

IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI S. RIFAUH RAHMAN, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.508/Mum./2016

(Assessment Year : 2012-13)

Edenred SA

C/o SRBC Associates & LLP

14th Floor, The Ruby

29, Senapati Bapat Marg

Dadar, Mumbai 400 028

PAN – AACCE9031G

..... Appellant

v/s

Dy. Commissioner of Income Tax

International Taxation

Circle-2(2)(1), Mumbai

.....Respondent

ITA no.7247/Mum./2017

(Assessment Year : 2013-14)

Edenred SA

C/o Walker Chandiok & Co. LLP

16th Floor, Tower-II, Indiabulls Finance Centre

Senapati Bapat Marg, Elphinstone (West)

Mumbai 400 013 PAN – AACCE9031G

..... Appellant

v/s

Dy. Commissioner of Income Tax

International Taxation

Circle-2(1)(2), Mumbai

.....Respondent

ITA no.7248/Mum./2017
(Assessment Year : 2014-15)

Edenred SA
C/o Walker Chandiook & Co. LLP
16th Floor, Tower-II, Indiabulls Finance Centre Appellant
Senapati Bapat Marg, Elphinstone (West)
Mumbai 400 013 PAN – AACCE9031G

v/s

Dy. Commissioner of Income Tax
International TaxationRespondent
Circle-2(1)(2), Mumbai

ITA no.5193/Mum./2018
(Assessment Year : 2015-16)

Edenred SA
C/o Walker Chandiook & Co. LLP
16th Floor, Tower-II, Indiabulls Finance Centre Appellant
Senapati Bapat Marg, Elphinstone (West)
Mumbai 400 013 PAN – AACCE9031G

v/s

Asstt. Commissioner of Income Tax
International Taxation, Circle-2(2)(1), MumbaiRespondent

Assessee by : Shri Jitendra Singh
Revenue by : Shri Soumendu Kumar Dash

Date of Hearing – 30/09/2022

Date of Order – 23/12/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The captioned appeals have been filed by the assessee for the assessment years 2012-13, 2013-14, 2014-15, and 2015-16 challenging the final assessment order passed by the Assessing Officer ('AO'), pursuant to the directions issued by the learned Dispute Resolution Panel ('learned DRP')

under section 144C(5) of the Income Tax Act, 1961 ('the Act'), details of which are tabulated below:-

<i>Appeal Number</i>	<i>Impugned Order under challenge before the Tribunal</i>
<i>ITA no.508/Mum./2016</i>	<i>Final assessment order dated 30/12/2015, passed by the AO under section 143(3) r/w section 144C(13) of the Act, pursuant to the directions dated 24/11/2015 issued by the learned DRP under section 144C(5) of the Act, for the assessment year 2012-13.</i>
<i>ITA no.7247/Mum./2017 ITA no.7248/Mum./2017</i>	<i>Final assessment orders dated 31/10/2017, passed by the AO under section 143(3) r/w section 144C(13) of the Act, pursuant to the separate directions dated 22/09/2017 issued by the learned DRP under section 144C(5) of the Act, for the assessment years 2013-14 and 2014-15.</i>
<i>ITA no.5193/Mum./2018</i>	<i>Final assessment order dated 13/07/2018, passed by the AO under section 143(3) r/w section 144C(13) of the Act, pursuant to the directions dated 18/05/2018 issued by the learned DRP under section 144C(5) of the Act, for the assessment year 2015-16.</i>

2. Since all the aforesaid appeals pertain to the same assessee involving, inter-alia, similar issues in the assessment years under consideration, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order. We now proceed to decide the issues on merit, as per the chronology of the assessment years under consideration.

ITA no.508/Mum./2016
Assessee's Appeal – A.Y. 2012-13

3. In its appeal, the assessee has raised the following grounds:-

"On being aggrieved by the order dated 30 December 2015 of the learned Deputy Commissioner of Income-tax (International Tax)-2(2)(1), Mumbai (AO) passed under section 143(3) read with section 144C of the Income tax Act, 1961 (Act) as also directions issued by the DRP, Mumbai dated 24 November 2015, the present appeal is being preferred on the following grounds amongst others which, it is prayed, may be considered without prejudice to one another.

On the facts and circumstances of the case and in law, the learned AO, as per the directions of DRP has:

1. General Grounds

erred in assessing total income at INR 8,48,48,880 as against returned income of INR 87,03,089;

2. Technology and Strategic Information Systems ('TSIS') fees taxed as royalty

erred in considering TSIS charges of INR 42,42,933 to be taxable as royalty under the provisions of Act and the India-France Double Taxation Avoidance Agreement ('DTAA');

3. Management service fees taxed as royalty

a) erred in characterizing and taxing management service fee amounting to INR 7,19,02,857 as royalty as against the characterization as Fees for Technical Services (FTS) as mentioned in the draft assessment order,

b) erred in characterizing and taxing the impugned management service fee as royalty by holding that the nature of the services rendered is same as that in the case of group company (i.e. Edenred Pte Ltd) where they have been held as royalty, however, in the group company's case the DRP has held management service fee as FTS only:

c) erred in not appreciating that impugned management service fee cannot be taxed as FTS under the provisions of the Act as well as Article 13 of the India-France DTAA read with Para 7 of the Protocol of the India-France DTAA containing the Most Favoured Nation clause and Article 12(5) of India-Finland DTAA which provides taxing right to the state where such services are performed (Le. France).

4. Erred in computing gross tax

erred in computing gross tax as INR 1,07,89,868 as against INR 98,23,868.

5. Short grant of credit for Tax deducted at source (TDS) erred in granting TDS amounting to INR 1,03,26,605 as against INR 1,33,26,605 claimed in the return of income thereby leading to short grant of TDS of INR 30,00,000:

6. Interest under section 234A of the Act

erred in levying interest under section 234A of the Act amounting to INR 32,431 which is not as per law.

7. Interest under section 2348 of the Act

erred in levying interest under section 2348 of the Act amount to INR 2,08,486 disregarding the fact that the Appellant is a non-resident assessee and its entire revenues/ receipts are subject to tax withholding in India under section 195 of the Act and the Appellant is not liable to pay advance tax in respect of such revenues.

The Appellant craves, to consider each of the above grounds of appeal without prejudice to each other and craves leave to add, alter, delete or modify all or any of the above grounds of appeal."

4. The brief facts of the case are: The assessee is a company formed and incorporated in France and belongs to Edenred Group of company which operates worldwide. For the year under consideration, the assessee received Rs. 8,48,48,879 from 3 companies that are incorporated in India, namely Edenred (India) Private Ltd, Royal Images Direct Marketing Private Limited, and SurfGold.com (India) Private Ltd. Out of the aforesaid amount, the assessee offered Rs. 87,03,089, for tax in India. However, the assessee claimed that the amount of Rs. 7,61,45,790, received on account of Management Service Fees and Technology and Strategic Information Systems ('*TSIS*') Service Fees as not liable to tax in India as per Article 13 read with the Protocol to the India France Double Taxation Avoidance Agreement ('*DTAA*') along with Article 13 of the India USA *DTAA* and the India Finland *DTAA*. The AO vide draft assessment order dated 31/03/2015, passed under section 143(3) r/w section 144C(1) of the Act treated the *TSIS* Service Fees of Rs. 42,42,933, as royalty within the meaning of Article 13(3) of India France *DTAA* as well as section 9(1)(vi) of the Act. As regards the Management Service Fees received by the assessee, the AO treated the same as fees for technical services under Article 13 of the India France *DTAA*.

5. The learned DRP vide its directions dated 24/11/2015, issued under section 144C(5) of the Act noted that in the case of the group company of the assessee viz. Edenred PTE Ltd. similar services provided for the assessment years 2011-12 and 2012-13 were held to be taxable in India. Finding the facts of the present case to be similar to the facts in the case of the group company of the assessee, the learned DRP directed that the consideration received by the assessee under both TSIS and Management Services Agreements is taxable in India. Accordingly, the learned DRP rejected the objections raised by the assessee in respect of the TSIS Service Fee. Further, the learned DRP held that the Management Service Fees received by the assessee are taxable as royalty. In conformity, the AO passed the impugned final assessment order dated 30/12/2015, passed under section 143(3) r/w section 144C(13) of the Act. Being aggrieved, the assessee is in appeal before us.

6. During the hearing, the learned Authorised Representative (*'learned AR'*) submitted that in case of group concern, the coordinate bench of the Tribunal held that the fee received for services similar to TSIS Service is not taxable as royalty. As regards the Management Service Fees received by the assessee, the learned AR submitted that the said receipt can also not be taxed as royalty.

7. On the contrary, the learned Departmental Representative (*'learned DR'*) submitted that in the group company's case, the receipt was held to be not taxable as fees for technical services by the coordinate bench of the Tribunal, however, in the present case, the learned DRP held the fees to be royalty and therefore the said decision is not applicable to the present case. The learned

DR further submitted that in the case of royalty there is no make available clause in the provisions of the India France DTAA.

8. We have heard the rival submissions and perused the material available on record. In the present case, vide draft assessment order, the AO held that TSIS Service Fee received by the assessee is taxable as royalty, while the Management Service Fee is taxable as fees for technical services. In further proceedings, the learned DRP came to the conclusion that services provided by the assessee are similar to the services provided by the group company of the assessee i.e. Edenred PTE Ltd. Accordingly, the learned DRP following its directions rendered in the case of group concern for the assessment years 2011-12 and 2012-13 directed that the consideration received by the assessee under both TSIS and Management Service Agreements are taxable in India. The learned DRP further directed that fees received by the assessee under the aforesaid agreements be taxed as royalty. It cannot be disputed that the learned DRP's direction was issued on 24/11/2015, and thus was appealable by the Revenue before the Tribunal. Since, the Revenue has not challenged the aforesaid findings of the learned DRP and has accepted the same, therefore now in the present appeal we need to only examine whether the receipts under the aforesaid agreements are in the nature of royalty. On which issue, the assessee is in appeal before us.

9. Under the TSIS Agreement, the services provided by the assessee include IT infrastructure management and mailbox and web hosting services. During the year, the assessee received total consideration of Rs. 42,42,933, from its 3 group companies, namely, Edenred (India) Private Ltd, Royal

Images Direct Marketing Private Limited, and SurfGold.com (India) Private Ltd. There is no dispute regarding the fact that under the agreement with each of the aforesaid entities the nature of services provided by the assessee is identical. Further, under the aforesaid agreement, services are broadly defined as any and all hosting services, support and maintenance services, development services, infrastructure and security services, and professional services proposed by the assessee to the Indian group companies. Vide draft assessment order, the AO held that the assessee and its Indian group companies are in the same business of managing prepaid CHM/CRM, rewards, loyalty, and marketing solution for corporate houses. Further, the services offered by Indian group companies need a sophisticated computer program that can monitor, track and maintain such transactions and loyalty/rewards points. The AO further observed that for this purpose the assessee is required to maintain the customer's individual profile where the personal information, as well as their transaction track, can be kept in the assessee's information processing Centre in France. The assessee owns and maintains the said processing Centre which requires a huge high-tech computer complex having multiple mainframe computers and other related hardware and software facilities involving substantial investment and capable of very high volume storage and high processing of data. The AO also observed that the assessee allows Indian companies and their approved customers to have access to and use its Central Processing Unit ('CPU') in France against payment. Further, the assessee allows the use of its mainframe situated in France and also incidental electronic mail excess, consolidated data network expenses, and consolidated data network services to Indian group entities on a payment basis. The AO

further held that the Indian company's access to mainframe computers through electronic connectivity on the basis of a contract for use establishes a business connection of the assessee with the Indian company in India. Accordingly, the AO came to the conclusion that income is taxable under the head royalty under section 9(1)(vi) of the Act. The AO also held that the income is also taxable as royalty under the provisions of India France DTAA. Accordingly, the AO added the income to the total income of the assessee as royalty taxable at 10% under the beneficial rate as per the DTAA.

10. We find that the taxability of income arising from similar services rendered by the assessee's group concern, namely, Edenred PTE Ltd came up for consideration before the coordinate bench of the Tribunal in Edenred PTE Ltd vs DCIT, in ITA No.2178/Mum./2017, for the assessment year 2013-14. The coordinate bench of the Tribunal after considering the facts of the case in para 6 of its order, decided the similar issue in favour of the assessee's group concern and held that income arising from the provision of services by the assessee cannot be treated as royalty either under the provisions of the Act or under the India Singapore DTAA. The relevant findings of the coordinate bench of the Tribunal are as under:

"7. As could be seen from the facts discussed herein before, the issue in dispute is, whether the payment received by the assessee from provision of IDC services can be treated as royalty under Article 12 of India-Singapore DTAA. As we find, identical issue came up for consideration before the Tribunal in assessee's own case for assessment years 2010-11 to 2012-13. In fact, learned DRP has decided the issue in favour of the revenue by relying upon its decision in assessee's own case in assessment year 2012-13. However, while deciding the appeals of the assessee on identical issue in assessment years 2010-11 to 2012-13 the Tribunal, in the order referred to earlier in the order, has held that the payment received by the assessee from provision of IDC services is not in the nature of royalty. The observations of the Tribunal in this regard are as under:

"6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below. We find that (i) under the said IDC agreement, the appellant, essentially provides IT infrastructure management and mail box/website hosting services to its India group companies; these IDC services are performed by the appellant's personnel in Singapore; the Indian group companies directly remit IDC service payments towards the appellant's bank account in Singapore, (ii) IDC is an ISO 27001 certified data centre owned by Edenred Pte. and located in Singapore; IDC services are provided using the IDC and IT/ security team in Singapore, (iii) the services under the IDC agreement comprise of administration and supervision of central infrastructure; mailbox hosting services and website hosting services, (iv) IDC services ensure 100% uptime for critical external facing applications which need highly secured web environment and dedicated team of security experts to ensure 100% uptime of security systems (firewall, antivirus, access controls) which are also hosted on server in Singapore.

We further observe that examples websites/applications/software hosted by Indian of group companies on the data centre in Singapore are web ordering application, corporate website, websites created for customers of Edenred India entities while making a loyalty program for them.

A perusal of the documents filed before the AO and DRP clearly indicate that (i) appellant has an infrastructure data centre, not information centre at Singapore, (ii) the Indian group companies neither access nor use CPU of the appellant, (iii) no CDN system is provided under the IDC agreement, no such use/access is allowed, (iv) the appellant does not maintain any such central data (u) IDC is not capable of information analytics, data management, (vi) appellant only provides IDC service by using its hardware/security devices/personnel; all that the Indian group companies received are standard IDC services and not use of any software, (vii) bandwidth and networking infrastructure is used by the appellant to render IDC services; Indian companies only get the output of usages of such bandwidth and network and not its use, (viii) consideration is for IDC services and not any specific program and (ix) no embedded/secret software is developed by the appellant. Against the above factual backdrop, let us discuss below the case laws relied on both sides.

6.1 We begin with the case laws relied on by the Ld. counsel. A plethora of precedents on the subject in which we are presently concerned compels us, in order to avoid prolixity, to refer only a few decisions below.

In the case of *Bharati Axa General Insurance Co. Ltd. (supra)*, the appellant, an Indian company carrying on business of general insurance entered into a service agreement with a Singapore company AXA ARC for receiving assistance such as business support, market information, technology support services and strategy support etc. from the latter. The AAR held that (i) though the services rendered by AXA ARC may well be brought within the scope of the definition of FTS under the IT Act as they answer the description of consultancy services or some of them may be categorized as technical services but the qualifying words "make available technical knowledge, experience, skill, know-how, which enables the recipient of services to apply the technology contained therein" in Article 12.4 of the DTAA make material difference, (ii) all technical or consultancy services cannot be brought within the scope of this definition unless they make available technical knowledge, knowhow etc which in turn facilitates the person acquiring the services to apply the technology embedded therein, (iii) services provided by AXA ARC to the applicant do not fulfill the requirements of the definition of FTS in the DTAA, (iv) even assuming that they are technical or consultancy services, it cannot be said that the applicant receiving the services is enabled to apply the

technology contained therein, (v) also there is nothing in the IT support services that answers the description of technical services as defined in the DTAA, (vi) therefore, the fees paid to AXA ARC by the applicant does not amount to fees for technical services within the meaning of the DTAA, (vii) as regards the payments made for providing access to software applications and to the server hardware system hosted in Singapore for internal purposes and for availing of related support services under the terms of the service agreement, same cannot be brought within the scope of the definition of 'royalty' in Article 12.3, (vii) there is no transfer of any copyright in the computer software provided by AXA ARC and it cannot be said that the applicant has been conferred any right of usages of the equipment located abroad, more so, when the server is not dedicated to the applicant.

Similarly, in the case of Standard Chartered Bank (*supra*), the assessee bank entered into an agreement with a Singapore company SPL, for the provision of data processing support for its business in India and that data processing is done outside India. Application software by which data is transmitted to hardware at Singapore and processed by SPL at Singapore is owned by the assessee. Thus what is used by the appellant is the computer hardware owned by SPL. The Tribunal held that (i) payment in question can be said to be a payment for a facility which is available to any person willing to use the facility, (ii) system software which is embedded in the computer hardware by which the computer hardware functions is not owned by SPL and SPL only has a license to use the system software; (iii) consideration received by SPL is for using the computer hardware which does not involve use or right to use a process, (iv) there is nothing on record to establish that the hardware could be accessed and put to use by the assessee by means of positive acts, (v) therefore, it cannot be said that the payment by the assessee to SPL is royalty within the meaning of Article 12 of the treaty.

In *ExxonMobil Company India (P) Ltd. (supra)*, the assessee had paid certain amount to 'EMCAP', Singapore towards global support fees. The AO opined that payment made by the assessee was in the nature of FTS as defined in Explanation 2 to section 9(1)(vii) of the Act. The Tribunal observed that as per terms of agreement, EMCAP had to provide management consulting, functional advice, administrative, technical, professional and other supporting services to the assessee; however, there was nothing in agreement to conclude that in course of such provision of service, EMCAP had made available any technical knowledge, experience, skill, knowhow or process which enabled assessee to apply technology contained therein on its own. Therefore, the Tribunal held that payment made by the assessee could not be considered as FTS as defined under Article 12(4)(b) of the India-Singapore DTAA.

In *M/s Reliance Jio Infocomm Ltd. (supra)* for AY 2016-17, the Tribunal observes that though the India-Singapore Tax Treaty is amended by Notification No. SO 935(E) dated 23.03.2017, however, the definition of 'royalty' therein has not been tinkered with and remains as such.

6.2 Now we turn to the case laws relied on by the Ld. DR. In the case of *Cargo Community Network (P.) Ltd. (supra)*, the assessee, a non-resident company has its registered office at Singapore. It is engaged in the business of providing access to an internet based air cargo portal known as Ezycargo at Singapore. The applicant received payments from an Indian subscribers for providing password to access and use the portal hosted from Singapore. The AAR held that payments made for concurrent access to utilize the sophisticated services offered by the portal would be covered by the expression royalty.

We find that subsequently, after considering the decision in *Cargo Community Network (P.) Ltd. (supra)*, *Mumbai ITAT in the case of Standard Chartered Bank 11 ITR 721* and *Yahoo India Pvt. 140 TTJ 195* held that no part of the payment could be said to be for use of specialized software on which data is processed as no right or privilege was granted to the company to independently use the computer.

In the case *IMT Labs (India) (P) Ltd. (supra)*, the assessee, an Indian company, entered into an agreement with a non-resident American company for securing license of a particular software, which the applicant is entitled to use. The applicant has to pay license fee for usage of software to the American company. The AAR held that 'Smarterchild' application software on the American company's server platform is scientific equipment licensed to be used for commercial purposes and therefore, payments made for producing and hosting 'Interactive Agent' applications would be covered by the expression 'royalties' as used in Article 12.

However, we find that in the instant case, appellant only provides service by using its hardware/security devices/personnel and not use of any software and therefore the above case is distinguishable from the present appeal.

In *ThoughtBuzz (P) Ltd. (supra)*, the applicant, a Singapore company was engaged in providing social media monitoring service for a company, brand or product. It was a platform for users to hear and engage with their customers, brand ambassadors etc. across the internet. The applicant offered service on charging a subscription. The clients, who subscribe, can login to its website to do a search on what is being spoken about various brands and so on. The AAR held that the amount received from offering the particular subscription based service is taxable in India as 'royalty' in terms of paragraph 2 of Article 12 of the DTAC between India & Singapore. However, we find that in the instant case, the appellant is only providing DC service which includes administration and supervision of central infrastructure, mailbox hosting services and website hosting services and therefore, the ratio laid down in the above is not applicable to the facts of the appellant's case.

6.3 From the enunciation of law in *Bharati Ax General Insurance Co Ltd. ExxonMobil Company India (P) Ltd., Standard Chartered Bank v. DDIT; DCIT v/s M/s Reliance Jio Infocomm Ltd.* narrated at para 6.1 hereinbefore, it is quite luculent that revenues under the IDC agreement ought not to be taxed in the hands of the appellant as royalty under the Act and/or India-Singapore DTAA. Therefore, we delete the addition of Rs.95,62,479/- made by the AO towards IDC charges and allow the 2nd ground of appeal.

8. *Facts being identical, respectfully following the decision of the coordinate Bench in assessee's own case as referred to above, we hold that the amount received by the assessee from provision of IDC services cannot be treated as royalty either under the provisions of the Act or under India-Singapore DTAA, hence, cannot be taxed at the hands of the assessee. Accordingly, addition of Rs. 1,86,50,124/- deleted. This ground is allowed."*

11. In the present case, from the nature of services provided by the assessee, it is evident that the services are performed by the assessee's own personnel in France and the payment on account of search services was

directly remitted by the Indian group companies to the assessee. As part of the TSIS Service Agreement, the Indian group companies only receive standard services and no licences in any software/right to use any software etc. is provided. Further, there is no sharing of any confidential information by the assessee with the Indian group companies. The term '*Royalty*' is not as widely defined in India France DTAA as in the India Singapore DTAA, which was taken into consideration by the coordinate bench of the Tribunal in the case of sister concern. Since it has not been disputed that the facts of the present case are similar to the case of the assessee's group concern, wherein income arising from services of similar nature are held to be not taxable as royalty, therefore, we find merit in the plea of the assessee. Accordingly, respectfully following the aforesaid decision of the coordinate bench of the Tribunal, we direct the AO to delete the addition in respect of TSIS Service Fees received by the assessee. As a result, ground No. 2 raised in assessee's appeal is allowed.

12. During the year, the assessee earned Management Service Fees amounting to Rs. 7,19,02,857, from its aforesaid Indian group companies under the Management Service Agreement. Under the agreement, the services provided by the assessee broadly include management services in the nature of external communication services, strategy and development services, finance services, legal services, general management, and coordination services, and zone management services. There is no dispute regarding the fact that under the agreement entered into with each of the aforesaid entities the nature of services provided by the assessee is identical. As noted above,

the AO vide draft assessment order treated the Management Services Fees as fees for technical services under section 9(1)(vii) of the Act and Article 13 of India France DTAA. However, in further proceedings, the learned DRP has held the fees received by the assessee under the Management Services Agreement to be taxable as royalty. As noted above, the Revenue has not filed any appeal against the appealable DRP's directions and therefore has accepted the findings of the learned DRP. From the perusal of the Management Services Agreement entered into by the assessee with the aforesaid Indian group companies, forming part of the paper book from page no. 280 – 324, we find that the scope of work is restricted to various services in the nature of public relations services, corporate social responsibility, partnership opportunities, networking coordination, financial services, legal services / advices, human resources. In support, the assessee has also filed copies of emails exchanged between the parties regarding the aforesaid services. As per the assessee, the services are provided only to support the Indian group companies in carrying on business efficiently and running the business in line with the business model, policies, and best practices followed by the Edenred group. From the perusal of documents available on record, it is evident that the services are general management services rendered by the assessee to its Indian group companies on a recurring basis and there is no use or right to use any copyright, patent, trademark, design, etc. Further, there is no sharing of any confidential information by the assessee with the Indian group companies. Though the assessee is a resident of France and therefore, is entitled to provisions of the India France DTAA, however, even under the provisions of the Act the fees received by the assessee for rendering the aforesaid services

do not constitute royalty. As the impugned management services rendered by the assessee are to be examined only on the touchstone of royalty in the present appeal, therefore, we are of the considered view that Management Service Fee received by the assessee is not in the nature of royalty and thus, the AO is directed to delete the addition on this account. As a result, ground No. 3 raised in assessee's appeal is allowed.

13. Ground No. 1 and 4, raised in assessee's appeal, are general in nature and therefore, in view of aforesaid findings need no separate adjudication.

14. Ground no.5, raised in assessee's appeal is pertaining to short grant of credit of TDS. This issue is restored to the file of the AO with the direction to grant TDS credit, in accordance with the law, after conducting the necessary verification. As a result, ground no.5 raised in assessee's appeal is allowed for statistical purposes.

15. The issue arising in ground No. 6 raised in assessee's appeal is pertaining to the charging of interest under section 234A of the Act. Accordingly, we deem it appropriate to remand this issue to the file of AO for *de novo* adjudication after the necessary examination of the fact whether the return of income was filed by the assessee within the prescribed time under the Act. As a result, ground No. 6, raised in assessee's appeal is allowed for statistical purposes.

16. The issue arising in ground No. 7, raised in assessee's appeal, is pertaining to levy of interest under section 234B of the Act. In view of the

decision of Hon'ble Supreme Court in DIT v. Mitsubishi Corporation, [2021] 438 ITR 174 (SC), ground No. 7, raised in assessee's appeal, is allowed.

17. In the result, this appeal by the assessee is allowed for statistical purposes.

ITA no.7247/Mum./2017
Assessee's Appeal – A.Y. 2013-14

18. In its appeal, the assessee has raised the following grounds:-

"On being aggrieved by the order dated 31 October 2017 of the learned Deputy Commissioner of Income-tax International Tax)(2)(1)(2), Mumbai (AO) passed under section 1433) read with section 144C(13) of the Income-tax Act, 1961 (the Act) as also directions issued by the DRP, Mumbai dated 22 September 2017, the present appeal is being preferred on the following grounds amongst others which, it is prayed, may be considered without prejudice to one another

On the facts and circumstances of the case and in law, the learned AO, as per the directions of DRP has

1. General Grounds

Erred in assessing total income at INR 7,09,51,660 as against returned income of INR 77,18,773;

2. Technology and Strategic Information Systems (TSIS") fees taxed as royalty

Erred in considering TSIS charges of INR 33,30,780 to be taxable as royalty under the provisions of the Act and the India-France Double Taxation Avoidance Agreement (DTAA");

3. Management service fees taxed as royalty

a) *Erred in characterizing and taxing management service fee amounting to INR 5,99,02,109 as royalty as against the characterization as Fees for Technical Services (FTS) as mentioned in the draft assessment order;*

b) *Erred in characterizing and taxing the impugned management service fee as royalty by holding that the nature of the services rendered is the same as that in the case of group company (c. Edenred Pte. Ltd.) where they have been held as royalty, however, in the group company's case the DRP has held management service fee as FTS only;*

c) *Erred in not appreciating that impugned management service fee cannot be taxed as FTS under the provisions of the Act as well as Article 13 of the India-France DTAA read with Para 7 of the protocol of the India-France DTAA*

containing the Most Favoured Nation Clause and Article 12(5) of the India-Finland DTAA which provides taxing right to the state where such services are performed (France);

d) Erred in not appreciating that impugned management service fee cannot be taxed at FTS under the provisions of the Act as well as Article 13 of the India-France DTAA read with Para 7 of the protocol of the India-France DTAA containing the Most Favoured Nation Clause and Article 12 of the India-USA DTAA which provides that only services which makes available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design are taxable as FTS/fees for included services,

4. *Erred in computing gross tax*

Erred in computing gross tax as INR 85,88,382 as against INR 82,17,924;

5. *Short grant of credit for Tax deducted at source ('TDS')*

Erred in granting TDS credit amounting to INR 85,52,734 as against INR 91,65,609 claimed in the return of income thereby leading to short credit of TDS of INR 6,12,875;

6. *Interest under section 234A of the Act*

Erred in levying interest under section 234A of the Act amounting to INR 356 which is not as per law;

7. *Interest under section 234B of the Act Erred in levying interest under section 234B of the Act amounting to INR 19,580 disregarding the fact that the Appellant is a non-resident assessee and its entire revenue / receipts are subject to tax withholding in India under section 195 of the Act and the Appellant is not liable to pay advance tax in respect of such revenues;*

The Appellant craves, to consider each of the above grounds of appeal without prejudice to each other and craves leave to add, alter, delete or modify all or any of the above grounds of appeal."

19. The issue arising in grounds No. 2 and 3 raised in assessee's appeal is pertaining to the taxability of TSIS Service Fees and Management Services Fees received by the assessee as royalty. The learned DRP vide its directions, after noting that the facts for the year under consideration are similar to the preceding assessment year, held that both the receipts are taxable as royalty. Since a similar issue has been decided in assessee's appeal being ITA No.

508/Mum./2016, for the assessment year 2012-13, therefore, our findings/conclusion rendered in the said appeal shall apply *mutatis mutandis*. Accordingly, grounds No. 2 and 3 raised in assessee's appeal are allowed.

20. The issue arising in grounds No. 1 and 4 are general in nature and therefore need no separate adjudication in view of our aforesaid findings.

21. Ground no.5, raised in assessee's appeal is pertaining to a short grant of credit of TDS. This issue is restored to the file of the AO with the direction to grant TDS credit, in accordance with the law, after conducting the necessary verification. As a result, ground no.5 raised in assessee's appeal is allowed for statistical purposes.

22. The issue arising in ground No. 6 raised in assessee's appeal is pertaining to the charging of interest under section 234A of the Act. Accordingly, we deem it appropriate to remand this issue to the file of AO for *de novo* adjudication after the necessary examination of the fact whether the return of income was filed by the assessee within the prescribed time under the Act. As a result, ground No. 6, raised in assessee's appeal is allowed for statistical purposes.

23. The issue arising in ground No. 7, raised in assessee's appeal, is pertaining to the levy of interest under section 234B of the Act. In view of the decision of Hon'ble Supreme Court in DIT v. Mitsubishi Corporation, [2021] 438 ITR 174 (SC), ground No. 7, raised in assessee's appeal, is rendered consequential in nature and therefore is allowed for statistical purposes.

24. In the result, this appeal by the assessee is allowed for statistical purposes.

ITA no.7248/Mum./2017
Assessee's Appeal – A.Y. 2014-15

25. In its appeal, the assessee has raised the following grounds:-

"On being aggrieved by the order dated 31 October 2017 of the learned Deputy Commissioner of Income-tax (International Tax)-(2)(1)(2), Mumbai (AO) passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (the Act) as also directions used by the DRP, Mumbai dated 22 September 2017, the present appeal is being preferred on the following grounds amongst others which, it is prayed, may be considered without prejudice to one another.

On the facts and circumstances of the case and in law, the learned AO, as per the directions of DRP has:

1. General Grounds

Erred in assessing total income at INR 5,39,54,650 as against returned income of INR 30,99,370;

2. Technology and Strategic Information Systems (TSIS) fees taxed as royalty

Erred in considering TSIS charges of INR 41,31,404 to be taxable as royalty under the provisions of the Act and the India-France Double Taxation Avoidance Agreement (DTAA");

3. Management service fees taxed as royalty

a. *Erred in characterizing and taxing management service fee amounting to INR 4,67,23,873 as royalty as against the characterization as Fees for Technical Services (FIS) as mentioned in the draft assessment order;*

b. *Erred in characterizing and taxing the impugned management service fee as royalty by holding that the nature of the services rendered is the same as that in the case of group company (re Edenred Pte Ltd) where they have been held as royalty, however, in the group company's case the DRP has held management service fee as FTS only,*

c. *Erred in not appreciating that impugned management service fee cannot be taxed as FTS under the provisions of the Act as well as Article 13 of the India-France DTAA read with Para 7 of the protocol of the India-France DTAA containing the Most Favoured Nation Clause and Article 12(5) of the India-Finland DTAA which provides taxing right to the state where such services are performed (i.e. France);*

d. *Erred in not appreciating that impugned management service fee cannot be taxed as FTS under the provisions of the Act as well as Article 13 of the India-France DTAA read with Para 7 of the protocol of the India-France DTAA containing the Most Favoured Nation Clause and Article 12 of the India-USA DTAA which provides that only services which makes available technical knowledge, experience, skill, know how, or processes, or consist of the development and transfer of a technical plan or technical design are taxable as FTS/ fees for included services.*

4. *Erred in computing gross tax*

Erred in computing gross tax as INR 66,45,335 as against INR 63,62,468,

5. *Interest under section 234B of the Act*

Erred in levying interest under section 234B of the Act amounting to INR 9,38,363 disregarding the fact that the Appellant is a non-resident assessee and its entire revenue/receipts are subject to tax withholding in India under section 195 of the Act and the Appellant is not liable to pay advance tax in respect of such revenues.

The Appellant craves, to consider each of the above grounds of appeal without prejudice to each other and craves leave to add, alter, delete or modify all or any of the above grounds of appeal."

26. The issue arising in grounds No. 2 and 3 raised in assessee's appeal is pertaining to the taxability of TSIS Service Fees and Management Services Fees received by the assessee as royalty. The learned DRP vide its directions, after noting that the facts for the year under consideration are similar to the preceding assessment year, held that both the receipts are taxable as royalty. Since a similar issue has been decided in assessee's appeal being ITA No. 508/Mum./2016, for the assessment year 2012-13, therefore, our findings / conclusion rendered in the said appeal shall apply *mutatis mutandis*. Accordingly, grounds No. 2 and 3 raised in assessee's appeal are allowed.

27. The issue arising in grounds No. 1 and 4 are general in nature and therefore need no separate adjudication, in view of our aforesaid findings.

28. The issue arising in ground No. 5, raised in assessee's appeal, is pertaining to the levy of interest under section 234B of the Act. In view of the decision of the Hon'ble Supreme Court in DIT v. Mitsubishi Corporation, [2021] 438 ITR 174 (SC), ground No. 7, raised in assessee's appeal, is rendered consequential in nature and therefore is allowed for statistical purposes.

29. In the result, this appeal by the assessee is allowed for statistical purposes.

ITA no.5193/Mum./2018
Assessee's Appeal – A.Y. 2015-16

30. In its appeal, the assessee has raised the following grounds:-

"On being aggrieved by the order dated 13 July 2018 of the learned Assistant Commissioner of Income-tax (International Tax)-2(2)(1), Mumbai (AO) passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (the Act) as also directions issued by the DRP Mumbai dated 18 May 2018, the present appeal is being preferred on the following grounds amongst others which, it is prayed, may be considered without prejudice to one another.

On the facts and circumstances of the case and in law, the learned AO, as per the directions of DRP has:

1. General Grounds

Erred in assessing total income at INR 5,36,59,590 as against returned income of INR 47.65,378.

2. Management service fees taxed as Fees for Technical Services ("FTS")

a) *Erred in not appreciating that impugned management service fee of INR 4:35.95.413 cannot be taxed as FTS under the provisions of the Act as well as Article 13 of the India-France Double Taxation Avoidance Agreement (DTAA) read with Para 7 of the protocol of the India-France DTAA containing the Most Favoured Nation Clause and Article 12(5) of the India - Finland DTAA which provides taxing right to the state where such services are performed (ie France);*

b. *Erred in not appreciating that impugned management service fee of INR 4,35,95,413 cannot be taxed as FTS under the provisions of the Act as well as Article 13 of the India-France DTAA read with Para 7 of the protocol of the India-France DTAA containing the Most Favoured Nation Clause and Article 12 of the India-USA DTAA which provides that only services which makes available technical knowledge, experience, skill know-how, or processes, or*

consist of the development and transfer of a technical plan or technical design are taxable as FTS/fees for included services;

3. *Technology and Strategic Information Systems (TSIS") fees taxed as royalty*

Erred in considering TSIS charges of INR 52,98,797 to be taxable as royalty under the provisions of the Act and the India-France DTAA;

4. *Erred in computing gross tax*

Erred in computing gross tax as INR 62,67,501 as against INR 60,05,098.

The Appellant craves, to consider each of the above grounds of appeal without prejudice to each other and craves leave to add, alter, delete or modify all or any of the above grounds of appeal."

31. The issue arising in ground No. 2, raised in assessee's appeal, is pertaining to the taxability of management service fees received by the assessee as fees for technical services.

32. The brief facts of the case pertaining to this issue are: During the year under consideration, the assessee earned management service fees amounting to Rs. 4,35,95,413 from its Indian group companies. The assessee claimed that the same is not liable to tax in India as per Article 13 read with the Protocol to the India France DTAA along with Article 12 of India Finland DTAA. Further, the assessee claimed that the said Management Service Fee is also not liable to be taxed in India as per Article 13 read with the Protocol to the India France DTAA along with Article 12 of India USA DTAA. The management services were rendered by the assessee under the same agreements with Indian group companies which were entered in the preceding assessment years. During the assessment proceedings, the assessee was asked to explain why this amount should not be taxed in India. In response thereto, the assessee submitted that the services are provided only to support the Indian

group companies in carrying on business efficiently and running the business in line with the business model, policies, and best practices followed by the Edenred group. The assessee further submitted that these services are performed by the personnel of the assessee in France and payments are directly remitted from India to the assessee in its bank account in France. The assessee also invoked the provisions of the Protocol to the India France DTAA regarding the Most Favourable Nation ('MFN') clause and submitted that beneficial provisions of other DTAA entered into by India are applicable in the present case. The AO vide draft assessment order dated 15/12/2017 passed under section 143(3) r/w section 144C(1) of the Act did not agree with the submissions of the assessee and held that Management Service Fee received by the assessee is taxable as fees for technical services under section 9(1)(vii) of the Act as well as the India France DTAA.

33. The learned DRP vide its directions dated 18/05/2018 issued under section 144C(5) of the Act held that India Finland DTAA is not applicable to the present case. As regards the reliance placed by the assessee on the India USA DTAA, on the basis that the restrictive definition of fees for technical services in the said DTAA be applied to the present case, by relying on the Protocol to the India France DTAA, the learned DRP held that assessee has made available technical input as well as the necessary training to the manpower of the group companies. Therefore, the services rendered by the assessee under the Management Services Agreement fall under the category of '*make available*' and accordingly, constitutes fees for technical services even under the India USA DTAA. Thus, unlike preceding assessment years, in the year under

consideration, the learned DRP held that the management service fee received by the assessee is taxable in India as fees for technical services. In conformity, the AO passed the impugned final assessment order under section 143(3) r/w 144C(13) of the Act. Being aggrieved, the assessee is in appeal before us.

34. During the hearing, the learned AR submitted that the assessee is entitled to claim the benefit of India USA DTAA in view of para 7 of the Protocol to the India France DTAA. The learned AR further submitted that the assessee has not '*made available*' any technical knowledge, experience, skill, know-how, or process, which has enabled its Indian group companies to apply the technology contained therein as per the restrictive definition of 'fees for included services' under Article 12(4) of the India USA DTAA.

35. On the contrary, the learned DR vehemently relied upon the orders passed by the lower authorities and submitted that the MFN clause as provided in the Protocol to the India France DTAA is not applicable to the present case in view of CBDT Circular No. 3/2022 dated 03/02/2022. Learned DR submitted that as per the said circular a separate notification has to be issued by India importing the benefits of the second treaty into the treaty with the First State, as required by the provisions of section 90(1) of the Act. However, there is no such notification that in India France DTAA the provisions of India USA DTAA will be imported.

36. We have considered the rival submissions and perused the material available on record. As noted above, during the year under consideration, the assessee rendered the services to its Indian group companies under

Management Services Agreement which was executed in the preceding assessment year. Under the agreement, the services provided by the assessee broadly include management services in the nature of public relations services, corporate social responsibility, partnership opportunities, networking coordination, financial services, legal services / advices, human resources. The assessee, inter-alia, claimed benefit under para 7 of the Protocol to the India France DTAA and submitted under the restrictive definition of 'fees are included services' as provided in Article 12(4) of the India USA DTAA, the services provided by the assessee are not taxable. In order to decide the claim of the assessee, it is relevant to note the provisions of the Protocol to the India France DTAA. Paragraph 7 of the Protocol, which is relevant to the present case, reads as under:

"7. In respect of articles 11 (Dividends), 12 (Interest) and 13 (Royalties, fees for technical services and payments for the use of equipment), if under any Convention, Agreement or Protocol signed after 1-9-1989, between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later."

37. Thus, as per the para-7 of the Protocol to the India France DTAA, if under any Convention between India and a third State, which is a member of the OECD, entered after 01/09/1989, India limits its taxation for dividend, interest, royalty, fees for technical services or payment for the use of the equipment 'to our lower rate' or 'restrict the scope' than the rate or scope as agreed between India and France, then such rate or scope shall apply under

the India France DTAA. Thus, under the Protocol to the India France DTAA, the most-favoured-nation treatment extended by India under DTAA with other OECD member countries is also extended to India France DTAA. The para-7 of the Protocol to the India France DTAA came up for consideration before the Hon'ble Delhi High Court in Steria (India) Ltd. Vs CIT, [2016] 386 ITR 390 (Delhi), wherein the Hon'ble Delhi High Court observed as under:

"15. The Court finds no warrant for the above restrictive interpretation placed on Clause 7 of the Protocol. The words "a rate lower or a scope more restricted" occurring therein envisages that there could be a benefit on either score i.e. a lower rate or more restricted scope. One does not exclude the other. The other expression used is "if under any Convention, Agreement or Protocol signed after 1-9-1989 between India and a third State which is a member of the OECD". This also indicates that the benefit could accrue in terms of lower rate or a more restrictive scope under more than one Convention which may be signed after 1st September 1989 between India and a State which is an OECD member. The purpose of Clause 7 of the Protocol is to afford to a party to the Indo-France Convention the most beneficial of the provisions that may be available in another Convention between India and another OECD country."

38. In the present case, the assessee is a resident of France and thus in view of para-7 of the Protocol to the India France DTAA has sought the benefit of the restricted scope of the definition of 'fees for included services' as provided under the India USA DTAA. Article 12(4) of the India USA DTAA, defines the term 'fees for included services' as under:

"(4) For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of 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, or consist of the development and transfer of a technical plan or technical design."*

39. It is the submission of the assessee that the services provided under the Management Services Agreement with Indian group companies do not make available any technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or a technical design. To understand the meaning of the term 'make available' the following observations of the coordinate bench of the Tribunal in the case of Shell Global International Solutions BV vs ITO [(2015) 64 taxmann.com 3 (Ahd)], becomes relevant:

"17. As for the connotations of 'make available' clause in the treaty, this issue is no longer res integra. There are at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi High Court in the case of DIT v. Guy Carpenter & Co Ltd. [2012] 346 ITR 504 and Hon'ble Karnataka High Court in the case of CIT v. De Beers India (P.) Ltd. [2012] 346 ITR 467/208 Taxman 406/21 taxmann.com 214 in favour of the assessee, and there is no contrary decision by Hon'ble jurisdictional High Court or by Hon'ble Supreme Court. In De Beers India (P.) Ltd. case (supra), their Lordships posed the question, as to "what is meaning of 'make available'", to themselves, and proceeded to deal with it as follows:

'.....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. 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 "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 "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.'

18. In the case of Boston Consulting Group (supra), it was stated that "advising on "marketing strategies" is held to be outside the scope of technical

services" and that as for the "business of rendering strategy consulting services, such as business strategy, marketing and sales strategy, portfolio strategy" carried on by the assessee "the nature of these services is materially similar". All these services were held to be outside the scope of fees for technical services taxable under the Indo-US tax treaty. In the case of Bharat Petroleum Corpn. Ltd. v. Jt. DIT [2007] 14 SOT 307 (Mum.), another coordinate bench of this Tribunal, inter alia, held that market study covering study of supply and demand analysis, domestic refining capacity, price forecast etc did not constitute fees for technical services as it did not transmit the technical knowledge. In the case of Ernst & Young (P.) Ltd. In re [2010] 189 Taxman 409/323 ITR 184 (AAR), the Authority for Advance Ruling, inter alia, observed that "some of the services enumerated have the flavor of managerial services" but "services of managerial nature are not included in Article 13 (of Indo-UK tax treaty, which is in pari materia with the treaty provision before us) unlike many other treaties". We are in considered agreement with the views so expressed by the Authority for Advance Ruling. On the same lines are various decisions of this Tribunal in the cases of ICICI Bank Limited v. Dy. CIT [2008] 20 SOT 453 (Mum.) and McKinsey & Co. Inc v. Asstt. DIT [2006] 99 ITD 549 (Mum.). What essentially follows, therefore, is that as long as the services rendered by the assessee are managerial or consultancy services in nature, which do not involve or transmit the technology, the same cannot be brought to tax as fees for technical services."

40. Therefore, only when the recipient of the services, by virtue of the rendition of services by the assessee, is enabled to provide the same services without recourse to the service provider, the services can be said to have been 'made available' to the recipient of services. A mere incidental advantage to the recipient of service is not sufficient to fall under the category of 'make available'. Therefore, the technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and 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. However, in the present case, apart from merely using the terminology 'made available', the Revenue has not brought any instance on record where the Indian group companies were shown to have used such information without depending upon the assessee. The fact that the assessee continued to render

the services, on a recurring basis, under the Management Services Agreement entered into by the assessee in the preceding assessment years also justifies the claim of the assessee that no technical knowledge, experience, skill, or know-how has been made available to the Indian group companies. Therefore, the management services rendered by the assessee under the Management Service Agreement do not constitute 'fees for included services' under the India USA DTAA.

41. The learned DR submitted that since there is no notification as per CBDT Circular No. 3/2022 dated 03/02/2022, in order to import the benefits of the India USA DTAA into the treaty with France, therefore, the Protocol to the India France DTAA cannot be invoked in the present case. We find that the aforesaid circular came up for consideration before the coordinate bench of the Tribunal in GRI Renewable Industries S.L. vs DCIT, in ITA No. 202/Pun./2021, wherein vide order dated 15/02/2022, the coordinate bench observed as under:

"10. It would be prudent to take cognizance of the CBDT Circular No.3/2022 dated 03-02-2022 providing clarification and laying down certain pre-requisites for deriving the benefit of the MFN clause in the Protocol to India's DTAA's with certain countries. The CBDT has summed up its opinion in para 5 of the Circular, reading as under:-

"5. In view of the above, it is hereby clarified that the applicability of the MFN clause and benefit of the lower rate or restricted scope of source taxation rights in relation to certain items of income (such as dividends, interest income, royalties, Fees for Technical Services, etc.) provided in India's DTAA's with the third States will be available to the first (OECD) State only when all the following conditions are met:

(i) The second treaty (with the third State) is entered into after the signature/ Entry into Force (depending upon the language of the MFN clause) of the treaty between India and the first State;

(ii) The second treaty is entered into between India and a State which is a member of the OECD at the time of signing the treaty with it;

(iii) India limits its taxing rights in the second treaty in relation to rate or scope of taxation in respect of the relevant items of income; and

(iv) A separate notification has been issued by India, importing the benefits of the second treaty into the treaty with the first State, as required by the provisions of sub-section (1) of Section 90 of the Income Tax Act, 1961.

If all the conditions enumerated in Paragraph 5(i) to (iv) are satisfied, then the lower rate or restricted scope in the treaty with the third State is imported into the treaty with an OECD State having MFN clause from the date as per the provisions of the MFN clause in the DTAA, after following the due procedure under the Indian tax law.”

11. A look at the above para deciphers that the benefit of a lower rate of taxation or restricted scope of source taxation rights, as contained in the MFN clause with reference to 'royalty' and 'fees for technical services' etc. provided in the India's DTAA with second State, can be availed under the DTAA with the first State only when the four conditions are fulfilled. There is no dispute that conditions enshrined under points (i) to (iii) are fulfilled in the instant case. The condition under point (iv) states that a separate notification should be issued by India importing the benefit of the second treaty into treaty with the first State as required u/s 90(1) of the Act. Thus, it becomes ostensible that the CBDT has mandated the issuance of a separate notification for importing the benefits of a treaty with second State into the treaty with the first State by relying on provisions of subsection (1) of Section 90 of the Income Act, 1961. Let us examine the prescription of section 90(1) of the Act which has been invoked as a shield for stipulating the fourth requirement. This section provides that: 'The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,— (a) for the granting of relief in respect of— (i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or.....and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.' In our opinion, the Circular specifying the need for a separate notification for importing the beneficial treatment from another Agreement as a corollary of section 90(1) of the Act, overlooks the plain language of the section seen in juxtaposition to the language of the Protocol, which treats the MFN clause an integral part of the Agreement. What is amply borne out from the language of section 90(1) is that a notification may be made for implementing the agreement that the Central Government has entered into with the Government of any country outside India for the granting the relief. Reference to the expression 'make such provisions as may be necessary' for the purpose of notification in the Official Gazette, is to adopt the manner of notifying as may be necessary for implementing the agreement and not that the notification is to be issued piecemeal and in a truncated manner. On notifying the Agreement or Convention, all its integral parts, get automatically notified. As such, there remains no need to again notify the individual limbs of the Agreement so as to make them operational one by one.

12. It is trite law that a circular issued by the CBDT is binding on the AO and not on the assessee or the Tribunal or other appellate authorities. It has been

held so authoritatively in CIT Vs. Hero Cycles Pvt. Ltd. (1997) 228 ITR 463 (SC) as reiterated in CCE Vs. M/s. Ratan Melting and Wire Industries (2008) 220 CTR 98 (SC). Ex consequenti, the Circular transgressing the boundaries of section 90(1) of the Act, cannot bind the Tribunal.

13. Notwithstanding the above, it can be seen that the CBDT has panned out a fresh requirement of separate notification to be issued for India importing the benefits of the DTAA from second State to the DTAA with the first State by virtue of its Circular, relying on such requirement as supposedly contained in section 90(1) of the Act. In our considered opinion, the requirement contained in the CBDT circular No.03/2022 cannot primarily be applied to the period anterior to the date of its issuance as it is in the nature of an additional detrimental stipulation mandated for taking benefit conferred by the DTAA. It is a settled legal position that a piece of legislation which imposes a new obligation or attaches a new disability is considered prospective unless the legislative intent is clearly to give it a retrospective effect. We are confronted with a circular, much less an amendment to the enactment, which attaches a new disability of a separate notification for importing the benefits of an Agreement with the second State into the treaty with first State. Obviously, such a Circular cannot operate retrospectively to the transactions taking place in any period anterior to its issuance. In view of the foregoing discussion, we are satisfied that the requirement of a separate notification for implementing the MFN clause, as per the recent CBDT circular dt. 03-02-2022, cannot be invoked for the year under consideration, which is much prior to the CBDT circular of the year 2022."

42. Thus, respectfully following the aforesaid decision of the coordinate bench of the Tribunal, we are of the considered view that CBDT Circular No. 3/2022 dated 03/02/2022 is not applicable to the present appeal. Therefore, in view of the aforesaid findings, we are of the considered opinion that the assessee is entitled to claim the benefit of the restricted definition under India USA DTAA in view of the Protocol to the India France DTAA. Since the assessee has been found not to have 'made available' any technical knowledge, experience, skill, or know-how, therefore, Management Service Fees received by the assessee cannot be taxed under the provisions of Article 13 of the India France DTAA read with para 7 of the Protocol to the India France DTAA and Article 12(4) of India USA DTAA. In view of the above, the alternative claim of the assessee under India Finland DTAA becomes academic. Further, once the

taxability fails in terms of the treaty provisions, there is no occasion to refer to the provisions of the Act, as in terms of section 90(2). The taxability of impugned receipts, under section 9(1)(vii) of the Act, is thus wholly academic. Hence, the AO is directed to delete the addition on this account. Accordingly, ground No. 2 raised in assessee's appeal is allowed.

43. The issue arising in ground No. 3 raised in assessee's appeal is pertaining to the taxability of TSIS Service Fees received by the assessee as royalty. The learned DRP following its directions rendered in assessee's own case for the assessment year 2012-13 held that the TSIS Service Fee is taxable in India as royalty. Since a similar issue has been decided in assessee's appeal being ITA No.508/Mum./2016, for assessment year 2012-13, therefore, our findings/conclusion rendered in the said appeal shall apply *mutatis mutandis*. Accordingly, ground No. 3 raised in assessee's appeal is allowed.

44. The issue arising in grounds No. 1 and 4 are general in nature and therefore need no separate adjudication, in view of our aforesaid findings.

45. In the result, this appeal by the assessee is allowed.

Order pronounced in the open Court on 23/12/2022

Sd/-
S. RIFAUH RAHMAN
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 23/12/2022

Copy of the order forwarded to:

- (1) The Assessee;*
- (2) The Revenue;*
- (3) The CIT(A);*
- (4) The CIT, Mumbai City concerned;*
- (5) The DR, ITAT, Mumbai;*
- (6) Guard file.*

*Pradeep J. Chowdhury
Sr. Private Secretary*

True Copy
By Order

Assistant Registrar
ITAT, Mumbai