आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं एवं श्री मंजुनाथ. जी, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND SHRI MANJUNATHA. G, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.: 1069, 1070 & 1071/Chny/2022, 159 & 315/Chny/2023**

निर्धारण वर्ष / Assessment Years: 2010-11, 2017-18, 2016-17, 2012-13 & 2013-14

DCIT/JCIT(OSD), Corporate Circle -1(1), Chennai – 600 034.	v.	M/s. Aspire Systems India Private Limited, Old No. 4, New No. 7, II Trust Link Road, Raja Annamalaipuram, Chennai – 600 028. **[PAN: AACCA-4543-M]**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

आयकर अपील सं./**ITA Nos.: 39 & 40/Chny/2023**

निर्धारण वर्ष / Assessment Years: 2012-13 & 2013-14

M/s. Aspire Systems India Private Limited, Old No. 4, New No. 7, II Trust Link Road, Raja Annamalaipuram, Chennai – 600 028. **[PAN: AACCA-4543-M]**	v.	DCIT, Corporate Range-1, Chennai – 600 034.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

Assessee by : Ms. Jharna B. Harilal, FCA
Department by : Shri. S. Senthil Kumaran, CIT

सुनवाई की तारीख/Date of Hearing : 01.12.2023
घोषणा की तारीख/Date of Pronouncement : 13.12.2023

आदेश /O R D E R

PER BENCH:

This bunch of 5 appeals filed by the revenue and two appeals filed by the assessee are directed against separate,

but identical orders of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi, dated 19.09.2022, 16.11.2022 14.12.2022 and pertains to assessment years 2010-11, 2012-13, 2013-14, 2016-17 & 2017-18. Since, facts are identical and issues are common, for the sake of convenience, appeals filed by the revenue and the assessee are clubbed, heard together and are being disposed off, by this consolidated order.

2. The revenue has taken common grounds of appeal for all assessment years. Therefore, for the sake of brevity, grounds of appeal filed for assessment year 2016-17 are reproduced as under:

> *"1. The order of the CIT(A) is contrary to law, facts and circumstances of the case.*
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> *2. Whether the Ld. CIT(A) erred in deleting the disallowances made u/s 40(a)(i) of the IT Act without appreciating the fact that the services rendered by ASUS and ASFZE fall within the ambit of provisions of Section 9(1)(vii) of Act and are also subject to explanation of Sec. 9(2) of Act?*
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> *3. Whether the Ld. CIT(A) erred in deleting the disallowances made u/s 40(a)(i) of the IT Act without appreciating the fact that the outsourcing charges paid by the assessee company for availing those services falls under the definition of 'fees for included services' as per clause 4 of article 12 of India-USA DTAA?*
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> *4. Whether the Ld. CIT(A) erred in deleting the disallowances made u/s 40(a)(i) of the IT Act without appreciating the fact that the fees for technical services received by the ASUS and ASFZE was deemed to accrue or arise in India and the assessee is liable for deduction of tax on the said payments u/s 195 of the Act?*

5. Whether the Ld. CIT(A) erred in ignoring the legal position that if the assessee (i.e., the person responsible for paying such sum to the Non-resident) was of the view that the whole of the sum would not be income chargeable in the hands of the recipient, Section 195(2) of the Act requires him to make an application to the AO u/s 197 r.w.s. 195(2) to determine the amount chargeable and upon such determination deduct tax on such sum so determined?

6. Whether the Ld. CIT(A) erred in ignoring the legal principle laid by Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Ltd vs CIT (1999) 239 ITR 587 (SC) (para 9 that if no such application u/s 195(2) is filed, Income Tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such "sum" to deduct tax thereon before making payment?

7. For this or any other legal ground that may be adduced at the time of hearing in view of the Hon'ble Supreme Court decision in the case of NTPC Co., Ltd vs CIT (1998) 229 ITR 383 (SC).

8. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored."

3. The assessee has filed common grounds of appeal for both assessment years. Therefore, for the sake of brevity, grounds of appeal filed for assessment year 2012-13 are reproduced as under:

"1. The order of the Learned CIT(A) is against the law, facts and circumstances of the case.

2. The Learned CIT(A) erred in disallowing a sum of Rs. 28,93,928 towards provision made for expenses on accrual basis for professional charges under section 37 without considering the fact that the appellant is following mercantile system of accounting.

The appellant seeks your leave to add, alter, amend or delete any of the grounds prayed at the time of hearing."

4. The brief facts of the case are that, the assessee M/s. Aspire Systems India Pvt. Ltd. (ASI) is engaged in the business of software development and provides complete lifecycle services, ranging from new product development and product advancement to product migration, re-engineering, sustenance and support. M/s. Aspire Systems Inc. (ASUS), incorporated in USA and Aspire Systems FZE, incorporated in UAE for the installation of software developed by the appellant at the client's site. The assessee company has paid outsourcing charges/consultancy charges to ASUS and Aspire Systems FZE for rendering installation and testing services to assessee's clients at USA and said payment has been made without deducting applicable TDS as per the provisions of section 195 of the Income-tax Act, 1961 (hereinafter referred to as "the Act").

5. The assessee has filed its return of income u/s. 139(1) of the Act. The cases were selected for scrutiny and during the course of assessment proceedings, the Assessing Officer noticed that outsourcing charges paid by the assessee to non-resident service providers is in the nature of 'fee for technical services' (FTS) as defined u/s. 9(1)(vii) of the Act and thus,

called upon the assessee to explain as to why payment made to non-residents without deducting tax at source u/s. 195 of the Act cannot be disallowed u/s. 40(a)(i) of the Act. In response, the assessee submitted that outsourcing charges paid to non-residents for rendering installation and testing services are in the nature of support services without any technical knowledge and thus, cannot be considered as fees for technical services within the ambit of provisions of section 9(1)(vii) of the Act. Since, payment made to non-resident service providers is not a FTS, the assessee is not liable to deduct TDS as per section 195 and thus, said payment cannot be disallowed u/s. 40(a)(i) of the Act.

6. The Assessing Officer, however was not convinced with explanation furnished by the assessee and according to the Assessing Officer, payments made to non-residents are subject to TDS as per the provisions of section 195 of the Act, because said payments are in the nature of fees for technical services as per the provisions of section 9(1)(vii) of the Act. Since, the appellant has failed to deduct TDS on payment made to non-residents, the Assessing Officer held that said payment needs to be disallowed u/s. 40(a)(i) of the Act. The Assessing Officer

has discussed the issue at length in light of provisions of section 9(1)(vii) of the Act and Explanation to section 9(2) of the Act along with Article 12 of the India-USA DTAA and observed that payments made to non-residents for rendering services does not come under exception to section 9(1)(vii)(b) of the Act. The Assessing Officer, further observed that in absence of Permanent Establishment (PE) or branch office outside India, the business cannot be said to be carried on outside India in order to exclude said payments under the exception to section 9(1)(vii)(b) of the Act. The Assessing Officer, took support from the decision of DIT vs Rio Tinto Technical Services [2012] 340 ITR 507, and observed that, if the fees received from the third party satisfies and is covered by the Explanation 2 to section 9(vii) of the Act, then it is fee for technical services and it is immaterial whether the assessee is made available technical information or not. Therefore, rejected arguments of the assessee and disallowed payment made to non-residents towards outsourcing/consultancy charges u/s. 40(a)(i) of the Act for non-deduction of tax at source u/s. 195 of the Act. The relevant findings of the Assessing Officer are as under:

"5.2.3 The submission of the assessee has been considered carefully and he same is not accepted for the following reasons.

During the course of assessment proceedings, the assessee was required to produce a copy of the agreement entered into by the assessee company with Aspire US for rendering of Professional Service. In response, the assessee filed the same. The relevant portion of the submission is reproduced as under.

The agreement entered into by the assessee with Aspire Systems Inc,. USA (ASUS). A few of the paragraphs in the said Agreement are produced as under.

Contract

Thursday, 1st April 2011

No.: ASUS\10-1 1\01

This contract for rendering of services is made effective as of 1st April, 2011

By and between Aspire Systems (India) Private Limited ("ASI"), of 1/D-1, SIPCOTNT Park, Siruseri, Tamil Nadu-603103 JNDIA and Aspire Systems, Inc., ("ASUS") 1735 Technology Drive, Suite 260, Scan Jose CA-95110,USA shall be valid for a period of One year.

PERFORMANCE OF SERVICES AND USE OF FACILITIES:

1.1 Time to time, ASUS will subcontract part of the work to ASI that it has entered into with its customers. When the main contract is between ASUS 85% of the billing amount (Billing Amount is the amount invoiced to the customer, excluding billing that is relevant to ASUS).

Exception to Clause (1)

In view of our long-term customer relationship and criticality of ASUS in the customer relationship, for Auto Viktron Group ("AVG"), for which contract entered by ASUS and the work is purely rendered by ASI, ASI will bill ASUS only for 50% of the customer Invoice Amount.

1.2 Time to time, ASI will subcontract pant of the work that it has entered into with its customers. When the main contract is between ASI and its customers and if ASI is using any of the ASUS resource to render the Service, ASUS will bill ASI at a flat rate (as per the table below) irrespective of the pricing in ASl's contract with its customer. In case the main contract is between ASI and Schawk Inc, and if ASI is using any of the ASUS resource to render the Service, ASUS will bill ASI at flat rate, as per the Table 2 below, irrespective of the pricing in ASI's contract with its customer in addition to table 1.

Designation	*Monthly Rate*
Project Manager	*$ 8,800*
Project Leader	*$ 8,000*
Senior Software Engineer	*$ 8,000*
Software Engineer	*$ 6,400*

Designation	*Monthly Rate*
Business Analyst	*$ 10,200*
Technical Analyst	*$ 9,520*
Coordinator	*$ 10,200*
EI-Architect	*$ 11,560*
Enterprise Architect	*$ 11,560*
Project Coordinator	*$ 10,880*
Technical Coordinator	*$ 10,200*
Senior Developer	*$ 8,000*
Business Systems Analyst	*$ 10,200*
Technical Lead	*$ 8,000*

1.3 Any cost incurred by ASUS on behalf of ASI on Marketing Materials, Hosting, Postage, Business Promotion Expenses, Software Costs, Reimbursement of tickets for travel, boarding & lodging, telephone cards, Visa Fees, Immigration Charges and other incidental expenses of its employees, will be charged to ASl on actual, and will be included in the periodic invoices.

1.4 Similarly, any cost incurred by ASl on behalf of ASUS on Marketing Materials, Postage, business Promotion Expenses, Software Costs, Reimbursement of tickets for travel boarding) & Lodging, telephone cards, and other incidental expenses of lits employees, will be charged to ASUS on actual and will be included in the periodic invoices.

1.5 As per the above clauses, mutual parties will, make billing and invoice respectively on a monthly basis. Parties need to send invoice in 1st week of the month for the work of previous month.

1.6 As mutually agreed by the parties, the receivable and payable as per the agreements in effect will be set off against each other subject to RBI's approval and the balance will be received or paid by the respective party.

5.2.4. From the above, it is clear that, the Contract is for rendering of services taken as sub-contract by ASUS from the assessee. t can be clearly seen that, the services provided by the assessee are highly technical and professional. AS per the agreement between the assessee and the ASUS, some of these professional services are required to be sub-contracted to ASUS. The payments are also as per the time lines of deliverables. Therefore, unless Aspire US (ASUS) makes available the reports of the work done by it to the assessee, takes a feedback from the assessee and the client regarding the services, the work done by ASUS cannot form part of the weekly progress report of the assessee to be given to the client. Clearly it shows that, the services rendered by ASUS are

made available to the assessee. Hence, even by the relevant DTAA between India and US, the payments made towards these services are chargeable to tax in India.

5.2.5. The nature of services is such that, there should be frequent interaction between the assessee and ASUS and integrated services will be delivered to the client to meet the timelines of the deliverables. Hence, it can be clearly concluded that, the services rendered by ASUS are through the assessee company located in India. Therefore, these services fall within the ambit of provisions of Section 9(1)(vi) of Act and are also subject to explanation of Sec.9(2) of Act.

5.2.6. The nature of payments is "fees for technical services' (FTS). There is no dispute regarding this. Income from technical service rendered by a non-resident is taxable in India irrespective of the fact whether the non-resident has a residence or a place of business or business connection in India. The same is provided by Explanation below sec. 9(2) introduced by the Finance Act, 2007 with retrospective effect from 1.6.1976. Since the onus to complete the Contract lies with the assessee, the services rendered by the sub-contractor (ASUS) will also be supervised by, the assessee and any short comings will be resolved with mutual Sharing of information and technology. Hence, it is concluded that, the services rendered by the ASUS are made available to the assessee.

5.3. The assessee vide letter dated 05.12:2019 submitted that the payments made falls within the exclusion clause of Section 9(1) (vii)(b) of the Act. The submissions of the assessee has been carefully considered and not accepted for the following reasons:

5.3.1. Taxability under the provisions of the Act:

The provisions of Sec.9(1) (vi) of Income Tax Act is reproduced below:

"9. (1) The following incomes shall be deemed to accrue or arise in India -(vii) income by way of fees for technical services payable by-

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or
(c) a person who is a non-resident, where the fees are Payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

[Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement, made before the 1st day of April, 1976, and approved by the Central Government]

[Explanation1.-For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.]

Explanation (2).For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries"]

(2) Notwithstanding anything contained in sub-section (1), any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in India, if the pension is payable to a person referred to in article 314 of the Constitution or to a person who, having been appointed before the 15 day of August, 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India.

[Explanation - For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vi) of sub-section (1) and shall be included in the total income of the non-resident, whether or not, ---
(i) the non-resident has a residence or place of business or business connection in India; or
(ii) the non-resident has rendered services in India.]

As per explanation of Sec.9(2) of Income Tax Act:-
"Explanation - For, the removal of, doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall, be deemed to accrue or arise in India under clause (V)or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,

(i) The non-resident has a residence or place of business or business Connection in India; or
(ii) The non-resident has rendered services in India."

5.3.2. The exclusions provide under sub-clause (b) would be applicable if the assessee has a branch or a permanent establishment (PE) at the place outside India and payments were made to the non- residents from India. The business cannot be said to be carried on outside India. Therefore, the transactions fall outside the ambit of the exceptions provided in section 9(1) (vi) (b) of the Act.

5.3.3. The question whether the payment would come within the exclusion part of this Expiation 2 to sec 9(1) (vi) of the Act or not would have to be established by the person who claims the exclusion as held by the Orissa High Court in Orissa Synthetics Limited Vs, ITO (2013 ITR 34). From a combined reading of clause (vii) (b) and Explanation 2 of sec 9(1), it becomes abundantly clear that any consideration, whether lump sum or otherwise, paid by a person who is resident in India to a non-resident for rendering any managerial or technical, be within the ambit of " income deemed to accrue or arise in India", It is to be noted that u/s 9(1)(vi) (b) of the Act, the expression used is fees for services utilised in India and not the expression fees for Services rendered in India, It may be that some of the services are rendered abroad by the personnel employed or deputed by non-resident Company under collaboration agreement with the Indian Company. But, if the fees are paid for services utilised by the Indian company in its business carried on by it in India, irrespective of the place where the services were rendered, the amounts of the fees should be deemed to accrue or arise in India.

5.3.4. In absence of branch or PE outside India and since the payments were made to the non-residents from India, the business cannot be said to be carried on outside India. Therefore, the transactions fall outside the ambit of the exceptions provided in section 9 (1)(i)5 of the Act. Therefore, the payments made to non residents are liable to be taxed in India in hands of the non- residents.

5.3.5. In view of the above facts and discussions, the payment made by the assessee definitely fall within the provisions of Section 9(1)(vi) of the Act. Therefore, keeping in view of the provisions of Section 9(1)(vi) of the Act and Explanation to Section 9(2) of Act, the services rendered by ASUS and ASFZE are chargeable to tax in India.

5.4. ***TAXABILITY AS PER THE DTAA:***

5.4.1. The assessee vide their letter dated 05.12.2019 submitted as follows:

As per the DTAA entered between India and USA, the subcontracting charges for the aforementioned services will fall under Article 7: Business income of the DTAA, according to which tax needs to be deduced at source only when the entity i.e. ASUS in the contracting state has a Permanent Establishment in India. Thus, in the absence of a Permanent establishment in India, the payments made to ASUS shall not be taxed in India.

Further, the DTAA between India and UAE, provides for taxation of the Business income in the same lines as that of DTAA between India and USA. Since the vendor ASFZE do not hold any permanent Establishment in India. The relevant portion of Article 7 of DTAA between India and UAE is provided below for your reference:

Furthermore, the assessee would like to state that even the provisions of Article 12 to the DTAA entered between India and USA which covers Royalties and Fee for Technical Services would not be applicable.

An extract of Article 12 of the DTAA is provided below for your reference:

Article : 12 *royalties and fees for included services "means payments of any kind to any person in consideration for the rendering of any technical or consultancy services 9includingthrough the provision of services of technical or other personnel) if such services:*

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information paragraph 3 it received :or

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

Make Available clause:

The term make available means that the person acquiring the technical service is enabled to independently apply the technology. Thus where the recipient of technical services does not get equipped with the knowledge or expertise and the recipient would not be able to apply it in future independently without support from the service

provider, it will not be a case of technical service having been "made available'.

Since Aspire USA does not make available any technical knowledge to the assessee. Article 12 shall not apply in this regard.

5.4.2. *The said services are technical services and the assessee is liable for deduction of tax from the said payments. The services provided by the concerns have made available Technical knowledge, experience, and Technical knowhow to the assessee in executing the business. The make available clause is elaborated in the following paragraphs.*

The term "make available" narrows down the scope of FTS to Include only those payments for FTS which fulfil conditions set out for "make available", The term "make available" means:

Technical knowledge, experience, skill, know-how, or Process, or
Consist of development and transfer of a technical plan or technical design.

If any of above three conditions as, set out is met it can be said that the FTS is made available.

Payments made for consulting services (as per the invoices submitted by the assessee) are technical in nature and also make available technical knowledge, experience and thus taxable under FTS,

Make available means recipient of the service should be in a position to derive an enduring benefit-and should be in a position to utilize this knowledge in future on his own.

If fee received from the third party satisfies and is covered by Explanation 2 to section 9(1)(vi) it is fee for technical services. It will be immaterial whether the assessee had acquired or gained the said technical information because of business or trading activity or after conducting tests, mapping etc. DIT Vs Rio Tinto Technical Services (2012) 340 ITR 507.

5.4.3. Further, it is pertinent to note that the assessee has not submitted material evidences which proves that the services provided by the concerns has not made available services to the assessee company. It is noted that the assessee has argued for the make available clause of knowhow and claims that the said clause is not applicable in the contract between the assessee company and its Associates.

As regards the payments made to ASFZE, it is held the section has been amended with retrospective effect from

01.06.1976 vide Finance Act, 2007 including an Explanation which reads as under:

> *[Explanation - For the removal of doubts, it is hereby declared that for the purposes of this section, where income is deemed to accrue or arise in India under clauses (v), (vi), and (vii) of sub- section (1), such income shall be included in the total income of the non-resident, whether or not the non-resident has a residence or place of business or business connection in India.]*
>
> *In other words, in respect of Royalty income and Fees for Technical Services earned by a non-resident, it is not necessary for the non-resident to have his residence or place of business or business Connection in India.*
>
> *Therefore, the assessee should have withheld the tax on the payments made to ASUS and ASFZE as, per the provisions of Sec.195 of the Act. Since the assessee has not withheld the tax, the expenditure towards the payments made to ASUS and ASFZE amounting to Rs.24,24,78,003/- debited to the Profit & Loss Account for the year ending 31.03.2016 are disallowed as per the provisions of Sec.40(a)() of the Act and added back o the total income of the assessee.*
>
> *5.5. Based on the above discussions relied upon, an amount of 24,24,78,003/- is disallowed u/s. 40 (a)() of the Act and added back to the total income of the assessee under the head of Income from Business for Financial Year 2015-16 relevant to the Assessment Year 2016-17."*

7. Being aggrieved by the assessment order, the assessee preferred an appeal before the ld. CIT(A). Before the ld. CIT(A), the assessee contended that payment made to non-resident service providers for rendering installation and testing service is not fees for technical service as defined u/s. 9(1)(vii) of the Act. The assessee further contended that assuming for a moment, said payment is in the nature of FTS, but it falls under the exception to section 9(1)(vii)(b) of the Act, because

the services were utilized in the business or profession carried on by said person outside India or for the purpose of making or earning any income from any source outside India. Since, the appellant has paid consultancy charges to ASUS in USA for rendering services to appellant clients at USA, said payment is made outside India and for rendering services outside India. The assessee had also taken support from Article 12 of India-USA DTAA and argued that unless make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or technical design, any payment made to service provider cannot be treated as fees for technical services.

8. The ld. CIT(A), after considering relevant submissions of the assessee and also taken note of various judicial precedents, held that payment made by the assessee to ASUS and Aspire Systems FZE falls under the exception to section 9(1)(vii)(b) of the Act, wherein the payments made by the appellant to the non-resident company is for rendering services outside India and thus, same is not deemed to accrue or arisen in India and is not liable for TDS u/s. 195 of the Act. The ld. CIT(A) further observed that payments made by the

appellant to non-resident service providers are directly related to services rendered to the customers outside India and income earned from such customers, in turn form a part of the business. Hence, services are utilized in the business carried on outside India. The ld. CIT(A), further observed that payments made to the non-resident service providers is also for the purpose of making income from any source outside India, because the assessee has entered into a contract for software development services to their customers in USA and for this purpose, availed services of non-resident service provider. Thus, services are utilized for earning income from source located outside India. Therefore, the two conditions for exception to section 9(1)(vii)(b) of the Act are satisfied and thus, same cannot be treated as fee for technical service for the purpose of section 195 of the Act and thus, payment made to non-residents cannot be disallowed u/s. 40(a)(i) of the Act. The ld. CIT(A), had also discussed the issue in light of Article 12 of Indo-USA DTAA and argued that unless make available the technical knowledge or processes or plan, any payment made to non-residents for rendering any services including technical services cannot be treated as fees for technical services as per provisions of section 9(1)(vii) of the Act. Thus,

opined that the services rendered by both the non-residents does not fall under the purview of fees for technical services and consequently, payment made to non-residents cannot be disallowed u/s. 40(a)(i) of the Act for non-deduction of tax at source u/s. 195 of the Act. Aggrieved by the ld. CIT(A) order, the revenue is in appeal before us.

9. The ld. DR, Shri S. Senthil Kumaran, CIT, submitted that the ld. CIT(A) erred in deleting the disallowance made u/s. 40(a)(i) of the Act without appreciating the fact that the services rendered by non-residents fall within the ambit of provisions of section 9(1)(vii) of the Act and are also subject to explanation to section 9(2) of the Act. The ld. DR, further submitted that outsourcing charges paid by the assessee company for availing services falls under the definition of fees for technical services as per clause 4 of Article 12 of India-USA DTAA and thus, as per the provisions of section 195 of the Act, the assessee ought to have deducted TDS while making payment to non-residents. Since, the assessee has failed to deduct TDS on payments made to non-residents, the Assessing Officer has rightly disallowed said payment u/s. 40(a)(i) of the Act, but the ld. CIT(A) without appreciating

relevant facts simply deleted additions made by the Assessing Officer.

10. The ld. DR, further referring to the decision of Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Ltd vs CIT [1999] 239 ITR 587, submitted that, if at all the assessee claims that payments made to non-residents are not liable for TDS, then the assessee should have filed application as per the provisions of section 197 r.w.s. 195(2) of the Act. The assessee without complying relevant provisions simply claimed that payment made to non-residents is not fees for technical services and provisions of section 195 of the Act is not applicable and consequently, disallowance cannot be made u/s. 40(a)(i) of the Act. In this regard, he has filed detailed written submissions on the issue which reads as under:

> *"During the course of the appellate proceedings before the Hon'ble ITAT, 'B' Bench, Chennai on 8/8/2023 and 10/8/2023, the Hon'ble ITAT has directed the appellant to furnish a copy of agreement entered by the appellant company (Aspire Systems India P Ltd.) with its ultimate customers for the purpose of software development. In response to the same, the appellant has submitted a letter dt. 11/8/2023 and furnished following documents. The details of the same is as under:*
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> 1. *Change Order-12 to consulting services agreement entered by the appellant company with Mineral Tree Inc. dt.28/2/2015 (Consulting Service Agreement not submitted)*

2. *Change order 15 to consulting services agreement entered by the appellant company with Wide Orbit Inc. dt.8/1/2015 (Consulting Service Agreement not submitted)*
3. *Consulting Agreement entered by the appellant company with Motive Systems, (A Finland Corporation) dt.5/1/2010*

2. By analysis of the above documents, it is submitted that the appellant company has not enclosed/submitted the original consulting services agreement dt. 16/5/2011 (related to the change order-12) entered with Mineral Tree Inc. dt.26/12/2015. Similarly, the appellant company has not submitted its original consulting agreement dt.31/1/2011, in relation to the change order 15 entered into with Wide Orbit Inc.

3. Further, it has been observed from the change order-15 dated 08/01/2015 to consulting services agreement with Wideorbit Inc., that various software development services were executed by the appellant company, which includes both off-shore work (the work to be executed within India) and on-shore work (work to be executed outside India) to its clients in USA. It is noticed from Page No.3 of the Change order-15 that major Quality Assurance (QA services), has been rendered by the appellant company outside India. The Quality Assurance Services generally implies that, it is a systematic process of determining whether a product of service meets specified requirements. Hence, rendering of quality assurance (QA) services by the appellant company by way of on-sight/on-shore deployment clearly indicates that the appellant company renders complex technical services outside India, which is nothing but an integral part of the composite consulting agreement entered with Wideorbit Inc. for the purpose of software development. Similarly, the on-sight deployment was also observed for the software development - DELPHI (page 9 of the Agreement).

4. It is also observed from Page 19 of consulting agreement dt.5/1/2010 (Exhibit 'A' statement of work) that the on-sight research work was executed by the appellant to its clients. The relevant part of the agreement is reproduced as under:

"Onsite Resource Working form Offshore: If the Company requires any of the permanent (long term) onsite resources to work with the Consultant's Offshore team and approves such travels, Company will pay the consultant the Onsite rates applicable for such permanent onsite resource. Also, any associated travel, boarding & lodging expenses will also be paid by the company for such duration of stay at Offshore."

In view of the above, it is clear that the ultimate customers of the appellant company engage the off-shore team for the final execution of software developed by the appellant.

5. It has been submitted during the course of the hearing before the Hon'ble 'B' Bench that the appellant did not provide the financials of the subsidiary Companies in USA & UAE (AS-US & AS-UAE). Further, it has submitted during the course of the hearing that the appellant's activity squarely falls under the category of "fee for technical services" as per the decision of Hon'ble Delhi High Court in the case of CIT Vs Havells India Ltd. In 352 ITR 376 (Delhi) and the decision of Hon'ble ITAT, 'D' Bench, Chennai, in the case of DCIT VS Alstom T & D India Ltd. (2016) in 68 Taxmann.com 366 due to the fact that, the subsidiary companies made available their complex technical skills for the completion/final execution of the software development programme with the ultimate customer of the appellant in US/UAE. In other words, until the involvement of the US subsidiary, the software development will not be completed.

6. Existence of PE: Further, it was submitted that the control and management of the subsidiary companies of the USA & UAE were completely under the purview of Indian management, as it is evident that the agreement entered by the appellant with AS-US Inc. clearly indicates that the signatories of AS-US are the Director and Managing Director of the appellant company only. The same has been established from the financials of the appellant company. Also, it has been observed from Form 3-CEB - Appendix-4 that the name and address of the associated enterprises/persons are located only in India. Further, the CIT(A) has not appreciated the said aspect of Permanent Establishment (PE) in his order. Hence, it is submitted that the same may be adjudicated by the Hon'ble ITAT as per the decision of Hon'ble Delhi High Court in the case of CIT Vs Jansempark Advertising & Marketing P Ltd. Vide ITA No.525/2014 dt.11/03/2015.

7. Disallowance required u/s.37(1) of the Act: Notwithstanding the above, since the entire alleged services rendered by AS-US have not been substantiated by the appellant company by way of providing the following details:

- *i. Nature of services rendered.*
- *ii. Valuation of the said services.*
- *iii. How the services were utilised by the appellant for its business purposes?*
- *iv. What exactly the benefits received on account of receipt of such services?*

v. Copies of the relevant invoices received by the subsidiary companies (AS-US & AS-UAE) for rendering such services.

8. In the absence of the above particulars, the services received also deserved for the disallowance u/s.37(1) of the IT Act, for which reliance was placed on the decision of Hon'ble ITAT, 3rd Member in the case of ACIT Vs Amarnath Reddy (126 ITD 113), Chennai.

9. In view of the above facts and circumstances, the issue may be remitted back to the file of the AO to verify the above acts as per the decision of the Hon'ble ITAT in assessee's own case for the A Ys 2011-12 & 2014-15 vide ITA Nos.2000 & 762/CHNY/2020 dt.23/ 12/2022."

11. The Ld. Counsel for the assessee, supporting the order of the ld. CIT(A) submitted that, if he go by the nature of work rendered by non-resident service providers, it is purely in the nature of support service, which cannot be considered as fees for technical services as per the provisions of section 9(1)(vii) of the Act. The services are rendered outside India and for making or earning income from a source outside India. Further, the service provider does not make available technical knowledge or processes to the appellant. In order to consider payment to non-residents within the ambit of section 9(1)(vii) r.w.s. 9(2) of the Act and Explanation thereto, said payments should be in the nature of fees for technical services as per the Income-tax Act or as per Article 12 of DTAA between India and USA. Since, Article 12 provides for make available clause, unless said clause is satisfied, payment made to non-resident

for technical services cannot be considered as fees for included services. The AR, further submitted that assuming for a moment, payment made to non-resident is in the nature of fees for technical services, but said payment falls under exception to section 9(1)(vii)(b) of the Act and thus, same cannot be considered for the purpose of section 195 of the Act and consequently, disallowance u/s. 40(a)(i) of the Act cannot be made. The ld. CIT(A), after considering relevant facts has rightly deleted additions made by the Assessing Officer and their order should be upheld.

12. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The assessee is in the business of software development service for offshore customers and for this purpose, had entered into a contract with ASUS for providing installation and testing services. As per the agreement between the assessee and ASUS, the service providers carried out testing, implementation, tutoring and demonstrating services. The work carried out by ASUS represents the services done on behalf of the assessee for a client located at USA. If you go by the nature of service provided by non-residents, it appears that it is not purely technical services as

defined, but a support service which may fall under the definition of fees for technical services. However, any payment made to non-resident are in the nature of fees for technical services has to be analysed in light of provisions of section 9(1)(vii) of the Act and exception provided therein. As per exception to section 9(1)(vii) of the Act, payment made by a person who is a non-resident, except where the fees are payable in respect of services 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 is outside the scope of section 9(1)(vii) of the Act. From a plain reading of Clause (b) of section 9(1)(vii) of the Act, it is evident that the services rendered by non-resident clearly falls under the exception whereby the same is not deemed to accrue or arise in India in case said services are 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. In the present case, on perusal of contract between the assessee and the non-resident services providers, it is clear that payment made by the assessee to non-residents is directly related to services rendered to the customers outside India and income earned

from such customers, in turn form part of the business of the assessee. Therefore, in our considered view it falls under the category of services utilized for a business or profession carried on by such person outside India. Further, the second aspect of exception as per Clause (b) to section 9(1)(vii) of the Act is that services utilized for the purpose of making income from any source outside India. In the instant case, services were carried on outside India by non-residents for offshore customers, because the customers of the appellant are situated outside India and services were utilized for earning income from source outside India. Therefore, in our considered view, the second part of exception as per section 9(1)(vii)(b) of the Act is also satisfied. Thus, from the above it is undoubtedly clear that the services were not rendered in India, the person to whom the payment was made is a non-resident and finally an amount paid is a business income to the recipient who does not have any permanent establishment in India. Therefore, in our considered view payment made to non-residents towards services rendered in connection with installation and testing services was not chargeable to tax in India as it is covered under exception to section 9(1)(vii)(b) of the Act. Thus, provisions of section 195 of the Act are not

attracting and question of disallowance u/s. 40(a)(i) of the Act would not arise.

13. Coming back to observations of the Assessing Officer. According to the Assessing Officer, when fees for services were utilized in India, then it does not come under the ambit of exception u/s. 9(1)(vii)(b) of the Act. In our considered view, the Assessing Officer is erred in contending that there should be a permanent establishment or branch office outside India to come under the purview of exception u/s. 9(1)(vii)(b) of the Act, because it is nowhere mentioned in the section that there should be a branch or permanent establishment outside India to come under the ambit of exception u/s. 9(1)(vii)(b) of the Act. Therefore, we are of the considered view that payment made to non-resident for rendering contract services outside India comes under the purview of section 9(1)(vii)(b) of the Act and thus, same is not chargeable to tax in India. Since, the income of non-resident is not chargeable to tax in India, the assessee need not to deduct TDS u/s. 195 of the Act on said payment. Since, the assessee is not required to deduct TDS u/s. 195 of the Act, payment made to non-residents cannot be disallowed u/s. 40(a)(i) of the Act.

14. Coming back to the arguments of the Assessing Officer that Clause (b) of Article 12 of India-USA DTAA is satisfied. Article 12 of India-USA DTAA deals with Royalties and fee for included services. As per Clause (b) of Article 12 in order to treat any payment under Article 12, make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design is required. Concept of make available has been explained by various Courts including the Hon'ble Supreme Court. The term make available means, the person acquiring the technical service is enabled to independently apply the technology. Therefore, where the recipient of technical services does not get equipped with the knowledge or expertise and the recipient would not be able to apply it in future independently without support from the service provider, it will not be a case of technical service having been made available. The fact that the provisions of services may require technical input by the person providing the service which does not mean that technical knowledge, skills etc are made available to the person purchasing the service, if it is performing a technical service does not amount to make available technical knowledge, skill etc. This fact has been

explained by the Hon'ble High Court of Karnataka in the case of CIT & ITO vs De Beers India Minerals (P) Ltd [2012] 72 DTR 82 (Kar). Therefore, in our considered view payment made by the assessee to non-resident service providers cannot be brought under Article 12 of India-USA DTAA.

15. The Assessing Officer had also raised another contention in light of provisions of section 197 r.w.s. 195(2) of the Act in light of decision of Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Ltd vs CIT (Supra). We have gone through the decision of Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Ltd vs CIT (Supra) and find that said case law is not applicable for the simple reason that, it was a case of deduction of lower TDS on payment made to non-resident in light of composite contract entered into between non-resident and resident entities. The said composite contract was not only for supply of plant and machinery and equipment in India, but also comprised the installation and commissioning of the same in India. Erection and commission services gave raise to income taxable in India. There is no dispute on this aspect. The only issue raised in that case was whether TDS was applicable only to income payments or to composite payments

which has no element of income embedded under those facts. The Hon'ble Supreme Court held that in view of provisions of section 195(2) of the Act, the appellant is required to file an application u/s. 197 of the Act, for determining the amount of tax needs to be deducted on payment made to non-resident. In the instant case, neither any services were rendered nor was any payment made to the non-residents in India. Further, non-resident does not have any permanent establishment in India. The payment made by the assessee is towards work carried out at USA and FZE. There is no question of any composite payment nor does it include any component of any income chargeable to tax in India as per the provisions contained in section 4, 5 & 9 of the Act. Therefore, we are of the considered view that the case laws relied upon by the Assessing Officer is not applicable to the facts of the present case.

16. At this stage, it is necessary to consider the decision of Hon'ble Supreme Court in the case of GE India Technology Centre Pvt Ltd Vs CIT [2010] 327 ITR 456, where the Hon'ble Supreme Court after considering its earlier decision in the case of Transmission Corporation of Andhra Pradesh Ltd vs CIT

(Supra), held that in order to apply the provisions of section 195(2) r.w.s. 197 of the Act, income of non-resident should be chargeable to tax in India. In the present case, since income of non-resident is not chargeable in India, the assessee need not to make an application u/s. 195(2) r.w.s. 197 of the Act for determining the amount of TDS to be deducted on payment made to non-resident. Thus, we are of the considered view that the Assessing Officer is erred in relying upon the decision of Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Ltd vs CIT (Supra).

17. At this stage, it is relevant to consider the decision of ITAT, Chennai Benches in assessee's own case for assessment years 2011-12 & 2014-15. The Tribunal after considering relevant facts has set aside the issue of disallowance u/s. 40(a)(i) of the Act for non-deduction of TDS u/s. 195 of the Act, to the file of the CIT(A) for fresh adjudication. The Tribunal while deciding to set aside the issue has followed its earlier decision in assessee's own case for assessment year 2009-10. We find that for assessment year 2009-10, the issue has been remitted back to the file of the ld. CIT(A), after considering certain new evidences filed by the assessee which

were not before the Assessing Officer or the CIT(A). But, for the impugned assessment years, the CIT(A) has considered all evidences filed by the assessee while adjudicating the issue of disallowance u/s. 40(a)(i) of the Act and thus, in our considered view, the issue need not to be set aside to the file of the CIT(A) for fresh adjudication.

18. In this view of the matter and considering facts and circumstances of this case, we are of the considered view that payments made by the assessee to non-residents for rendering installation and testing services fall under the provisions of section 9(1)(vii)(b) of the Act and thus, not liable to tax in India. Since, income of non-resident is not taxable in India, the assessee need not to deduct TDS u/s. 195 of the Act on payment made to non-resident service providers. Since, the assessee is not required to deduct TDS u/s. 195 of the Act, the question of disallowance of said payments u/s. 40(a)(i) of the Act does not arise. The ld. CIT(A) after considering relevant facts has rightly deleted additions made by the Assessing Officer and thus, we are inclined to uphold the findings of the ld. CIT(A) and reject grounds taken by the revenue for all assessment years.

19. The next issue that came up for our consideration from revenue appeal for assessment year 2010-11 is deletion of addition made towards disallowance of bad debts. The assessee has claimed bad debts written off to the tune of Rs. 3,07,71,048/-. The Assessing Officer disallowed bad debts claimed on the ground that the assessee has claimed exemption u/s. 10A of the Act for earlier assessment years and income pertains to bad debts was not offered in the computation of total income for all previous years and thus, opined that conditions prescribed u/s. 36(2) of the Act are not satisfied and accordingly, disallowed bad debts written of amounting to Rs. 3,07,71,048/-.

20. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. There is no dispute with regard to the fact that the assessee has claimed bad debts written off to the tune of Rs. 3,07,71,048/-, which has been actually write off in the books of accounts of the assessee. It is also not in dispute that income pertains to bad debts written off has been offered to tax in earlier assessment years. Further, whether the assessee has paid tax or claimed exemption under certain provisions of the Income-tax Act does not matter, but what is required is

income pertains to said bad debts has been credited in the profit and loss account in earlier years or not. Since, the assessee has offered income pertains to bad debts written off in earlier years and also write off of bad debts in the books of accounts, in our considered view, conditions prescribed u/s. 36(2) of the Act are satisfied. Therefore, we are of the considered view that, the Assessing Officer is erred in disallowing bad debts u/s. 36(1)(v) r.w.s. 14A of the Act. The ld. CIT(A), after considering relevant facts has rightly directed the Assessing Officer to verify whether the amounts claimed as bad debts were included in the income for earlier assessment years. Thus, we are inclined to uphold the findings of the ld. CIT(A) and reject ground taken by the revenue.

21. The next issue that came up for our consideration from appeal filed by the assessee for assessment years 2012-13 and 2013-14 is disallowance of provision for expenses. The assessee company debited provisions for expenses under professional charges. The Assessing Officer, called upon the assessee to file necessary details with regard to the provisions made for expenses. According to the Assessing Officer, provision made for expenses is not ascertained liability and contingent in nature and thus, cannot be allowed as deduction.

On appeal, the ld. CIT(A) sustained additions made by the Assessing Officer.

22. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. If a liability is arising in a particular accounting year, deduction should be allowed although the liability may have to be qualified and discharged at a future date. In the present case, the assessee could not file any evidences to prove that the liability has arisen for the impugned assessment year for services availed in the course of business of the assessee. Since, assessee could not file any evidence and also basis for quantifying amount of provision made for expenses, in our considered view said provision can only be treated as unascertained liability, which is not crystallized during the impugned assessment year. Therefore, we are of the considered view that there is no error in the reasons given by the Assessing Officer and the ld. CIT(A) to disallow provision for expenses and thus, we are inclined to uphold the findings of the ld. CIT(A) and reject ground taken by the assessee for both assessment years.

23. The next issue that came up for our consideration from grounds of appeal of revenue for assessment year 2017-18 is deletion of disallowance of employees contribution to PF & ESI u/s. 36(1)(va) of the Act. The Assessing Officer had disallowed belated payment to employees contribution to PF & ESI u/s. 36(1)(va) r.w.s. 2(24)(x) r.w.s. 43B of the Act. The ld. CIT(A) deleted additions made by the Assessing Officer towards disallowance of employees contribution to PF & ESI.

24. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The controversy on deduction towards employees contribution to PF & ESI has been finally resolved by the Hon'ble Supreme Court in the case of Checkmate Services P. Ltd., in Civil Appeal No.2833 of 2016, order dated 12.10.2022, where it has been clearly held that belated payment to employees contribution to PF & ESI under respective Act, but on or before due date for filing return of income u/s. 139(1) of the Act is not eligible as deduction u/s. 36(1)(va) r.w.s. 2(24)(x) of the Act. Therefore, by following the decision of Hon'ble Supreme Court in the case of Checkmate Services P. Ltd., *supra*, we are of the considered view that belated payment to employees contribution to PF & ESI cannot be

allowed as deduction. The ld. CIT(A) without appreciating relevant facts simply deleted additions made by the Assessing Officer. Thus, we reverse the findings of the ld. CIT(A) on this issue and uphold the additions made by the Assessing Officer towards belated payment to PF & ESI u/s. 36(1)(va) r.w.s. 2(24)(x) of the Act.

25. In the result, appeals filed by the revenue for assessment years 2010-11, 2012-13, 2013-14 & 2016-17 are dismissed and appeal filed by the revenue for assessment year 2017-18 is partly allowed and appeals filed by the assessee for assessment years 2012-13 & 2013-14 are dismissed.

Order pronounced on 13th December, 2022 at Chennai.

Sd/-	Sd/-
(महावीर सिंह)	**(मंजुनाथ. जी)**
(MAHAVIR SINGH)	**(MANJUNATHA. G)**
उपाध्यक्ष /**Vice President**	लेखासदस्य**/Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated, the 13th December, 2023
JPV

आदेश की प्रतिलिपि ग्रेषित/Copy to:
1. पीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3.आयकर आयुक्त/CIT 4.. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF