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

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER) AND MS KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 1283/MUM/2022
Assessment Year: 2011-12

Deputy Commissioner of Income Tax, Office of the Asstt. Commissioner of Income Tax 6(1)(1), Room No. 504, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai-400020.	**Vs.**	M/s Exxon Mobile Company Pvt. Ltd., Kalpataru Point, Plot No. 107, Road No. 8, Sion (East), Mumbai-400020.
Appellant		**PAN No. AAACE 3157 H** **Respondent**

C.O. No. 113/MUM/2022
(ITA No. 1283/MUM/2022)
Assessment Year: 2011-12

M/s Exxon Mobile Company Pvt. Ltd., Kalpataru Point, Plot No. 107, Road No. 8, Sion (East), Mumbai-400020.	**Vs.**	Deputy Commissioner of Income Tax, Office of the Asstt. Commissioner of Income Tax 6(1)(1), Room No. 504, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai-400020.
PAN No. AAACE 3157 H **Appellant**		**Respondent**

Revenue by	:	Ms. Samruddhi Hande, DR
Assessee by	:	Mr. Paras Savla, Adv. a/w Mr. Dhiraj Jain
Date of Hearing	:	22/09/2022
Date of pronouncement	:	28/09/2022

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue and cross-objection by the assessee are directed against the order dated 24.03.2022 passed by the Ld. Commissioner of Income-tax (Appeals)-56, Mumbai [in short 'the Ld. CIT(A)'], for assessment year 2011-12.

2. The grounds raised by the Revenue are reproduced as under:

i. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is justified in deleting the disallowance of Rs.3,72,63,413/- u/s. 40(a)(ia) of the IT Act 1961 without appreciating that the services rendered by EMCAP were crucial in carrying out the business activity of the assessee and while rendering such services EMCAP had made available the technical skill and expertise to the assessee.*

ii. *"Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is justified in deleting the disallowance of Rs. 3,72,63,413/ -u/S. 40(a)(ia) of the iT Act 1961 without appreciating that the payment made by the assessee is in the nature of fees for technical services as defined in Explanation 2 to sec 9(1)(vii) of the Act.'*

iii. *Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is justified in not appreciating that assessee was duty bound to deduct tax at source while making payment u/s. 195 of the IT Act 1961 to EMCAP as EMCAP earned fees by virtue of its business connection in India and is liable to be taxed in India"*

iv. *"Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is justified in not appreciating that the interest u/s 234B is calculated on the basis of assessed total income*

v. *The Appellant prays that the order of the CIT (Appeals) on the above grounds be set aside and that of the AO be restored.*

2.1 The cross-objections raised by the assessee are reproduced as under:

1. *The learned Commissioner of Income tax (Appeals) ought to have appreciated and held that payment of global support services charges to EMCAP was towards reimbursement of expenses incurred and it does not have any profit element or mark up and therefore the same was not liable to tax.*
2. *The learned Commissioner of Income tax (Appeals) ought to have appreciated and held that global support service charges are not in the nature of 'fees for technical services' as defined in Explanation 2 to section 9(1)(vii) of the Income Tax Act, 1961 (the Act).*

3. *The learned Commissioner of Income tax (Appeals) ought to have appreciated and held that global support service charges are paid for earning income from source outside India and therefore covered by the exception to section 9(1)(vii)(b) of the Act and therefore not chargeable to tax.*
4. *Each one of the above grounds of appeal is without prejudice to the other.*

3. Briefly stated, facts of the case are that the assessee is engaged in the business of market development, dissemination of product information of specialty chemicals and polymers research and development activities. The assessee filed original return of income on 28.11.2011 declaring total income of ₹48,21,69,765/- which was further revised on 11.12.2012 declaring total income of ₹60,68,47,823/-. The assessment was completed by the Assessing Officer on 25.05.2015 after taking into consideration report of Transfer Pricing Officer for determination of arm's length price of international transaction carried out by the assessee. One of the addition made by the Assessing Officer include disallowance of ₹3,72,63,413/- u/s 40(a)(ia) of the Income-tax Act, 1961 (in short

'the Act') for non-deduction tax at source on global support service fee paid.

4. Before us, the Ld. Departmental Representative (DR) fairly accepted thus issue-in-dispute is covered against the Revenue by the order of the Tribunal for assessment year 2007-08 to assessment year 2010-11.

5. We have heard rival submissions of the parties on the issue-in-dispute and perused the relevant material on record. The Revenue in its ground is agitated by way of action of the Ld. CIT(A) for allowing the payment in dispute even without deduction of tax at source by the assessee and not holding the same as fee for technical services. We find that the Ld. CIT(A) in para 7.3 of the impugned order has followed the decision of the Tribunal in the case of the assessee for assessment year 2007-08 (ITA No. 6708/M/2011). The said decision of Tribunal has been followed in subsequent assessment years 2008-09 to 2010-11. The Tribunal in AY 2010-11

has also followed its finding in AY 2008-09. The relevant para of the ITAT in ITA No. 4520/Mum/2017 for AY 2010-11 is reproduced as under:

> *"19. Considered the rival submission and material placed on record. We notice from the records that the identical grounds raised in the present appeal in respect of disallowance made u/s 40(a)(ia) of the Act, have already been decided by the Coordinate Bench of ITAT in ITA No. 4521/Mum/2017 for AY 2008-09 in assessee's own case on merits. For the sake of clarity, which is reproduced below:-*
>
> *We have heard the rival submissions and perused the relevant materials on record. We find that similar disallowance made by the AO, then confirmed by the Ld. CIT(A) has been deleted by the Tribunal vide order dated 21.02.2018 for Ay 2007-08, by observing that :*
>
> *"48. We have heard rival contentions and perused material on record. We have also applied our mind to the decisions relied upon. It is evident, while disallowing the amount in dispute under section 40(a)(i) of the Act, the Assessing Officer has held that the payment made by the assessee to EMCAP towards Global support services is in the nature of fees for technical service as defined under Explanation-2 to section 9(1)(vii) of the Act. It is also relevant to note, under Article-12 of India Singapore tax treaty, fees for technical services, though, is taxable in the hands of the recipient in Singapore, however, it can also be taxed in India under certain circumstances. Applying the said provision, it is necessary to*

determine whether the payment made can at all be termed as fee for technical services as defined under Artic1e—12 of India Singapore Tax Treaty. In our considered opinion, we have to address this issue at the very outset. Article—12(4) of India Singapore tax treaty defines fee for technical services as under:—

"12.4 the term "fees for technical "services" as used in this Article means payments of any kind to any person in consideration of 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."

49. The Assessing Officer has treated the payment made as fees for technical services on the reasoning that under the agreement EMCAP has made available managerial and technical services to the assessee. The expression "make available" which also appears in Article 12(4)(b) of the India-US tax treaty would mean the recipient of such service is able to apply or make use of the technical knowledge, knowhow, etc., by himself in his business or for his own benefit and without recourse to the service provider in future and

for this purpose a transaction of the technical knowledge, experience, skills, etc., from the service provider to the service recipient is necessary. Some sort of durability or permanency of the result of the rendering of services is envisaged which will remain at the disposal of the service recipient. In other words, the technical knowledge, experience, skill, etc., must remain with the service recipient even after the rendering of the services has come to an end. In contrast to Article—12(4)(b) of the India—U.S. tax treaty, Article— 12(4)(b) of India—Singapore tax treaty has made it more specific by providing that technical knowledge, experience, skill, knowhow or process, would not amount to fees for technical service unless it enables the person acquiring the service to apply the technology therein. A perusal of the agreement between the assessee and EMCAP makes it clear that as per the terms of the agreement EMCAP would provide management consulting, functional advice, administrative, technical, professional and other support services to the assessee either itself or through any affiliate or through third parties. However, there is nothing in the agreement to conclude that in the course of such provision of service, EMCAP has made available any technical knowledge experience, skill, knowhow, or process which enables the assessee to apply the technology contained therein on its own without the aid of EMCAP. The Hon'ble Karnataka High Court while explaining the true import of expression "make available" in case of De Beers India Mineral Pvt. Ltd. (supra) has observed as under:-

"What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" 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 "making available", the technical knowledge, skill, etc., must remain with the person receiving the services even after the particular contract comes to an end. lt 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 he 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 "made available" 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 "fees for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."

A careful analysis of the observations of the High Court, makes it clear that "make available" not only would mean that recipient of the service is in a position to derive an enduring benefit out of utilisation of the knowledge or knowhow on his own in future

without the aid of the service provider but such technical knowledge, skill, knowhow, etc., must remain with the recipient even after the contract comes to an end. The Court has observed, the technology will be considered to have been made available when the person acquiring the service enable him to apply the technology. Further, the Court went on to hold that the payment can be considered as fees for technical services only if the twin test of rendering service and making technical knowledge available at the same time is satisfied. If we apply the aforesaid tests laid down by the Hon'ble Karnataka High Court to the facts of the present case it becomes clear that it has not been established on record that while rendering the services, EMCAP has made available technical knowledge, knowhow, skill, etc., to the assessee in a manner to enable him to apply them independently or on its own. Therefore, the payment made by the assessee cannot be considered as fees for technical services as defined under Article 12(4)(b) of the India-Singapore tax treaty and for this reason also we do not have to examine taxability of the same under section 9(1)(vii) of the Act. Moreover, it is a fact on record that the payment of global support service fee was made under the agreement which has continued from the year 2003. It is a matter of record that in the preceding assessment years though the assessee has paid global support service fees to EMCAP without deducting tax at source, no disallowance under section 40(a)(i) was ever made. Therefore, there being no difference in facts in the impugned assessment year, considering that the payment was made under the same contract, even, applying the rule of consistency, no disallowance under section 40(a)(i) can be made in the impugned assessment year.

Accordingly, we delete the disallowance made by the Assessing Officer. These grounds are allowed."

9.1 For AY 2008-09, the Tribunal has followed the above order while deciding similar addition made by the AO u/s 40(a)(i) of the Act Facts being identical, we follow the above order of the Co-ordinate Bench in appellant"s own case for AY 2007- 08 and AY 2008-09 and delete the addition of Rs.1,85,29,377/- made by the AO u/s 40(a)(i) of the Act.

20. Therefore, respectfully following the above decision of Coordinate Bench in assessee's own case which is applicable mutatis mutandis in the present case, we are inclined to accept the submission of Ld. AR. Therefore, we delete the disallowance made by AO and confirmed by Ld. CIT(A) u/s 40(a)(ia) of the Act. Accordingly, the grounds raised by the assessee are allowed."

5.1 Since, the Ld. CIT(A) has followed binding precedent on the issue-in-dispute, therefore, we do not find any error in the order of the Ld. CIT(A) on the issue-in-dispute. Accordingly, we uphold the same. The Ground No. 1 to 3 raised by the Revenue are accordingly dismissed.

5.2 The Ground No. 4 is consequential and therefore same is also dismissed.

5.3 The ground No. 5 and 6 are general in nature and accordingly dismissed as infructuous.

6. As far as the cross-objection raised by the assessee are considered, the Ld. Counsel of the assessee submitted that same had been raised as alternative remedy. Since we have already dismissed the appeal by the Revenue, therefore, the cross-objection raised by the assessee are rendered infructuous, hence, we are not adjudicating upon same. The cross-objections are accordingly dismissed.

7. In the result, both the appeal of the Revenue and cross-objection of the assessee are dismissed.

Order pronounced in the open Court in 28/09/2022.

Sd/-	**Sd/-**
(KAVITHA RAJAGOPAL)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated:28/09/2022
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