आयकर अपीलीय अधिकरण,'डी'न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपीलसं./**ITA No.:953/CHNY/2015**

निर्धारण वर्ष/Assessment Year: 2010-11

&

C.O No.50/CHNY/2016

[in I.T.A. No.953/CHNY/2015]

The DCIT / ACIT, Central Circle – 3(2), Chennai.	vs.	**VA Tech Wabag Ltd.,** "Wabag House", No.17, 200 feet Thoraipakkam-Pallavaram Main Road, Sunnambu Kolathur, Chennai – 600 117. **[PAN: AABCV 0225G]**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent/ Cross Objector)

&

आयकर अपीलसं./**ITA No.: 807/CHNY/2016**

निर्धारण वर्ष/Assessment Year: 2011-12

VA Tech Wabag Ltd., "Wabag House", No.17, 200 feet Thoraipakkam-Pallavaram Main Road, Sunnambu Kolathur, Chennai – 600 117. **[PAN: AABCV 0225G]**	vs.	**The ACIT,** Central Circle – 3(2), Chennai.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

राजस्वकीओर से /Revenue by : Dr. S. Palanikumar, CIT

निर्धारितीकी ओर से/Assessee/Cross Objector by: Shri Ashik Shah, CA

सुनवाई की तारीख/Date of Hearing : 07.06.2023

घोषणा की तारीख/Date of Pronouncement : 31.08.2023

आदेश /O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the revenue in ITA No 953/Chny/2015 and Cross objection No. 50/Chny/2016 by the assessee, for the assessment year 2010-11, are arising out of the final assessment order passed by DCIT, Central Circle 3(2), Chennai dated 25.02.2015 u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter the 'Act') pursuant to the directions of Dispute Resolution Panel, Chennai (DRP) u/s. 144C(5) of the Act dated 26.12.2014. The appeal by the assessee in ITA No.807/Chny/2016 for the assessment year 2011-12 is arising out of the final assessment order passed by the ACIT, Central Circle-3(2), Chennai dated 29.01.2016 u/s 143(3) r.w.s. 92CA(3) & 144C(13) of the Act pursuant to the directions DRP u/s. 144C(5) of the Act dated 23.12.2015.

2. The first common issue in this appeal of Revenue for A.Y 2010-11 and the appeal of assessee for A.Y 2011-12 is as regards to the issue of adjustment made to Arms Length Price(ALP) on account of corporate guarantee commission whether to be made or not. For this, the Revenue for A.Y 2010-11 has raised following ground No.2:

"2.1 The Hon'ble DRP erred in allowing the claim of Corporation Guarantee amounting to Rs. 3,49,27,400/-.

2.2 It is submitted that the decision of the Hon'ble ITAT in the case of Redington India Limited has not reached finality and further appeal is pending before the Hon'ble High Court."

3. For this, the assessee for A.Y 2011-12 has raised the following Ground No.3:

"3. Additions pursuant to the order of the Learned Transfer Pricing Officer ("Ld. TPO")

3.1 Both the Ld. TPO and Hon'ble DRP have erred in law and on facts in making addition of INR 2.30,12,800 as commission income on the guarantee extended by the Appellant to its Associated Enterprise (AE"), when providing corporate guarantee is not an international transaction under section 92B of the Act.

3.2 Without prejudice to the above grounds, the Ld. TPO have erred in charging the guarantee commission on the opening balance of outstanding guarantee value."

4. The Ld. counsel as well as Ld. CIT-DR agreed that the facts and circumstances are exactly identical in both the years and hence, we take the facts from A.Y 2010-11 in ITA No.953/Chny/2015 and will decide the issue.

5. The brief facts of the case are that the assessee acquired the shares in VA Tech Wabag GmBH, Austria ("VA Tech, Austria") from Siemens Aktiengesellschaft Osterreich, Austria ("Siemens"). At the time of acquisition of shares, the assessee took over the contingent

liability, which included a corporate performance guarantee given by Siemens to the Bank of Austria, which in turn provided performance guarantee to various customers of VA Tech Austria. The details of corporate guarantee are as under:

DETAILS OF CORPORATE GUARANTEE				
FY	*On behalf of*	*Bank*	*Euro (million)*	*INR (crores)*
2009-10	*WABAG, Austria*	*SBI Belgium*	*35.000*	*2,11,96,00,000*
	WABAG, Austria	*Bank Austria*	*3.000*	*20,67,00,000*
Total for Financial Year 2009-10 relevant for AY 2010-11 is Rs. 2,30,12,80,000				

6. The assessee explained that when it has acquired the shares of VA Tech Austria from Siemens through its 100 percent subsidiary VA Tech Wabag (Singapore) Pte Limited, the assessee took over the corporate performance guarantee given by the Siemens to Bank of Austria. The A.O during the course of assessment proceedings noted that as a part of acquisition of VA Tech WABAG, Austria through its Singapore AE, the assessee had exposed itself to the Performance Corporate Guarantee to the extent of Euro 67.985 million of which 64.985 was through ICICI Singapore and Euro 3 million through Bank Austria. As the costs of counter guarantee issued through ICICI were found to be prohibitive and the terms and conditions not favourable, the guarantees given through ICICI Singapore were swapped by assessee with SBI Belgium. This clearly shows that the

transaction involves elements of costs and risks. The A.O accordingly taken 1% of the average exposure and directed upward adjustment of Rs. 3,49,27,400/- and treated the same as international transaction. Aggrieved, the assessee raised objections before DRP.

7. The DRP deleted the corporate guarantee determined by the TPO as ALP and making upward adjustment accordingly. The DRP deleted by observing as under:

> *"3.5.3. The issue of determining the ALP on corporate guarantee has already been examined by the jurisdictional bench of Chennai ITAT in the case of Redington India Ltd. v. JCIT (ITA No.513/ Mds/2014). The Honble ITAT has held that since there is no cost involved in extending the corporate guarantee, it will not constitute "an international transaction". The relevant portion of the order of the ITAT of Redington India Ltd. v. JCIT (TA No.513/Mds/20 14 dated 07.07.20 14) are as under:*
>
> > *94. The ITAT, Delhi Bench, in the case of Bharti Airtel Ltd. vs. Addl. CIT, 43 Taxmann.com 150, has held that providing of corporate guarantee does not involve any cost to the assessee and, therefore, it is not "an international transaction", even under the definition of the said term as amended by the Finance Act 2012. This is because, the guarantee provided by an assessee does not have any bearing on profits, income, loss or assets of the assessee.*
> >
> > *95. In view of the nature of corporate and bank guarantees given by the assessee company and in the light of the above order of the ITAT, Delhi Bench, we hold that the TP addition made against corporate and bank guarantees is not sustainable in law. The addition is therefore deleted.*
>
> *3.5.4. Respectfully following the decision of the jurisdictional ITAT in the case of Redington India Ltd. v. JCIT (ITA No.513/ Mds/ 20 14 dated 07.07.2014), we are of the opinion that providing of corporate guarantee will not constitute an international transaction for the purpose of determining the ALP. Hence, the TPO's action of determining the ALP*

at Rs.3,49,27,400/- is not justified, and consequently the proposed upward adjustment of Rs.3,49,27,400/- is deleted."

Aggrieved, the Revenue is in appeal before the Tribunal.

8. Before us, the Ld. CIT-DR relied on the decision of Hon'ble High Court of Madras in the case of Redington (India) Ltd. vs. Addl. CIT [2022] 242 ITR 450 (Mad.).

9. On the other hand, the Ld. counsel for the assessee only requested that in view of the decision of Hon'ble Bombay High Court in the case of *Everest Kanto Cylinder Ltd. 52 taxmann.com 395 (Bom.)*, wherein it is held that the corporate guarantee upward adjustment in ALP can be done by taking 0.5%, but it is held to be international transaction. The Ld. counsel for the assessee only requested that the upward adjustment of ALP can be done at 0.5%.

10. After hearing both the parties and going through the facts and circumstances of the case, we concur with the TPO's order that this is an international transaction, but upward adjustment is now covered in favour of the assessee partly by the decision of Hon'ble Bombay High Court in the case of *Everest Kanto Cylinder Ltd*, supra, wherein it is directed that the adjustment should be made @0.5%. Hence, we direct the A.O accordingly.

11. Coming to ITA No.807/CHNY/2016 for the assessment year 2011-12 of assessee's appeal, the issue is regarding corporate guarantee charged by AO and affirmed by DRP at the rate of 1.5%. Since we have adjudicated this issue while dealing with Revenue's Appeal in ITA No.953/CHNY/2015 for assessment year 2010-11 and the facts are identical, taking a consistent view, we direct the AO to adopt the rate @ 0.5%. This issue of the assessee's appeal is partly-allowed.

12. The next issue of Revenue's appeal in ITA No.953/Chny/2015 is as regards to the order of DRP directing the A.O to treat the royalty payment i.e., onetime payment for use of brand name as capital expenditure. For this, the Revenue has raised following Grounds No.3.1 to 3.6:

> *"3.1 The Hon'ble DRP erred in directing the AO to treat the Royalty payment as Capital expenditure.*
>
> *3.2. The Hon'ble DRP failed to appreciate the fact that at the time of entering into agreement, the assessee was not a subsidiary of the Vienna Entity. The said agreement was not given effect to and the assessee continued to use the Wabag Brand Name along with Vatech without making any payment.*
>
> *3.3. The leaned DRP failed to appreciate that the assessee was known by the name Va Tech Wabag Ltd right from the year 2000 onwards and there has been no change in the name.*
> *3.4. The Hon'ble DRP ought to have appreciated the fact that the agreement entered into in April 2005 when the assessee cases to be the subsidiary of the Vienna entity provided for payment of Rs.10 lakhs per annum. This agreement was not enforced at all.*

3.5. The Hon'ble DRP ought to have appreciated that the assessee had agreed to make onetime lump sum payment of Rs.2 crores to the subsidiary for use of the name and logo perpetually ie., Vatech and Wabag, out of the above, the assessee treated Rs.45 lakhs as revenue expenditure for use of Brand and Rs.155 lakhs as capital expenditure for purchase of Brand.

3.6 The Hon'ble DRP failed to consider the above factual matrix and gave a direction to treat the entire payment of Rs.2 crores as capital in nature eligible for claim of depreciation by the assessee."

13. The brief facts of the case are that during the course of assessing the transfer pricing adjustment, the TPO noted from the audit report in Form No.3CEB that there is a claim of revenue expenditure on account of usage of brand name amounting to Rs. 45 Lakhs and payment of Rs. 155 Lakhs for purchase of brand name and capitalize the same in the books of accounts claiming depreciation. The TPO noted the facts that the name of the assessee was changed from Balcke Durr and Technologies Limited to VA Tech WABAG Limited pursuant to a special resolution dated 10.03.2000. There has been no change either in the name or in the Logo used by the assessee right from that time till date and the assessee continued to carry on the business under the same name and Logo uninterrupted, despite being asked to use a secondary Trade Name in conjunction with WABAG, by its Austrian Subsidiary by agreement dated April, 2005 upon payment of Rs. 10 lakhs per annum. The said agreement was not enforced by either of the

parties. It was accepted by the assessee that during the period 2000 to 2005 when it became a subsidiary of VA Tech WABAG, Vienna no usage charge was collected from the assessee, since the assessee happened to be the subsidiary of the brand owner. In the year 2005, when the assessee ceased to be a subsidiary for a short period of time due to dilution in the holding of VA Tech WABAG, Vienna, an agreement called as Brand Usage and Non Compete Agreement was entered into between the assessee and its erstwhile Austrian Holding company, whereby the payment of Rs.10 Lakhs per annum was imposed for the twin rights conferred on the assessee viz., the Non compete right and the brand usage viz., brand name 'WABAG' was to be used in conjunction with any other distinct second Trade name, other than VA Tech. However, the assessee continued to use 'WABAG' brand name with VA Tech without making any payment as contemplated by the agreement and did not even provide for the same in its books, even though it is an entity following mercantile system of accounting. In November 2007, the assessee acquired 100% stake in VA Tech WABAG GmbH, Vienna through its wholly owned subsidiary VA Tech WABAG (Singapore) P Ltd. In connection therewith a share purchase agreement dated 19.09.2007 was entered into with Siemens (the seller). As part of

the terms, the assessee was granted a perpetual, non exclusive and royalty free license to use the term and the registered trade mark VA Tech, however only together with the term WABAG (This is the name of the assessee right from year 2000 onwards). It is only after a period of two years in September, 2009 that the assessee claimed that another Amendment to the BUNCA dated April, 2005 was entered into whereby the assessee was called upon to make a lump sum one-time payment of Rs.2 Crores which would cover the rights granted under the agreement in the past and in the future and to use the name and logo in conjunction with any other name perpetually. In view of above facts, the TPO noted that the amendment agreement dated 21.09.2009 and the payment in pursuance thereof appears to be unnecessary for the reason that WABAG, Austria is 100% subsidiary and earlier when the assessee was the subsidiary of Austria entity from 2000 to 2005 WABAG, Austria did not charge any brand usage charges for the reason that the assessee was a subsidiary. In such eventuality, the TPO noted that the subsidiary demanding of lump sum payment from its ultimate holding company for a right which is already been conferred on the assessee by SIEMENS, the erstwhile holding company of WABAG, Austria for a royalty free license to use the

trade name VA Tech only in conjunction with WABAG after waiting for a period of 4½ years. According to TPO, this is not a prudent business decision and even otherwise, for the long period during which WABAG, Austria did not insist of any payment as per terms and conditions in agreement of April, 2005. Therefore, documents relied upon in the form of BUNCA, Addendum and Amendment and the payment contemplated therein has no evidentiary value and hence, ALP is determined to be at Nil. Aggrieved, the assessee raised objections before DRP.

14. The DRP also directed that the payment is capital in nature and reverse the findings of the A.O/TPO by observing in Para 3.5 as under:

> *"3.5.4. Thus, there was a "brand usage agreement" between the assessee and M/s. VA Tech Wabag GmbH Austria on 07.04.2005, for using the WABAG' brand for a period of 5 years, and the royalty payable is Rs.10 lakhs per annum.This agreement was for a restricted use limited to specified territory like India, Bangladesh, Srilanka, Nepal, Afghanistan,Thailand, Philippines, Singapore, Mayanmar, Austrialia, Indonesia. Though there was a "brand usage agreement" agreement with M/s. VA Tech Wabag GmbH Austria is in existence from 07.04.2005 onwards, there were no payments till 2009, on the ground that the latter did not insist for the payments. Now, consequent to the purchase of purchased the shares of M/s. VA Tech Wabag GmbH Austria, from its holding company Siemens, M/s. VÀ Tech Wabag GmbH Austria became the subsidiary of the assessee (though M/s. VA Tech Wabag (Singapore) Pte Ltd). In September 2009, there was new agreement between the assessee and M/s. VA Tech Wabag GmbH Austria, as per which the assessee is permitted to use the "WABANG" throughout the world for which the assessee is required to pay a onetime royalty of Rs.2,00,000/- which*

includes the arrears of Rs.45,00,000/- for the period April 2005 to September 2009. Thus there is a justification in the assessee's payment of royalty to M/s. VA Tech Wabag GmbH Austria, for using the brand name "WABAG".

Aggrieved, now the Revenue is in appeal before the Tribunal.

15. We have heard the rival contentions, perused the materials available on record. We noted that the assessee entered into a brand usage agreement dated 07.04.2005 with VA Tech, Austria which was restrictive and applicable only to select countries. This agreement was amended vide an amending agreement dated 21.09.2009, VA Tech, Austria granted the right to use the brand tag and Logo in conjunction with any other name prefixed and suffices to the extent that said use of the name is as per legal position of the country. Admittedly, there is no dispute about the genuineness of the payment but only the A.O has questioned the commercial wisdom of the assessee to make the payment. We noted that the DRP has rightly held the payment as revenue in nature and hence, we confirm the order of DRP allowing the claim of the assessee. This issue of Revenue's appeal is dismissed.

16. The next common issue in these two appeals, one by assessee and one by Revenue is as regards to the order of DRP allowing the

claim of provision for warranty. For this, the Revenue raised Ground No.5.1 for A.Y 2010-11 in ITA No.953/Chny/2015 as under:

> *"5.1 The Hon'ble DRP failed to appreciate that the assessee has not submitted any supporting document for its claim that the provision for warranty is made on scientific basis. The Hon'ble DRP failed to notice that the assessee has not submitted any proof for the same."*

17. The brief facts of the case are that the A.O during the course of assessment proceedings noticed from the accounts of the assessee, Schedule-III of the submission of total income that the assessee has admitted an amount of Rs.1,72,31,699/- towards provision for warranty. During the course of scrutiny assessment, the A.O required the assessee to explain the above claim. The assessee explained vide his letter dated 18.02.2014 that, the provision for warranty of Rs. 1,72,31,699/- is arrived on the past experience and on a realistic basis and claimed as a revenue expenditure as per the decision of Hon'ble Supreme Court in the case of *Rotork Controls India (P.) Ltd. 180 taxmann 422 (SC)*. The A.O has not accepted the claim of the assessee and disallowed the same by holding that the provision for warranty estimated by the assessee has not crystallized and hence, not allowable. According to him, creation of provision is allowed only to the extent of business crystallization. Hence, he disallowed the provision for

warranty and added back to the returned income of the assessee. Aggrieved, the assessee filed objections before DRP.

18. The DRP allowed the claim of the assessee by observing in para 3.4.2 and 3.4.3 as under:

> *"3.4.2 We have considered the draft order of the Assessing Officer, the contentions of the assessee, etc. carefully. The issue of provisions tor warranty is a widely debated issue and the matter has gone up the Supreme Court. The Hon'ble Supreme Court in the case of Rotork Controls India P Ltd. VS. CIT (314 ITR 62)(SC) held that the provisions for warranties is an allowable deduction. The head note of the decision is as under:*
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> *Rotork Controls India (P.) Ltd, v. CIT(180 TAXMAN 422)/SC)/(314 ITR 62)(SC)*
> *Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of - Assessment years 1991-92 to 1994-95 - Whether for a provision to qualify for recognition, there must be a present obligation arising from past events, settlement of which is expected to result in an outflow of resources and in respect of which a reliable estimate of amount of obligation is possible - Held, yes - Whether if historical trend indicates that in past large number of sophisticated goods were being manufactured and defects existed in some of items manufactured and sold, then provision made for warranty in respect of army of such sophisticated goods would be entitled to deduction from gross receipts under section 37(1), provided data is systematically maintained by assessee - Held, yes*
>
> *3.4.3 Similar issues of provisions for warranty have also been decided by the Hon'ble Madras High Court, in favour of the assessee, in the case of M/s. Hyundai Motors Indias Ltd, Vide TCA No.629 of 2013 dated 29.10.2013. Based on the said decision this panel, vide directions in FNo.DRP/CHE/59/2014-15 dated 15.12.2014, had also allowed the appeals of M/s. Hyundai Motors India Ltd in A.Y. 20 10-1 1. Since the issue is identical, the above decisions of Supreme Court as well as the jurisdictional High Court are equally applicable to the facts of the instant case also. Therefore, respectfully following the decisions of the Supreme Court in the case of Rotork Controls India P Ltd. vs. CIT (3 14 ITR 62)(SC) and the jurisdictional High Court in the case of M/s. Hyundai Motors India Ltd (in TCA No.629 of 2013 dated 29.10.2013), we are of the opinion that the assessee's provisions for warranty is an allowable expenditure. The Assessing Officer is directed*

to allow the assessee's claim. The assessee succeeds in its objections in this regard."

Aggrieved, now the Revenue is in appeal before the Tribunal.

19. We have heard the rival contentions, perused the materials available on record. We noted the fact that the assessee is engaged in the business of design, develop, manufacture, sale, erection and commissioning of water treatment and sewerage plant. After completion of each and every project there will be a warranty period as per contract executed by the assessee with the client which may vary from two to three years. During this warranty period the assessee needs to maintain the plant and needs to replace the defective component at free of cost. The warranty became an integral part of the sale price and in other words the warranty stood attached to the sale price of the product. The Warranty provision had to be recognized because the assessee had a present obligation as a result of past events resulting in an outflow of resources and a reliable estimate could be made of the amount of the obligation. The assessee is being in the business of design, develop, execute, sale, erection and commissioning of water treatment and sewerage plant made a provision of warranty based scientific methods of accounting adopted by the assessee. This also depends upon historical trend

and other related facts. The assessee has a contractual obligation to maintain the plant for a minimum period of two to three years depending upon the agreement and during this period the assessee has to freely replace the components if they became defective. This issue is settled by Hon'ble Supreme Court in the case of Rotok India Put. Ltd. (Supra), wherein it was held that warranty became an integral part of sale price, in other words, the warrant stood attached to the sale price of the product. Warranty provision had to be recognized because, the assessee had a present obligation as a result of past events resulting in an outflow of resources and a reliable estimate could be made of the amount of obligation. The value of contingent liability like warranty expenses, if properly ascertained and discounted on accrual basis, can be an item of deduction U/s.37 of the Act. Since the assessee estimated the warranty and made a provision on a scientific basis the assessee is eligible to claim as revenue expenditure. Furthermore, the assessee reverses any excess provision made in the earlier year(s) and hence, it is clear from this that there is no excess claim by the assessee with regard to warranty. Hence we find no infirmity in the claim of assessee and the same has rightly been allowed by DRP. We uphold the same.

20. Similar issue for provision for warranty is raised by assessee in its appeal in ITA No.807/CHNY/2016 for assessment year 2011-12 and the facts are exactly identical in this year also what was in assessment year 2010-11 in ITA No.953/CHNY/2015, taking a consistent view, we allow the provision for warranty in this year also. This issue of assessee's appeal is allowed.

21. The next issue in this appeal of Revenue is as regards to the order of DRP allowing the claim of expenses incurred for engineering services rendered by third party outside India. For this, the Revenue has raised following Ground No.6.1:

> *"The Hon'ble DRP failed to appreciate that the department has filed appeal before the Hon'ble High Court in the case of Ajappa Integrated Project management and that the disallowance of Rs. 2,96,49,439/- towards engineering charges by A.O is justified."*

22. The brief facts are that the assessee claimed to have made expenses on account of engineering services rendered by third parties outside India and made payment for an amount of Rs. 2,96,43,439/-. The assessee before A.O during the course of assessment proceedings explained that VA Tech Wabag Ltd., paid engineering charges of Rs. 2,96,49,439/- to VA Tech Wabag Gmbh Austria. These services are utilized for executing a project at Suralaya, Indonesia (Project No. P117) and Muscut (Project

No.P076). Since the projects are located outside India and the technical services rendered by VA Tech Wabag GmbH, Austria was utilized for making or earning any income from a source outside India, as per section 9(i)(vii) of the Act, the engineering charges paid is not an income earned in India and accordingly the assessee has not deducted any TDS on the same. According to A.O, the assessee has not deducted TDS u/s. 195 of the Act and hence, he disallowed the payments made on account of engineering services rendered by third parties outside India by holding the same as if for technical services and added back to the returned income of the assessee. Aggrieved, the assessee preferred objections before DRP.

23. The DRP accepted the objections of the assessee and reverse the finding of the A.O by observing in Para 3.3.2 and 3.3.3 as under:

> *"3.3.2. We have considered the draft order of the Assessing Officer, the contentions of the assessee, etc. carefully. The assessee is into the business of erecting water treatment plants in several countries. For this purpose it has been availing technical (engineering) services from M/s. VA Tech Wabg GmbH, Austria, a non-resident company, which has no PE in India. All these services are availed and utilized in foreign countries for erecting the water treatment plants in respective countries. There are no disputes in these facts. Recently, a similar issue came up before the Chennai bench of ITAT for adjudication in the case of DOCIT U. Ajapa Integrated Project Management Consultants P. Ltd. In this case, the company paid consultancy fee to non-resident consultants for carrying out consultancy services in Nigeria. These consultants were used in business of the company abroad. The Hon'ble bench held that income of such non-residents could not be deemed to accrue or arise in India, and,*

therefore, section 9(1)(vii) (b) would not apply. The relevant portion of the decision is as under:

DCIT V. Ajapa Integrated Project Management Consultants P Ltd [2011] 16 taxmann.com 269 (Chennai)/ (2012| 49 SOT 37 (Chennai)(URO)

16. We have perused the orders and heard the rival contentions. This issue is slightly different from the issue raised by the Revenue in its ground No.2. Here, the payments made by the assessee were to non-residents Indian who were working abroad. Assessee had made no deduction of tax at source whatsoever. As per the assessee, they were working for its business carried on in Nigeria and hence, by virtue of Section 9(1) (vi)(b) of the Act, the fees payable to such nonresidents could not be considered as income accruing or arising to them in India. We find that that the ACIT in his directions under Section 144A of the Act,had stated as under:

> *"S 9(1)(vi)(b) itself provides the exception. If the Resident-assessee utilizes the services of the Non-resident, in its business outside India, it is covered under the exception given in the section itself and the payment received by the non-resident cannot be deemed to accrue or arise in India. Here, the assessee company, utilized the services of two non-resident in its business outside India, i.e. in Nigeria. Therefore, though assessee company has shown that the payments are Resolution Pane directly related to the Nigerian project, the fact that the payments were made from India and not from Nigeria leaves some ambiguity in determining whether the exception provided to the non-resident on utilization of services outside India would directly apply to the said non-resident consultants and Chennaiwhether the income accrue to them in India or abroad, as section 9(1)(vi)(b) is a deeming provision." [Emphasis supplied]*
>
> *17. It is clear from the above that the payments made by the assessee to non-resident consultants, were directly related to the Nigerian projects of the assessee. Assessee being engaged in consultancy business, the fees paid to Such consultants on its projects abroad has to be considered as fees paid for services utilized in the business of the assessee outside India. Therefore, clearly Section 9(1)(vi)(b) of the Act applied and the income earned by such non residents cannot be deemed to accrue or arising in India. Therefore, assessee had every reason to hold a bona fide belief that no part of the payment had any element of income which was chargeable to tax in India. When the assessee held such a bona fide belief, it is clearly covered by the decision of Hon'ble Apex Court in GE India Technology Cen. (P) Ltd. (supra) and decision of Special Bench of this Tribunal in Prasad Productions Ltd. (supra). This being so, assessee could not be put in a position where it can be visited*

with the rigours associated with non deduction of tax at source. It cannot be fastened with any liability associated with non-deduction of tax at source on such payments. In these circumstances, application of Section 40(a)(i) of the Act was not called for. ...."

Further, the Chennai "A" bench of ITAT in the case of Aqua Omega Services (P.) Ltd. v. ACIT, held that fee for technical services paid to non-residents for providing underwater diving services in Saudi Arabia under a contract, is not liable for TDS. since the services of non-residents, to whom technical fee was paid by assessee, were utilized for business carried on outside India for earning income from a source outside India. The relevant portion (Head-note) of the decision is as under:

Aqua Omega Services (P.) Ltd. D. ACIT[2013] 31 taxmann.com 179 (Chennai-Trib.)/2013] 23 1TR(T) 191 (Chennai - Trib.)
Head-note: Section 9, read with section 40(a)(i), of the Income-tax Act, 1961 - Income - Deemed to accrue or arise in India Fees for technical services - Assessment year 2008-09 - Assessee was in business of providing underwater diving services in Saudi Arabia undera contract and paid fees to non-resident divers there - Whether, since services of non-residents, to whom technical fee was paid by assessee, were utilized for business carried on outside India for earning income from a source outside India, no TDS liability would arise- Held, yes (Para 19)

3.3.3 The facts of the present assessee's case are exactly similar to the facts involved in the above two cases. Hence the above decisions of the ITAT are equally applicable to the facts of the instant assessee. Therefore, respectfully following the decision of the jurisdictional ITAT in the above referred two cases, we hold that the above technical (engineering) service payments to the non-residents for services rendered outside India, are not assessable to tax in India in the hands of the recipients and consequently the assessee is not under any obligation to deduct the TDS on the above technical (engineering) service payments u/s. 195 of the Act. Therefore, the provisions of section 40(a)(i) have no application in the pre sent case. Accordingly, the proposed disallowance of export technical (engineering) service payments of Rs.2,96,49,439/- for non-deduction of TDS u/s.40(a)(i) r.w.s. 195 of the Act, is not justified and deleted. The assessee succeeds in its objections in this regard."

Aggrieved, the Revenue is in appeal before the Tribunal.

24. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the assessee paid engineering charges to VA Tech Wabag GmbH, Austria for the purposes of engineering services which were utilized in providing water treatment plants for Indonesia and Muscat. Since, these projects are located outside India and technical services rendered by VA Tech Wabg GrnbH, Austria, was utilized for making or earning any income from a source outside India as per section 9(1)(vi), the engineering charges paid is not an income earned to India and accordingly it is not subject to withholding tax in India. The A.O made the disallowance of RS.2,96,49,439/ being technical and engineering charges paid to VA Tech Wabg GmbH, Austria on the presumption that no withholding tax has been deducted by the assessee. The A.O failed to understand that as per Section 9 (1) (vii) clause (b) of the Act, the income deemed to accrue or arise in India in respect of income by way of technical services payable by a person who is a resident, except where the fees are payable in respect of service utilized in a business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India. Since the technical services provided by VA Tech Wabg GmbH, Austria, were utilized for

the purpose of making or earning any income from any source outside India, the technical charges paid by VA Tech India to VA Tech Wabg GmbH, Austria is not an income earned in India and the question of deduction of tax does not arise. The engineering/ technical services paid to VA Tech Wabg GmbH, Austria by VA Tech India were utilized by VA Tech India in respect of project executed by it at Indonesia and Muscat. Since the engineering services provided by VA Tech Wabg GmbH, Austria were utilized by VA Tech India at Indonesia and Muscat for the purpose of making or earning any income from a source outside India, it is not an income earned in India as per section 9(1)(vi) of the Act and hence the question of deduction of tax does not arise. The transmission Corporation of India case applies to those situations where any sum is paid to non-resident which is chargeable to tax U/s.4 of the Act. Since the technical fee paid to non-resident is not earned in India as per section 9(1)(vi) of the Act, it is not an income in the hands of the non-resident in India and the question of deduction of tax will not arise. The A.O's contention that TDS needs to be deducted in respect of engineering fee paid to non-resident is not right since it is well settled law that, the deduction of tax arise only if the income is earned in India. Since the engineering/technical fee paid to foreign

agent is not an income earned or accrue or arise in India, as per section 9(1)(vi) of the Act, the question of deduction of tax does not arise. Hence, we are of the view that DRP has rightly deleted the addition and we confirm the same. This issue of revenue's appeal is dismissed.

25. The next issue in this appeal of Revenue is against the order of DRP allowing the claim of deduction u/s. 80IA of the Act being income derived by the assessee for development of infrastructure facilities. For this, the Revenue has raised following Grounds No.4.1 to 4.4:

> *"4.1 The Hon'ble DRP failed to appreciate that as per sec. 80IA(1), the assessee is eligible for deduction only for the profits and gains derived from any business referred to in Sec. 80IA(4) and in the assessee's case, the net income derived by the assessee by entering into a mere contract agreement for development of infrastructural facilities cannot be equated to profits and gains derived by the assessee's undertaking derived from the profits and gains of development of infrastructural facilities.*
>
> *4.2 The Honble DRP ought to have appreciated that some of the works executed by the assessee were related to expansion of already existing infrastructure facilities, which does not satisfy the condition that, for claiming deduction u/s 801A, the infrastructure projects should be a new one.*
>
> *4.3 The Hon'ble DRP failed to appreciate that the assessee does not have the entire plant and machinery for the execution of the works, but has sub-contracted the work to other persons, thus making it ineligible for deduction u/s 80IA(4).*

4.4 The Hon'ble DRP failed to appreciate that the department has appealed before ITAT on this issue for AY 2002-03, 2003-04, 2004-05, 2006-07 & 2007-08 and to which a decision is still pending."

26. The brief facts are that the assessee in its return of income claimed deduction u/s. 80IA of the Act amounting to Rs. 53,19,46,943/- and claimed that the assessee has fulfilled all the conditions as stipulated in Section 80IA(4) of the Act in regard to that the assessee enterprise is carrying on business of developing infrastructure facilities, which is owned by the assessee and it has entered into an agreement with local authorities for developing infrastructure facilities and hence, the assessee has claimed deduction u/s. 80IA(4) of the Act. The A.O relying on the decision of Hon'ble Supreme Court in the case of *CIT vs. Sterling Foods 237 ITR 579 (SC)* has not allowed the claim of the assessee and also held that the assessee is actually is a contractor, therefore, the A.O disallowed the claim of deduction by observing as under:

"Hence, based on the above facts and circumstances of the case and the detailed examination of the contract agreements, it is concluded that the assessee is not eligible to claim deduction u/s.80-1A for the following reasons:

(1) The income was not derived from the development of infrastructural facilities as discussed.
(2) The assessee is not the developer of the project but is a mere contractor
(3) The assessee is not the owner of the project
(4) The assessee is not having the entire plant & machineries for execution of the works but sub contracting the work to other persons.

Accordingly, the claim made by the assessee as deduction u/s. 80IA for Rs.53,19,46,943/- is hereby disallowed."

Aggrieved, the assessee raised objection before DRP.

27. The DRP considering the earlier orders, allowed the claim of the assessee by observing in para 3.1 to 3.1.3 as under:

"3.1.2. We have considered the order of the Assessing Officer, the contentions of the assessee, orders of the CIT(A), etc. carefully. The issue of claim of deduction u/s.80-IA of the Act is a recurring issue. Similar issues have come up before the appellate authorities in the earlier assessment years. The basic contention of the Assessing Officer is that the assessee is not the owner of the projects but acted as a mere contractor and hence it is not eligible for deduction u/s.80-IA of the Act. Similar disallowances were also made in the earlier years starting from the A.Y.2003-4. The CIT(A)-II, Chennai, allowed the appeals of A.Ys. 2003-04, 2003-04, 2004-05 in favour of the assessee. When the revenue preferred appeals before the ITAT, the issue of deduction u/s.80-IA was remitted back to the file of CIT(A) with some directions. The Commissioner of Income Tax (Appeals)-III, Chennai (vide ITA Nos.737,738/06-07 and 141/Tr. 1/ 12-13/A-III dated 18.05.2012) held that the assessee's water treatment projects are eligible for deduction u/s.80-IA of the Act. The Commissioner of Income Tax (Appeals)-III, Chennai also allowed the assessee's appeals of A.Ys.2006-07 and 2007-08 (vide ITA No.439/08-09/A-III and ITA No.54/ 10-11/A-III dated 24.02.20 12).

3.1.3. The facts of the present assessment year 2010-11 are also exactly identical to those involved in the above mentioned A.Ys.2003-04, 2003-04, 2004-05, 2006-07 and 2007-08. Therefore, respectfully following the decision of the Commissioner of Income Tax (Appeals), we direct the Assessing Officer to allow the assessee claim of deduction u/s.80-IA of the Act. The assessee succeeds in its objections in this regard.

Aggrieved, now the Revenue is in appeal before the Tribunal.

28. Before us, the Ld. CIT-D.R argued that the DRP did not appreciate the fact that the assessment year in appeal pertains to

AY 2010-11, wherein Section 801A of the Act undergone substantial amendment by way of insertion of explanation to this section by Finance Act 2009 with retrospective effect from 01.042000. As per the explanation, nothing contained in this section shall apply in relation to a business referred to in sub section 4 which is in the nature of work contract awarded by any person including the Central or State Government and executed by the undertaking or enterprise referred to in sub section 1. The DRP did not discuss any of the facts in its direction dated 26.12.2014. It had simply followed the earlier year decisions pertaining to A.Y.2003-04, 2004-05, 2006-07 and 2007-08. The discussion of DRP was cryptic in paragraph 3.1.2 and 3.1.3 without appreciating the legislative amendment. In this connection, the Ld. CIT-DR stated that the following evidences were available from the assessment record:

1. Attention is drawn to auditor's report at page no. 4 to 5 of the paper book at paragraph-4, the statutory auditor has given categorical qualification that the appellant company is not entitled for 80-1A deduction on account of the amendment made in Finance Act 2009.

2. As per the audited financials in page no.6 to 13 of the paper book, the revenue from operations was Rs.700.96 Cr and the net profit as per the financials was Rs.68.04 Cr. In the computation of income, after various adjustment, the gross total income was quantified into Rs.1 16.54 Cr. Out of this, Rs.53.19 Cr was claimed as a deduction 80-IA of the I T Act, in spite of the qualification given by statutory auditor.

3. Attention is drawn to Form No.10CCB placed in page no.22 to 24 of the paper book. It was issued by Sri S Kumar, Proprietor, of Kumar Srinivasan

and Associates dated 30.09.2020. It did not quantify, out of which project this deduction was eligible.

4. Attention is also drawn to page no. 14 to 17 of the paper book which is the schedules forming part of the financial statement. In page no. 15, under the head 'contingencies in point no. (a), (b),(c)'", the statutory auditor has given his finding that on account of the amendment into Finance Act, 2009, in section 80-IA, the company is not entitled for any deduction u/s 80-1A, as they have been executing only the contract work awarded by the Central or State Government. He had also mentioned that on conservative basis, the tax liability on account of possible denial of deduction, prospectively from 1.4.2009 has been fully provided, as current tax.

5. Attention is also drawn to Form No.3CD placed in page no.18 to 21 of the paper book. In point no.26 at page no.19, there is yet another qualification that the deduction of 80-IA claim was on account of the C.A certificate in spite of legislative amendment into section 801A.

6. Attention is drawn to page no.25 to 28 of the paper book. This is the TDS particulars available from 26AS statement. This data was provided by the appellant during the course of assessment proceedings. It is clearly mentioned that majority of the payments were from various Government Bodies by treating the appellant as a contractor u/s 194C of the IT Act.

29. The Ld. CIT-DR further submitted that all these facts were available from the assessment record and the AO had passed a speaking order by analysing the whole issue comprehensively. The DRP failed to appreciate this fact and allowed the appeal with cryptic observation. Hence, according to him the order of DRP be reversed.

30. On the other hand, the Ld. counsel for the assessee relied on the decision of Hon'ble Madras High Court in assessee's own case dated 07.03.2019, wherein the Tribunal has considered the issue of

developer or contractor vide Question No.1 that *"whether the ITAT is right in law in holding that the assessee is eligible for deduction u/s. 80IA(4) of the Act?* And Question NO.2 *"whether the ITAT is correct in law in holding that the assessee is a "Developer" and not "contractor" and therefore, is eligible for deduction u/s. 80IA(4) of the Act".* The Ld. counsel then, drew our attention to the findings of Hon'ble High Court given in para 6 as under:

> *"6. Having heard the learned counsel for the parties, we are satisfied that the findings of facts rendered by the learned Tribunal as well as the First Appellate Authority do not deserve any interference by this Court under Section 260A of the Act and no Substantial Question of Law arises in these Appeals filed by the Revenue. Since the Assessee admittedly entered into contract with Local Bodies or Municipal Bodies for undertaking the contract works for developing the infrastructure-sewage system, he is directly entitled to get the benefit of such deductions under Section 80IA (4) of the Act. The said Section, in fact, even extends the benefit to the Contractor, who is transferred with such Infrastructure Facility for operating and maintaining the same as per the Proviso to Section 80IA (4) of the Act. We have already dealt with this controversy in a judgment delivered by us in the case of Commissioner of Income Tax v. M/s.Chettinad Lignite Transport Services Private Limited in T.C.A.No.741 of 2009 decided on 06.03.2019, the relevant portion of which order is quoted below for ready reference :*
>
> > *"8. From a reading of the aforesaid Provisos to Section 80IA(4), it is clear that the Legislature intended to extend the said benefit under Section 80IA of the Act to an enterprise involved in (i) developing or; (ii) operating and maintaining or; (iii) developing, operating and maintaining any infrastructure facility. The term "infrastructure facility" has been defined in the Explanation and the same includes a toll road, a bridge or a rail system, a highway project, etc. These are, obviously, big infrastructure facilities for which the enterprise in question should enter into a contract with the Central Government or State Government or Local Authority. However, the Proviso intends to extend the benefit of the said deduction under Section 80IA of the Act even to a transferee or a contractor who is approved and recognised by the concerned authority and undertakes the work of the said development of infrastructure facility or only operating or maintaining*

the same. The Proviso to sub-section (4) stipulates that subject to the fulfillment of conditions, the transferee will be entitled to the said benefit, as if the transfer in question had not taken place. It has been found by the Assessing Authority himself, in the present case, that the present Assessee M/s.Chettinad Lignite Transport Services Private Limited under an Agreement dated 16.04.2002, captioned as Lignite Transport System with M/s.ST-CMS Electric Company Private Limited, had undertaken the work of developing the said railway sidings and was operating and maintaining the same. The only ground on which, the Assessing Authority denied the said benefit was that the Assessee himself did not enter into any such contract with the Railways or with the Central Government.

9. The learned Tribunal, however, in our opinion, rightly applied the Proviso to Section 80IA(4) of the Act and held that since the Assessee was recognised as contractor for these railway sidings, which undoubtedly fell under the definition of "infrastructure facility", it was entitled to the said benefit under Section 80IA of the Act. The grounds on which the Assessing Authority denied the said benefit to the Asessee ignoring the effect of Provisos to Section 80IA(4), therefore, could not be sustained. The learned Tribunal, in our opinion, has rightly held that the Proviso does not require that there should be a direct agreement between the transferee enterprise and the specified authority for availing the benefit under Section 80IA of the Act. There is no dispute before us that the Assessee was duly recognised as transferee or assignee of the principal contractor M/s.ST-CMS Company Private Limited and was duly so recognised by the Railways to operate and maintain the said railway sidings at Vadalur and Uthangalmangalam Railway Stations. The findings of fact with regard to the said position recorded by the learned Tribunal are, therefore, unassailable and that clearly attracted the first Proviso to Section 80IA(4) of the Act.

10. The learned counsel for the Revenue relied upon a decision of this Court in the case of M/s.Covanta Samalpatti Operating Private Limited, Chennai-20 v. The Assistant Commissioner of Income Tax, Company Circle I (3), Chennai-34, reported in (2018) 93 Taxmann 38. In the said case, the claim of the Assessee company, which was engaged in power generation, for deduction under Section 80IA of the Act was denied by the Revenue on the ground that the Assessee Undertaking had not been set up for generation and distribution of power and that the Assessee was only a contractor for the maintenance work of power plant, which was owned by Samalpatti Power Corporation Private Limited (SPCL). On these facts, the Court held that the Assessee was not entitled to deduction under Section 80IA of the Act. We do not find any parity of facts of the said case with the facts available before us. The power generating companies are

entitled to deduction under Section 80IA of the Act in different sub clauses viz., under Section 80IA(4)(iv) of the Act. Where there is no such Proviso, as is available in clause (i) of Section 80IA(4) of the Act, which deals with deduction to enterprise involved in developing, operating and maintaining the infrastructure facilities. Obviously, if the Assessee is getting only fees for the maintenance of certain power generating plant, as was the case before the Co- ordinate Bench of this Court in Covanta case (supra), he may not be entitled to such deduction, but the fact situation before us is entirely different and, therefore, we do not find any support from the said case cited by the learned counsel for the Revenue.

11. We are, therefore, of the considered opinion that there is no merit in these appeals filed by the Revenue and the questions of law framed above deserve to be answered in favour of the Asessee and against the Revenue. We hereby do so. The appeals preferred by the Revenue deserve to be dismissed and accordingly, the same are dismissed. No costs."

And accordingly dismiss the appeal of revenue. The Ld. counsel for the assessee stated that the issue is fully covered by the decision of Hon'ble Jurisdictional High Court in assessee's own case.

31. We have heard the rival contentions, and gone through facts and circumstances of the case. We noted that the issue is covered in favour of the assessee but amendment was brought in by the Finance Act, 2009 by inserting the explanation, as inserted by the Finance Act, 2009 w.r.e.f 01.04.2000 and the relevant explanation to Section 80IA reads as under:

"Explanation.- For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section(4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section(1)."

We noted that this explanation has not at all been examined whether the assessee falls as a work contractor in this case in term of assessee's contracts and agreements entered into with various Municipalities for water treatment plants. Hence, this needs to be examined. Hence, we remit this issue back to the file of the A.O to examine this explanation with the facts of the case of the assessee and re-decide the issue accordingly. This issue of Revenue is remanded back to the file of A.O. Hence, this issue of Revenue's appeal is allowed for statistical purposes.

32. Similar issue in regard to claim of deduction u/s.80IA of the Act was raised by assessee in this year, assessment year 2011-12 in ITA No.807/CHNY/2016 and the facts are exactly identical what was in assessment year 2010-11 in ITA No.953/CHNY/2015 of Revenue's appeal, taking a consistent view we set aside this issue also to the file of the AO and hence, this issue of assessee's appeal is allowed for statistical purposes.

33. The assessee has filed C.O No.50/Chny/2016 for A.Y 2010-11 and raised only one issue of ESOP claim. The relevant ground raised by the assessee in its C.O reads as under:

"*1. Amortization of deferred employee compensation*

1.1 The Ld. AO and Hon'ble DRP have failed to consider the deferred employee compensation claimed by the Respondent amounting to INR 93,16,155 on the ground that claim was not made in the return of income but only during the assessment proceeding.

1.2 The Ld. AO and Hon'ble DRP have failed to appreciate that in case of an issue of Employee Stock Options ("ESOP"), the Respondent was eligible to claim the difference between the issue price and market price of the shares, which is the discount on ESOP, as amortized expenditure over the vesting period."

34. At the outset, the Ld. counsel for the assessee stated that neither A.O nor DRP has considered the claim, although same was made during the course of assessment proceedings, but this claim made in the return of income. The Ld. counsel for the assessee stated that the relevant facts are available on record as the same was made before the A.O. He drew our attention to letter dated 27.01.2014, which is enclosed in assessee's paper book at Page 89, wherein the claim of amortization of deferred employees compensation is made. The relevant claim made as under:

"The assessee has issued ESOP to employees during 2007. The difference between the issue price and the net worth of the share is charged off over the years as per the accounting standards. During the year the company has charged off Rs.9316155/- as amortization deferred employee's compensation. Although theassessee has disallowed the same in the computation of income as per the as per the following court decisions it is held that discount on ESOP is a permitted revenue expenditure. Hence we request you to allow the same as revenue expenditure.

S.S.I Ltd. Vs DCIT 2004 85TTJ 1049 Chennai Tribunal
CIT Vs. Infosys Technology Ltd. 2007 293 ITR 146, Karnataka High Court."

35. When these facts were confronted to Ld. CIT-DR, he could not controvert the same, but objected for allowing the claim.

36. After hearing both sides and going through the facts of the case, we set aside this issue to the file of the A.O, who will examine the claim of the assessee in detail and then, decide the claim according to law.

37. Similar issue is raised by assessee in its appeal for assessment year 2011-12 in ITA No.807/CHNY/2016, as the facts are identical what was in assessee's C.O. No.50/CHNY/2016 arising out of ITA No.953/CHNY/2015 and hence, taking a consistent view, we set aside this issue to the file of the AO and the appeal of the assessee is allowed for statistical purposes.

38. The next issue in assessee's appeal in ITA No.807/Chny/2016 for A.Y 2011-12 is as regards to the disallowance of depreciation of ERP implementation. For this, the assessee has raised following Ground No.5 as under:

> *"5. Disallowance of depreciation ERP implementation costs - INR 2,81,43.042*
> *5.1 Both the Ld. AO and Hon ble DRP have erred in regarding the cost to cost reimbursement towards costs of ERP implementation made to the AE of the Appellant as a royalty payment, and disallowed such expenditure under section 4o(a)) of the Act on account of non-deduction of taxes at source under section 195 of the Act.*

5.2 The Ld. AO has erred in regarding disallowing the depreciation claim on ERP implementation costs under section 40(a)(i) of the Act and whereas the Hon'ble DRP has erred in directing the Ld. AO to disallow the entire ERP implementation costs capitalized in the books of accounts, by treating it as royalty expenditure under the Act."

39. Brief facts are that during Financial Year 2010-11 relevant to A.Y 2011-12a new ERP system implementation was carried out within its group globally i.e., the assessee and its subsidiaries and its holding companies, to suit the changing business needs. Accordingly, VA Tech, Austria, the subsidiary of the assessee had purchased ERP software called IFS and incurred consultancy fee for ERP implementation. The assessee made payment amounting to Rs. 9,38,10,140/- towards ERP implementation on cost to cost reimbursement basis without any mark up to VA Tech Austria. The assessee capitalized the ERP implementation cost in its books of accounts and claimed depreciation amounting to Rs. 2,81,43,042/-. The A.O has disallowed the same by characterizing that it is a revenue expenditure and the DRP also upheld the same on the basis that no TDS has been deducted by making payment for acquisition of the software system. Aggrieved, the assessee preferred appeal before the Tribunal.

40. Before us, the Ld. counsel for the assessee stated that the ERP cost was capitalized by the assessee and has been reimbursed on

cost to cost basis and hence, no tax was deducted at source at the time of payment made to VA Tech Austria and no revenue expenditure was claimed. The Ld. counsel stated that the issue is now covered by the decision of Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT [2021] 125 taxmann.com 42 (SC)*, wherein it is held that the taxpayer capitalized the payment in question that the taxpayer has not deducted the tax at source on such payment u/s. 40(a)(i) of the Act cannot be invoked for making disallowance of depreciation. The Hon'ble Punjab and Haryana High Court in the case of *CIT v. Mark Auto Industries Ltd. [2013] 40 taxmann.com 482 (P&H)* held as under:

> *"6. Learned counsel for the revenue was unable to substantiate that in the absence of any requirement of law for making deduction of tax out of the expenditure on technical know-how which was capitalized and no amount was claimed as revenue expenditure, the deduction could be disallowed under Section 40(a)(i) of the Act. Accordingly, no infirmity could be found in the order passed by the Tribunal which may warrant/ interference by this Court. Thus, both the questions are answered against the revenue and in favour of the assessee."*

41. As the issue is now covered in favour of the assessee, we direct the A.O to allow depreciation on the amount capitalized in regard to payment made for ERP implementation. This issue of assessee's appeal is allowed.

42. The next issue in this appeal of assessee is as regards to disallowance of expenses relatable to exempt income by invoking the provisions of Section 14A of the Act. At the outset, the Ld. counsel for the assessee has not pressed this ground. Hence, the same is dismissed.

43. The next issue in this appeal of assessee is as regards to disallowance of market fee. For this the assessee has raised following Ground No.7:

> *7. Disallowance of marketing fee*
>
> *7.1 Both the Ld. AO and Hon'ble DRP have erred in law and on facts in making a disallowance of INR 1,73,77,686 under section 40(a)(i) of the Act for non-deduction of taxes at source, being payment made to Mr. Jaffer Jee, a non-resident individual towards consulting / marketing services rendered for projects undertaken in Sri Lanka, without considering the provisions of section 9(1) (vii) of the Act and the Double Taxation Avoidance agreement between India and Sri Lanka as it stood during the relevant AY."*

44. The brief facts of the case are that the assessee was executing a water treatment project in Sri Lanka and the assessee has availed certain support services from one Mr. Jaffer Jee, a non-resident. The services rendered by the agent were in the nature of marketing and consulting amounting to Rs. 1,73,77,686/-. These payments were without deduction of TDS and hence, the A.O invoking the provisions of Section 40(a)(i) of the Act disallowed the expenses. Aggrieved, the assessee preferred appeal before DRP.

45. The DRP confirmed the action of the A.O by observing in para 7.2 of its order as under:

> *"7.2 The submissions of the assessee have duly been considered. The assessee has relied on the judgment of Jurisdictional High Court in case of Orient Express v CIT T.C.A No 92 of 2015 and Faizan Shoes Pvt Ltd v CIT T.CA No.789 of 2013. However it is observed that these two cases relate to payment of commission to the agent and not related to the Payment of Technical Fees and thus are entirely different on facts. DTAA provisions are entirely different for Technical services and so the issue is not covered by the above two judgments. The issue has been discussed in detail by the TPO in his order. The assessee has failed to controvert the findings of the AO. The order of the AO on the issue is very reasonable and the same cannot be faulted with. So the objection of the assessee cannot be accepted."*

Aggrieved, now the assessee is in appeal before the Tribunal.

46. Before us also, the Ld. counsel for the assessee relied on the decision of Hon'ble Madras High Court in the case of *CIT v. Faizan Shoes (P.) Ltd. [2014] 48 taxmann.com 48 (Mad.)*, wherein the Hon'ble High Court has considered that the services rendered by non-resident agent for completion of export commitment would not fall under the definition for fee for technical services. The Hon'ble Jurisdictional High Court observed in para 12 as under:

> *"12. In the light of the above said decisions and the finding rendered by us on the earlier issue that the services rendered by the non-resident agent can at best be called as a service for completion of the export commitment and would not fall within the definition of "fees for technical services", we are the firm view that Section 9 of the Act is not applicable to the case on hand and consequently, Section 195 of the Act does not come into play. In view of the above finding, the decision of the Supreme Court in Transmission Corpn. Of A.P Ltd's. case (supra), relied upon by the learned Standing Counsel for the Revenue is not applicable to the*

facts of the present case. We find no infirmity in the order of the Tribunal in confirming the order of the Commissioner of Income Tax (Appeals).”

47. We noted that none of the authorities below have discussed the nature of marketing fee whether these are paid fee for technical services this needs to be examined. In case, these are not fee for technical services, the A.O cannot make disallowance. Hence, to examine this issue, the matter restore back to the file of A.O. This issue of assessee’s appeal is allowed for statistical purposes.

48. In the result, the appeal filed by the Revenue as well as the cross objection of the assessee for assessment year 2010-11 and the appeal filed by the assessee for assessment year 2011-12, all are partly-allowed for statistical purposes.

Order pronounced on 31st August, 2023 at Chennai.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल)	(महावीर सिंह)
(MANOJ KUMAR AGGARWAL)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 31st August, 2023

EDN
आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती/Assessee 2. राजस्व/Revenue 3. आयकर आयुक्त /CIT
4. विभागीय प्रतिनिधि/DR 5. गार्ड फाईल/GF.