

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SMT. KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

**ITA No.996/Mum/2022
(Assessment Year :2018-19)**

M/s. Shell Information Technology International BV C/o. B S R & Co. LLP 2 nd Floor, Lodha Eecelus Apollo Mills Compound N. M. Joshi Marg, Mahalakshmi Mumbai	Vs.	Deputy Commissioner of Income Tax (International Taxation)-4(2)(1) 17 th Floor, Room No.1708, Air India Building Nariman Point, Mumbai – 400 021
PAN/GIR No.AAICS9091A		
(Appellant)	..	(Respondent)

Assessee by	Shri Madhur Agarwal
Revenue by	Ms. Surabhi Sharma
Date of Hearing	07/11/2022
Date of Pronouncement	28/11/2022

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No.996/Mum/2022 for A.Y.2018-19 preferred by the order against the final assessment order passed by the Assessing Officer dated 16/03/2022 u/s.143(3) r.w.s. 144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the Id. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 25/02/2022 for the A.Y.2018-19.

2. The assessee has raised the following grounds of appeal:-

“Based on the facts and circumstances of the case, Shell Information Technology International BV (hereinafter referred to as 'SITI BV' or 'the Appellant') craves leave to prefer an appeal against the order passed by the Deputy Commissioner of Income Tax (International Taxation), Range-4(2X1), Mumbai (hereinafter referred to as the "learned AO"] under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel-2, (hereinafter referred to as the "Hon'ble DRP) on the following grounds, each of which are without prejudice to one another.

On the facts and circumstances of the case and in law, the learned AO based on the directions of the Hon'ble DRP:

General

1. Erred in assessing the total income at Rs. 3,59,11,69,013 as against Rs. 8,35,360 total income as per the revised computation filed by the Appellant subsequently on being granted refund. As per return of income filed by the Appellant, the total income was NIL.

Receipts towards IT support services does not constitute 'income'

2. Erred in holding that the payments received by the Appellant constitutes 'income' without appreciating that the appellant works on cost only arrangement and the receipts were reimbursements being in the nature of cost allocation without markup and hence does not constitute 'income' under section 2(24) of the Act;

Receipts towards IT Support services held as 'Fees for Technical Services' ("FTS") under the Act as well as India-Netherlands DTAA

3. Erred in holding that payments of Rs. 3,59,11,69,013 received by the Appellant for IT Support Services constitutes 'FTS' under the provisions of the Act and under Article 12 of the India- Netherlands DTAA;

4. Failed to appreciate that IT support services do not 'make available' any technical knowledge, experience, skill, know-how or processes, etc. to the service recipient under Article 12(5)(b) of the India-Netherlands DTAA and hence not subject to tax in India;

5. Failed to also appreciate that IT support services are not for providing specialized technical inputs or any technical services which are ancillary

and subsidiary to the application/enjoyment of the any right/property/information and hence cannot be termed as FTS under Article 12(5)(a) of the India-Netherlands DTAA and hence not subject to tax in India;

Receipts towards IT Support services held as "Royalty" under the Act as well as India-Netherlands DTAA

6. Erred in holding that payments of Rs. 3,59,11,69,013 received by the Appellant for IT Support Services constitutes 'Royalty' under the provisions of the Act and under Article 12(4) of the India- Netherlands DTAA without appreciating the fact that receipts towards IT support services are not for information concerning industrial, commercial or scientific experience;

Short granting of credit for Tax Deducted at source (TDS)

7. Erred in not granting the TDS credit of Rs. 69,67,972.

Interest under section 234B of the Act

8. Erred in levying interest under section 234B of the Act without appreciating the facts and circumstances of the case.

Penalty under section 270A of the Act

9. Erred in levying penalty under section 270A of the Act for misreporting/underreporting particulars of income without appreciating the facts and circumstances of the case.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of the appeal.

3. We have heard rival submissions and perused the materials available on record. The assessee is a tax resident of Netherlands. It is engaged in providing Information Technology Support Services to Shell Group entities as well as to Key Application Service (KAS) provider worldwide. The return of income for the A.Y.2018-19 was filed by the assessee on 29/11/2018 declaring total income of Rs.'Nil' claiming refund

of Rs.7,19,25,900/-. The assessee operates in Europe, United States and Asia Pacific region. During the year ended 31/03/2018, the company provided software access and information technology support services to Indian parties. The details of Revenue earned by the company from Indian parties are as under:-

Name of Payee	Amount received (INR)	Rate of IDS	TDS	Whether offered for taxation
Hazira LNG Private Limited	31,634,064	10%	31,82,242	Not offered to tax in ROI as the receipts are in the nature of cost allocation. Further, the receipts are not chargeable to tax in India pursuant to India-Netherlands Double Taxation Avoidance Agreement.
CGI Information Systems and Management Consultants Private Limited (Logical)	69,903,006	10%	68,23,875	
IBM India Private Limited	106,190,640	10%	76,79,227	
Accenture Services Private Limited	137,579,694	10%	1,02,95,018	
Shell India Markets Private Limited - ('SIMPL' ¹)	1,587,534,733	-	-	

Wipro Limited	1,454,986,629	-	-	
BG Exploration and Production India Ltd.	434,688,586	10%	4,39,45.538	
Total	3,822,517,352		38,730,044	

3. Out of the revenue of Rs.3,82,25,17,352/-, the Company has received an amount of Rs.23,13,48,339/- for providing software access and balance of Rs.3,59,11,69,013/- towards IT support services.

IT support services

The assessee has submitted that the assessee company is engaged in providing IT support services such as helpdesk services and network infrastructure services like troubleshooting, workstation support, WAN services, LAN services, tele & video conferencing services, run and maintenance services to Shell Group entities worldwide.

Access to use the Software

The assessee has also submitted that in order to provide the IT support services mentioned above, the Company receives some application support from third parties i.e. KAS providers like WIPRO, IBM etc. To enable third parties to provide this application support, the Company in turn provides restricted access to Shell's IT infrastructure, hardware, services etc. to KAS as well as Shell group entities. Expenses incurred in relation to the services were in the nature of cost allocations and were allocated without any mark-up.

3.1. During the course of assessment proceedings, the assessee was sought to explain as to why the receipts towards IT support services should not be treated as fee for technical services under the Act as well as under the DTAA as has been done in earlier years. In reply, the assessee submitted that it works on "cost only" arrangement i.e. the common cost incurred by the company for various support services are charged to Shell entities for availing such services. The assessee further submitted that the costs are allocated to the entities availing the services on the basis of appropriate allocation keys depending upon the nature of costs incurred. These costs are not marked up and are charged to the cost sharers on the basis of actual costs incurred by the assessee. Without prejudice to the aforesaid submissions, the assessee further submitted that income received from Indian customers in respect of services of providing IT support services, helpdesk services and network access and related services provided by the assessee do not fall in the purview of "royalty" under Article 12(5)(a) of the DTAA. It was also contended that these services do not "make available" technical knowledge experience etc to Indian customers to fall in the purview of "fee for technical services" under Article 12(5)(a) of the DTAA. The Id. AO vide draft assessment order dated 13/05/2021 did not agree with the submissions of the assessee and held that the payment received by the assessee towards IT support services are in the nature of fee for technical services as well as in the nature of royalty both under the Act as well as under the DTAA. We find that the Id. DRP by placing reliance on its directions given in assessee's own case for A.Y.2017-18 held that the payments received by the assessee to be fee for technical services and not royalty both under the Act as well as under the DTAA. The Id. AO passed final assessment order u/s.143(3) r.w.s. 144 C(13) of the Act on 16/03/2022 pursuant to the directions of the Id. DRP by treating the

receipts of the assessee as fee for technical services u/s.9(1)(vii) of the Act and also under Article 12(5)(a) and 12(5)(b) of the India Netherlands DTAA.

3.2. We find that the lower authorities had relied on the orders passed by them for A.Y.2017-18 in assessee's own case. This Tribunal for A.Y.2017-18 in assessee's own case had disposed of the appeal in ITA No.1245/Mum/2021 dated 11/05/2022 wherein by following its own order for A.Y.2016-17 held that the payment received for IT support services cannot be treated either as fee for technical services or as royalty both under the Act as well as under the DTAA. The relevant operative portion of the said order passed for A.Y.2017-18 is reproduced hereunder:-

9. We have considered the rival submissions and perused the material available on record. We find that the Co-ordinate Bench of the Tribunal in assessee's own case in Shell Information Technology International, B.V. v/s DCIT, in ITA no.6638/Mum./2019, vide order dated 06.03.2020, for assessment year 2016-17, inter-alia, while holding that the payment received by the assessee towards IT support services does not constitute Fee for Technical Services under the provisions of the Act as well as under Article-12 of the DTAA, observed as under:-

"9. We have perused the material on record including the decisions of the coordinate Benches of the Tribunal relied upon by the Ld. counsel. As pointed out by the Ld. counsel, the coordinate Benches have decided the identical issue in favour of the assessee in the assessee's appeals pertaining to the AYs 2011-12 to 2014-15. We further notice that Ground No. 5 and 6 of the present appeal are identical to the assessee's appeal for the AY 2015-16 and the coordinate Bench has decided the said issue in favour of the assessee by following the decision of the Tribunal in assessee's own appeals pertaining to the earlier assessment years. The findings of the coordinate Bench are as under:-

7. Coming to Ground Nos. 5 and 6 of Grounds of appeal, Ld. Counsel for the assessee submitted that these grounds relates to receipts towards IT support services held as FTS under the Act as well as the India Netherlands DTAA, and it was decided in favour of the assessee for the A.Y.2011-12 to 2014-15 by the Tribunal. Copy of the order is placed on record.

8. *Ld. DR vehemently supported the orders of the authorities below.*

9. *We have heard the rival submissions and perused the orders of the authorities below. We have perused the order of the Tribunal for the A.Y.2010-11 to 2011-12 in ITA No. 2058/MUM/2016 dated 28.05.2018 wherein the Tribunal following the order for the A.Y. 2009-10 to 2010-11 in ITA.No. 2204/MUM/2014 and 1203/Mum/2015, held as under: -*

"16. We have heard the rival submissions and also perused the material on record. The co-ordinate Bench has decided the identical issue in favour of the assessee in the assessee's own case ITA No. 2204/Mum/2014 for the A.Y. 2009-10 and ITA No. 1203/Mum/2015, for the A.Y. 2010-11 holding as under:- "7. The next issue common issue in both the appeals of assessee is as regards to taxability of payment received by assessee from IT support services which constitutes Fees for Technical Services ('FTS') and royalty under the India Netherlands Treaty DTAA. For this Assessee has raised following ground:- "Payments towards IT Support fees held in be Fees for Technical Services 'FTS') and royalty.

4. *Erred in holding that payments received by the Appellant for IT support DTAA.*

5. *Failed to appreciate that IT support services do not 'make available any technical knowledge, skill, experience etc.to the services recipient under Article 12 of the India-Netherlands DTAA and hence not subject to tax in India.*

6. *Erred in alternatively holding that the receipt from IT - support services qualify as Royalty' under the IndiaNetherlands DTAA."*

8. *The facts and circumstances are exactly identical in both the AYrs i.e. 2009-10 and 2010-11 and also the grounds raised are identically worded hence, we will take- the facts from 2009-10.*

9. *The learned Counsel for the assessee, first of all, took us through the findings of the DRP on the issue which is recorded in Para 53 as under:*

"5.3 Discussions and directions of DRP 5.3.1 We have considered the draft assessment order, submissions of assessee and material. We have seen that under the Master Services Agreement, the assessee SITI BV has furnished technical and advisory services to various clients based in India. The delineated services are significantly technical in nature and the resultant fees are liable to be treated as Fees for Technical Services. We are also in agreement with the AO that the Ruling of Hon'ble Authority for Advance

Rulings in the case of ARE VA T&D India Limited (A TD/L) is applicable in the case of assessee. In this case, the Aar held as below:

"We have noted that under- the IT Agreement, the French company is to provide support services through a central team in the area of Information Technology to the Applicant and to its other subsidiaries in the world. The provision of support services by the French company would 'itself make available, the technical knowledge/ experience to the Applicant.

In Porfetti Van Melle Holdings B.VI this Authority held the view that the expression 'in available only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilize the knowledge or knowhow in future on his own".

Here, information technology relating to design, engineering, manufacturing and supply of electric equipment that help in transmission and distribution of power, commissioning and servicing of tr'Inernv ion and distribution system is provided to the Indian entity Which is applied in running the business of the Applicant and the employees of the Applicant would got equipped to carry on the systems on their own without reference to the French Company, when the IT Agreement comes to an end. It is not as if for making available, the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the agreement on its expiry. We are of the view that the services provided under the IT agreement are in the nature of Fees for Technical Services and taxable under' the DTAA as well as under the Act.

Though the ruling is technically not binding in the present case, the 7 ratio and logic followed by the Hon'ble Authority have very high degree of persuasive value. in any case, this technical know-how is of an enduring nature and has a direct nexus with the assessee's business.

5.3.2 considering the above factual and leg& matrix we are of the opinion that the action of the AO in treating the above receipt is fee for technical services does not require any interference The alternate arguments on taxability of the receipt as royalty do not require any direction from the penal as we have already upheld the taxability of the services as "fees for included service".

10. The learned Counsel for the assessee explained the facts that the SITI BV is a company registered in the Netherlands. SITI BV is in the business of providing information technology (IT) support services. During the financial year ended 31.03.2006 SITI BV provided IT (mobile office) support services, IT helpdesk and network infrastructure related services to: Indian customers. SITI BV is a tax resident of the Netherland and is eligible to claim benefits under the Double Taxation Avoidance Agreement entered into between India and The

Netherlands. He explained that SITI BV is in the business of providing information technology support services SITI BV typically, provides helpdesk services-and network infrastructure services to Shell group companies comprising. Information Technology (IT) support for solving any IT related problems faced by users i e any problem faced by users for accessing any application software c-mails, Computer repairs and maintenance etc. desktop laptop and workstation support, Services related to Wide area network ('WAN') arid Local area network ('LAN') for connection to the global servers', and Facilitating teleconferencing and video conferencing services Further, in the event Shell requires IT services from external service providers like WIPRO and IBM SITI BV is engaged in providing the necessary network access and related services as well. For this purpose, reference can be made to the scope of services to be rendered by SITI BV to WIPRO under the Services Agreement (copy of which is enclosed in the paper book of the assessee) and from the same [Article 3](#) is reproduced below:

[Article 3](#) - Provision of Services SITI BV shall provide the IT Service Provider with the service." Further, 'Service' has been defined in [Article I - Definitions](#) as 'the combined Sub-services provided by S/IT BV to she IT Services Provider wider this Agreement, which Sub-services include the (if Services, the STO Services and she provision by S/IT BV to the IT Service Provider and Service Personnel of access to and/or use -of GI software and/or Optional Software....

11. Further, SITI BV is company incorporated in The Netherlands. SITI BV is a tax resident of The Netherlands eligible to claim the benefits, conferred by the Double Taxation Avoidance Agreement entered into between India and The Netherlands (Treaty'). [Section 90](#) of the Act read with the Circulars and several judicial precedents issued thereunder provide that a non-resident taxpayer is eligible to be assessed as per the provisions of the Act or as per the provisions of the relevant double taxation avoidance agreement, whichever is more beneficial. SITI BV is a nonresident for Indian tax purposes. Accordingly, SITI BV could be assessed as per the provisions of the Actor as per the Treaty, whichever is more beneficial to SITI By. IN view of the same, the non-taxability of the services rendered by SITI BV has been examined under the provisions of the Treaty. [Article 12\(4\)](#) of the Treaty defines the term.

"Payments of any kind received as a consideration for the use, or the right to use, any copyright of literacy, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.'

12. From the above, it is clear that SITI BV is engaged in providing IT services to Indian entities but does not provide any right to use any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. Even under the agreements entered into with WIPRO and IBM, SITI BV only

provides them access to the software i.e. computer Programme. SITI BV does not provide them the right to use the copyright embedded in the software. In other words, WIPRO, IBM are not permitted to make copies and sell the software. Under the Services Agreements, WIPRO and IBM-have been granted the mere under the right in the copyrighted software and not the right of, use of copyright'. Whereas use of copyright' encompasses exploitation of the rights embedded in a copyright but a mere user right is a limited right and consideration paid for Such user right cannot be regarded as consideration for use of or right to use a copyright. In view of the above, the learned Counsel for the assessee stated that the issue is fully covered by the decision of Hon'ble Delhi High Court in the case of DIT Vs Guy Carpenter & Co Ltd (2012) 20 taxmann.com 807 (DelHC), wherein India-UK DTAA was under consideration of Hon.,ble Delhi High Court and Hon'ble High Court after considering the [Article 13](#) of the DTAA of India-UK and also the facts of the assessee finally held the concept of 'make available' of technical services that such receipts would not amount to fee for technical services so as to the "concept of make available clause' contained in Article 13(4)(c) of the treaty has not been satisfied In the given facts and circumstances of the case Hon.,ble Delhi High Court vide Para 8 to 13 held as under: -

*"8. Before we go on to examine the findings of the Tribunal it would be pertinent to refer to [article 13](#) of the DTAA to the extent it is relevant :-
"ARTICLE 13- 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 law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed: (a) In the case of royalties within paragraph 3 (a) of this Articles, and fees for technical services within paragraphs 4 (a) and (c) of this Article,-

(i) during the first five years for which this Convention has effect; (aa) 15% of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Govern rent of the first mentioned Contracting State or a political sub-division of that State and (bb) 20% of the gross amount of such royalties or fees for technical services in all other cases; and (ii) during subsequent years 15% of the gross amount of such royalties or fees for technical services; and

(b) in the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this [Article](#), 10% of the gross amount of such royalties and fees for technical services.

3** ** (4) For the purpose of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:

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

b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received, or Make available technical knowledge, experience, skill, knowhow or processes, or consist of the development and transfer of a technical plan or technical design.

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid:

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

(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 private use of the individual or individuals making the payment, or

(e) TO an employee of the person making the payments --Or to any individual or partnership for professional services as defined in [Article 15 \(Independent personal services\)](#) of this Convention (6), (7), 7 and (9) **
**

9. A plain reading of [Article 13\(4\)\(c\)](#) of the DTAA indicates that 'fees for technical services' would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which, inter alia, "makes available" technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. According to the Tribunal this make available condition has not been satisfied inasmuch as no technical knowledge, experience, skill, know-how, processes, have been made dye/lab/c by the assessee to the insurance companies operating in India. It also does not consist of the development and transfer of any technical plan or technical design. -

10. The Tribunal examined the evidence available on record in order to return a finding on the issue as to whether the payments received by the assessee from the insurance companies operating in India would fall within the expression 'fees for technical services' as appearing in article, 13(4)(c) of the DTAA read with section 9(1)(vii) of the said Act. While doing so the Tribunal, inter alia, found that the assessee company was an international reinsurance intermediary (broker) and was a tax resident of United Kingdom. Further, that it was a recognized broker by the financial services authority of United Kingdom, it was also an admitted position that the assessee did not maintain any office in India and that it had a referral relationship with J B Boda reinsurance (Broker) Pvt. Ltd of Mumbai and that J. B. Boda was duly licenced by the Insurance Regulatory & Development Authority to transact reinsurance business in India. The Tribunal also observed as under. -

"27. In the illustrative transaction, New India Insurance Co. Ltd in India has entered into an agreement to reinsure on an Excess Loss basis the catastrophe risk arising from its primary insurance cover in conjunction with J.B. Boda and Alsford Page and gems Ltd. (the reinsurance brokers). The terms of the agreement specifies that the assessee in conjunction with J.B. Bode are recognized as intermediary, through whom all communications relating to this agreement shall pass. The terms of the agreement further provides that the assessee will provide all the details of agreed endorsements to the reinsurers by e-mail or facsimile and shall submit the slip policy to XIS (Lloyd's processing market) for signing. The assessee will act as a claim administrator and Will submit claims advices to relevant market systems. For the services rendered, the assessee along with the other reinsurance brokers acting as an intermediary in the reinsurance process for New India Assurance Co. will be entitled to 10% brokerage. From the role played by the assessee in the reinsurance process as discussed above, it is evident- to us that the assessee was rendering only intermediary services while acting as an intermediary/facilitator in getting the reinsurance cover for New India Insurance Co. There exists no material or basis on the basis of which, it Would be said that the assessee was rendering any kind of technical/consultancy service within the meaning of Article 13 of Indo-UK treaty. The consideration received by the assessee acting as an intermediary in the reinsurance process cannot, by any stretch of imagination, be qualified as a consideration received for rendering any financial analysis related consultancy services rating agency advisory services, risk based capital analysis etc. as alleged by the A.O."

The Tribunal also noted the process by which the transactions takes place. It has been pointed out that the originating insurer in India would contact J. B. Boda/ M, B. Boda for placing identified risks/ class of risks with international reinsurers. J.B. Boda, in turn, would contact one or more international firm(s) of reinsurance broker(s) like the assessee for competitive proposals from the international reinsurer. Then, the international reinsurance brokers like the assessee would contact other

primary brokers and various syndicates in the Lloyds market for competitive proposals. Based on the various offers or proposals given by the- international reinsurance brokers, like the assessee, to J.B. Boda, the latter would present various options to the originating insurer in India, which would take a final-decision in the matter. Based on the decision of the originating insurer in India, the policy terms would then be agreed upon and the risk would be placed with the international reinsurer it was also pointed out that as per the normal industry practice, tea reinsurance premium net of brokerage at 10% as per the policy contract is remitted to the assessee, i.e., reinsurance brokers, for onward transmission to international reinsurers. The intermediation fee which is another word for brokerage is paid separately by the originating insurance in India to J.B. Bodo, the international reinsurance brokers like the assessee and other intermediaries, based on a mutually agreed ratio which accounts for their relative contribution in the reinsurance process.

12. Based on this manner of transacting, the Tribunal came to a conclusion that the payment received by the assessee could not be regarded as 'fees for technical services'. Further, more, the Tribunal also held that such receipts would not amount to fees for technical services as the "make available" clause contained in [article 13\(4\)\(c\)](#) had not been satisfied in the facts and circumstances of the present case.

*13. In our view, the Tribunal has arrived at these conclusions purely on assessing the factual matrix of the case at hand. The findings are in, the nature of factual findings and, therefore, according to us, no substantial question of law arises for our consideration, particularly, because the learned counsel for the Revenue was unable to point out any perversity in the recording of such findings. As such no substantial question of law arises for our consideration. The appeal is dismissed. There shall be. no order as to costs." 13. Further, the learned Counsel for the asséssee stated that the reliance placed by DRP in *Areyay T and D India Limited of Perfeti Van Melle Holdings B.V. In re* [2011] 16 taxmann.com 207 (AAR - New Delhi) was reversed by Hon'ble Delhi High Court and reported in 2014 52 taxmann.com 161 (Delhi), wherein Hon'ble Delhi High Court has considered as under: -*

"1. This writ petition is directed against the ruling dated 09.12.2011 in AAR NO.86912010 given by the Authority for Advance Rulings. One of the pleas raised by the petitioner was that the said authority had not considered the Double Taxation Avoidance Agreement between India and Portugal which is an OECD country. The learned counsel for the petitioner submitted that any agreement between India and an OECD country could be looked into while construing the IndoNetherlands Double Taxation Avoidance Convention. The learned counsel for the petitioner had also raised the plea that the memorandum of understanding concerning fees for included services referred in [Article 12\(4\)](#) of the Indo USA DTAA concerning the expression? Available? was also not considered by the Authority for Advance Rulings; It-was submitted that the said Authority refused to look

into the IndoPortugese DTAA or the Indo USA DTAA and memorandum of understanding between India and USA on the ground that only the Indo Netherlands DTAC needed to be looked into.

2. The learned counsel for the respondent states that the Authority for Advance Rulings was correct in not looking, into the Indo - Portugese DTAA, but insofar as the Indo-USA DTAA is concerned a provision similar to that DTAA has been incorporated in the Indo- Netherlands DTAC by virtue of paragraph 5 of Article 12 of the same, whereby the very same make available clause, which is to be found in the DTAA between India and USA read with the memorandum of understanding connected therewith, has been incorporated into Indo- Netherlands convention by way of amendment on 30.08.1999, notification No. S.O. 693 (E) [reported in (1999) 239 ITR (Stat) 56]. It is evident that the Authority for Advance Rulings had not considered the said amendment."

14. In view of the above, we are of the that the concept of make available of technical services that such receipts would not amount to fee for technical services so as to the "concept of make available clause contained in [Article 13\(4\)\(c\)](#) of the treaty has not been satisfied. Accordingly, we delete the addition and allow this issue of assessee"s appeal."

17. Since, the co-ordinate Bench has decided the identical issue in favour of the assessee in assessee"s own appeals for the A.Y. 2009-10 and 2010-11 referred above, we respectfully following the order of the co-ordinate Bench allow Ground No. 5, 6 and 7 of this appeal.

10. Facts being identical, respectfully following the said decision of the Tribunal we allow Ground Nos. 5 and 6 of the assessee.

11. In so far as Ground No.2 is concerned the Ld. Counsel for the assessee submitted that since it was held in favour of the assessee on Royalty and FTS ground, the ground raised by the assessee in respect of receipts towards access to use software and IT support services does not constitute "income" may be kept open. Accordingly, this ground is kept open which may be contested as and when the situation arises.

12. The rest of the grounds are only consequential in nature and the same are restored to the file of the Assessing Officer for adjudication in accordance with law."

10. The coordinate Bench has decided the identical issue in favour of the assessee in assessee"s own appeal ITA No. 7283/Mum/2018 AY 2015-16 by following the decisions of the coordinate Benches rendered in assessee"s own appeals pertaining to the AY 2011-12 to 2014-15 and AY 2015-16. Since there is no change in the facts of the present case and since the findings of the AO are not in accordance with the decision of coordinate Benches discussed above, we respectfully following the decision of the

coordinate Bench, set aside the impugned order and allow ground No. 5 and 6 of the assessee's appeal."

10. The learned Departmental Representative could not show us any reason to deviate from the aforesaid order and no change in facts and in law was alleged in the relevant assessment year. The issue arising in present appeal is recurring in nature and has been decided in favour of the assessee by decisions of Co-ordinate Bench of the Tribunal for preceding assessment years. Thus, respectfully following the order passed by Co-ordinate Bench of the Tribunal in assessee's own case cited supra, which has also followed the judicial precedents in assessee's own case, the impugned addition made by treating payment received for IT support services as Fee for Technical Services under the provisions of the Act and under [Article-12](#) of the DTAA, is deleted. As a result, ground nos.3, 4 and 5 raised in assessee's appeal are allowed.

11. Insofar as grounds nos.6 and 7, raised in assessee's appeal are concerned, the learned DRP has already held that the payment towards IT support services could not fall under „royalty“ in the instant case. Thus, the Assessing Officer is directed to follow the directions issued by the learned DRP under [section 144C\(5\)](#) of the Act. As a result, grounds nos.6 and 7, raised in assessee's appeal are allowed.

3.3. Respectfully following the same, the ground Nos. 3-6 raised by the assessee are allowed.

4. The ground No.1 is general in nature and does not require any specific adjudication.

5. In so far as ground No.2 raised in assessee's appeal is concerned, the same is kept open by respectfully following the order passed by the Co-ordinate Bench of the Tribunal in assessee's own case stated supra.

6. The ground No.7 raised by the assessee pertains to short grant of TDS credit. The Id. AO is directed to verify the details and grant the same in accordance with law. Accordingly, the ground No.7 is allowed for statistical purposes.

7. The ground No.8 raised by the assessee is challenging chargeability of interest u/s.234B of the Act which would be consequential in nature.

8. The ground No.9 raised by the assessee is with regard to levy of penalty u/s.270A of the Act which would be premature for adjudication at this stage, hence, dismissed.

9. In the result, appeal of the assessee is partly allowed.

Order pronounced on 28/11/2022 by way of proper mentioning in the notice board.

Sd/-

(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-

(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 28/11/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)