

IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI S. RIFAUZ RAHMAN, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.401/Mum./2018

(Assessment Year : 2013-14)

ITA no.7490/Mum./2018

(Assessment Year : 2014-15)

Goldman Sachs & Co. LLC
(erstwhile known as Goldman Sachs & Co.)
M/s. SRBC & Associates LLP
14th Floor, The Ruby
29, Senapati Bapat Marg, Dadar (West)
Mumbai 400 028 PAN – AAGCG9387H

..... Appellant

v/s

Dy. Commissioner of Income Tax
International Taxation
Circle-2(3)(2), Mumbai

.....Respondent

ITA no.6005/Mum./2019

(Assessment Year : 2015-16)

ITA no.1264/Mum./2021

(Assessment Year : 2017-18)

Goldman Sachs & Co. LLC
(erstwhile known as Goldman Sachs & Co.)
M/s. ERNST & Young LLP
14th Floor, The Ruby
29, Senapati Bapat Marg, Dadar (West)
Mumbai 400 028 PAN – AAGCG9387H

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-2(3)(2), Mumbai

.....Respondent

Assessee by : Shri Madhur Agarwal
Revenue by : Shri Soumendu Kumar Dash

Date of Hearing – 05/04/2023

Date of Order – 08/05/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present batch of 4 appeals has been filed by the assessee challenging the separate impugned final assessment orders passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 ("the Act"), pursuant to the directions issued by the learned Dispute Resolution Panel, Mumbai ("learned DRP") under section 144C(5) of the Act, for the assessment years 2013-14, 2014-15, 2015-16 and 2017-18.

2. Since the appeals pertain to the same assessee involving similar issues, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order.

ITA no.401/Mum./2018 **Assessee's Appeal – A.Y. 2013-14**

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

"Aggrieved by the order passed by the Deputy Commissioner of Income-tax (International Taxation)-2(3)(2) Mumbai (AO) dated 15 November 2017, under section 143(3) read with section 144C(13) of the Act, pursuant to the directions of the Hon'ble Dispute Resolution Panel-1 (DRP), Mumbai, Goldman Sachs & Co [the Appellant] respectfully submits that the learned AO has erred in passing the order on the following grounds:

1. *The learned AO erred in making an addition of Rs 180,083,986 in respect of project administration costs such as courier, binding, stationery, reprographics, etc. reimbursed to the Appellant by Goldman Sachs Services Private Limited (GSSPL) in connection with the Campus' being built by the latter in Bangalore on the ground that these reimbursements are in the nature of Fees for Included Services (FIS) as per Article 12 of the India- US Double Taxation Avoidance Agreement (DTAA) and makes available technical knowledge, skills, processes, etc.*

2. *Without prejudice to the above, the learned AO has erred in holding that the Appellant is not correct in bifurcating the various components of the overall activity of rendering technical services, for the purpose of its characterization and accordingly, the entire cost of Rs 605,494,657 (including the amount of Rs 180,082,986) incurred in connection with the Campus' is to be examined together and not in segmentation.*

3. *The learned AO has erred in making an addition in respect of recovery of market data charges amounting to Rs 178,429,474 on the basis that the same qualifies as Royalty under Article 12 of the India-US DTAA without appreciating the fact that these constitute expenses allocated by the Appellant to its Associated Enterprises (AES) in India as reimbursement of expenses incurred on behalf of the AEs in India.*

4. *In levying interest under section 234A of the Act amounting to Rs 1,477,076 on the basis that Appellant has filed its return of income after the due date prescribed under the provisions of the Act.*

The Appellant craves leave to add, alter, vary, omit, substitute or amend any or all of the above grounds of appeal, at any time before or at the time of the appeal, so as to enable the Hon'ble Income-tax Appellate Tribunal to decide this appeal according to law."

4. The issue arising in grounds no.1-2, raised in assessee's appeal, is pertaining to the addition of Rs.18,00,83,986, in respect of project administration costs as Fees for Included Services ("FIS") under the India-US Double Taxation Avoidance Agreement ("DTAA").

5. The brief facts of the case pertaining to this issue are: The assessee was a partnership firm incorporated in and a tax resident of the United States of America. The assessee was also registered with the Securities and Exchange Board of India as a Foreign Institutional Investor. For the year under consideration, the assessee filed its return of income on 30/11/2013 declaring a total income of Rs.42,54,10,670. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. During the

year under consideration, the assessee, inter-alia, earned income amounting to Rs.42,54,10,671, in respect of professional services received from Goldman Sachs Services Private Limited ("GSSPL"), its associated enterprise in India, which was offered to tax as Fees for Technical Services ("FTS") under section 115A of the Act @ 10.30%. During the year under consideration, the assessee also received certain amounts as reimbursements from its various associated enterprises in India, including GSSPL, in respect of salary, corporate service charges, and miscellaneous expenses. However, these receipts were not offered to tax on the basis that they are in the nature of reimbursement of expenses incurred on behalf of the Indian entities. In this case, pursuant to the reference made to the Transfer Pricing Officer for computation of arm's length price in relation to the international transaction detailed in Form No.3ECB, no adjustment was proposed to the transactions reported by the assessee. During the assessment proceedings, on the basis of details filed by the assessee, it was noticed that only an amount of Rs.42,54,10,671 from the head of 'Recovery of Campus Charges' has been offered to tax, even though the total amount received under the head 'Campus Charges' was Rs.60,54,94,657. In response thereto, the assessee submitted that, during the year, it has earned income amounting to Rs.42,54,10,671, on account of rendering professional services to its associated enterprise, i.e. GSSPL. Since the said services are in the nature of FTS, the same were subjected to tax at the rate of 10% as per the provisions of section 9(1)(vii) r/w section 115A of the Act. The assessee further submitted that GSSPL's new campus is being constructed by a third-party developer in Bangalore. While the developer is

responsible for the construction of the building, the campus is being built based on the design/inputs provided by GSSPL. It was further submitted that some of the services like architectural services, engineering services, project administration, legal services, etc. are being provided by vendors located outside India and for ease of convenience, payments to these vendors are being made by the assessee, which are being cross charged to GSSPL as per the agreement entered between the assessee and GSSPL.

6. The Assessing Officer ("AO") vide draft assessment order dated 30/12/2016 passed under section 143(3) read with section 144C(1) of the Act did not agree with the submissions of the assessee and held that the assessee is competent enough to provide such services and it has sufficient talented personnel to provide such services, for which payments have been made to the assessee. The AO further held that the assessee has failed to give a clear-cut bifurcation of the said payments, which have been offered to tax and which have not been offered to tax. The AO also held that the assessee has not given any reasoning with proper supporting as to why the balance amount has not been offered to tax. Accordingly, the AO came to the conclusion that it cannot be gathered or understood as to how the balance amount of Rs.18,00,83,986 is not FIS when the said payment is part and parcel of the total amount. Consequently, the AO treated the amount of Rs.18,00,83,986 as FIS to be taxed @ 10%. The assessee filed detailed objections before the learned DRP against the aforesaid addition made by the AO. Vide its directions dated 29/09/2017 issued under section 144C(5) of the Act, the learned DRP rejected

the objections filed by the assessee and held that the agreement and details of services provided by the assessee indicate that services being in the nature of architectural services, technological services, and project administration services clearly either related to development and transfer of technical designs or make available technical knowledge, skill, experience or process to the parties in India executing the campus project. The learned DRP further held that receipts comprising of the reimbursable items cannot be separated from other expenses for the purpose of deciding their character. In conformity with the DRP directions, the AO passed the impugned final assessment order under section 143 (3) read with section 144C(13) of the Act on this issue. Being aggrieved, the assessee is in appeal before us.

7. We have considered the submissions of both sides and perused the material on record. In the present case, the assessee is a tax resident of the United States of America and therefore is entitled to the benefit of the India-US DTAA. The assessee's associated enterprise in India, i.e. GSSPL decided to expand its premises by setting up a new campus in Bangalore, and in this connection, GSSPL entered into an agreement with a developer for the development of a new campus. With effect from 01/04/2012, the assessee entered into Campus Project Services Agreement with GSSPL, whereby the assessee agreed to render the following Campus Project Services to GSSPL:-

"A. *Architectural services*

These services include assistance with architectural services in relation to the new campus and would broadly comprise of the following:

- *Project pre-development studies*

- *Design services*
- *Structural engineering in relation to the building*

B. Engineering services

These services include assistance with engineering services in relation to the new campus and would broadly comprise of the following:

- *Civil and geo technical engineering consulting*
- *Interior designing and consulting*
- *Structural engineering other than in relation to building*
- *Pre-transaction design studies*
- *Mechanical, Electrical and Plumbing design consultancy*

C. Project administration

These include other services rendered from time to time which are essentially administrative in nature and which are aimed at assisting GSSPL in monitoring the overall progress of the project. The said services will not involve any transfer of designs, etc which would be covered under Sections A and B and would broadly comprise of the following:

- *Project pre-development administration: Monitor the deliverables from various vendors, collate information, analyse the same and identify key issues to be discussed and addressed.*
- *Procurement services: Assist in the identification and selection of the various alternative vendors for supply of various materials and services etc*
- *Project and financial controls: Assist with the identification of key parameters both financial and non financial (for example - budgets, project schedules) for implementation of the project*
- *Capital management project management: Assist with the capital management for the campus project.*
- *Scheduling: Tabulate the various steps and phases involved in the development of the project along with the associated timelines for the implementation of the respective steps*
- *Legal services: Assist with legal review of the contracts to be entered into for the campus project."*

8. Further, as per the aforesaid Agreement, the assessee agreed to employ or ensure the deployment of sufficient qualified personnel to ensure proper fulfilment of the Campus Project Services. As per the aforesaid Agreement, the parties agreed that GSSPL will pay service fees, including the cost of employees engaged in providing the Campus Project Service; and the cost of services provided by 3rd parties to enable the assessee to provide the Campus Project Services, with a mark-up of 7%. It is not in dispute that during the year under consideration, the assessee received an amount of Rs.60,54,94,657, from GSSPL for services provided in relation to the development of the campus. Out of the aforesaid amount, Rs.42,54,10,671, was offered to tax by the assessee as FTS/FIS, and taxes were withheld by GSSPL. However, the balance amount of Rs.18,00,83,986, was not offered for taxation on the basis that the same is mere reimbursement of expenses, which were initially incurred by the assessee on behalf of GSSPL and were subsequently cross-charged to GSSPL. In this regard, the assessee furnished the following details of services before the learned DRP:-

<i>Name of the Vendor</i>	<i>Description of the services rendered</i>	<i>Amount (Rs.)</i>	<i>Reasons</i>
<i>A. Esteben Co. Inc.</i>	<i>Document handling charges (such as archiving documents, scanning the hard copies, etc.) and printing charges.</i>	<i>8,68,437</i>	<i>Mere document handling and printing charges do not result in any transfer of knowledge, process, know-how or make available any technical knowledge to the Applicant Copy of the agreement and invoices enclosed as Annexure-4</i>
<i>Turner and Townsend</i>	<i>Assistance and support in estimating, scheduling, cost engineering and related control functions.</i>	<i>1,17,48,089</i>	<i>The said services are standard services that enable the Applicant to maintain schedule and budgets. The services are in relation to specific tasks</i>

			<i>and are not capable of being utilised by the Applicant independently in any other context without the aid of the vendor.</i>
<i>Jacobs Donald Beer, LLC</i>	<i>Review of kitchen designs and adequacy of space for intended purposes.</i>	<i>2,31,567</i>	<i>These services involve the provision of commercial information and do not consist of development and transfer of any technical plan or technical design. As explained in Example 7 of the MoU to the India-US DTAA, consultancy services which may involves the use of substantial technical skill and expertise but does not making available to the Indian company any technical plan or design should not be regarded as taxable under Article 12. Copy of the agreement and invoices enclosed as Annexure 5.</i>
<i>Cerami and Associates</i>	<i>Review of the acoustical design (i.e. designed to absorb or control sound criteria).</i>	<i>1,63,185</i>	<i>These services involve the provision of commercial information and do not consist of development and transfer of any technical plan or technical design. As explained in Example 7 of the MoU to the India-US DTAA, consultancy services which may involves the use of substantial technical skill and expertise but does not make available to the Indian company any technical plan or design should not be regarded as taxable under Article 12. Copy of the relevant extract of the agreement and invoices enclosed as Annexure 6.</i>
<i>Walker Parking Consultants</i>	<i>Review of the security consultants parking area security recommendations.</i>	<i>16,32,104</i>	<i>The vendor provided parking consultancy and review services. These services do not consist of development and transfer of any technical plan or technical design nor does it make available technical knowledge, skill, know how or processes. Copy of the invoices enclosed as Annexure 7.</i>
<i>Turner Construction</i>	<i>Preparation of work schedule.</i>	<i>6,89,685</i>	<i>These services do not consist of development and transfer of any technical</i>

Co.			<i>plan or technical design nor does it make available technical knowledge, skill, know how or processes</i>
<i>Economic Project Solutions Inc.</i>	<i>Project administration services.</i>	<i>4,86,888</i>	<i>These services do not consist of development and transfer of any technical plan or technical design nor does it make available technical knowledge, skill, know how or processes. Copy of the invoices enclosed as Annexure 8.</i>
<i>URS Corporation</i>	<i>Procurement services, Project controls, financial controls.</i>	<i>38,41,233</i>	<i>These services do not consist of development and transfer of any technical plan or technical design nor does it make available technical knowledge, skill, know how or processes. Copy of the invoices enclosed as Annexure 9.</i>
<i>Tishman Speyer</i>	<i>Project management pre-development</i>	<i>12,01,96,707</i>	<i>Not taxable as FIS under the India US tax treaty, as would not make available any technical knowledge, skill etc and deliverables do not include any technical plan or technical design. Copy of the agreement enclosed as Annexure 10.</i>
<i>Hines Interests Limited Partnership</i>	<i>Project Management Service, Administration Management services</i>	<i>4,36,115</i>	<i>There is no development and transfer of a technical plan or technical design.</i>
<i>The Cantor Seinuk Group Inc.</i>	<i>Project administration services</i>	<i>58,16,460</i>	<i>The payment pertains to services of selection of vendor and qualification of vendor evaluation. Not taxable as FIS under the India US tax treaty, as would not make available any technical knowledge, skill etc and deliverables do not include any technical plan or technical design. Copy of the invoices enclosed as Annexure 11.</i>
<i>Van Deusen & Associates</i>	<i>Project administration services</i>	<i>21,75,999</i>	<i>The vendor provided services in relation to review of vertical transportation like elevators / escalators etc. These services do not consist of development and transfer of any technical plan or technical design nor does it make available technical knowledge, skill, knowhow</i>

			<i>or processes.</i>
<i>Blank Rome LLP</i>	<i>Legal services</i>	<i>2,21,10,357</i>	<i>These services do not consist of development and transfer of any technical plan or technical design nor does it make available technical knowledge, skill, know how or processes and is covered specifically in the case of Linklaters LLP discussed below. Copy of the invoices enclosed as Annexure 12.</i>
<i>Syska Hennessy</i>	<i>Telecommunication services</i>	<i>63,67,212</i>	<i>These services do not consist of development and transfer of any technical plan or technical design nor does it make available technical knowledge, skill, know how or processes.</i>
<i>Others</i>		<i>3,58,650</i>	
		<i>29,67,290</i>	<i>Foreign exchange difference</i>
<i>Total:</i>		<i>18,00,83,986</i>	

9. Thus, from the above, it is evident that the breakup of Rs.18,00,83,986 was provided by the assessee, though not before the AO but before the learned DRP, along with the description of services rendered by each 3rd party vendor. In the present case, no material was brought before us as regards the nature of services in respect of which the payment is treated as FTS by the assessee and offered for taxation under section 115A of the Act @ 10.30%. Even before the lower authorities, no such details were furnished by the assessee. Only details pertaining to the receipt of Rs.18,00,83,986, which were claimed as reimbursement of expenses incurred on behalf of GSSPL were filed in the proceedings before the learned DRP. As per the Revenue, since the assessee has claimed to have experienced personnel, processes, and resources in real estate administration that can be used to provide Campus Project Services, therefore, entire payment of Rs.60,54,94,657 received by the

assessee under the Campus Project Services Agreement is in nature of FTS/FIS and thus is liable to be taxed in India. Further, since the income amounting to Rs.42,54,10,671 was already offered to tax as FTS/FIS by the assessee, the balance amount of Rs.18,00,83,986 is also taxable as FTS/FIS in India.

10. It is pertinent to note that in order to determine whether the income received by the assessee falls within the ambit of FTS/FIS, it is relevant to examine the services rendered by the assessee in respect of which said income is received and whether the said service satisfies the conditions laid down under the provisions of the Act/DTAA. We are of the considered view that merely because the assessee has accepted the amount of Rs.42,54,10,671 to be in nature of FTS/FIS, the other payment for Campus Project Services cannot be treated as FTS/FIS without the examination of each and every service, particularly when the details pertaining to same are available on record. Adoption of such a broad brush approach without examination of each and every service rendered by the assessee can also lead to a situation where overall the services may appear to be not falling within the ambit of FTS/FIS but a standalone examination of each service may lead to a different conclusion.

11. Since the assessee is a tax resident of the United States of America and is entitled to the benefit of India-US DTAA, therefore before proceeding further it is relevant to examine the relevant provisions of the DTAA for deciding the

issue at hand. 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."*

12. It is not the case of the Revenue that services rendered by the assessee are ancillary and subsidiary to the application or enjoyment of the right, property, or information as referred to in Article 12(3) of the India US DTAA. Therefore, Article 12(4)(a) of the India-US DTAA has no application to the present case. Further, for the applicability of Article 12(4)(b) of the India-US DTAA, it is relevant that the technical or consultancy services rendered '*make available*' technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or a technical design. It is the submission of the assessee that the afore-mentioned services 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.”

13. 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 GSSPL was shown to have used such information without depending upon the assessee. The fact that the assessee continued to receive payment for similar services, on a recurring basis, under the Campus Project Services Agreement in the subsequent assessment years also justifies the claim of the assessee that no technical knowledge, experience, skill, or know-how has been made available to GSSPL.

14. Further, even if we examine the aforesaid services, in respect of which the assessee received a total payment of Rs.18,00,83,986, we find that the

same pertains to document handling and printing charges; assistance and support in estimating, scheduling, cost engineering and related control functions; review of kitchen design; review of acoustical design; review of security consultants, parking area, security recommendations; preparation of work schedule; project administration services; procurement services; project pre-development management; project management services, administrative assistance and construction management services; legal services and telecommunications services, which can neither be said to be made available to the recipient nor can consist of development and transfer of any technical plan or a technical design. Therefore, we are of the considered opinion that the aforesaid services do not fall within the ambit of FIS as per Article 12(4) of the India-US DTAA and thus the amount of Rs.18,00,83,986 received by the assessee is not taxable under Article 12(4) of the India-US DTAA. As a result, grounds no.1-2 raised in assessee's appeal are allowed.

15. The issue arising in ground No. 3, raised in assessee's appeal, is pertaining to addition on account of market data charges as Royalty under Article 12 of the India-US DTAA.

16. The brief facts of the case pertaining to this issue are: During the assessment proceedings, it was noticed that the assessee has received communication charges of Rs.51.90 crores. Out of same, an amount of USD 32,85,994 (equivalent to Rs.17,84,29,474) represents payment for access to various specialised online information portals like Bloomberg, Reuters, Platts, Moody's Analytics, etc. These amounts were shown under the head 'market

data expenses'. As per the assessee, these payments were cost allocations done to Indian parties with respect to the usage/allocation with respect to these accesses. The AO vide draft assessment order passed under section 143(3) r/w section 144C(1) of the Act treated these amounts as being in the nature of Royalty under Article 12(4) of the India-US DTAA on the basis that the receipts will be for the use of information concerning the industrial, commercial scientific experience. The assessee filed detailed objections before the learned DRP against the aforesaid addition made by the AO. The DRP vide its directions issued under section 144C(5) of the Act held that the amount represents the payment made for access to various online databases, and corresponding costs have been allocated to various associated enterprises. The learned DRP further held that the nature of fee paid to these entities from whom data access right has been obtained are such that they fall within the ambit of Royalty as per the India-US DTAA, therefore the receipt of such amounts by the assessee from the end users is also liable to be treated as Royalty and therefore requires to be taxed in India. In conformity with the DRP directions, the AO passed the impugned final assessment order under section 143(3) r/w section 144C(13) of the Act on this issue. Being aggrieved, the assessee is in appeal before us.

17. We have considered the submissions of both sides and perused the material available on record. During the year under consideration, the assessee received an amount of USD 86,18,304 from its associated enterprises in India on the allocation of expenses pursuant to the agreement dated

01/06/2007. Since Goldman Sachs Group has operations spread across various jurisdictions through its affiliates, therefore from time to time the Group incurred certain costs in respect of common communication and technology platforms for the Group companies (in and outside India), which were subsequently allocated to the relevant entities on the basis of the respective usage. During the year, the assessee received an amount of USD 32,85,994 (equivalent to Rs.17,84,29,474) from Indian entity for allowing the usage of the database of various entities. The details pertaining to the same are as under:-

<i>Particulars</i>	<i>USD</i>
<i>Bloomberg</i>	<i>983,077</i>
<i>Factset Research System Inc.</i>	<i>710,080</i>
<i>Reuters</i>	<i>579,234</i>
<i>Intex Solutions, Inc.</i>	<i>199,132</i>
<i>Platts</i>	<i>159,994</i>
<i>Capital IQ</i>	<i>145,039</i>
<i>Standard & Poors</i>	<i>102,333</i>
<i>Thomson Financial</i>	<i>73,592</i>
<i>Moody's Analytics</i>	<i>61,117</i>
<i>Fitch</i>	<i>31,894</i>
<i>Haver Analytics</i>	<i>29,048</i>
<i>Money Net Inc.</i>	<i>25,234</i>
<i>Fame Information Services</i>	<i>25,012</i>
<i>SNL Financial</i>	<i>19,076</i>
<i>Interactive Data Corporation</i>	<i>18,637</i>
<i>Telekurs Inc.</i>	<i>16,660</i>
<i>THEMARKETS.com</i>	<i>14,720</i>
<i>Bridge</i>	<i>12,113</i>
<i>Factiva</i>	<i>11,978</i>
<i>Advantage Data Inc.</i>	<i>9,472</i>
<i>OPIS Energy Group</i>	<i>7,701</i>
<i>The McCloskey Group</i>	<i>7,115</i>
<i>Euromonitor International</i>	<i>6,548</i>
<i>NASDAQ</i>	<i>6,443</i>
<i>Option Metrics, LLC</i>	<i>5,295</i>
<i>Markit Group Limited</i>	<i>4,911</i>
<i>Street Account, LLC</i>	<i>4,764</i>
<i>Wm Company Ltd.</i>	<i>4,452</i>
<i>Wood Meckenzie Ltd.</i>	<i>4,350</i>

<i>Dow Jones & Company</i>	<i>2,667</i>
<i>Wealth Engine.com</i>	<i>1,655</i>
<i>Intelligence Press Inc.</i>	<i>923</i>
<i>GS Execution and Clearing</i>	<i>729</i>
<i>TCB Data System, Inc.</i>	<i>579</i>
<i>Clarksons</i>	<i>449</i>
<i>Money-Media</i>	<i>277</i>
<i>Copp Clark Professional</i>	<i>269</i>
<i>Market Axess</i>	<i>184</i>
<i>Prospect News Inc.</i>	<i>147</i>
<i>Average LIBOR.com</i>	<i>77</i>
<i>Options Price Reporting Authority</i>	<i>17</i>
<i>Total</i>	<i>32,85,994</i>

18. As per the assessee, firstly, this receipt is in the nature of reimbursement of expenditure incurred on behalf of the associated enterprise, and secondly, in any case, the contract with third-party vendors is on a principal-to-principal basis, and for the usage of the database, which does not involve any transfer of technology or making available any technology either to the assessee or to the associated enterprise. Further, neither the assessee nor the associated enterprise has control or physical access to the server of the vendors, and therefore, the said payments cannot qualify as the use of or right to use of software nor for making available technical knowledge, experience, skill, etc. Thus, the receipt is not in the nature of Royalty in accordance with the India-US DTAA. However, the Revenue treated the receipts are for the use of information concerning industrial, commercial, scientific experience and therefore taxable as Royalty under Article 12(4) of the India US DTAA. We find that while dealing with the issue of taxability of subscription fees received from the customers for providing market research report on the pharmaceutical sector, the coordinate bench of the Tribunal in *IMS AG (now known as IQVIA AG) v/s DCIT*, in ITA no.6445/Mum./2016, vide order dated 13.07.2020, for

the assessment year 2013–14, held that subscription fees received is not taxable as Royalty. The relevant findings of the coordinate bench of the Tribunal, in this regard, are as under:-

"3. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before us is a company incorporated, and fiscally domiciled, in Switzerland. The assessee company is engaged in providing market research report on pharmaceutical sector to its customers across the world at a predetermined subscription prices, The company collects, processes and utilizes the data and information, particularly in the field of medicine and pharmaceuticals for the delivery of reports through online IMS knowledge link. The company enters into agreements with its customers for providing the review reports (IMS reports) setting out the details of modules required to be accessed by the customers and the consideration for these services. In essence thus, the IMS reports, based on module selected, are statistical database compilations, providing geo economical data, about a pharma molecule, providing insight into the connected issues relating to information and developments. The licence access so granted is a non-exclusive and non-transferable right. It is consideration received, as allowing this non-exclusive, non-transferable access to the database and IMS reports which is subject matter of dispute before us. The authorities below have held that in the light of Hon'ble Karnataka High Court's judgment in the case of CIT Vs Wipro Ltd [(2011) 203 Taxman 621 (Kar)] and other judgments by the same Hon'ble High Court, which have been followed by a coordinate bench of this Tribunal as well, these receipts are required to be taxed as royalty under section 9(I)(vi) as also under article 12(3) of the Indo Swiss DTAA. The assessee is aggrieved and is in further appeal before us.

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

5. We find that Hon'ble jurisdictional High Court, in the case of DIT Vs Dun and Bradstreet Information Services India Pvt Ltd[(2012) 20 taxmann.695 (Mum)] has, while approving and concurring with the approach of Authority for Advance Ruling in the case of this very assessee, observed as follows:

"The assessee had imported business information reports from Dun and Bradstreet, USA, and made remittances in respect thereof without deducting tax at source. The Assessing Officer held that the assessee was liable to deduct tax at source and accordingly passed an order under section 195 read with section 201 of the Act. The appeal filed by the assessee was dismissed by the Commissioner of Income-tax (Appeals). On further appeal, the Income-tax Appellate Tribunal set aside the order passed under section 195 read with section 201 of the Act by following its decision in the assessee's own case for the assessment year 2002-03 in I.T.A. No. 1773/Mum/2006 and the decision of the Authority for Advance Rulings on identical facts in the case of Dun and S.A. Bradstreet Espana In re Authority for Advance Rulings No. 615 of 2003 [2005] 272ITR 99 (AAR)), D and B Europe Authority for Advance Rulings No. 657 of 2005, dated October 27, 2005, and D and B UK Authority for Advance Rulings

No. 656 of 2005, dated October 27, 2005. In all these cases the Authority for Advance Rulings held that the sale of very same business information reports by the subsidiaries of Dun and Bradstreet US in Spain, Europe and V. K. to the assessee did not attract the provisions of section 195 of the Act. Though the decision of the Authority for Advance Rulings is not binding in the present case, since the decision of the Authority for Advance Rulings relates to the very same business information reports imported by the petitioner and no fault in the decision of the Authority for Advance Rulings is pointed out, we see no reason to interfere with the decision of the Income-tax Appellate Tribunal."

6. The AAR's decision, which is so concurred with, *inter alia* states as follows:

"The instant case it is not a case of paying consideration for the use of or right to use any copyright of literary, artistic or scientific work or any patent trade mark or for information of commercial experience. The Commissioner sought to bring the payments under royalty/fees for technical service for the reason that the BIRs are copyright protected and end-users are required to use for their own purpose and the analysis of raw data provided in the BIRs would be similar to that of providing a technical or consultancy services. We have already mentioned above that a BIR is a standardized product of D&B, it provides factual information on the existence, operation, financial condition, management and experience line of business, facility and location of a company; it also provides special events like any suit, lien, judgment or previous or pending bankruptcy. Further, banking relationship and accountants, information like whether it is a patent company or authority concerned, has any branches etc. It also gives a rating of the company. The informations that are provided in a BIR are said to be publicly available; they are collected and compiled by D&B associates. A BIR is accessible by any subscriber on payment of requisite price with regular internet access for which no particular software or hardware is required. The applicant states that access to data base of the applicant is available to public at large at a price as in case of buying a book and it is not a pre-requisite, that BIR must be downloaded by DBIS only and in fact some clients, such as Expert credit guarantee corporation, in fact, access the server themselves to download BIR. The applicant does not have any server in India for the use of DBIS. Indeed the applicant has specifically averred that the copyright in the BIR would neither be licensed nor assigned to either the DBIS or the Indian customer. From these aspects it is clear that the aforementioned ruling of the Authority is distinguishable on facts. If a group of companies collects information about the historical places and places of interest for tourists in each country and all informations are maintained on a central computer which is accessible to each constituent of the Group in each country, can a supply of such information electronically on payment of price be treated as royalty or fee for technical services ? We think not.

The next case relied upon by the Commissioner is also a ruling of the Authority in *Ericsson Telephone Corpn. India AB, In re [1997] 224ITR 2031*. In that case the applicant was a company incorporated in Sweden. It provided, *inter alia*, services within radio and telecommunication. It entered into contracts with three Indian companies for the introduction of the cellular system of telecommunication in India and opened branch offices in India at New Delhi, Bombay and Madras. The Indian company informed applicant that while making payments under the agreement they would withhold income tax at 55% as provided in the Finance Act, 1995. According to the applicant tax deduction could not have exceeded 5,5% of the gross payments, as the net profit on the contract would not be more 10%, It was, therefore, not a case of whether the

amount paid could be termed as fee for technical services. It was admittedly a case of payment of fee for technical services.

For the abovementioned reasons, payments made by the DBIS to the applicant for purchases of BIRs do not answer the description of 'royalties' within the meaning of para 3 of article 13 of the treaty. So payments made by the DBIS to the applicant cannot be regarded as royalty payment. In our view, the applicant has rightly equated the transaction of sale of BIRs to sale of a book, which does not involve any transfer of intellectual property or a book."

7. *Article 12(3) of Indo Swiss DTAA, that we are currently dealing with, is verbatim the same as Article 13(3) of India Spain DTAA that Hon'ble Authority of Advance Ruling was dealing with. The conclusions so arrived at by the Authority for Advance Ruling, which now stand approved by Hon'ble jurisdictional High Court, are equally applicable in the context of Indo Swiss DTAA as well. It is only elementary that when the assessee is not taxable under the provisions of the respective DTAA, there is no occasion to examine the taxability under the Income Tax Act 1961, since the provisions of the Income Tax Act 1961 apply only when these provisions are more favourable to the assessee vis-a-vis the provisions of the applicable DTAA.*

8. *When the above position was brought to the notice of the learned Departmental Representative, he simply placed his reliance on the stand of the authorities below. He could not, however, neither point out any legally distinguishable features between the case before Hon'ble jurisdictional High Court vis-a-vis this case, nor any other reasons for not following the binding precedent from Hon'ble jurisdictional High Court. Once our Hon'ble jurisdictional High Court has expressed a view, it cannot be open for us to be swayed by a contrary view expressed by any other Hon'ble High Court. No decision from Hon'ble jurisdictional High Court, contrary to the above decision of Hon'ble jurisdictional High Court, was brought to our notice.*

9. *In view of the above discussions, as also bearing in mind entirety of the case, we delete the impugned addition of Rs 23,01,00,058 as royalty in the hands of the assessee. The assessee gets the relief accordingly."*

19. We find that the term 'Royalty' as defined in the India-US DTAA is worded similarly to India-Swiss DTAA, which was under consideration in the aforesaid decision. From the record, it is evident that the payment is in respect of usage of the database of the third-party vendors, which was later on recovered by the assessee from the associated enterprises. Therefore, in view of the aforesaid decision, once the payment made for the usage of the database does not fall within the ambit of Royalty, recovery of costs by the

assessee from the associated enterprises for the usage of the database cannot also result in Royalty in the hands of the assessee. In any case, in the present case, it has not been disputed by the Revenue that the payment received by the assessee is in the nature of reimbursement of cost and therefore we are of the considered opinion that the same cannot be chargeable to tax. Thus, in view of the aforesaid findings, we direct the AO to delete the addition in respect of the recovery of market data charges. As a result, ground No. 3 raised in assessee's appeal is allowed.

20. Insofar as the levy of interest under section 234A of the Act is concerned, we deem it appropriate to remand this issue to the file of the Assessing Officer 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. Accordingly, ground no.4, raised in assessee's appeal is allowed for statistical purposes.

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

ITA no.7490/Mum./2018
Assessee's Appeal – A.Y. 2014–15

22. In this appeal, the assessee has raised the following grounds:–

"Aggrieved by the order passed by the Deputy Commissioner of Income-tax (International Taxation)-2(3)(2) Mumbai ('AO') dated 29 October 2018, under section 143(3) read with section 144C(13) of the Act, pursuant to the directions of the Hon'ble Dispute Resolution Panel-1 (West Zone) (DRP), Mumbai, Goldman Sachs & Co. [the Appellant] respectfully submits that the learned AO has erred in passing the order on the following grounds:

1. The learned AO erred in making an addition of Rs 90,732,979 in respect of project administration costs such as courier, binding, stationery, reprographics, etc. reimbursed to the Appellant by Goldman Sachs Services Private Limited (GSSPL) in connection with the 'Campus' being built by the latter in Bangalore on the ground that these reimbursements are in the nature of Fees for Included Services (FIS) as per Article 12 of the India- US Double Taxation Avoidance Agreement (DTAA) and makes available technical knowledge, skills, processes, etc.

2. Without prejudice to the above, the learned AO has erred in holding that the Appellant is not correct in bifurcating the various components of the overall activity of rendering technical services, for the purpose of its characterization and accordingly, the entire cost of Rs 295,600,485 (including the amount of Rs 90,732,979) incurred in connection with the 'Campus' is to be examined together and not in segmentation.

3. The learned AO has erred in making an addition in respect of recovery of market data charges amounting to Rs 237,564,324 on the basis that the same qualifies as Royalty under the section 9(1)(vi) of the Act and Article 12 of the India-US DTAA as well, without appreciating the fact that these constitute expenses allocated by the Appellant to its Associated Enterprises (AEs) in India as reimbursement of expenses incurred on behalf of the AEs in India.

4. In levying interest under section 234A of the Act amounting to Rs 1,969,784 on the basis that Appellant has filed its return of income after the due date prescribed under the provisions of the Act.

5. In initiating penalty proceedings under section 271(1)(c) of the Act.

The Appellant craves leave to add, alter, vary, omit, substitute or amend any or all of the above grounds of appeal, at any time before or at the time of the appeal, so as to enable the Hon'ble Income-tax Appellate Tribunal to decide this appeal according to law."

23. The issue arising in grounds no.1-2, raised in assessee's appeal, is pertaining to the addition in respect of project administration costs as FIS under the India-US DTAA. Since a similar issue has been decided in assessee's appeal for the assessment year 2013-14, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds no.1-2 raised in assessee's appeal are allowed.

24. The issue arising in grounds no.3, raised in assessee's appeal, is pertaining to addition on account of market data charges as Royalty under Article 12 of the India-US DTAA. Since a similar issue has been decided in assessee's appeal for the assessment year 2013-14, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.3 raised in assessee's appeal is allowed.

25. Insofar as the levy of interest under section 234A of the Act is concerned, we deem it appropriate to remand this issue to the file of the Assessing Officer 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. Accordingly, ground no.4, raised in assessee's appeal is allowed for statistical purposes.

26. Ground no.5 is pertaining to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

27. In the result, the appeal by the assessee is partly allowed for statistical purposes.

ITA no.6005/Mum./2019
Assessee's Appeal – A.Y. 2015–16

28. In this appeal, the assessee has raised the following grounds:–

"Aggrieved by the order passed by the Deputy Commissioner of Income-tax (International Taxation)-2(3)(2) Mumbai (learned AO) dated 30 July 2019, under section 143(3) read with section 144C(13) of the Act, pursuant to the directions of the Hon'ble Dispute Resolution Panel-1 (West Zone) (DRP), Mumbai, Goldman Sachs & Co. [the Appellant] respectfully submits that the learned AO has erred in passing the order on the following grounds:

1. *The learned AO erred in making an addition of Rs 3,55,79,013 in respect of project administration costs such as courier, binding, stationery, reprographics, etc, reimbursed to the Appellant by Goldman Sachs Services Private Limited (GSSPL) in connection with the Campus' being built by the latter in Bangalore on the ground that these reimbursements are in the nature of Fees for Included Services (FIS) as per Article 12 of the India- US Double Taxation Avoidance Agreement (DTAA) and makes available technical knowledge, skills, processes, etc.*

2. *Without prejudice to the above, the learned AO has erred in holding that the Appellant is not correct in bifurcating the various components of the overall activity of rendering technical services, for the purpose of its characterization and accordingly, the entire cost of Rs 11.48,96,557 (including the amount of Rs 3,55,79,013) incurred in connection with the Campus' is to be examined together and not in segmentation.*

3. *The learned AO has erred in making an addition in respect of recovery of market data charges amounting to Rs 29,18,25,488 on the basis that the same qualifies as Royalty under the section 9(1)(vi) of the Act and Article 12 of the India-US DTAA as well, without appreciating the fact that these constitute expenses allocated by the Appellant to its Associated Enterprises (AES) in India as reimbursement of expenses incurred on behalf of the AEs in India.*

4. *In granting short credit of withholding taxes amounting to Rs 3,50,947.*

5. *In levying interest under section 234A of the Act amounting to Rs 19,63,868 on the basis that Appellant has filed its return of income after the due date prescribed under the provisions of the Act.*

6. *In levying interest under section 2348 of the Act.*

7. *In not allowing brought forward short term capital loss of Rs 27,952 to be carried forward to AY 2016-17.*

8. *In initiating penalty proceedings under section 271(1)© of the Act.*

The Appellant craves leave to add, alter, vary, omit, substitute or amend any or all of the above grounds of appeal, at any time before or at the time of the appeal, so as to enable the Hon'ble Income-tax Appellate Tribunal to decide this appeal according to law."

29. The issue arising in grounds no.1-2, raised in assessee's appeal, is pertaining to the addition in respect of project administration costs as FIS under the India-US DTAA. Since a similar issue has been decided in assessee's appeal for the assessment year 2013-14, the decision rendered therein shall

apply *mutatis mutandis*. As a result, grounds no.1-2 raised in assessee's appeal are allowed.

30. The issue arising in grounds no.3, raised in assessee's appeal, is pertaining to addition on account of market data charges as Royalty under Article 12 of the India-US DTAA. Since a similar issue has been decided in assessee's appeal for the assessment year 2013-14, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.3 raised in assessee's appeal is allowed.

31. Ground no.4, raised in assessee's appeal is pertaining to short credit of withholding taxes. 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.4 raised in assessee's appeal is allowed for statistical purposes.

32. Insofar as the levy of interest under section 234A of the Act is concerned, we deem it appropriate to remand this issue to the file of the Assessing Officer 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. Accordingly, ground no.5, raised in assessee's appeal is allowed for statistical purposes.

33. Ground no.6, raised in assessee's appeal, is pertaining to the levy of interest under section 234B of the Act, which is consequential in nature. Therefore, ground no.6 is allowed for statistical purposes.

34. Ground no.7, raised in assessee's appeal is pertaining to not allowing carried forward to next year of the brought forward short-term capital loss. This issue is restored to the file of the AO to be decided afresh, in accordance with the law, after conducting the necessary verification. As a result, ground no.7 raised in assessee's appeal is allowed for statistical purposes.

35. Ground no.8 is pertaining to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

36. In the result, the appeal by the assessee is partly allowed for statistical purposes.

ITA no.1264/Mum./2021
Assessee's Appeal – A.Y. 2017-18

37. In this appeal, the assessee has raised following grounds:-

"Aggrieved by the order passed by the Deputy Commissioner of Income-tax (International Taxation)-2(3)(2) Mumbai (learned AO), under section 143(3) read with section 144C(13) of the Act, pursuant to the directions of the Hon'ble Dispute Resolution Panel-1 (West Zone) ('DRP'), Mumbai, Goldman Sachs & Co. [the Appellant] respectfully submits that the learned AO has erred in passing the order on the following grounds:

1. The learned AO erred in making an addition of Rs 43,192,502 in respect of project administration costs such as courier, binding, stationery, reprographics, etc. reimbursed to the Appellant by Goldman Sachs Services Private Limited (GSSPL) in connection with the 'Campus' being built by the latter in Bangalore on the ground that these reimbursements are in the nature of Fees for Included Services (FIS) as per Article 12 of the India- US Double Taxation Avoidance Agreement (DTAA) and makes available technical knowledge, skills, processes, etc.

2. Without prejudice to the above, the learned AO has erred in holding that the Appellant is not correct in bifurcating the various components of the overall activity of rendering technical services, for the purpose of its characterization and accordingly, the entire cost of Rs 101.170,584 (including the amount of Rs

43,192,502) incurred in connection with the 'Campus' is to be examined together and not in segmentation.

3. The learned AO has erred in making an addition in respect of recovery of market data charges amounting to Rs 294,384,715 on the basis that the same qualifies as Royalty under the section 9(1)(vi) of the Act and Article 12 of the India-US DTAA as well, without appreciating the fact that these constitute expenses allocated by the Appellant to its Associated Enterprises (AEs) in India as reimbursement of expenses incurred on behalf of the AEs in India.

4. In levying interest under section 234A of the Act amounting to Rs 389,429 on the basis that Appellant has filed its return of income after the due date prescribed under the provisions of the Act

5. In not allowing the short-term capital loss of Rs 130,664 to be carried forward to AY 2018-19.

6. In initiating penalty proceedings under section 270A of the Act.

The Appellant craves leave to add, alter, vary, omit, substitute or amend any or all of the above grounds of appeal, at any time before or at the time of the appeal, so as to enable the Hon'ble Income-tax Appellate Tribunal to decide this appeal according to law."

38. The issue arising in grounds no.1-2, raised in assessee's appeal, is pertaining to the addition in respect of project administration costs as FIS under the India-US DTAA. Since a similar issue has been decided in assessee's appeal for the assessment year 2013-14, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds no.1-2 raised in assessee's appeal are allowed.

39. The issue arising in grounds no.3, raised in assessee's appeal, is pertaining to addition on account of market data charges as Royalty under Article 12 of the India-US DTAA. Since a similar issue has been decided in assessee's appeal for the assessment year 2013-14, the decision rendered therein shall apply *mutatis mutandis*. As a result, ground no.3 raised in assessee's appeal is allowed.

40. Insofar as the levy of interest under section 234A of the Act is concerned, we deem it appropriate to remand this issue to the file of the Assessing Officer 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. Accordingly, ground no.4, raised in assessee's appeal is allowed for statistical purposes.

41. Ground no.5, raised in assessee's appeal is pertaining to not allowing carried forward to next year of the brought forward short-term capital loss. This issue is restored to the file of the AO to be decided afresh, 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.

42. Ground no.6 is pertaining to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

43. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on 08/05/2023

Sd/-
S. RIFAUH RAHMAN
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 08/05/2023

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai