foreign tax credit claimed ought to be allowed.

16.2 Further any enhancement to total income, in so far as it relates to the income of the eligible unit, should be eligible for deduction under Section 10AA of the Act (refer decision of the Hon'ble High Court of Karnataka in **CIT and Anr. v. Mpack Technology Services Pvt. Ltd.** (Order dated 11.07.2018 passed in ITA No. 228.2013).

16.3 The Ld. D.R. relied on the order of the lower authorities.

16.4 We have heard the rival submissions and perused the materials available on record. After hearing both the parties, we remit this issue to the file of AO to grant foreign tax credit in accordance with law.

17. In the result, both the appeals of assessee in ITA Nos.2898/Bang/2018 & 2387/Bang/2019 are allowed for statistical purposes.

Order pronounced in the open court on 4<sup>th</sup> Aug, 2022

**Sd/-**  
**(Beena Pillai)**  
**Judicial Member**

**Sd/-**  
**(Chandra Poojari)**  
**Accountant Member**

Bangalore,  
Dated 4<sup>th</sup> Aug, 2022.  
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.**