

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'C' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President
&
Shri Rajesh Kumar, Accountant Member**

**I.T.A. No. 298/KOL/2022
Assessment Year: 2017-2018**

***M/s. Ineos Commercial
Services UK Limited,.....Appellant
Chapel Lane, Hawkslease,
Hampshire, Lyndhurst-SO437FG,
United Kingdom
[PAN: AACCI7840R]***

-Vs.-

***Commissioner of Income Tax (IT & TP),.....Respondent
Kolkata,
Aayakar Bhawan,
110, Shanti Pally, E.M. Bypass,
Kolkata-700107***

Appearances by:

*Shri Rahul Shah, CA and Ms. Pooja Saraf, CA, appeared
on behalf of the assessee*

*Sri Abhijit Kundu, CIT, D.R., appeared on behalf of the
Revenue*

Date of concluding the hearing : July 11, 2023

Date of pronouncing the order : July 18, 2023

O R D E R

Per Shri Rajpal Yadav, Vice-President (KZ):-

The assessee is in appeal before the Tribunal against the order of Id. Commissioner of Income Tax (IT & TP), Kolkata dated 30th March, 2022 passed under section 263 of the Income Tax Act, 1961 in A.Y. 2017-18.

2. The assessee has raised seven grounds of appeal. However, its grievances revolve around a single issue, namely, Id. CIT has erred in taking cognizance under section 263 of the Income Tax Act and thereby setting aside the assessment order dated 18.12.2019 passed under section 143(3) with a direction that *de novo* assessment be made.

3. Brief facts of the case are that the assessee has filed its return of income on 31.10.2017 declaring total income of Rs.4,42,58,223/-. The case of the assessee was selected for scrutiny assessment and an assessment order was passed on 18.12.2019 under section 143(3). It is a very brief assessment order, therefore, we deem it appropriate to take note of the complete order, which reads as under:-



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE 1(2),IT, KOLKATA

To, INEOS COMMERCIAL SERVICES UK LIMITED CHAPEL LANE HAWKSLEASE,CHAPEL LANE HAMPSHIRE LYNDHURST,FOREIGN United Kingdom	
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PAN: AACCI7840R	AY: 2017-18	Order No: ITBA/AST/S/143(3)/2019-20/1022610146(1)	Dated: 18/12/2019
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Name of the assessee	INEOS COMMERCIAL SERVICES UK LIMITED
Address of the assessee	CHAPEL LANE HAWKSLEASE, CHAPEL LANE HAMPSHIRE, LYNDHURST, FOREIGN, United Kingdom
Status	COMPANY
Range/Circle/Ward	CIRCLE 1(2),IT, KOLKATA
Resident/Resident but not Ordinary resident/ Non-resident	Non-Resident
Date of Hearing	22/08/2018, 09/09/2019, 31/10/2019, 15/11/2019, 25/11/2019
Section/Sub-section under which assessment is made	143(3)
Date of Order	18/12/2019

ASSESSMENT ORDER

Assessment Order u/s 143 (3) of Income Tax Act.

The assessee has filed the Return of Income on 31/10/2017 declaring total income of Rs.4,42,58,223/-. The return was processed u/s 143 (1) of Income Tax Act 1961 by CPC on 25/03/2019 accepting return income. The case was selected for scrutiny through CASS. Notice u/s 143(2) of the Income Tax Act, 1961 dated 10/08/2018 was issued through ITBA and served on the assessee.

2. Notices under Section 142(1) of the Act were also issued to the assessee electronically asking to submit the details/explanation. In response to the above notices the assessee has filed details/submissions/explanation electronically through e-filing portal. Printouts of details/submissions/explanation along with supporting documents have been taken. Some of the details have been filed in physical form in

this office as the same were bulky. The details/submissions/explanation along with supporting documents have been verified and placed on record.

3. The assessee M/s Ineos Commercial Services UK Limited is non-resident UK based company engaged in providing technical services to Indian companies. The assessee has shown income as fees for technical services received from ONGC and offered it for taxation at the rate of 10% of gross receipt as per the provision of section 115A (1) (b) of Income Tax Act 1961 and Article 13 of DTAA between India and UK.

4. In view of the above income shown in Return of Income is accepted.

Income shown in Return of Income Rs.4,42,58,223/-.

5. Assessed u/s 143 (3) of I T Act. Tax Calculation done on ITBA Systems & the applicable interest charged, and the calculation sheet is appended with this order. Notice of Demand u/s 156 of the Act is being issued to the assessee with this order.

JAIBHIM TUKARAM NARNAWARE
CIRCLE 1(2),IT, KOLKATA

4. The Id. Commissioner perused the record and order of the Id. Assessing Officer, thereafter formed an opinion that the assessment order is erroneous as much as it caused a prejudice to the interest of the revenue. Hence, it required revision by exercising the powers under section 263. Accordingly Id. Commissioner has issued a notice dated 11.01.2022, copy of this notice has been placed on page no. 271 of the paper book. It reads as under:-

Sl. No.	Nature of income and Name of the Party	Gross receipts (in INR)	Remarks
1.	Fess for training imparted to employees of ONGC Petro Additions Ltd. In connection with polythelene plant.	4,42,58,223	Income offered to tax

To,
INEOS COMMERCIAL SERVICES UK LIMITED
CHAPEL LANE HAWKSLEASE , CHAPEL LANE HAMPSHIRE
LYNDHURST , FOREIGN
United Kingdom

PAN/TAN: AACCI7840R	AY: 2017-18	DIN & Notice No : ITBA/REV/F/REV1/2021-22/1038641230(1)	Dated: 11/01/2022
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NOTICE FOR THE HEARING

M/s/Mr/Ms

Subject: Notice for Hearing in respect of Revision proceedings u/s 263 of the **THE INCOME TAX ACT, 1961** – Assessment Year **2017-18**.

In this regard, a hearing in the matter is fixed on **20/01/2022** at **03:30 PM**. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: incometaxindiaefiling.gov.in

2. With reference to the above, this is a notice u/s 263 of the Income tax Act, 1961 for the purpose of revision of assessment order made in the case of the above named assessee u/s 143(3) dated 18/12/2019 for Assessment Year 2017-18 by the Assistant Commissioner of Income tax (International Taxation), Circle-1(2), Kolkata.

3. The order u/s. 143(3) of the I.T. Act, 1961 was passed in the case of the above named assessee for the Assessment Year 2017-18 on 18/12/2019. In the return of income, the assessee declared total income at Rs. 4,42,58,223/-for the previous year 2016-17 relevant to Assessment Year 2017-18. The case was selected for scrutiny through CASS. The details of gross receipts as submitted by the assessee during the course of assessment proceedings are as under:

3.	Fess for supervision services from Brahmaputra Cracker and Polymer Limited(BCPL)	3,99,39,056	Not offered to tax
4.	Charges for Rental Charges for containers from Brahmaputra Cracker and Polymer Limited(BCPL)	27,37,020	Not offered to tax

3.1 The entire receipt from BCPL amounting to Rs.4,26,76,076/- was claimed as exempt income and TDS deducted on such receipts was re-claimed by the assessee. The assessment order was passed u/s. 143(3) of the Income tax Act, 1961 by the Assessing Officer on 18/12/2019 accepting the income declared in return of income and a refund of Rs.51,25,699/- was granted to the assessee.

4. Subsequently, on verification of the material available on records, it was found that the order of assessment was erroneous and prejudicial to the interest of revenue on the following grounds :-

(i) It was explained during course of assessment that the fees for supervision services was not offered for taxation as the assessee has not "made available" any technical knowledge or experience as per Article 13 of DTAA agreement between India and United Kingdom. It was also claimed that the Rental Charges for containers were in the nature of business income and hence not taxable in India.

As per paragraph 4 of Article 13 of the DTAA, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which :

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

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received ; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

In the explanation furnished by the assessee, the definition of fees for technical services

has been explained only as per 4(c), ignoring the definitions as per 4(a) and 4(b) of Article 13 of the DTAA.

It is further observed that all the payments received from BCPL were related to an agreement entered into between the assessee and BCPL on 18/03/2009. The agreement was towards Licence for manufacture of linear polyethylene in Assam, India and its sale throughout the world. The agreement categorically stipulated that the assessee had the right to grant licences under patents and rights of valuable confidential information on a process (Innovene Process) for the manufacture of linear polyethylene and was willing to grant licences and right of BCPL for the design, procurement, construction and operation of the plant in Assam, India for manufacture of linear polyethylene and by the aforesaid process. Thus, the assessee, through the agreement, was granting BCPL licences under Licensor Patents. It is mentioned here, that as per paragraph 3(a) of Article 13 of DTAA, which is relevant to the definition provided for fees for technical services as per paragraph 4(a), mentioned above, royalties means payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

From the above, it would be evident that the payments received from BCPL were for rendering technical or consultancy services (including the provision of services of technical or other personnel) which was ancillary and subsidiary to the application or enjoyment of the patent right (Licence). Further, the assessee was granting Licence to BCPL as per the terms set out in the agreement which in turn included, i) Disclosure of Process Information, ii) Process Design of the Plant, iii) Training, iv) Technical Assistance, v) Performance Guarantee Test Runs, and Transition Tests, vi) Performance Warranties, etc, which, therefore, entailed setting of a manufacturing plant so as to enable BCPL to manufacture Linear Polyethylene. BCPL was being given the exclusive rights to use Process Information only for the purposes of design, procurement, construction, maintenance and operation of the plant. Hence, setting up of the plant was essentially a part of granting Licences for the assessee's patent in question.

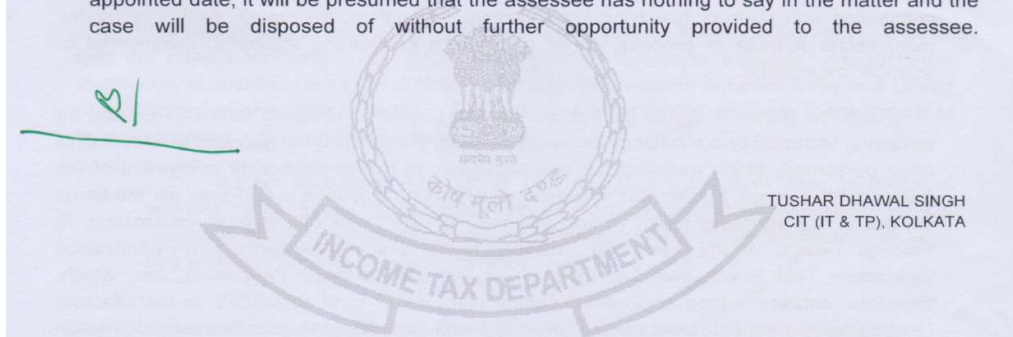
In this context, it is also mentioned that as per the Clause of Taxation (Clause 21 of the agreement), the assessee authorized BCPL to deduct from each payment made to the assessee, the requisite amount of withholding tax (TDS) and pay the same to Government of India under the DTAA. The assessee was liable to pay tax on Licence Fee, the BDEP Fee, the Mandatory Services Fee and any personal income tax incurred by the assessee's representatives while in India for services provided in relation to the Plant, BCPL, had therefore, rightly deducted tax while making payment of Mandatory Services Fee and rental charges as mentioned above during the financial year 2016-17 relevant to A.Y. 2017-18.

5. It is observed that the Assessing Officer has not examined this issue during the assessment proceedings as a result of which taxable income has gone untaxed. In view of

these facts, the order u/s. 143(3) dated 18/12/2019 for A.Y. 2017-18 is considered to be erroneous and prejudicial to the interest of revenue and is proposed to be set aside u/s. 263 by the order of the Commissioner of Income Tax (IT & TP), Kolkata. The assessee is requested to show cause as to why the assessment order for A.Y. 2017-18 may not be revised / set aside in accordance with the provisions of Section 263 of the Income Tax Act 1961.

6. The assessee is hereby offered an opportunity of being heard in accordance with the provisions u/s. 263 of the I.T. Act, 1961 and thereby required to attend the office of the undersigned at Room No. 201, 110-Shantipally, E.M. Bypass, Kolkata-700107 on **20/01/2022** at 03.30 **P.M.** either in person or by a representative duly authorised in writing in this behalf. The assessee or the authorised representative of the assessee may produce or cause there to be produced at the said time any document, accounts and any other evidence on which the assessee may rely in support of its reply. The assessee may furnish the information in writing in this office personally or by post or by e-mail to kolkata.cit.ittp@incometax.gov.in or submit orally during the hearing on the said date and time.

7. Please note that in case of non-compliance on the part of the assessee on the appointed date, it will be presumed that the assessee has nothing to say in the matter and the case will be disposed of without further opportunity provided to the assessee.



5. The assessee filed written submission, which has been reproduced by the ld. CIT and thereafter ld. CIT passed the impugned order on 30.03.2022.

6. Brief facts giving rise to this proceeding are that the assessee entered into an agreement with Brahmaputra Cracker and Polymer Limited (BCPL) on 18.03.2009, vide which licence for manufacture of linear polyethylene in Assam and its sale across the world. Under this agreement, the assessee granted licence and the necessary knowhow including design, procurement, construction and operation of plant in Assam for the patentee by innovene process for manufacture of linear

polyethylene to BCPL. Thus the assessee was actively helped BCPL in setting up the production process including training of its manpower, providing expert as well as supervision and commissioning services. The assessee has received fees under different categories enumerated in the agreement. Copy of the agreement is available on pages no. 23 to 208 of the paper book. It has categorised the fees under following heads:-

- (a) "licence fee and payments" (Article 3 of the Agreement 3.1 to 3.1.6). The assessee has offered tax on receipt of this fee.
- (b) BDEP Fees – Article 3.2 of the Agreement- the assessee has paid tax on receipt of this fee also.
- (c) Training Fees- Article 3.3- it had paid tax on this receipt also.
- (d) Mandatory Service Fees- Article 3.4- it has paid tax on the receipt of these fees.
- (e) Technical Assistance Fees- Article 7 of the Agreement. (It did not include this receipt in taxable income.)

7. The fees amounting to Rs.3,99,39,056/- was not offered for tax by the assessee. The ld. CIT while examining the scope of the contract including the nature of receipt under different heads formed an opinion that it is a composite contract and this fee under the head

“supervisory services’ (i.e. item (e) above), cannot be segregated at the instance of assessee. In the opinion of ld. CIT, this aspect was not examined by the ld. Assessing Officer constructively either in the assessment order or during the assessment proceeding. Therefore, ld. CIT set aside the assessment order and directed the ld. Assessing officer to reframe the assessment order after examining this issue and hearing the assessee.

8. While impugning the order of ld. CIT, ld. Counsel for the assessee has raised two-fold submissions. In his first-fold of submission, he submitted that it is incorrect to suggest that ld. Assessing Officer has not examined this issue. The ld. Assessing Officer has gone through all the details and thereafter did not tax it. Therefore, it is to be construed that he has examined it but deem it fit to accept this stand of the assessee. For buttressing this fold of contention, he took us through the pages no. 1 to 3, wherein show-cause notice issued under section 142(1) of the Income Tax Act dated 24.10.2019 is placed on record. In response to this show-cause notice, the assessee has filed submission dated 15.11.2019 and the copy of this submission is placed on pages no. 4 to 8 of the paper book. He further submitted that the ld. Assessing Officer has again issued notices under section 142(1) on 19.11.2019 and 02.12.2019. These two notices were also replied by the assessee. The stand of the

assessee was that the receipt was in the nature of supervisory services under this head. The assessee has not made available the technical knowledge, experience, skill, knowhow or processes. Therefore, under Article 13 of India-UK Treaty, the fees received for providing such services, where technology was not made available that would not fall within the concept of FTS, i.e. fees for Technical Services. The assessee has filed a note, which is available on pages no. 5 to 7 of the paper book. It relied upon the judgment of ITAT, Mumbai in the case of Raymond Limited -vs.- DCIT (86 ITD 791) and the decision of the Hon'ble Karnataka High Court in the case of CIT -vs.- De Beers India Minerals (P) Limited (2012) 21 taxmann.com 214. Though the ld. Assessing Officer has not made any discussion in the assessment order but it is to be construed that he must have applied his mind on this submission and only thereafter chose not to tax these receipts. He further contended that when ld. Assessing Officer has taken one of the plausible views on a debatable point, then, his order cannot be termed as erroneous and no action under section 263 deserves to be taken against the ld. Assessing Officer. In support of his contention, he placed on record a large number of decisions contained in the paper book running into 456 pages. In all, assessee has placed on record copies of 33 decisions.

8.1. In his next fold of submission, he submitted that whether the alleged supervision service fees is to be taxed as FTS or not, will depend upon the nature of technical services provided by the assessee and construction of facts along with interpretation of Article 13 of India-UK Treaty may lead to divergent opinion at the end of the authorities, but the view taken by the ld. Assessing Officer cannot be termed as erroneous view and, therefore, no action under section 263 deserves to be taken.

9. The ld. CIT(DR), on the other hand, put reliance upon the order of ld. CIT and submitted that the ld. CIT has examined this aspect in detailed in the impugned order and thereafter formed an opinion that it is a composite contract, which cannot be segregated in parts and, therefore, rightly found the assessment order as erroneous.

10. We have duly considered the rival contentions and gone through the record carefully. Before we embark upon an enquiry on the facts and issues agitated before us to find out whether the action u/s 263 of the Act, deserves to be taken against the assessee or not, it is pertinent to take note of this section. It reads as under:-

“263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing

Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.”

11. A bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and

examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show-cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. He may set aside the order and direct the Assessing Officer to pass a fresh order. At this stage, before considering the multi-fold contentions of the ld. Representatives, we deem it pertinent to take note

of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

(i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

(ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. It cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law.

(vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.

(vii) The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not see stratified with the conclusion.

(viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.

(ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

12. In the light of above, let us analyse the facts and circumstances of the case. The assessee has been contending that it has received fees towards supervisory charges and since it has not made available technical knowledge about providing of these supervisory charges, therefore, under Article 13 of India-UK Treaty, this receipt will not fall in the ambit of FTS and not taxable. On an analysis of the record, we are of the opinion that the first step at our end is to find out these services for which it has charged this receipt. Under Article 7 of the Agreement, the assessee has listed the Technical Assistance Services for which it has been charging the

fees. These conditions are running into four pages. The relevant part reads as under:-

“7. TECHNICAL ASSISTANCE

In this Agreement, “Mandatory Services” shall mean:

- (i) *review of Licensee's documents referred to in Clause 7.1;*
- (ii) *attendance at equipment vendors' premises in accordance with Clause 7.2.1;*
- (iii) *mechanical installation check and pre-commissioning safety audit of the Plant referred to in Clause 7.2.2.1;*
- (iv) *assistance with pre-commissioning and commissioning of the Plant referred to in Clause 7.2.2.2;*
- (iv) *attendance at and assistance with carrying out PGTRs and transition Tests at the Plant in accordance with Clause 7.2.2.3 and Clause 8.*

7.1. In consideration of the fee paid by Licensee under Clause 3.4.1, the Licensor shall provide to Licensee the following Mandatory Services:

7.1.1. Licensee shall provide to Licensor five (5) copies and one (1) editable electronic copy in English of each document listed in the Eighth Schedule and Licensor shall, at no additional cost to Licensee, promptly review Licensee's documents for compliance with the BDEP, return comments (if any) to Licensee within fifteen (15) working days of receipt of such "documents by Licensor. Notwithstanding this review, Licensee shall remain exclusively responsible for the design of the Plant and for ensuring that the design conforms to the BDEP;

7.1.2. Upon dispatch by the Licensor of its written comments on the Licensee P&ID's as defined in the Eighth Schedule (Licensee's "issued for construction" P&IDs) the Parties shall meet within thirty (30) days at a location and time to be agreed for the purpose of assisting Licensee in the interpreting and understanding Licensor's comments on Licensee's "issued for construction" P&IDs;

7.1.3 Licensee shall notify Licensor that the critical piping model is ready for review. Within thirty (30) days thereafter, the Parties shall

meet at a location and time to be mutually agreed to review the critical piping model. Within twenty-eight (28) days, Licensor shall provide its written recommendations (if any) concerning the critical piping model.

The documents referred to in this Clause 7.1 shall constitute the detailed engineering documents essential for Licensor to fulfill the warranty referred to at Clause 10.1. The meetings referred to in this Clause 7.1 may take place as a single meeting if agreed by the Parties.

7.2. In consideration of the fee paid by the Licensee under Clause 3.4.2, Licensor shall provide the following Mandatory Services to Licensee:

7.2.1. for attendance at the equipment vendors' premises to witness testing and inspection of the equipment essential to fulfill the warranty referred to at Clause 10.1 listed in the Eighth Schedule, subject to Licensee notifying Licensor no later than thirty (30) days in advance that such equipment is ready for testing and inspection;

7.2.2. advice and assistance to Licensee at the Plant essential for Licensor to fulfil the warranty referred to at Clause 10.1 including:

7.2.2.1. checking that the mechanical installation of the Plant is in accordance with the BDEP and conducting the pre-commissioning safety audit;

7.2.2.2 pre-commissioning and commissioning;

7.2.2.3. the carrying out of the PGTRs and Transition Tests.

7.3. Licensor shall observe and abide by all safety regulations notified by Licensee during the course of performance of services at Licensee's petrochemical complex at Lepetkata, district Dibrugarh, Assam, India (including the Plant).

7.4. Before commencement of commissioning Licensor and Licensee will each appoint a leader of their respective commissioning groups (Licensor/Licensee Representatives).x x x x x x x x x x

13. A perusal of the above clauses of the Agreement would indicate that basically these fees were charged for

review of licensee's documents, attendance at the equipment vendors' premises in accordance with clause 7.2 and so on. During the course of hearing, we put a question to the ld. Counsel for the assessee, whether this service is an independent service as a stand-alone. We also enquired how this service alone can be performed by the assessee without entering into this complete agreement. The reply of the ld. Counsel for the assessee was in negative. Therefore, these clauses if read into clauses starting from the Article 3, then, would reveal that it is a fee for one part from the composite contract and it cannot be segregated. This service was not being provided on a item which can be consider as stand alone item even without availability of this agreement.

14. As far as the first-fold of submission of the ld. Counsel for the assessee is concerned, that ld. Assessing Officer has perused the submission of the assessee particularly the note dated 15.11.2019 available on pages no. 4 to 7 of the paper book is concerned, we are of the view that the assessee had made a fatuous attempt to goad the adjudicating authority in a field, where facts are not available. The judgments of ITAT, Mumbai in the case of Raymond Limited as well as of Hon'ble Karnataka High Court in the case of De Beers India Minerals (P) Limited could only be relevant if the assessee has been providing this nature of services as a stand-alone and

not dependent upon the other performance of this agreement. The theory of conditions enumerated in Article 13 of the DTAA between UK and India is totally misplaced. The enquiry at this angle is to be made if it is determinable that services provided by the assessee are stand alone services and not dependent upon the agreement. It is an unnecessary argument raised by the assessee before the ld. Assessing Officer for absolving from tax liability and this effort was not examined by the ld. Assessing Officer elaborately and diligently. If agreement is being perused, then, it would give a meaning that it is a composite agreement and different category of receipts cannot be segregated from it. Therefore, this concept of applicability of Article 13 is not at all applicable in the present case. The facts to that effect are not available precisely. Non-examination of the ld. Assessing Officer with that angle has caused prejudice to the interest of the Revenue. The ld. CIT has rightly set aside this order by exercising powers under section 263.

15. The observations made by us will not impair or injure the case of the Revenue and will not cause any prejudice to the defence/explanation of the assessee on merit. The observations made by us are for the purposes of bringing home our conclusion in support of the order of ld. CIT in this appeal. Therefore, the issue that has been relegated by the ld. CIT for fresh hearing to the ld.

Assessing Officer is to be examined afresh on merit in accordance with law. In view of the above, we do not find any merit in this appeal, it is dismissed.

16. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open Court on July 18, 2023.

**Sd/-
(Rajesh Kumar)
Accountant Member**

**Sd/-
(Rajpal Yadav)
Vice-President(KZ)**

Kolkata, the 18th day of July, 2023

- Copies to : (1) M/s. Ineos Commercial
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(3) Commissioner of Income Tax ,
(4) The Departmental Representative
(5) Guard File
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By order

*Assistant Registrar
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.