IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA Nos. 497 to 500 & 784/Mum/2022
(A.Ys.2014-15 to 2016-17 & 2018-19)

Income Tax Officer (IT) 3(2)(2), Room No. 1627, 16th Floor, Air India Building, Nariman Point, Mumbai – 400021	Vs.	M/s Macrotech Developer Ltd. (as successor of Lodha Developer Ltd. which was Bellissiomo Crown Buildmart Pvt. Ltd) 412, Floor-4, 17 G Vardhaman Chamber, Cawasji Patel Road, Horniman Circle, Fort, Mumbai - 400001
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACL1490J		
Appellant	..	Respondent

C.O. Nos. 73 to 75 & 85 /Mum/2022
(A.Ys.215-16, 2016-17 & 2018-19)

M/s Macrotech Developer Ltd. (Successor Jawala Real Estate Pvt. Ltd) 412, Floor-4, 17 G Vardhaman Chamber, Cawasji Patel Road, Fort, Mumbai - 400001	Vs.	Income Tax Officer (IT) 3(2)(2), Room No. 1627, 16th Floor, Air India Building, Nariman Point, Mumbai – 400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACL1490J		
Appellant	..	Respondent

Appellant by :	Niraj Sheth
Respondent by :	Soumendu Kumar Dash

Date of Hearing	04.01.2023
Date of Pronouncement	24.01.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

All these 5 appeals filed by the revenue and 4 Cross Objection filed by the assesse are directed against the different orders of ld. CIT(A)-57, Mumbai. Since, similar issues and identical facts are involved in these appeals except the variation in the amount, therefore for the sake of convenience all these 5 appeals are adjudicating together by taking ITA No.497/Mum/2022 as a lead case and its finding will be applied as mutatis mutandis to the other 4 appeals.

ITA No. 497/Mum/2022

"1. Whether, on the fact and circumstances of the case and in law, the Ld. CIT(A) erred in treating the remittance made to various non resident entities towards Architectural Design consultancy services, Wind Engineering Consultancy services and Landscape Architectural Consultancy Services as consultancy services when the services provided are make available in nature and come in the purview of Fees for Technical Services as per India Singapore DTAA.

2. Whether, on the fact and circumstances of the case and in law, the Ld. CIT(A) erred in treating the remittance made to LDL UK Ltd. towards marketing services for projects of the assessee company as consultancy services when the services provided come in purview of Fees for Technical Services as per India UK DTAA."

3. Whether, on the fact and circumstances of the case and in law, the Ld. CIT(A) erred in treating the remittance made to various non resident entities towards. brokerage for sale of projects in India as consultancy services ignoring the fact that the income of the non resident has accrued in India."

4. Whether, on the fact and circumstances of the case and in law, the Ld. CIT(A) erred in treating the remittance made to various non resident entities for reimbursement of expenses as consultancy services when reimbursement were for services rendered by vendors whose services were in the nature of Fees for Technical Services."

5. The Appellant prays that the order of the ld CIT(A) on the above ground(s) be set aside and that of the Assessing Officer be restored.

6. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

2. Fact in brief is that assesse is engaged in the business of land development and construction of real estate properties. The AO passed an order dated 31.07.2018 raising demand of Rs.1,29,23,408/- u/s 201(1) and interest of Rs.78,10,519/- u/s 201(1A) of the Act on account of not withholding tax u/s 195 of the Act pertaining to payment made under the following categories:-

(i) Architectural Consultancy and payment for other services.

(ii) Brokerage payment.

(iii) reimbursement of expenses.

3. During the course of assessment the assesse submitted that such payments were not taxable in the hands of foreign recipients as per the provision of the Act r.w. the provisions of applicable Double Tax Avoidance Agreement (DTAA).

Ground No. 1 & 2: Levy of demand u/s 201/201A of foreign payment towards architectural design consultancy services and other services:

4. During the year under consideration the assesse has made the following remittances to the foreign vendors:

Sr. No.	*Name of Vendor*	*Country of Residence*	*Nature of service*	*Amount of Remittance (INR)*
1.	*Woha Designs Pte. Ltd.*	*Singapore*	*Architectural Design Consultancy Services.*	*9,24,82,928*
2.	*Rowan Williams Davies*	*Canada*	*Wind and Microclimate Engineering Consultancy Services.*	*84,97,409*
3.	*Sitetectonix Pte. Ltd.*	*Singapore*	*Landscape Architectural Consultancy services*	*24,64,004*
4.	*Lodha Developers UK Ltd.*	*UK*	*Marketing Consultancy Services*	*72,41,081*
Total				*11,06,85,422*

5. On query the assesse submitted the relevant details along with the nature of such consultancy services as under:

Sr. No.	Name of Vendor	Country of Residence	Nature of service	Remarks detailed in
1.	WOHA Designs Pte. Ltd.	Singapore	Architectural Design Consultancy Services. Such services are not taxable as 'Fees for Technical Services' since the services do not meet 'make available' criteria.	Annexure A
2.	Rowan Williams Davies	United Kingdom	Wind and Microclimate Engineering Consultancy Services. Such services are not taxable as 'Fees for Technical Services' since the services do not meet 'make available' criteria.	Annexure B
3.	Sitetectonix Pte. Ltd.	Singapore	Landscape Architectural Consultancy Services. Such services are not taxable as 'Fees for Technical Services' since the services do not meet 'make available' criteria.	Annexure C
4.	Lodha Developer UK Ltd.	UK	Marketing Consultancy Services. Such services are not taxable as 'Fees for Technical Services' since the services do not meet 'make available' criteria.	Annexure D

6. The assesse submitted that such services did not meet 'make available' criteria, therefore, the same were not taxable in India pursuant to beneficial provision of respective DTAA. However, the assessing officer after referring provision of Sec. 195(1), section 5 (2) and Section 9(1)(vii) and the document submitted by the assesse come to the conclusion that the payment to non-resident were taxable and assesse failed to deduct tax on such remittance, therefore he held that assesse was in default as per provision of Sec.201(1) of the Act and Sec. 201(1A) of the Act.

7. Aggrieved the assesse filed the appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assesse. The relevant operating part of the decision of the ld. CIT(A) is reproduced as under:

> ***"5.1 Consultancy payment in relation to architectural service, interior design etc.***
>
> *5.1.1 The appellant has submitted documents like invoice, work order issued to the foreign vendor, Form 15CA, Form 15CB related to the foreign remittances.*

The assessee further submitted that from the nature of services provided by the non- resident entities and the terms and conditions under which it was provided, it is clear that whatever services were provided are project specific and cannot be used for any other project by the appellant. Further, vendor has developed the design based on information received from the owner as per work order. It is emphasized by the asssessee that while providing such services neither any technical knowledge, skill, etc is made available to the assesse for utilizing them in future independently nor any developed drawing or design have been provided to the appellant, which can be applied by the appellant independently.

5.1.2 Thus the assessee submitted that the services rendered by the vendor is not taxable under clause 12(4) of the tax treaty.

5.1.3 The service provided to the assessee can be broadly divided into two categories based on the DTAA with respective countries:-

i. Cases wherein there is specific mention of FTS under the DTAA and wherein there is 'make available' criteria.
ii. Cases wherein there is no mention of FTS under the DTAA.

5.1.4 In the present case, payment to Sr.No.5 which is an entity in UAE is covered in the second category. Whereas all other payments are related to first category wherein there is 'make available' clause.

5.2 Findings with respect to make available criteria countries.

5.2.1 I have gone through the submissions of assessee and AO's finding. The issue is covered by the decision of Hon'ble ITAT in the case of DCIT Vs Forum Homes Pvt. Ltd (2021) ITA 5804/Mum/2018 (Mumbai Tribunal). For ready reference the finding of Hon'ble ITAT is reproduced below:

> *8. We have considered rival submissions in the light of decisions relied upon and perused the materials on record Undisputedly, the assessee, at the relevant point of time was developing a residential project at BKC In connection with the development of such project the assessee had availed certain technical/consultancy services from three non- resident entities located in Singapore. For availing such services, the assessee has pav certain amount to the non-resident entities. The short issue arising for consideration before us is, whether the payment made by the non-resident entities can be termed as FTS under Article 12(4) of India Singapore Tax Treaty For better appreciation, Article 12(4) of the tax treaty is reproduced hereunder:-*
>
> > *"4. The term fees for technical services as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:*
> >
> > *(a) are ancillary……*

(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein, or (c) consist of the development and transfer of a technical plan or technical design but excludes any service that does not enable the person acquiring the service to apply the technology contained therein."

9. A reading of Article 12(4) of the tax treaty would make it clear that payment made to a resident of one of the contracting state can be regarded as FTS, if, in course of providing managerial/technical or consultancy services, technical knowledge experience, skill know how or processes is made available which enables the person acquiring such services to apply the technology contained therein It further provides, if the services consist of development and transfer of a technical plan or technical design, but excludes any services that does not enable the person acquiring the service to apply the technology contained therein would not qualify as FTS In the facts of the present appeal, the payments made and the nature of services rendered are as under:-

Sr. No.	*Name of the party*	*Country*	*Amount (Rs.)*	*Nature of services*
1.	*Arc Studio architecture + Urbanism Pte. Ltd.*	*Singapore*	*2,85,35,269/-*	*Architectural drawing/design in relation to BKC project.*
2.	*Web Structure Pte. Ld.*	*Singapore*	*68,57,342/-*	*GFC drawing/design in relation to BKC project*
3.	*RMR Engineers Pte. Ltd.*	*Singapore*	*12,24,464/-*	*MEP drawing/design in relation to BKC project*

10. Thus, as could be seen, the scope of work is limited to various types of drawings and designs for the residential project being developed at BKC On further verification of facts on record, it is evident that insofar as Arc Studio Architecture Urbanism Pte. Ltd concerned, it will provide an illustrative site/roof plan showing all the components of the project, general landscape, recommendation and overall infrastructure elements, such as entry driveways and service circulation, Diagram showing each of the major public at 1.200 scale, image board to describe the architectural character of the project etc. The scope of work also requires the entity to prepare schematic design drawings, approved by the client in case of minor adjustment. The terms of the agreement make it clear that the design drawing rendering, model, specification electronic files including database: and spreadsheets and other derivation that are part of the project will remain the intellectual property of the service provider and are intended for use solely with respect to the project further restrains the assessee from utilizing such intellectual property for any other project or for addition to the subject project or for completion of the project by any other entity Similar is the scope of work and terms and conditions in respect of Web Structures Pte. Ltd another non-resident entity

11. Thus from the nature of services provided by the non-resident entities and the tem and conditions under which it was provided, it is clear that whatever services were provided are project specific and cannot be used for any other project by the assessee Further while providing such services neither any technical knowledge, skill, etc. is made available to the assessee for utilizing them in future, independently nor any developed drawing or design have been provided to the assessee which can be applied by the assesse independently. Thus, it is very much clear, the conditions of Article 12(4) of the tax treaty are not fulfilled

12. Though the assessing officer has generally observed that in course of providing services to the assessee, the non-resident entities have made available technical knowledge, know-how, processes to the assessee However, no substantive material has been brought on record by him to back such conclusion Even, before us, learned departmental representative has not brought any material to demonstrate that conditions of Article 12(4) have been fulfilled in the facts of the present case. In view of the aforesaid we do not find any valid reasons to interfere was then of learned Commissioner (Appeals) Accordingly, we uphold the order of teamed Commissioner (Appeals) on the issue by dismissing ground raised."

5.2.2 On going through the order of A.O and assessee's submission, it can be seen that the facts of the case are almost similar to the case mentioned above

5.2.3 Following the above judgment, it is held that income of the entities were not taxable in India. Therefore, the assessee was not required to deduct TDS on these payments."

8. During the course of appellate proceedings before us the ld. D.R has referred the order of the A.O and the analysis of the document made by the A.O in the assessment order. He submitted that there was close connection of the architectural design services providers with the assesse and the whole process was approved by the owner after specifying, the planning and architectural design services. The ld. D.R supported the order of the assessing officer.

9. However, the ld. Counsel specifically referred Article 12 of the India & USA DTAA on the issue of payment of fees for technical services. In this regard he referred protocol between USA & India and referred paragraph 4(b) of the protocol that technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The use of a product which embodies technology shall not

per se be considered to make the technology available. He also referred India of Article 12 of the India Singapore DTAA which exclude any service that does not enable the person to use the technology independently.

10. Heard both the sides and perused the material on record. During the year under consideration the assesse made remittances to Woha Design Pvt. Ltd. Singapore for providing services relating to architectural design which include macro lable lay out of the entire project including design positioning of various buildings, placement, of common amenities like swimming pool & club houses etc. The assesse submitted along with the supporting document that while providing such services not any technical knowledge skill etc. was made available to the assesse to apply these services independently in future.

11. We have also perused the details of payment towards architectural design consultancy services to Woha Design Pte. Ltd, comprising copies of work order, note on payment made to Woha Design Pte. Ltd, copy of invoices, Form No. 15CA and 15CB along with other relevant documents placed in the paper book. The nature of payment was pertained to consultancy services for master planning of the specific project namely Wadala TT, Mumbai. As per clause 14 of the agreement, the design prepared by the design consultant was solely for the purpose of the above referred project. Woha design consultant is a tax resident of Singapore and Article 12 of the India Singapore DTAA deals with the taxability of income from Royalties & FTS. It provides that services will be considered as FTS only if such vendor is making available the technical knowledge, experience, skill, knowhow or process which enable the person acquiring the services to apply the technological contained therein. The relevant part of the Article 12 of the Royalties

and Fees for Technical Services of the India Singapore DTAA is reproduced as under:

> ***"ARTICLE 12 ROYALTIES AND FEES FOR TECHNICAL SERVICES***
>
> 1. *Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State*
> 2. *However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent.*
>
> 4. *The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:*
>
> a. *are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received, or*
> b. *make available technical knowledge, experience, skill, know-how or processes. which enables the person acquiring the services to apply the technology contained therein; or*
>
> **c. *consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.***
>
> *For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person..."*

It is clear from the clause c of the Article 12.4 of the treaty as supra that services of managerial, technical or consultancy will be regarded as fees for technical services only if such services consists of the development and transfer of a technical plan or technical design but categorically exclude any service that does not make available and does not enable the person acquiring the service to apply the technologically contained thereon on its own.

Similarly, the payment made to Rowan Williams Davies relating to wind micro climate engineering consultancy services, payment made to landscape architectural consultancy service to Sitetectonix Pte. Ltd. & payment for marking consultancy services to Lodha Developer U.K. Ltd

were also not taxable as fees for technical services, since, the services do not meet 'make available' criteria. Since as per Article 13 of India U.K. DTAA payment for services rendered would fall within the ambit of FTS only if such services are in the nature of 'make available'.

12. We have also perused the various judicial pronouncements referred by the ld. Counsel:

> *"1. ITAT Mumbai in the case of Forum Homes (P) Ltd. [2021] 132 taxmann.com 223*
> *2. ITAT Pune in the case of Gera Development (P) Ltd. [2016] 72 taxmann.com 238*
> *3. ITAT Mumbai in the case of Buro Happold Limited [TS-76-ITAT-2019 (Mum)]*
> *4. Hon'ble Karnataka High Court in the case of De Beers India Minerals (P) Ltd. [2012] 21 taxmann.com 214*
> *5. ITAT Mumba in the case of SCA Hygiene Products AB [2021] 123 taxmann.com 152"*

In the case of Forum Homes (P) Ltd. [2021] 132 taxmann.com 223 the head note is reproduced as under:

> *Section 9 of the Income-tax Act, 1961, read with article 12 of DTAA between India and Singapore Income Deemed to accrue or arise in India (Royalties/Fees for technical services Make available) - Assessment year 2015-16 Assessee-company was developing a residential project and had availed technical/consultancy services from three non-resident entities against certain fee - Assessing Officer held that fee paid to non-resident entities would qualify as FTS under section 9(1)(vii) and also under article 12(4) Terms of agreement showed that design, drawing, et,, would remain intellectual property of said entities and were intended for use solely with respect to project and it further restrained assessee from utilizing such intellectual property for any other project and while providing such services neither any technical knowledge, skill, etc., was made available to assessee for utilizing them in future, independently nor any developed drawing or design had been provided to assessee which could be applied by assessee independently Whether, on facts, conditions of article 12(4) of tax treaty were not fulfilled and, thus, said fee could not qualify as FTS-Held, yes [Paras 8-12] [In favour of assessee]"*

In the case of Gera Development (P) Ltd. Vs. DCIT as referred supra the ITAT Pune held that payments made by the assesse, India Company to US company for architectural design and drawings of different buildings and facilities could not be held as fees for technical services as mere passing of project specific architectural drawings and design with

measurements did not amount to 'making available' technical knowledge, know or process and, consequently no TDS was deductible from said payments. We have also considered the similar findings in the other judicial pronouncements as cited supra by the ld. Counsel.

13. In the light of the facts as discussed above in this order, the A.O has not brought any material on record to demonstrate that how the service provider has made available to the assesse any technical knowledge, skill etc. which can be applied by the assesse independently in future. Therefore, after taking into consideration, the provisions of DTAA and judicial pronouncement as discussed supra we do not find any reason to interfere in the findings of the Ld. CIT(A).

Ground No. 3: Remittance made to various non-resident towards brokerage for sale of projects in India:

14. During the year under consideration the assesse has made certain remittances on account of brokerage to non-resident without deduction of tax. The detail of such payment are as under:

Sr. No.	*Name of Broker*	*Remittance Amount (INR)*	*Country of Residence*	*Remarks detailed in*
1.	*Ashkanani International General Trading & Contracting*	*12,80,071*	*Kuwait*	*Brokerage paid for sale of flats in New Cuffe Parade Project*
2.	*Avendus Capital Inc.*	*17,00,582*	*USA*	*Brokerage paid for sale of flat in Cuffe Parade Project*
Total		*29,80,653*		

15. On query the assesse explained that foreign parties were carrying out there business operations in the territory outside India in their respective countries and they do not have any business operations or any business in India. The commission was paid merely for referring customers to the company who have expressed interest in buying properties in the projects which were developed by the company in

India. There was no technical knowledge or special skills which was required for providing such services nor the services were managerial in nature. Therefore, the such payment cannot be treated as FTS under the provisions of the Act. The assesse further submitted that it has also relied on 'No PE Declaration' and Tax Residency certificate (CTR) provided by such parties to whom commission payment were made. Therefore, the subject payment cannot be attributed to tax, therefore, no tax was withheld u/s 195 of the Act. However, A.O has not agreed with the submission of the assesse. The A.O stated that all the payments made by the assesse as brokerage to foreign vendors shall fall under the ambit of Sec.5(2) as the income from such payments to foreign vendors has arose or deemed to have arise in India only as the source i.e the flats sold for which the brokerage was paid, lies in India only. The AO has also stated that the brokerage payment were for identifying the potential customers for the assesse and thus the nature of services provided by the agents were in the nature of consultancy fall under the definition of FTS u/s 9(1)(vii) of the Act.

16. Aggrieved, the assesse filed the appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assesse. The relevant part of the decision of ld. CIT(A) is reproduced as under:

> ***"5.4 Brokerage***
>
> *5.4.1 I have gone through the assessee's submissions, AOs findings and other relevant facts. The A.O. treated the payment as FTS relying on the decision of ITAT Cochin Bench in the case of English Indian Clays Ltd vs. ACIT (IT) (2013) 39 taxmann.com 50. As per the A.O. it was held by the Hon'ble ITAT that payment to the foreign company for marketing survey and identifying potential customers for assessee's product were only consultancy services taxable in India.*
>
> *5.4.2 I have gone through the judgements of Hon'ble Cochin ITAT. For ready reference, the relevant portions of Hon'ble ITAT's order is reproduced below:-*
>
> ***English Indian Clays Ltd. (TS-527-ITAT-2013(COCH)***
>
> ***The facts***

"the assessee engaged M/s Stratum Resources as marketing agent for South East Asian countries. M's Stratum Resources has to study the market situation in South East Asia for the product manufactured by the assessee and they have to market the product of the assessee in those countries. The has also entered into a similar agreement with Tionale Enterprises Pte Ltd Singapore. However, the CIT(A) found that Tionale Enterprises Pte Ltd is only a marketing agency, therefore, tax need not be deducted on the payments made to them. However, in respect of M's Stratum Resources, the CIT(A) found that it is consultancy charges, therefore, tax has to be deducted Accordingly, the CIT(A) confirmed the disallowance made by the assessing officer."

Assessee's arguments

"According to the Id representative. M's Stratum Resources was engaged only for purpose of marketing the assessee's product in South East Asian countries, therefore, the payment cannot be considered as consultancy charges. Hence, it is not taxable in India and consequently, the question of deduction of tax at source u's 195 of the Act does not arise. The ld representative has placed has reliance on the judgment of the Apex Court in V. Lakshmanan v. BR Mangalagiri & Ors [1995 Supp (2) SCC33] and submitted that the nomenclature or label given in the agreement cannot be a decisive factor. According to the ld representative, the substance of the agreement should be taken into consideration. Referring to another judgment of the Supreme Court in the case of Assam Small Scale Ind Dev Corp Ltd and JD Pharmaceuticals and Anr [2005 13 SCC [9] the ld representative submitted that the expression in the agreement cannot be a decisive factor. The nature transaction is required to be determined on the basis of the substance and not by the nomenclature. Therefore, merely because it was mentioned as consultancy charges in the agreement, the real substance of marketing the product cannot be ignored. The Id representative has also placed his reliance on the judgment of the Kerala High Court in the case of Joe Joseph & Ors v KC Moideen reported in 1996 (1) KLJ 656 3. The Id representative further submitted that new sub sections (3) and (4) were inserted in section 201 with effect from 01-04-2010 According to the Id representative, sub sections (3) and (4) of section 201 which were inserted by Finance Act, 2009 with effect from 01-04-2010 cannot be applied retrospectively for the year under consideration According to the ld representative, the retrospective operation is not practical and possible. The ld representative placed his reliance on the Special Bench decision of the Delhi Bench of this Tribunal in New Skies Satellites NV vs ADIT, Intl Taxation Cir.2(1), New Delhi (2009) 121 ITDI (Del)(SB) According to the ld representative, the transaction in this case refers to payment of commission Section 195 of the Act requires deduction of tax while making payment to non resident Indian According to the ld representative, in this case, the payment made to non resident Indian is not taxable, therefore, there is no question of any deduction of tax The ld representative further submitted that the entire amount payable to the non resident Indian has already been paid Therefore, the amendment to section 201 cannot fix the liability on the assessee to deduct tax."

Department's arguments

"4 On the contrary, Shri KK John, the ld DR submitted that as per the agreement with M/s Stratum Resources, the foreign party has to take market survey and identify the potential customers and file a report to the assessee The payment

is on every day basis 50% of the total payment depending upon the work of the foreign party has to be paid in advance Therefore it is not a case of marketing the product in foreign countries, but it is a case of doing marketing survey and the assessee is paying consultancy charges. The agreement nowhere states that the foreign party has to market the product of the assessee in South East Asian countries. In the absence of any enabling provision to enable the foreign party to market the assessee's product in foreign countries, the payment made by the foreign party cannot be construed as payment for marketing According to the Id DR, marketing survey and identifying the potential customers for the assessee's product are only consultancy services and therefore, the payment made to foreign party is taxable in India. Hence, the assessee is bound to deduct tax u's 195 of the Act Referring to the provisions of section 201(3) of the Act, the Id DR submitted that the assessing officer passed the imped order before 31-03-2011. Proviso to section 20113) of the Ad enables assessing officer to pass order before 31-03-2011 in respect of financial year commencing on or before 04-2007 Therefore, the order passed by the assessing officer is within the period provided in section 201(3) of the Act. Therefore, there is no question of any impossibility as claimed by the assessee"

Hon"ble ITAT's findings

"5. We have considered the rival submissions on either side and also perused the material available on record. We have also carefully gone through the copy of the agreement said to be entered into between the assessee and the foreign party The CIT(A) also has reproduced copy of the agreement on pages 24 and 25 of the impugned order. As rightly submitted by the ld DR the work of the foreign party is to identify the potential customer and file a report regarding the market strategy and developmental studies. Agreement does not enable the foreign party to market the product of the assessee in South East Asian countries. The foreign party only has to do survey and file a report so that the assessee could market their product after considering the report filed by the foreign party. Therefore, the payment made to M's Stratum Enterprises is only consultancy charges as found by the CIT(A). It is not a case of marketing the product in the foreign country. Therefore, this Tribunal is of the considered opinion that the CIT(A) has rightly confirmed the order of the assessing officer."

5.5 Analysis

5.5.1 On going to the judgement, it can be seen that the assessee has entered into the agreement with two foreign entities.

1. *M/s. Stratum Resources*
2. *M/s Tionale Enterprises Pte Ltd*

5.5.2 In the case of Tionale Enterprise Pte Ltd, the CIT(A) itself held that this entity was engaged as a marketing agency and therefore no tax was deductable in this case.

5.5.3 Whereas in the case of Stratum Resources the CIT(A) found that the payment is for consultancy charges and therefore tax has to be deducted.

5.5.4 From the argument of learned D/R, it can be seen that payment to M/s. Stratum Resources was based on "everyday basis" This shows that the

payment of M/s. Stratum Resources was not linked to sales but was based on the time consumed in market survey, identify the potential customer and file a report.

5.5.5 On the basis of these facts and after examining the agreement Hon ITAT came to the conclusion that the agreement does not enable the foreign party to market the product of assesse. The party was to conduct the survey and file a report to assessee. Therefore the Hon. ITAT held that payments made to Stratum Enterprises were consultancy charges.

5.5.6 The facts of the current case are entirely different from the case of English Indian Clays limited. As in the present case, the brokerage is directly related to sales have gone through the invoices and it was seen that brokerage in these cases was paid @ of 2% of sale consideration (invoices attached as Anx 1 & 2)

5.5.7 It can also be seen that even in the case of English Indian Clays Limited payment made to M/s. Tionale Enterprise Pte Ltd. for marketing agency were held to be not taxable and therefore it was held, by the CIT(A) itself, that no tax was deductible.

5.5.8 Considering the above, I am of the opinion that brokerage payment can at the best be equated with commission.

5.5.9 In this regard, I place my reliance on the judgment of Hon'ble Delhi High Court in the case of DCIT vs. EON Technology (P) Ltd (15 taxmann.com 391) 2011 (Delhi HC). For ready reference, the finding of Hon'ble Delhi High Court is reproduced below.

> *"2. The respondent assessee EON Technology Pvt. Ltd is a private limited company engaged in business of development and export of software. During the relevant assessment year 2007-08, the assessee had paid commission of Rs.33,36,068/ to its parent/holding company EON Technologies, U.K., (ETUK, for short) on the sales and amounts realized on export contracts procured by ETUK for the respondent assessee. There is no dispute about the nature and on what account commission has been paid. The quantum etc. and the fact that ETUK was entitled to said payment is not doubted or disputed 3. The contention and question raised by the Revenue is that the commission income of Rs 33,36,068/ earned by ETUK had accrued in India or was deemed to accrued in India and, therefore, the respondent assessee was liable to deduct tax at source and as there was failure, the said expenditure should be disallowed under Section. 40(a)(ia) of the Act. The relevont portion of the assessment order reads:-*
>
> > *"There are express provisions of the IT Act that provide for taxation of any part of income that accrues or arises or deemed to accrue or arise in India. When one states accrual of income it is basically an absolute concept when both the situs and receipt of such income is within the territories of the country. However it such conditions are not met fully and completely, then the deeming concept comes into play. As per previous judicial pronouncement, it has been clearly established that income can be said to be received when it reaches the assessee but it can be to have "accrued" or "arisen" immediately when the right to receive the*

said income becomes vested in the assessee. By performing the functions as envisaged in the agreement, the ETUK has earned the right to receive the income, thereby attracting the provisions of section 5 of the Act. It has further been stated vide various judicial pronouncement including in the case of CIT Vs. Punjab Tractors Cooperative Multipurpose Society Ltd that in the case of rendering of services, income would accrue at the time of such rendering of services. As per the agreement of ETUK is the sole selling and marketing agent for the assessee, which means ETUK is rendering the service of selling which has enabled him to earn the right to receive the income from ET India, ie the assessee. Since such receipts situs/origin in Indio, this portion of income liable to be taxed in India. It shall not out of place to mention that the place of accrual of income is the place where right to receive that income arises with the corresponding liability of the prayer to make the payment of the same there. The assessee's statement that since no operation/business are carried out in the taxable territories of India then the income accruing abroad through on any business connection in India cannot be deemed to accrue or arising in India, does not hold any water as the source of such income arising to ETUK is its business connection with the assessee company in India Le. the source is situate wholly and completely within territories of India. Another contention of the assessee regarding that that this commission payment is remitted directly to ETUK and is therefore not received in India is also not tenable since receipt and right to receive are two distinct concepts both of which cannot be used interchangeably Here the ETUK may not have received the amount in India but due to its business connection in Indio, ETUK has earned the right to receive this income "deemed to accrue" and thereby becoming liable to be taxed in India of the portion that accrues or arises in India." (emphasis supplied)

4. The reasoning of the Assessing Officer is confusing, laconic and not clear. In the first paragraph of the assessment order quoted above it has been held that the right to receive income by ETUK had situs or origin in India. It is stated that the place of accrual of income was in India as payment was made from India and, therefore, it is deemed to be received in India. In the first paragraph towards the end, the Assessing Officer has held that that the source of income by way of commission earned by ETUK has business connection with the respondent- assessee in India i.e. the source was situated wholly and completely within the territory of India. The second paragraph refers to business connection and principle of deemed accrual. 5. Thus, on one hand, it was held that the commission income paid to ETUK had accrued or arisen in India and the said ETUK had right to receive income in India, since the situs/origin is in India but it is also averred that ETUK had business connection with the respondent assessee in India. 6. Concept of deemed accrual of income is different from income accruing, arising or received in India. When income accrues, arises or is received in India by a non resident, it is taxable in India. Income which is deemed to accrue or arise in India under the Act is taxable in India even though such income has not actually accrued, arisen or received in India. 7. To appreciate the legal position, Section 52) of the Act is reproduced below:- "Section 5 (2): Subject to the provisions of this Act. the total income of any previous year of a person who is a

non-resident includes all income from whatever source derived which-(a) Is received or is deemed to be received in Indio in such year by or on behalf of such person; or (b) Accrues or arises or is deemed to accrue or arise to him in India during such year. Explanation 1: Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India. Explanation 2: For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India" 8. It is apparent from the Section 5(2) of the Act that total income of previous year of a person, who is a non-resident, is chargeable to tax in India if it is received or is deemed to be received in India or accrues or arises or is deemed to accrue or arise to him in India. Explanation 1 to the said section stipulates that income accruing or arising outside India shall not be deemed to be received in India within the meaning of the said section by reason of the fact that it is taken into account in the balance sheet prepared in India. Explanation 1 is a complete answer to the observations of the Assessing Officer that commission income had accrued, arisen or was received by ETUK in India because it was recorded in the books of respondent assessee in India or was paid by the respondent assessee situated in India. This aspect has been also examined below while dealing with the question of deemed accrual.

*9. Section 9 of the Act postulates and states when income is deemed to arise in India. The Assessing Officer has not mentioned any specific provision of Section 9 but it appears that he had invoked Section 9(1)(1) of the Act which for the sake of convenience is reproduced below:- "**9. Income deemed to accrue or arise in India**-(1) The following incomes shall be deemed to accrue or arise in India-() all income accruing or arising, whether directly or indirectly, through or from any business connection in Indio, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of o capital asset situate in India. Explanation 1-For the purposes of this clause- (a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India, (b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in Indio for the purpose of export; (c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India; (d) in the use of a non-resident, being-(1) an individual who is not a citizen of India, or (2) a firm which does not have any partner who is a citizen of India or who is resident in Indio, or (3) a company which does not have any shareholder who is a citizen of India or who is resident in India, no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India;*

Explanation 2.-For the removal of doubts, it is hereby declared that "business connection' shall include any business activity carried out through a person who acting on behalf of the non-resident,- (a) has and habitually exercises in Indio, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident, or (b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident, or (c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling. controlled by, or subject to the same common control, as that non-resident: Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business: Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status

10. For the said provision to apply, the Assessing Officer was required to examine whether the said commission income is accruing or arising directly or indirectly from any business connection in India. The Assessing Officer has not dealt with or examined the said aspect but has merely recorded that the payment made to ETUK was taxable in India because of its "business connection". The Assessing Officer did not elaborate or has not discussed on what basis he had come to the conclusion that "business connection" as envisaged under Section 9(1)(i) existed On this aspect, we may note that the respondent assessee had submitted that ETUK was a non resident company and did not have any permanent establishment in India. ETUK was not rendering any service or performing any activity in India itself. These facts are not and cannot be disputed. Explanation 2 has not been invoked or relied upon by the Revenue Factual matrix in respect of Explanation 2 has not been referred to or examined by the Assessing Officer and is not on record. 11 Commissioner of Income Tax (Appeals) relied upon two circulars issued by the Central Board of Direct Taxes being Circular No. 23 dated 23 July, 1969 and Circular No. 786 dated 7 February, 2000, reported in [2000] 241 ITR 132 (St.). The relevant portion of the said circulars, for the sake of convenience are quoted below:- Circular No.23 dated 23.07.1969 "Foreign Agents of India Exports Where a foreign agents of India exporter operates in his own country and his commission is usually remitted directly to m/him and is therefore, not received by him or on his behalf in India. Such an agent is not liable to income tax in India on the commission" Circular No.786 dated 07.02.2000 "As clarified earlier in circular No.23 dated 23-7-1969 (see under section (5) where the non-resident agent operates outside the country, no part of his income arises in India, and since the payment is usually remitted directly abroad, it cannot be held to have been received by or on behalf of agent in India.

Such payments were therefore, held to be not taxable in India. This clarification still prevails. In view of the fact that the relevant sections [section 5(2) and section 9] have not undergone and change in this regard. No tax is therefore deductible under section 195 from export commission and other related charges payable to such a non-resident for services rendered outside India. 12. On the said aspect we may refer to the decision of the Supreme Court in C.I.T. vs. Toshoku Limited, (1980) 125 ITR 525 (SC). This case relates to the assessment year 1962-63. The Indian assessee had paid commission to two foreign companies through whom they had procured export orders Questions arose; what was the effect of the entries in the books of accounts of the Indian assessee which had resulted in debit and credit entries on account of commission and secondly, whether procurement of export orders by the foreign companies for the Indian company had resulted in a business connection. Two contentions were rejected by the Supreme Court inter-alia recording as under-

> *"It cannot be said that the making of the book entries in the books of the statutory agent amounted to receipt by the assessees who were non-residents as the amounts so credited in their favour were not at their disposal or control. It is not possible to hold that the non-resident assessees in this case either received or can be deemed to have received the sums in question when their accounts with the statutory agent were credited, since a credit balance, without more, only represents a debt and a mere book entry in the debtor's own books does not constitute payment which will secure discharge from the debt. They cannot, therefore, be charged to tax on the basis of receipt of income actual or constructive in the taxable territories during the relevant accounting period XXX In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the ossessees in India as contemplated by cl. (o) of the Explanation to s. 9(1)(i) of the Act. The commission amounts which were earned the non-resident assessees for services rendered outside India cannot, therefore, be deemed be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department."*

13. The aforesaid decision is a complete answer to the contention raised by the Revenue and as mentioned in the assessment order that commission income had accrued and arisen in India when credit entries were made in the books of the respondent assessee in favour of the ETUK and the said income towards commission was received in India. As noticed above, the stand of the Revenue is contrary to the two circulars issued by the CBDT in which it is clearly held that when a non-resident agent operates outside the country no part of his income arises in India, and since payment is remitted directly abroad, and merely because an entry in the books of accounts is made, it does not mean that the non-resident has received any payment in India. This fact alone does not establish business connection. In Circular No. 786 dated 7 February,

2000, it has been stated that in such cases, the Indian assessee is not liable to deduct TDS under Section 195 of the Act from the commission and other related charges payable to such a non- resident having rendered service outside India.

14. The term "business connection" has been interpreted by the Supreme Court to mean something more than mere business and is not equivalent to carrying on business, but a relationship between the business carried on by a non-resident, which yields profits and gains and some activities in India, which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in India (CIT Vs. R.D. Aggarwal and Company (1965) 56 ITR 20 (SC), Carborandum & Co. Vs. CIT (1977) 2 SCC 862 and Ishikawajma-Harima Heavy Industries Itd. Vs. Director of income Tax, Mumbai (2007) 3 SCC 481] The test which is to be applied is to examine the activities in India and whether the said activities have contributed to the business income earned by the non-resident, which has accrued, arisen or received outside India. The business connection must be real and intimate from which the income had arisen directly or indirectly. The question of business connection, therefore, has to be decided on facts found by Assessing Officer (or in the appellate proceedings). In the present case, facts found by the Assessing Officer do not make out a case of business connection as stipulated in Section 9(1) (i) of the Act. There is hardly any factual discussion on the said aspect by the Assessing Officer. He has not made any foundation or basis for holding that there was business connection and, therefore, Section 9(1)(1) of the Act is applicable. Appellate authorities; on the basis of material on record, have rightly held that "business connection" is not established.

15. The scope and ambit of Section 195 of the Act has been explained by the Supreme Court in GE India Techonology Centre (P) Ltd. vs. CIT (2010) 327 ITR 456. In the said case the expression "any other sum chargeable under the provisions of the Act" in Section 195 of the Act was elucidated and explained. It was held that if payment is made in respect of the amount which is not chargeable to tax under the provisions of Act, tax at source (TDS, for short) is not liable to be deducted. Decision of Supreme Court in Transmission Corporation of Andhra Pradesh vs. CIT, (1999) 239 ITR 587 (SC), operates and is applicable when the sum or payment is chargeable to tax under the provisions of the Act. In such cases, TDS has to be deducted on the gross amount of payment made and not merely on the taxable income included in the grass amount. The said decision would not apply in case payment is made but the said sum in entirety is not chargeable or exigible to tax under the provisions of the Act. The said distinction has been rightly understood by the first appellate authority and the ITAT and correctly applied by them. 16. It will be appropriate to refer to the following observations of the Supreme Court in the Commissioner of Income Tax, New Delhi Vs. Eli Lilly and Company (India) Private Ltd., (2009) 15 SCC 1, wherein it has been observed: "60. Under the 1961 Act, total income for the previous year is chargeable to tax under Section 4. Section 4(2) inter alia provides that in respect of income chargeable under Section 4(1), income tax shall be deducted of source where it is so deductible under any provision of the 1961 Act. Section 192(1) falls in the machinery provisions. It deals with

collection and recovery of tax. That provision is referred to in Section 4(2). Therefore, if a sum that is to be paid to the non-resident is chargeable to tax, tax is required to be deducted. The sum which is to be paid may be income out of different heads of income mentioned in Section 14, that is to say, income from salaries, income from house property, profits and gains of business, capital gains and income from other sources 61. The scheme of the TDS provisions applies not only to the amount paid, which bears the character of "income" such as salaries, dividends, interest on securities, etc. but the said provisions also apply to grass sums, the whole of which may not be income or profits in the hands of the recipient, such as payment to contractors and sub-contractors 62. The purpose of TDS provisions in Chapter XVII-B is to see that the sum which is chargeable under Section 4 for levy and collection of income tax, the payer should deduct tax thereon of the rotes in force, if the amount is to be paid to a non-resident. The said TDS provisions are meant for tentative deduction of income tax subject to regular assessment. (See Transmission Corpn of AP Ltd. v. CIT, SCC pp. 273-74, para 10: ITR pp. 594-95.)" (emphasis supplied) It was thereafter lucidly clarified: "73. On the question as to whether there is any interlinking of the charging provisions and the machinery provisions under the 1961 Act, we may, at the very outset, point out that in CIT v. BC Srinivasa Setty this Court has held that: "10. the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section." We may add that the 1961 Act is an integrated code and, as stated hereinabove, Section 9(1) integrates the charging section, the computation provisions as well as the machinery provisions. (See Section 9(1)() read with Sections 160, 161, 162 and 163) 74. In the present case, it has been vehemently urged that TDS provisions being machinery provisions are independent of the charging provisions whereas as held by this Court in B C. Srinivasa Setty, the 1961 Act is on integrated code. 75. To answer the contention herein we need to examine briefly the scheme of the 1961 Act. Section 4 is the charging section. Under Section 4(1), total income for the previous year is chargeable to tax. Section 4(2) inter alia provides that in respect of income chargeable under sub-section (1), income tax shall be deducted at source whether it is so deductible under any provision of the 1961 Act which inter alia brings in the TDS provisions contained in Chapter XVII 8 In fact, if a particular income falls outside Section 4(1) then TDS provisions cannot come in.

76. Under Section 5, all residents and non-residents are chargeable in respect of income which accrues or is deemed to accrue in India or is received in India. Non-residents who are not assessable in respect of income accruing and received abroad are rendered chargeable under Section 5(2)(b) in respect of income deemed by Section 9 to accrue in India" (emphasis supplied) 17. After referring to Eli Lilly (supra) in GE India Technology Centre Private Limited (supra), it has been held: "17. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in CIT v. Eli Lilly & Co. (India) (P) Ltd the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the IT Act form one single integral, inseparable code and therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax under the IT Act. It is

true that the judgment in Eli Lilly was confined to Section 192 of the IT Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head "Salaries" Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under the provisions of the Act", which expression, as stated above, does not find place in other sections of Chapter XVII. It is in this sense that we hold that the IT Act constitutes one single integral inseparable code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the IT Act.

18. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the monies deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the IT Act by which a payer can obtain refund. Section 237 read with Section 199 implies that only the recipient of the sum i.e. the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all meats. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in Indio, the Government would nonetheless collect tax. In our view, Section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable" where a proportion of the sum so chargeable is liable to tax 18. In view of the aforesaid discussions, it has to be held that there is no error in the findings recorded by the Commissioner of Income Tax (Appeals) which have been in the impugned order by the ITAT. We do not find any merit in the present appeal and the same is dismissed."

5.5.10 In this judgment, the Hon'ble Delhi High Court has with the issue of deduction of tax on commission payment to a foreign party, and all the aspects related to this issue were analysed in detail by the Hon'ble High Court

5.5.11 Respectfully following the judgment of Hon'ble Delhi High Court, it is held that brokerage payment (which is similar to commission payment) cannot be taxed in Therefore, no TDS was deductible on these payments

5.5.12 This issue is therefore decided in favour of assesse."

17. During the course of appellate proceedings the ld. D.R has placed reliance on the finding of A.O and contended that payment made to the non-resident of brokerage is taxable. On the other hand the ld. Counsel has referred page no. 187 to 220 of the paper book and contended that

assesse has made payment of brokerage to non-resident for rendering services outside India and the payments were made to them by the assesse in their bank accounts outside India, therefore, the same were not taxable in India. The ld. Counsel has relied on the following judicial pronouncements:

> *"1. Decision of Hon'ble Supreme Court in case of CIT vs. Toshoku Ltd. (1980) (125 ITR 525)*
>
> *2. Decision of Hon'ble Delhi High Court in case of DCIT vs. EON Technology (P) Ltd (15 taxmann.com 391) 2011*
>
> *3. Decision of Hon'ble Delhi High Court in case of DIT(IT) vs. Panalfa Autoelektrik Ltd (49 taxmann.com 412) 2014*
>
> *4. Decision of Hon'ble Bombay High Court in case of Gujarat Reclaim & Rubber Products Ltd. [2017] 79 taxmann.com 352*
>
> *5. Decision of Hon'ble ITAT Delhi in case of ACIT, Circle 14(1), New Delhi Vs. Kapoor Industries Ltd [2021] 125 taxmann.com 271"*

In the case of CIT Vs. Toshoku Ltd. (1980) (125 ITR 525) wherein held as under:

> *"Section 5(2), read with section 9 of the Income-tax Act, 1961 Income Accrual of Assessment year 1962-63 An Indian exporter sold tobacco abroad through non-resident sales agents (assessees) - Sales agents were entitled to commission, as per agreement Sale price received on sale abroad was remitted wholly to Indian exporter who debited commission account and credited amount of commission payable to non-resident agents (i.e. assessees) Amount of commission was later remitted to non-resident agents- Whether, since non-resident asssessees did not carry on any business operations in India, amounts earned for services rendered outside India could not be deemed to be incomes which had either accrued or arisen in India - Held, yes - Whether, moreover, assessees could not be charged to tax on basis of receipt of income, actual or constructive, in taxable territories during relevant accounting period as they neither received nor could be deemed to have received sums in question when their accounts with Indian exporter were credited - Held, yes"*

18. Heard both the sides and perused the material on record. The assesse has made payment of brokerage to non-resident brokers for assistance on sale of flats to non-resident in the project developed by the assesse in India. The entire work by the broker was carried out outside India and the brokerage payment were made by the assesse in

the bank account of foreign parties outside India. The brokers has not carried out any operation in India. Therefore, the AO has not proved that how the provisions of Sec. 5(2) and provisions of Sec.9(1)(i) of the Act are attracted in the case of the assesse. Regarding applicability of provision of Sec.9(1)(vii) by way of treating the payment as fees for technical services the A.O has not proved that how such payment made in the context of 'make available' clause. From the perusal of material on record it is observed that there is no element of technical knowledge, experience, skill knowhow or process in the rendering of brokerage services. No such technical knowledge etc. is made available to the assesse by such brokers. Therefore, we don't find any infirmity in the decision of ld. CIT(A) that the payment of brokerage by the assesse to the brokers is not taxable in India either pursuant to Sec. 9(1)(vii) or under the provisions of DTAA due to restrictive definition of FTS/FIS, therefore, the ground of appeal of revenue stand dismissed.

Ground No. 4: Reimbursement of Expenses:

19. During the year under consideration the assesse had made remittance to foreign parties towards reimbursement of expenses. The detail of the payment are as under:

Sr. No.	*Date of 15CB certificate*	*Name of Vendor*	*Country of Residence*	*Remittance Amount (INR)*	*Purpose of Payment*
1.	*02 March 2014*	*WOHA Designs Pte. Ltd.*	*Singapore*	*1,57,480*	*Reimbursement of travel expenses and other miscellaneous expenses*
2.	*8 January 2014*	*Barkar Mohandas LLC*	*USA*	*5,99,888*	*Reimbursement of travel expenses.*
3.	*16 December 2013*	*WOHA Designs Pte.Ltd.*	*Singapore*	*4,15,165*	*Reimbursement of expenses and other miscellaneous expenses*
4.	*28 August 2013*	*Lodha Developers UK Limited*	*UK*	*31,49,220*	*Reimbursement of business expenses*
Total				*43,21,753*	

Regarding reason for non-deduction of TDS the assesse submitted that bankers Mohandas LLC had incurred travel and miscellaneous expenses of its employees visiting India for rendering services to the assesse. After referring the invoices the assesse submitted that it has reimbursed the expenses of cost to cost basis without any mark up. In respect of reimbursement of travel expenses to Lodha Developer U.K. Ltd, the assesse submitted that Lodha Developer U.K had incurred certain business related expenses on behalf of the assesse and same was charged by the Lodha Developer U.K to the assesse on cost to cost basis without any mark up. Similarly, the other expenses were also made cost to cost basis. Assessee also explained that there was no component of income embedded on the reimbursement of expenses made by the assesse and provision of Sec. 195 of the Act is not applicable since no income arose to the non-resident out of reimbursement (being cost to cost basis) without any markup and the same was not taxable in India. Therefore, the assesse was not required to withheld tax on the same. However, the A.O had not agreed with the submission of the assesse he was of the view that reimbursement made for the services were in the nature of FTS taxable both as per the act as well as DTAA. The AO also stated that the expenses met out by the service recipient were nothing but the expenses of the service provider in providing the services. Since expenses cannot be allowed while taxing the fees for included services, the amount of reimbursement also should be added with the fees for included services.

20. Aggrieved, the assesse filed the appeal before the ld. CIT(A). The ld. CIT(A) has deleted the addition made by the Assessing Officer. The relevant part of the decision of CIT(A) is reproduced as under:

> ***"7. Reimbursement of Expenses :-***
>
> *5.7.1 In my opinion, reimbursement of expenses will take the same colour which the original transaction (to which it relate) had. In other words, if the reimbursement of expenses is related to FTS then it will take the colour of FTS.*

If the reimbursement of expenses is related to brokerage, then it will take the colour of brokerage.

5.7.2 It is therefore, held that taxability of reimbursement of expenses will depend on the taxability of the original transaction to which it relate.

5.7.3 As in the present appeal, I have held that FTS, brokerage and purchase is not taxable in India and no TDS were deductible, therefore, it is held that no TDS will be deductible on reimbursement also.

5.7.4 This issue is decided in favour of assessee.

5.7.5 In the result these grounds are allowed."

21. During the course of appellate proceedings the ld. D.R has supported the order of Assessing Officer.

On the other hand, the ld. Counsel referred page no. 201 to 220 of the paper book and submitted that remittance made by the assesse towards reimbursement of expenses was on cost to cost basis without any mark up and same was not taxable.

21. Heard both the sides and perused the material on record. The assesse has made remittances to foreign parties towards reimbursement of expenses incurred by them. The expenses were incurred by such parties on account of travel, meal, hotel stay etc. Reimbursement were made in respect of actual expenditure incurred on cost to cost basis without any mark up. The assesse has also referred CBDT Circular No. 715 dated 08.08.1995 as per question no. 30 it provide that if separate bill has been raised for reimbursement of expenses then no taxes are deductible on such payment. The claim of the assesse that remittance was made towards reimbursement of expenses on cost to cost basis was not contrary disproved by the assessing officer. The assesse has also referred the following judicial pronouncements:

- *GE India Technology Centre Private Ltd vs CIT [2010] 327 ITR 456 (Supreme Court)*
- *DIT (IT)-I vs AP Moller Maersk A S [Civil Appeal No. 8040 of 2015] (Supreme Court)*

- *CIT vs Siemens Aktiongesellschaft [2009] 177 Taxman 81 (Bombay High Court)*
- *DIT - (IT) vs Krupp Udhe GMBH [2013] 40 taxmann.com 38 (Bombay High Court)"*

In the case of DIT (IT)-I vs AP Moller Maersk A S [Civil Appeal No. 8040 of 2015] (Supreme Court), the head note is reproduced as under:

> *Section 9 of the Income-tax Act, 1961, read with article 13 of the DTAA between India and Denmark Income Deemed to accrue or arise in India (Royalties and fee for technical services) - Assessee was a foreign company engaged in shipping business and was a tax resident of Denmark Assessee had agents in India working for it, who booked cargo and acted as clearing agents for assessee-In order to help all its agents, across globe, assessee had set up and was maintaining a global telecommunication facility which was a vertically integrated communication system - According to assessee, it was merely a system of cost sharing and payments received by assessee from its agents were in nature of reimbursement of expenses Assessing Officer did not accept said contention and held that amounts paid by agents to assessee was fees for technical services taxable in India under article 13(4) of DTAA - Tribunal opined that by setting up communication system in question assessee did not render any technical services and, thus, amount in question was not taxable as fee for technical services. High Court upheld order passed by Tribunal - Whether since communication system in question was an integral part of shipping business, which was allowed to be used by agents in order to enable them to discharge their role more effectively, it could not be treated as any technical services provided to agents Held, yes Whether, therefore, High Court rightly concluded that amount received by assessee from its agents could not be brought to tax as fee for technical services Held, yes [Para 12] [In favour of assessee]*

The Hon'ble Bombay High Court in the case of Director of Income Tax (International Taxation) Vs. Krupp Ltd. GMBH (2013) 40 taxmann.com 38 (Bombay) held that reimbursement of expenses for air tickets could not be treated as part of taxable income of the assesse. The A.O had neither brought any relevant material on record to substantiate that reimbursement of expenses were in the nature FTS nor disproved the claim of the assesse based on back to back invoices that no profit element were embedded in the reimbursement of such expenses. In the light of the above facts and findings we don't find any merit in the ground of appeal, therefore, ground of appeal of the revenue stand dismissed.

ITA No. 498/Mum/2022

Ground No. 1 & 2:

22. As the facts and the issue involved in this ground are the same as supra ground No. 1 & 2 of ITA No. 497/Mum/2022 therefore, applying the same findings mutatis mutandis, both ground of appeal of the revenue are dismissed.

Ground No. 3 & 4:

23. As the facts and the issue involved in this ground are the same as supra ground No. 3 & 4 of ITA No. 497/Mum/2022 therefore, applying the same findings mutatis mutandis, both ground of appeal of the revenue are dismissed.

ITA No. 784/Mum/2022

24. As the facts and the issue involved in this ground are the same as supra ground No. 1 & 2 of ITA No. 497/Mum/2022 therefore, applying the same findings mutatis mutandis, both ground of appeal of the revenue are dismissed.

Ground No. 3 & 4:

25. As the facts and the issue involved in this ground are the same as supra ground No. 3 & 4 of ITA No. 497/Mum/2022 therefore, applying the same findings mutatis mutandis, both ground of appeal of the revenue are dismissed.

ITA No. 500/Mum/2022

Ground No.1:

26. As the facts and the issue involved in this ground is the same as supra ground No. 1 of ITA No. 497/Mum/2022 therefore, applying the

same findings mutatis mutandis, this ground of appeal of the revenue is dismissed.

Ground No. 2:

27. As the facts and the issue involved in this ground is the same as supra ground No. 3 of ITA No. 497/Mum/2022 therefore, applying the same findings mutatis mutandis, this ground of appeal of the revenue is dismissed.

Ground No. 3:

28. As the facts and the issue involved in this ground is the same as supra ground No. 4 of ITA No. 497/Mum/2022 therefore, applying the same findings mutatis mutandis, this ground of appeal of the revenue is dismissed.

ITA No.499/Mum/2022

Ground No. 1 to 5:

29. As the facts and the issue involved in this ground are the same as supra ground No. 1 & 2 of ITA No. 497/Mum/2022 therefore, applying the same findings mutatis mutandis, all the grounds of appeal of the revenue are dismissed.

Ground No. 6:

30. As the facts and the issue involved in this ground is the same as supra ground No. 3 of ITA No. 497/Mum/2022 therefore, applying the same findings mutatis mutandis, this ground of appeal of the revenue is dismissed.

Ground No. 7:

31. As the facts and the issue involved in this ground are the same as supra ground No. 4 of ITA No. 497/Mum/2022 therefore, applying the

same findings mutatis mutandis, both these ground of appeal of the revenue are dismissed.

Ground No. 8:

32. During the year under consideration the assesse made remittance of Rs.30,464/- to Ideascape Marketing N. Communication F2C for purchases. As per DTAA with UAE (Article 7), payment to an entity in UAE can be brought to tax in India only when such entity has a permanent establishment in India. The AO has not brought any material on record to prove contrary, therefore we don't find any merit in this ground of appeal of the revenue. Accordingly, this ground of appeal stand dismissed.

Cross Objections Nos. 73 to 75 & 85/Mum/2022:

33. Since, we have dismissed the appeals of the revenue, therefore, cross objection filed by the assesse become infructuous the same stand dismissed.

34. In the result, all the appeals of the revenue are dismissed and all the cross objection filed by the assesse are also dismissed.

Order pronounced in the open court on 24.01.2023

Sd/-	Sd/-
(Aby T Varkey)	(Amarjit Singh)
Judicial Member	Accountant Member

Place: Mumbai
Date 24.01.2023
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.