INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar, Vice President
and, Sandeep S Karhail, Judicial Member]

ITA Nos.: 2049/Mum/2016, 5731/Mum/2019, and 742/Mum/2021
Assessment years: 2012-13, 2016-17 and 2017-18

Owens Corning (Singapore) Pte Ltd ……………………. **Appellant**
C/o Owen Corning (India) Pvt Ltd
Alpha Building, 7th floor, Hiranandani Gardens, Powai,
Mumbai 400 076 [PAN: AABCO5666L]

Vs.

Deputy Commissioner of Income Tax
International Taxation 3(2)(2), Mumbai ……………..…….**Respondent**

Appearances:
Jehangir Mistry, *along- with* **Megha Shah** *for the appellant*
Milind Chavan, *for the respondent*

Date of concluding the hearing : 07/04/22
Date of pronouncing the order : 06/07/22

O R D E R

Per Pramod Kumar, VP:

1. These three appeals pertain to the same assessee, involve some common issues and were heard together. As a matter of convenience, therefore, all the three appeals are being disposed of by way of this consolidated order.

2. We will first take up ITA No. 2049/Mum/2016.

3. This appeal is directed against the assessment order passed by the Assessing Officer under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2011-12, served on the assessee on 1st February 2016.

4. In the first ground of appeal, the assessee is aggrieved that **"the Assessing Officer/ the Dispute Resolution Panel has erred in taxing the amount of Rs 4,84,44,048 received by the appellant during the year under consideration as fabrication charges as 'fees for technical services' ".**

5. Briefly stated, the relevant material facts are like this. The assessee before us is a company incorporated in, and fiscally domiciled in, the Republic of Singapore. During the relevant previous year, the assessee company provided bushing and fabrication services to its

Indian affiliate by the name of Own Corning (India) Pvt Ltd (OCIPL, in short) and received fabrication charges aggregating to Rs 4,84,44,048. OCIPL is engaged in the business of manufacturing and sale of glass fibres, and it uses bushings, which are made of precious metals, i.e. platinum and rhodium, in the process of manufacturing glass fibres. These bushings are electrically heated crucibles containing numerous tiny holes through which glass, liquified by heat, is drawn at a very high speed into extremely fine glass filaments, which are simultaneously cooled. While this process does manufacture the required glass fibre, the tiny holes in the bushings, through which liquified glass passes, get enlarged and damaged. As a result, these bushings are required to be refurbished and refabricated. While the normal life of bushing is stated to be around 250 days, it is not uncommon that premature failures and damages also take place. When such refabrication is due, the bushings are sent by OCIPL to the assessee. The assessee melts the damaged bushings, adds additional alloy, to the extent required, and forms new bushing of the desired specifications. These additional alloys are supplied by Owens Corning Inc, USA (OC-US, in short), as and when, and to the extent, required. Upto July 2010, OCIPL used to send the bushings to OC-US for providing the metal and the refabrication, and duly paid for the alloys and the fabrication, but once the assessee started its operations in Singapore in July 2010, the bushings were sent to the assessee, and the assessee paid OC-US only for the alloys; the payment for fabrication charges were made to the assessee. While, in the first year, i.e. the financial year 2010-11 (assessment year 2011-12), the assessee offered income from such fabrication charges to tax in India, this year the claim of the assessee was that the fabrication charges received by the assessee from its Indian affiliate, i.e. OCIPL, were not taxable in India, as neither the assessee had a permanent establishment in India, nor such charges could be taxed as fees for technical services or royalties as the requirements of the related treaty provisions were not satisfied. The Assessing Officer, however, was not satisfied with the submissions of the assessee. He rejected the submissions of the assessee, and, while doing so, he observed as follows:

> *11. The assessee's explanation is considered but not acceptable for the following reasons.*
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> *11.1 The assessee's receipts are in the nature of FTS as per article 12(4)(a) of DTAA between India and Singapore. The Article 12(4)(a) is reproduced as follows:*
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> > *"Paragraph 1(a) of Article 12 refers to technical or consultancy services that are ancillary and subsidiary to the application or enjoyment of any right, property, or information for which a payment described in paragraph 3(a) or (b) is received. Thus para 4(a) includes technical and consultancy services that are ancillary and subsidiary to the application or enjoyment of an intangible for which a royalty is received under a licences or sale as described in para 3(a).*
>
> *11.2 The Article 12 on DTAA is understood as under:*
>
> *It is understood that in order for a service fee to be considered 'ancillary and subsidiary' to the application or enjoyment of some right, property, or information for which a payment described in Para 3(a) or (b) is received, the service must be related to the application or enjoyment of the right or property or information. In addition the clearly predominant purpose of the arrangement under which the payment of the service fee and such other payment are made must be in alignment to the right property, services rendered or information described in Para 3 stated herein above. The question of whether the service is related to the application or enjoyment of the right property or information or services*

rendered described in para 3 and whether the clearly predominant purpose of the arrangement is such application or enjoyment must be determined by reference to the facts and circumstances of each case. Factors that may be relevant to such determination include:

a) The extent to which the services in question facilitate the effective application or enjoyment of the right property or information described in Para 3

b) The extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties as described in Para 3.

C) Whether the person performing the services is the same person, as or a related person, to the person receiving the royalties described in Para 3 for this purpose persons are considered related if their relationship is described in Article (Associated Enterprises) or if the person providing the service is doing so in connection with an overall arrangement which includes the payer and recipient of the royalties.

12. On the basis of the above criteria, an analysis of the services of the assessee namely "Re-fabrication" is done one by one.

12.1 The extent to which the services in question facilitate the effective application or enjoyment of the right property or information described in Para 3

12.1.1 In the absence of the services rendered by the assessee company that is 're-fabrication of the bushings', there will be no effective application or enjoyment of the right property. The bushings cannot be used in an interval of every 250 days for effective application. Thus the Licence or Right to use of Bushings can be enjoyed by the recipient of the right only if the corresponding services are rendered.

12.2 The extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties as described in Para 3.

12.2.1 These services rendered are a continuous process and the assessee company continually receives bushings and alloys every 250 days for re-fabrication of the BUSHINGS provided in the ordinary course of business arrangements involving royalty.

12.3 Whether the party providing the services is the same one, as or as a related person, to the party receiving the royalties described in Para 3, these parties are considered related if their relationship is described in Article (Associated Enterprises) or if the party providing the service is doing so in connection with an overall arrangement which includes the payer and recipient of the royalties.

12.3.1 The service-providing party, in this case the 'assessee company' is the related person as per Article (Associated enterprise). In short, the assessee M/s Owens Corning Singapore is a related party or the Associated Enterprise of Owens Corning India Pvt Ltd and Owens Corning Industries India Pvt Ltd. Without prejudice to the above, the service provider viz the assessee company is providing service with an overall arrangement which includes the receiver of the FTS Owens Corning Pte Singapore, and Owens Corning USA-the supplier of the main ingredient 'ALLOY' in the re-fabrication of the hushing and the payers of the FTS viz Indian subsidiaries, Owens Corning India Pt Ltd and Owens Corning Industries India Pvt Ltd who send the Bushings for re-fabrication to the assessee and to whom Owens Corning Inc has leased out the asset. As discussed, this arrangement between Owens Corning Singapore,

Owens Corning Inc and Indian entities is a colorable device for tax planning and the corporate veil has to be lifted.

13. In the light of the above observations, the fees for technical services construes to be an income of the nonresident entity and is therefore deemed to or arise in India under Section 9(1) (vi) r.w.s. Explanation 2 of the Income Tax Act 1961. The assessee company is provided with the damaged busing and the alloy necessary to re-furnish it and the services rendered by the assesse company is only to re-fabricate the same which is clearly in the form of FEES FOR TECHNICAL SERVICES. Those re- fabrication services make the bushings ready to be used by the Indian subsidiaries.

14. In view of the above discussion, the receipts of the assessee are by way of technical services that are ancillary and subsidiary to the application or enjoyment of any right, being intangible for which a royalty is received under a license for which a payment described Para 3(a) or (b) is received.

15. In view of the above discussion, the receipts of the assessee by way of Fabrication charges/Fees of Rs.4,84,44,048/- are in effect 'FEES FOR TECHNICAL SERVICES' and Taxable u/s 9(1) (vii) of the I.T.Act r.w.s. Article 12(4) (a) of the DTAA between India and Singapore. Penalty proceedings u/s 271(1)(c) of the I.T.Act are initiated for furnishing inaccurate particulars of income. Accordingly the Income of the assessee is worked out as under:

FEES FOR TECHNICAL SERVICES Rs. 4,84,44,048/-
(Fabrication Charges as per computation attached with ROI)

6. When the stand so taken by the Assessing Officer was put to the assessee, the assessee raised grievances before the Dispute Resolution Panel, but without any success. Learned DRP confirmed the action of the Assessing Officer, on the basis of the following reasoning:

We have gone through the Draft order and the contentions of the assessee. According to Owens Corning Singapore, the fabrication charges were offered as FTS by them upto A. Y 2011-12 (F. Y.2010-11). However, in A.Y.2012-13 they have not offered the same for taxation stating that these fabrication charges received are not taxable in India, since, the company does not have any Permanent Establishment or business connection in India. Also these charges are not for any equipment and hence cannot be said to be Royalty in terms of Article 12(3) of the DTAA between India and Singapore. The assessee further states that the same cannot be classified as 'Fees for technical services for the following reasons:

"(a) The assessee has not granted any right, property or information to any Indian company in terms of Para 3 or Article - 12 and hence the fees received do not fall within the definition of 'fees included services' as per Article - 12(4) (a) of the DTAA. Since as per Article 12(4) (a) of the DTAA 'Fees for Included Services' should be ancillary or subsidiary to the application or enjoyment of the right or property or information for which a payment described in Para - 3.

(b) Also the services rendered by the company do not make available any technical knowledge, skills, experience etc. either to OCIPL or to Owens Corning Industries India Pvt. Ltd. and hence does not fall within the definition of 'fees for included services' as per Article - 12(4) (b) of the DTAA"

The assessee's explanation was considered by the A.O. and stated that it was not acceptable for the following reasons.

The assessee's receipts are in the nature of FTS as per Article 12(4) (a) of DTAA between India and Singapore. The Article - 12(4)(a) is reproduced as follows:

"Paragraph 4(a) of Article - 12 refers to technical or consultancy services that are ancillary and subsidiary to the application or enjoyment of any right, property, or information for which a payment described in paragraphs 3(a) or (b) is received. Thus para - 4(a) includes technical and consultancy services that are ancillary and subsidiary to the application or enjoyment of an intangible for which a royalty is received under a licenses or sole as described in para-3(a)".

The Article -12 on DTAA is understood as under:

It is understood that in order for a service fee to be considered 'ancillary and subsidiary' to the application or enjoyment of some right, property, or information for which a payment described in paras 3(a) or (b) is received, the services must be related to the application or enjoyment of the right or property or information. In addition the clearly predominant purpose of the arrangement under which the payment of the service fee and such other payment are made must be in alignment to the right property, services rendered or information described in Para - 3 stated herein above. The question of whether the service is related to the application or enjoyment of the right property or information of services rendered described in para-3 and whether the clearly predominant purpose of the arrangement is such application or enjoyment must be determined by reference to the facts and circumstances of each case.

Factors that may be relevant to such determination include:

(a) The extent to which the services in question facilitate the effective application or enjoyment of the right property or information described in para - 3.

(b) The extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties as described in para - 3.

(c) Whether the person performing the services is the same person, as or a related person, to the person receiving the royalties as described in para - 3 for this purpose persons are considered related if their relationship is described in Article-9 (Associated Enterprises) or if the person providing the service is doing so in connection with an overall arrangement which includes the payer and recipient of the royalties.

The extent to which the services in question facilitate the effective application or enjoyment of the right property or information described in para – 3.

In the absence of the services rendered by the assessee company that is 're-fabrication of the bushings', there will no effective application or enjoyment of the right property. The bushings cannot be used in an interval of every 250 days for effective application. Thus, the License or Right to use of Bushings can be enjoyed by the recipient of the right only if the corresponding services are rendered.

The extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties as described in para - 3.

These services rendered are a continuous process and the assessee company continually receives bushings and alloys every 250 days for re-fabrication of the BUSHINGS provided in the ordinary course of business arrangements involving royalty.

Whether the party providing the services is the same one, as or as a related person, to the party receiving the royalties described in para - 3, these parties are considered related if their relationship is described in Article - 9 (Associated Enterprises) or if the party providing the service is doing so in connection with an overall arrangement which includes the payer and recipient of the royalties.

The service providing party, in this case the 'assessee company' is the related person as per Article - 9 (Associated enterprise). In short the assessee M/s. Owens Corning Singapore is a related party or the Associated Enterprise of Owens Corning India Pvt. Ltd. and Owens Corning Industries India Pvt. Ltd. Without prejudice to the above, the service provider viz. the assessee company is providing services with an overall arrangement which includes the receiver of the FTS Owens Corning Pte Singapore, and Owes Corning USA-the supplier of the main ingredient 'ALLOY' in re-fabrication of the bushing and the payers of the FTS viz. Indian subsidiaries, Owens Corning India Pvt. Ltd. and Owens Corning Industries India Pvt. Ltd. who send the Bushings for re-fabrication to the assessee and to whom Owens Corning Inc. has leased out the asset As discussed, this arrangement between Owens Corning Singapore, Owens Corning Inc and India entities is a coloarable device for tax planning and the corporate veil has to be lifted.

In the light of the above observations, the fees for technical services construes to be 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 assessee company is provided with the damaged bushing and the alloy necessary to re-furbish it and the services rendered by the assessee company is only to re-fabricate the same which is clearly in the form of FEES FOR TECHNICAL SERVICES. These re-fabrication services make the bushings ready to be used by the Indian subsidiaries.

In view of the above discussion, the receipts of the assessee are by way of technical services that are ancillary and subsidiary to the application or enjoyment of any right, being intangible for which a royalty is received under a license for which a payment described para 3(a) or (b) is received.

In view of the above discussion, the A.O. treated the receipts of the assessee by way of Fabrication charges / Fees of Rs.4,84,44,048/- are in effect FEES FOR TECHNICAL SERVICES' and Taxable u/s 9(1) (vil) of the I.T. Act, r.w.s. Article 12(4) (a) of the DTAA between India and Singapore.

The A.O. has considered all the submissions of the assessee and has passed the reasoned draft order treating it as FTS. In fact, the assessee himself has offered it as FTS till A. Y.2011-12. Accordingly, the contention of the A.O. is upheld.

7. The Assessing Office thus proceeded with bringing to tax the said amount of Rs 4,84,44,048 to tax in the hands of the assessee, as fees for technical services under article 12(4)(a) of the India Singapore Double Taxation Avoidance Agreement. The assessee is aggrieved, and is in appeal before us.

8. We have heard the rival contentions, perused the material on record, and duly considered the facts of the case in light of the applicable legal position.

9. Let us first take note of the related provisions of the India Singapore Double Taxation Avoidance Agreement [(1994) 209 ITR (Stat) 1; **Indo Singapore tax treaty**, in short], which were, at the relevant point of time, as follows:

Article 9- ASSOCIATED ENTERPRISE

Where—

(a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and, in either case, conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly

ARTICLE 12- ROYALTIES AND FEES FOR TECHNICAL SERVICES

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

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use :

(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for 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, including gains derived from the alienation of any such right, property or information ;

(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8.

4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or

(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.

5. Notwithstanding paragraph 4, "fees for technical services" does not include payments :

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a) ;

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

(c) for teaching in or by educational institutions ;

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

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14 ;

(f) for services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred to in paragraph 2(j) of Article 5 ;

(g) for services referred to in paragraphs 4 and 5 of Article 5.

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

7. Royalties and fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, a statutory body or a resident of that State. Where, however, the person paying the

royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

8. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of royalties or fees for technical services paid exceeds the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

10. There is no dispute that the assessee is entitled to the benefits of the Indo-Singapore tax treaty, that the assessee does not have any permanent establishment in India, and that, accordingly, income earned by the assessee cannot be taxed as business profits under article 7 of the Indo Singapore tax treaty/ There is also no, and cannot be any, dispute that once the provisions of the applicable tax treaty are more beneficial to the assessee, the provisions of the Indian Income Tax Act, 1961 cannot be pressed into service. Therefore, as things stand now, everything hinges on the application of the provisions of article 12, dealing with fees for technical services, coming into play. There is also no dispute that refurbishing of bushes does not amount to "making available any technical knowledge, experience, skill, know-how or process" as there is no transfer of technology inherent in the process of rendition of these services, and, it is not even, therefore, the case of the authorities below that the fees received by the assessee can be taxed under article 12(3)(b) of the Indo Singapore tax treaty; their case is confined to the application of Article 12(4)(a) of the Indo Singapore tax treaty which provides that "*(t)***he term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services……are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received**". On the facts of this case, it is also not in dispute that no such payments, were made to the assessee by its Indian affiliate, which will be covered by Article 12(3) of the Indo-Singapore tax treaty. Yet, taxability under Article 12(4)(a) is invoked, on the ground that one of the group companies, i.e. OC-US, has received such payments from the Indian affiliate. OCIPL, which are covered by Article 12(3) of Indo-Singapore tax treaty, and by invoking Article 9. The stand of the Assessing Officer and the DRP is that since the alloys are provided by the OC-US, which is an associated enterprise under article 9, one has to proceed on the basis that the alloys are provided by the assessee, and as the services are "ancillary and subsidiary to the application or enjoyment of the right, property or information" for which payment is made to OC-US, these services are taxable as fees for technical services.

11. As far as the role of Article 9 is concerned, it comes into play when "**conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises"** and remains confined to bringing those profit for taxes which, but for such arrangements, an enterprise in the respective tax jurisprudence would have made. The scope of Article 9 thus is to neutralize the impact of intra- AE relationship vis-à-vis the profits made in dealings with such an AE. Beyond this limited scope, the application of Article 9 cannot restructure the transaction itself. That is, however, precisely what the revenue authorities seek to accomplish by invoking Article 9 in the present case. The alloy lease transaction that the Indian affiliate had with the OC-US, by invoking Article 9, is sought to be treated as a transaction with the assessee, but then, given the limited scope and role of Article 9, such an exercise is simply impermissible. It would amount to practically rewriting article 12(4) by supplementing the expression "**for which a payment described in paragraph 3 is received**" with the words by "**the enterprise or by any of its associated enterprises anywhere in the world**". Neither can we read into the treaty what is not written there, nor would it make any sense anyway. Such an approach is too far-fetched and is neither supported by a plain reading of the treaty provision or by any logical rationale, nor by any commentary or even academic literature. The OC US and the assessee, a Singapore-based entity, are distinct entities and, they have distinct legal existences. The mere fact that these entities are part of the same multinational group does not require, or justify, ignoring the distinct identities of these entities, or the fact that the operations of these entities are in different jurisdictions. It is also not even the case of the revenue authorities that the refurbishing work is not carried out in Singapore. While a lot of emphases is paid by the revenue authorities on the fact that on the same transaction the assessee had paid taxes in India in the immediately preceding year, and the fact that it is part of overall common arrangements that the leasing is done from one jurisdiction and the refurbishing or bushing is done is another jurisdiction. Nothing, however, turns on these arguments also. The acceptance of tax liability in one year does not constitute estoppel against the assessee for the other years, and it is for the group to organize a multinational group to organize its activity, as long as it is a bonafide arrangement, in a manner as deemed commercially expedient. The question that we have to really consider is whether or not the activity leading to income was actually carried out in that jurisdiction, and there is no dispute on that aspect at all. The fact that an arrangement regarding *situs* of entities providing different facilities, in connection with a transaction of the multinational group, is done in a tax-efficient manner, cannot be reason enough to disregard the arrangement. We are satisfied that so far as the income of the assessee from the refurbishing of the bushes is concerned, it is not taxable in India as the provisions of Article 12(3) cannot be invoked in this case, and that, so far as the provisions of Article 12(4)(a) are concerned, these provisions cannot be invoked as the assessee has not rendered these services in connection with the services "**for which a payment described in paragraph 3 is received**" by the assessee. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee, and delete the impugned addition of Rs 4,84,44,048. The assessee gets the relief accordingly.

12. Ground no. 1 is thus allowed.

13. Learned representatives fairly agree that in the event of the first ground of appeal being allowed, ground nos 2 and 3 will have to be dismissed as infructuous. As the first

ground of appeal, which is the core issue in this appeal, is allowed, these grounds of appeal are wholly academic and infructuous.

14. Ground no. 2 and 3 are thus dismissed as infructuous.

15. In the result, the ITA No. 2049/Mum/ 2016 is allowed in the terms indicated above.

16. As regards the remaining two appeals, i.e. ITA Nos. 5731/Mum/2019 and 742/Mum/2021, for the assessment years 2016-17 and 2017-18, learned representatives fairly agree that whatever we decide in ITA No 2049/Mum/2016, will apply mutatis mutandis in these two appeals as well, as the issue in these two appeals is exactly the same. For the detailed reasons set out above, we have upheld the plea of the assessee in the ITA No 2049/Mum/2016, and held that the refurbishing charges received by the assessee will not be taxable in India.

17. Respectfully following the view so taken, we approve the plea of the assessee for these two years as well, and hold that the refurbishing charges received from its Indian affiliate will not be taxable in India under article 12(4)(a). The impugned additions thus stand deleted, and the assessee gets the relief accordingly.

18. In the result, the ITA Nos 5731/Mum/2019 and 742/Mum/2021 are also allowed in the same terms as indicated above.

19. To sum up, all the three appeals are allowed in the terms indicated above. Pronounced in the open court today on the 06th day of July 2022.

Sd/-
Sandeep S Karhail
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 06th day of July, 2021

Copies to: (1) The appellant (2) The respondent
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai