

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
AND
MS. MADHUMITA ROY, JUDICIAL MEMBER**

ITA Nos. 943 to 946/Bang/2023
Assessment Years : 2012-13 to 2015-16

The Deputy Commissioner of Income Tax, Circle – 1(1)(1), Bangalore.	Vs.	M/s. Algonomy Software Pvt. Ltd. (formerly known as Manthan Software Services Pvt. Ltd.), No. 40/4, First Floor, Lavelle Road, Bangalore. Karnataka – 560 001 PAN: AADCM7750M
APPELLANT		RESPONDENT

&
C.O. Nos. 14 to 17/Bang/2023
(in ITA Nos. 943 to 946/Bang/2023)
(By Assessee)

Assessee by	:	Shri Narendra Kumar Jain, Advocate
Revenue by	:	Ms. Neera Malhotra, CIT-DR

Date of Hearing	:	09-01-2024
Date of Pronouncement	:	19-01-2024

ORDER

PER BENCH

The instant appeals and cross objections filed by the respective parties are directed against the order passed by the Ld.CIT(A)-12, Bangalore all dated 30.08.2023 for A.Ys. 2012-13 to 2015-16 respectively arising out of the order passed by the Assessing Officer u/s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") all dated 30.11.2019 for A.Ys. 2012-13 to 2015-16 respectively.

Before us, the appeals by revenue for A.Ys. 2012-13 to 2015-16 are barred by limitation for 25 days. Considering the facts and circumstances of the case, the delay is condoned.

Assessment Year 2012-13:

2. At the very outset of the matter, the Ld.Counsel appearing for the assessee submitted before us that the ground challenging the reopening of assessment under section 148 though raised by the assessee in each year are not pressed. Hence this particular ground of appeal is dismissed as not pressed. The cross objections are, therefore, dismissed as not pressed.

This here apply *mutatis mutandis* in A.Ys. 2013-14 and 2014-15.

3. So far as the cross objection in respect of AY 2015-16 is concerned, this ground preferred by the assessee are dismissed as not pressed. However, the disallowance of provision for

doubtful debts as has been challenged by the assessee will be considered by us.

4. In revenue's appeal, the following common grounds are raised:
 - a) Deletion of addition in respect of sales commission paid to Manthan Systems Inc. ('MSI') under section 40(a)(i) of the Act.
 - b) Deletion of addition in respect of ESOP expense made by the Ld.CIT(A).

Deletion of addition in respect of sales commission paid to Manthan Systems Inc. ('MSI') u/s. 40(a)(i) of the Act.

ITA No. 943/Bang/2023 – A.Y. 2012-13

5. The brief facts leading to this case is this that the assessee is a software private limited company incorporated in the year 2003 under the provision of Companies Act, 1956. It is engaged in the business of providing software development service, sale of software products and rendering of IT enabled Services (ITeS). Manthan Systems Inc. (MSI) is the company incorporated in the United States of America which is wholly owned subsidiary of assessee company; MSI provides sales and marketing services to the assessee for sale of assessee's product / services in the territory of North American / South American and Caribbean markets. The assessee company therefore paid commission to MSI for its services. Though in all the years under consideration assessment was done under section 143(3), no disallowance was made under section 40(a)(i) of the Act for non-

deduction of TDS on commission paid to the said company namely MSI. For the year under consideration, reassessment proceeding u/s. 147 was initiated by the Ld.AO and consequently by and under the order passed under section 143(3) r.w.s. 147 of the Act, disallowance of sales commission paid to MSI was made under section 40(a)(ia) of the Act which was challenged by the assessee before the First Appellate Authority. However, the order was made reversed by the First Appellate Authority deleting disallowances. Hence the appeal before us by the revenue.

6. At the outset of the proceeding, the Ld.Counsel appearing for the assessee submitted before us that the issue is squarely covered in the case of M/s. Manthan System Inc. vs. DCIT in IT(IT)A No. 723/Bang/2022 for A.Y. 2012-13 by order dated 23.09.2022. He contended that in that case the Ld.CIT(A) also held that the sales commission paid to the said Manthan System Inc. by the assessee does not fall within the ambit of FTS or under Article 12 of DTAA. It was further observed by the Ld.CIT(A) therein that the contention made by the Ld.AO that payment qualifies as royalty is also not sustainable and finally held that there is no liability to deduct TDS. Such contention made by the Ld.AR has not been able to be controverted by the Ld.DR.
7. We have heard the rival submissions made by the respective parties. We have also perused the relevant materials available on record.

8. We have perused the order passed in the matter of M/s. Manthan System Inc. vs. DCIT (supra), a copy whereof is available in the paper book filed by the assessee.
9. The crux of the case made by the assessee is this that since the services rendered to the appellant by the said Manthan Systems Inc. have been held not falling within the ambit of FTS or under Article 12 of the DTAA, the appellant is also not liable to deduct TDS on the payment made to the said company MSI as held by ITAT in the order under reference hereinabove. In this regard, we have carefully considered the order passed by the Ld.CIT(A) who has taken into consideration this particular aspect of the matter and deleted the addition with the following observation:

“4.3.4 FINDING AND DECISION

In the impugned order, the AO has made disallowance under Section 40(a)(i) of the payment made to Manthan Systems Inc. towards sales and marketing commission. The AO has extensively discussed why the commission paid by the appellant to Manthan Systems Inc was in the nature of Fees for Technical Services and was taxable both under the provisions of the Act and under the India-USA DTAA. The AO in Para 4.1 (Page 3 86 4) of the assessment order has listed the services provided by the Manthan Systems Inc. to the appellant and also stated that Manthan Systems Inc was providing sales and marketing services. These services are enumerated in the ARC Business Partner Agreement between the appellant and Manthan Systems Inc. dated 1 1 th February, 2009 as further amended and renewed by the agreement dated 1st April, 2013. The agreement was for marketing of the appellant's products and associated services, including the software called ARC developed by the appellant which were marketed in North and South America and the Caribbean by Manthan Systems Inc. Para 5 of the said agreement reproduced below further elaborates the nature

of the contract between the appellant and Manthan Systems Inc.

5. MSSPL's Responsibilities

5.1 MSSPL, shall provide MSI all necessary and relevant information pertaining to its ARC Products and Associated Services, including all relevant literature, brochure, soft copies, CDs etc. related to the Products and Services, which the Business Partner shall use to adequately market the Products and Services.

5.2 MSSPL shall, upon the receipt of a purchase order from the Customer, intimate MSI as to the acceptance of the purchase order. MSSPL shall be at liberty to reject any purchase order which does not comply with the pricing agreed at the end of the Commercial Negotiations or is not accompanied with the advance amount as agreed therein.

5.3 MSSPL shall send along with the confirmation of the purchase order, an invoice to the Customer with a copy for information to MSI, which shall reflect the purchase order number, line item number, description of items, quantities, the price payable by the Customer for the units sold.

5.4 Notwithstanding the generality of the above, MSSPL shall also:

(a) Direct leads to MSI which it may receive directly from prospects

(b) Continue lead generation and marketing activities

(c) Until MSI achieves a Sales Revenue Level of USD 1 Million, Provide Sales training hours to the MSI team consisting of:

(i) Product training

(ii) Technical and deployment training

(iii) Sales training

Training beyond that Revenue level shall be priced to MSI on par with MSSPL's Training offered to other Channel Partners.

(d) Assist in ARC Product and Associated Services sales. business, technical and commercial discussions, product demonstrations and services portfolio presentations to the prospect.

(e) Deploy, maintain, customize and support the product and services with clients

(f) Carry Commercial and contractual ownership of the Customer Relationship

(g) Bear equal share of the cost on all event participation focused on the promotion of the Product and Services.

(h) Conduct Road shows.

Paras 3.3 to 3.7 of the agreement also delineate the responsibilities of both parties to the agreement.

3.3 MSI shall use all reasonable efforts to pursue aggressive sales policies and procedures to realize the maximum sales potential for the ARC Products and Associated Services.

3.4 During the term of this Agreement, MSI shall not, without MSSPL's prior written consent, represent, promote or otherwise try to sell any other types of software Products and/or Services which perform identical functions as the Products and/or Services provided by MSSPL.

3.5 MSI shall support such special programs as may be developed by MSSPL from time to time in relation to the ARC Products and/or Associated Services. Such support may be in the form of marketing or promotional services, provision of certification programs, integration of sales reporting tools developed by the Company, or such other services as the Company may specifically request. Any such special programs provided at a fee or charge shall be mutually agreed upon by the Parties hereto.

3.6 MSI agrees to provide the Company with sales and marketing data required by MSSPL in respect of the sales of the ARC Products. MSI will directly input this information into the MSSPL program in the manner stipulated by the MSSPL.

3.7 MSI shall be entitled to receive from MSSPL such training as MSSPL may deem necessary in order for MSI to carry out its obligations under this Agreement.

From a reading of above clauses, it is evident that the services provided by Manthan Systems Inc. to the appellant were in the nature of marketing of the appellant's proprietary products. The AO has briefly

discussed in Para 6 and Para 8.3 of her order, that the information provided by the Manthan Systems Inc was in the nature of commercial information and hence the payment for the same was in the nature of royalty. However, this view is not tenable in the light of the clauses of agreement discussed above.

Be that as it may be, the AO has gone into some detail and also extensively discussed with reference to various case laws that the payment for the services rendered by Manthan Systems Inc was also FTS and chargeable to tax as per the Act and DTAA. The AO has not specifically identified whether the payment for the services was royalty or FTS. This issue has been decided in the appellant's favour by the Bangalore ITAT 'C' Bench in the case of Manthan Systems Inc. vs DCIT, International Taxation, Circle-1(2), Bangalore IT (IT)A No. 723/Bang/2022 for the AY 2012-13 wherein the same transaction has been held to be not taxable as FTS either under the Act or under Article 12 of the DTAA. The relevant portion of the order of the Tribunal is reproduced below.

“9. We have heard rival submissions and perused the material on record. The AO has referred to the services rendered by the assessee at para 6.1 of his order, The AO has contended that services rendered by the assessee are project management services and thereby fall within the ambit of FTS as per Explanation 2 to section 9(1)(vii) of the Act. The AO has concluded that services are in the nature of technical or consultancy services (Para 6.7 of the order). Finally at Para 10.2, it is concluded that services are technical in nature. The DRP has confirmed the finding of AO (Page 4 of the DRP order). The DRP has also observed that services of assessee assist MSSPL in making managerial/business decision. In the instant case, the assessee acted as intermediary and facilitates sale of software products/services outside India. On perusal of copy of sale and marketing agreement dated 11.02.2009 entered between the assessee and MSSPL, it is seen that the assessee rendered the following services.

- Promoting the software product/services on behalf of the Appellant;*
- Co-Ordination between the customers in North American, South American and Caribbean market and MSSPL;*
- Following up with the customers in North American, South American and Caribbean market for collection of amount.*

10. *In the instant case, the assessee is not providing any technical, managerial or consultancy services rather has been engaged to act as authorized business partner to market and promote the products or services of MSSPL outside India. In fact, the AO/DRP have not even concluded as to what is the nature of services rendered by the assessee. The decision regarding what are the products/services that are to be developed or provided, the price to be charged to the customer etc. are solely taken by MSSPL. The assessee does not play any role in the decision-making process. Further, once the assessee procures the orders, it is at the discretion of MSSPL whether to sell the product or render services to identified customers. The Hon'ble Delhi High Court in case of Dui-(International Taxation) vs Panalfa Autoelectrik Ltd (2014) 49 taxmann.com 412 (Delhi) held that commission paid by the assessee to its foreign Agent for arranging export sales and recovery of payments could not be regarded as fee for technical services under section 9(1)(vii) of the I.T.Act. The High Court held that the skill, business acumen and knowledge acquired by the non-resident were for his own benefit and use.*

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11. *The Hon'ble Supreme Court in the case of CIT v Toshoku Ltd (1980) 125 ITR 525 (SC) held that the sales commission paid to the commission agents outside India was not taxable in India. The Apex Court observed that the sales commission earned by the non-resident agents cannot be deemed to accrue or arise in India.*

12. *The Hon'ble Madras High Court in the case of CIT vs Faizan Shoes (P.) Ltd (2014) 48 taxmann.com 48 (Madras) had held that Assessee was not liable to deduct tax at source when non-resident agent provides services outside India on payment of commission.*

13. *In the case of Exotic Fruits (P.) Ltd reported in (2013) 10 taxmann.com 348 (Bangalore- Trib.), the Bangalore Bench of the Tribunal held that payment made to the non-resident agents does not fall within the meaning of managerial services as mentioned under section 9(1)(vii) of the I.T.Act and not required to deduct TDS under section 195. Further, it has been held that in the absence of permanent establishment(s) of such agents in India, the export commission income of the agents was not liable to be taxed in India and thus, the assessee was not obliged to effect any deduction of tax on the commission payments made to the agents who were positioned overseas.*

14. *The ITAT in the case of iRunway India (P) Ltd vs DCIT (2022) 138 taxmann.com 188 (Bangalore-Trib.) had held*

that where assessee has obtained certain sales consulting services from USA and commission is based on fixed percentage of sales, then merely because the service provider is technically qualified, sales commission paid for enabling sale could not become payment for rendering technical services and therefore, TDS is not applicable.

15. Similarly, the Bangalore tribunal in the case of *Deccan Creations (P.) Ltd vs DCIT (2022) 134 taxmann.com 144 (Bangalore-Trib.)* had held that services of foreign agents in the form of providing the data related to market trends and requirements of customers does not constitute as managerial services, as these services are usually provided by any agent. Thus, sales commission paid to foreign agents on the value of sales affected through them cannot be treated as technical services and therefore, not taxable in India. The following judicial pronouncements have also taken an identical view:-

- *PCIT vs Puma Sports India (P.) Ltd (2021) 127 taxmann.com 169 (Karnataka) SLP dismissed by Supreme Court - (2022) 134 taxmann.com 60 (SC);*
- *Bengal Tea & Fabrics Ltd. v DCIT (2018) 91 taxmann.com 38 (Kolkata - Trib.);*
- *DCIT v Divi's Laboratories Ltd (2011) 12 taxmann.com 103 (Hyd.);*
- *CIT vs. Model Exims, (2014) 42 taxmann.com 446 (ALL)*
- *Brakes India Ltd. v DCIT (2013) 33 taxmann.com 501 (Chennai - Trib.);*
- *Sri Subbaraman Subramanian v Asst CIT (2013) 30 taxmann.com 236 (Bangalore - Trib.);*
- *ACIT v India Shoes Exports (P.) Ltd (2015) 57 taxmann.com 303 (Chennai-Trib.);*
- *ACIT v Evergreen International Ltd (2018) 91 taxmann.com 111 (Delhi-Trib.);*
- *CIT v Orient Express (2015) 56 taxmann.com 331 (Madras);*
- *Divya Creation v ACIT (2017) 86 taxmann.com 276 (Delhi-Trib.); and*
- *Khimji Visram & Sons v ACIT (2014) 52 taxmann.com 485 (Mumbai- Trib.).*

16. In light of the above judicial pronouncements, the income received towards sales commission does not satisfy the definition of "FTS" under the Act as it is not in the nature of Managerial, Technical or Consultancy Services.

17. The AO has relied on the judgment of Hon'ble Supreme Court in case of *GVK Industries Ltd vs ITO (2015) 54 taxmann.com 347 (SC)* where in it was held that services

provided by Switzerland based company for raising required finance from international organisations on most competitive terms, payment made to swiss company for rendering such consultancy services amounted to 'fee for technical service' liable to tax in India. The above judgment of Hon'ble Apex Court is not applicable to facts of the present case. In the above judgment Hon'ble Supreme Court observed that the non-resident entity provided various services like advising the assessee on various aspects like financial structure, and security package to be offered to the lender, study of various lending alternatives for the local and foreign borrowings, making assessment of expert credit agencies worldwide and obtaining commercial bank support on the most competitive terms, assisting the assessee-company in loan negotiations and documentations with the lenders, structuring, negotiating and closing financing for the project in a coordinated and expeditious manner. The above services are clearly in the nature of consultancy services as they assist in decision making. However, in the instant case, the assessee has rendered sales and marketing services to MSSPL. No consultancy services are rendered and in fact even the AO has concluded that assessee has rendered technical services. Therefore, the above decision of Hon'ble Supreme Court in GVK Industries is not applicable to the facts of the present case. Further, the decision does not deal with the taxability under the treaty.

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19. Now, we shall deal with taxability as per DTAA:

The assessee is admittedly a tax resident of USA and hence it is eligible to claim benefits under India-USA DTAA. The payment received by the assessee will not qualify as "fees for Included services" under the India-USA DTAA. The definition "fees for Included services" under Article 12 to India-USA DTAA is as follows:

"fee for included services means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

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

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

20. *The payments towards sales and marketing services provide by the assessee is not covered under sub clause (a) to Article 12(4) of India-USA DTAA as it is not ancillary to application or enjoyment of any right. Further, clause (b) to Article 12(4) of India-USA DTAA is only applicable if the services are in the nature of technical or consultancy services, which make available knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design. The sales and marketing services rendered by assessee is not in the nature of technical or consultancy services. The AO has submitted that services are in the nature of project management of services and the same has been confirmed by the DRP. The project management services does not constitute technical or consultancy services and therefore are outside the ambit of "FIS" as defined in India-USA DTAA. Even if it is assumed without admitting that marketing services is technical or consultancy in nature, it did not make available any technical knowledge, experience, know-how, process to MSSPL. The term "make available" under the treaty law postulates a concept wherein the recipient of the services is not only benefited by the services but there is also a transfer of the technology, processes, skill etc., to the recipient in a manner which will enable the latter to apply the technology, processes, skill etc., in future without recourse to the service provider. The term "make available" encompasses some sort of durability and stability with reference to the transfer of technology, processes and skill etc., so that the same is not regarded as transient or ephemeral.*

21. *As per Memorandum of Understanding ("MOU") on Article 12 of the Treaty, entered into by the Government of India and the Government of USA on May 15, 1989, the technology is considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service. In this context, we rely on the judgment of the Hon'ble jurisdictional High Court in the case of CIT v De Beers India Minerals (P.) Ltd. 21 taxmann.com 214 (Kar.), wherein the Honourable High Court dealt with 'make available' clause. The High Court held that for attracting the liability to pay tax, not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The*

Hon'ble High Court, held that test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available.

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22. *Reliance is also placed on the judgment of Delhi High Court in the case of DIT v. Guy Carpenter & Co. Ltd. [2012] 346 ITR 504 (Del.)*

23. *The Kolkata Tribunal decision in the case of On process Technology India (P.) Ltd v DCIT (2018) 96 taxmann.com 428 (Kolkata-Trib.) is squarely applicable to the facts of the present case. In the aforesaid case, the Tribunal rendered decision in the context of India-USA DTAA. The Tribunal held that the act of securing orders and soliciting business by the foreign marketing companies does not make available any technical knowledge or technical service and the same is not taxable either ups 9(I)(vii) or under India-USA DTAA. Reliance is also placed on the decision of Delhi Tribunal in the case Rajinder Kumar Aggarwal (HUF) vs DC1T [2021] 131 taxmann.com 252 (Delhi-Trib.)*

24. *The AO has stated that marketing services rendered by the assessee are technical in nature and which are used by MSSPL for development of business, which results in enduring benefit. Accordingly, the A.O. has concluded that make available is satisfied as there is transfer of skill and knowledge which falls within the ambit of technical services. The DRP has also confirmed the view of the A.O. The AO and DRP has erred in not appreciating that what should be made available is technical knowledge, experience, skill etc. Making available service does not make available knowledge, experience, skill etc. MSSPL has to approach the assessee every time to get new customers and maintain relationship with existing customers. The test of make available as envisaged in the DTAA is therefore not satisfied in the instant case.*

25. *In light of the aforesaid reasoning, we hold that the sales and marketing services rendered by the assessee to MSSPL would not fall within the ambit of FTS as defined under section 9(1)(vii) or under Article 12 of DTAA. It is ordered accordingly.”*

As a corollary to the above order, since the services rendered to the appellant by Manthan Systems Inc. have been held to not fall within the ambit of FTS or under

Article 12 of the treaty, there was no requirement on the part of the appellant to deduct TDS on the payment to MS1. Respectfully following the above order of the jurisdictional Tribunal, the disallowance made by the AO under Section 40(a)(i) r.w.s. 195 of the sales and marketing commission paid by the appellant for the year under appeal is deleted.”

10. We further find that while dealing with the issue, the Coordinate Bench has been pleased to observe as follows while holding that the sales commission paid to the Manthan System Inc. does not fall within the ambit of FTS:

19. Now, we shall deal with taxability as per DTAA: The assessee is admittedly a tax resident of USA and hence it is eligible to claim benefits under India-USA DTAA. The payment received by the assessee will not qualify as "fees for Included services" under the India-USA DTAA. The definition "fees for Included services" under Article 12 to India-USA DTAA is as follows:

“fee for included services means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

- a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or*
- b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.”*

20. The payments towards sales and marketing services provide by the assessee is not covered under sub clause (a) to Article 12(4) of India-USA DTAA as it is not ancillary to application or enjoyment of any right. Further, clause (b) to Article 12(4) of India-USA DTAA is only applicable if the services are in the nature of technical or consultancy services, which make available knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design. The sales and marketing services rendered by assessee is not in the nature of technical or consultancy services. The AO has submitted that services are in the nature of project management of services and the same has been confirmed by the DRP. The project management services does not constitute technical or consultancy

services and therefore are outside the ambit of "FIS" as defined in India-USA DTAA. Even if it is assumed without admitting that marketing services is technical or consultancy in nature, it did not make available any technical knowledge, experience, know-how, process to MSSPL. The term "make available" under the treaty law postulates a concept wherein the recipient of the services is not only benefited by the services but there is also a transfer of the technology, processes, skill etc., to the recipient in a manner which will enable the latter to apply the technology, processes, skill etc., in future without recourse to the service provider. The term "make available" encompasses some sort of durability and stability with reference to the transfer of technology, processes and skill etc., so that the same is not regarded as transient or ephemeral.

21. As per Memorandum of Understanding ("MOU") on Article 12 of the Treaty, entered into by the Government of India and the Government of USA on May 15, 1989, the technology is considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service. In this context, we rely on the judgment of the Hon'ble jurisdictional High Court in the case of CIT v De Beers India Minerals (P.) Ltd. 21 taxmann.com 214 (Kar.), wherein the Honourable High Court dealt with 'make available' clause. The High Court held that for attracting the liability to pay tax, not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The Hon'ble High Court, held that test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available. The relevant finding of the Hon'ble High Cot reads as follows:-

"14. Therefore the Clause in Singapore agreement which explicitly makes it clear the meaning of the word 'make available', the said clause has to be applied, and to be read

into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know how or processes. To attract the tax liability, that technical knowledge, experience, skill, know how or process which is used by service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know how or processes so as to render such technical Services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know how or process to the recipient of the technical service, in view of the Clauses in the DTAA. the liability, to tax is not attracted.

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22. What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill?, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that

the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other word, payment of consideration would be regarded as 'fee for technical / included services' only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."

22. *Reliance is also placed on the judgment of Delhi High Court in the case of DIT v. Guy Carpenter & Co. Ltd. [2012] 346 ITR 504 (Del.)*

23. *The Kolkata Tribunal decision in the case of On process Technology India (P.) Ltd v DCIT (2018) 96 taxmann.com 428 (Kolkata-Trib.) is squarely applicable to the facts of the present case. In the aforesaid case, the Tribunal rendered decision in the context of India-USA DTAA. The Tribunal held that the act of securing orders and soliciting business by the foreign marketing companies does not make available any technical knowledge or technical service and the same is not taxable either ups 9(I)(vii) or under India-USA DTAA. Reliance is also placed on the decision of Delhi Tribunal in the case Rajinder Kumar Aggarwal (HUF) vs DCIT [2021] 131 taxmann.com 252 (Delhi-Trib.)*

24. *The AO has stated that marketing services rendered by the assessee are technical in nature and which are used by MSSPL for development of business, which results in enduring benefit. Accordingly, the A.O. has concluded that make available is satisfied as there is transfer of skill and knowledge which falls within the ambit of technical services. The DRP has also confirmed the view of the A.O. The AO and DRP has erred in not appreciating that what should be made available is technical knowledge, experience, skill etc. Making available service does not make available knowledge, experience, skill etc. MSSPL has to approach the assessee every time to get new customers and maintain relationship with existing customers. The test of make available as envisaged in the DTAA is therefore not satisfied in the instant case.*

25. In light of the aforesaid reasoning, we hold that the sales and marketing services rendered by the assessee to MSSPL would not fall within the ambit of FTS as defined under section 9(1)(vii) or under Article 12 of DTAA. It is ordered accordingly.”

11. Taking into consideration the entire aspect of the matter, we find force in the submission made by the Ld.Counsel that since it has already been decided by the Coordinate Bench that the services rendered to the assessee by the said Manthan Systems Inc. is not falling within the ambit of FTS or under Article 12 of the treaty, the assessee is not liable to deduct TDS on the payment made to the MSI.

12. Therefore, respectfully relying upon the same, we find no ambiguity in the order passed by the Ld.CIT(A) in holding that there is no liability to deduct TDS and accordingly, deletion of addition made to the assessee's income in respect of sales commission under section 40(a)(i) is found to be just and proper so as to warrant interference. The same is, therefore, upheld. The revenue's this ground of appeal, is, thus, found to be devoid of any merit and therefore, dismissed.

Deletion of addition in respect of ESOP expense made by the Ld.CIT(A).

13. At the outset of the proceedings, the Ld.Counsel appearing for the assessee submitted before us that the issue is squarely covered by the judgment of Hon'ble Karnataka High Court in case of CIT, LTU vs. Biocon Ltd., reported in [2020] 121 taxmann.com 351 (Karnataka). In this regard, the Ld.Counsel

appearing for the assessee submitted the written notes which is reproduced as follows:

“Ground 2 The Revenue has taken a Ground that services rendered by the US entity are in the nature of Consultancy as provided in Explanation 2 to Section 9(1)(vii) providing significant professional skills and the subsidiaries are not mere marketing or commission agents.

In this regard, the Respondent submits as follows:

a. The CIT(A) has held that sales commission is not taxable both under the Income Tax Act and DTAA. The Revenue has not taken ground that the CIT(A)'s decision of non-taxability under the DTAA needs to be reversed. Thus, entire contention of Revenue has no legs to stand on as once income is not taxable under the tax treaty, its taxability under the Act is of no relevance.

b. Without prejudice, the Appellant submits that MSI is not providing any technical, managerial or consultancy services rather has been engaged to act as authorized business partner to market and promote the products or services of Respondent outside India. For the said activity, Respondent pays sales commission to MSI. Sales Commission is computed based on the percentage of billings made to customers for the orders secured by MSI.

c. The services provided by MSI are not in the nature of FIS even under India USA DTAA. Payment to MSI is not covered under sub clause (a) to Article 12(4) of India-USA DTAA as it is not ancillary to application or enjoyment of any right.

d. It is also not covered under clause (b) to Article 12(4) of India- USA DTAA as Sales Commission is not in the nature of technical or consultancy services. Further, the services of MSI do not 'make available' any technical knowledge, experience, know-how, process to the Respondent. Thus, the payment does not satisfy the make available test envisaged under Article 12 of India USA DTAA.

e. The Honourable Bangalore ITAT in the case of Manthan Systems Inc (Supra) has held that amount paid by the Respondent to MSI is not in the nature of FTS both under the Act and DTAA.”

14. We also find from the order passed by the Ld.CIT(A) that while dealing with the matter, he has relied upon the judgment passed by the jurisdictional High Court in case of CIT, LTU vs. Biocon Ltd. (supra) which was held as follows:

“6. We have considered the submissions made by learned counsel for the parties and have perused the record. The singular issue, which arises for consideration in this appeal is whether the tribunal is correct in holding that discount on the issue of ESOPs i.e., difference between the grant price and the market price on the shares as on the date of grant of options is allowable as a deduction under Section 37 of the Act. Before proceeding further, it is apposite to take note of Section 37(1) of the Act, which reads as under:

Section 37(1) says that any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head, "Profits and Gains of Business or Profession".

7. Thus, from perusal of Section 37 (1) of the Act, it is evident that the aforesaid provision permits deduction for the expenditure laid out or expended and does not contain a requirement that there has to be a pay out. If an expenditure has been incurred, provision of Section 37(1) of the Act would be attracted. It is also pertinent to note that Section 37 does not envisage incurrence of expenditure in cash.

8. Section 2(15A) of the Companies Act, 1956 defines 'employees stock option' to mean option given to the whole time directors, officers or the employees of the company, which gives such directors, officers or employees, the benefit or right to purchase or subscribe at a future date the securities offered by a company at a free determined price. In an ESOP a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The employees are given stock options at discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price.

In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the service of the company, the option vest with the employees.

9. In the instant case, the ESOPs vest in an employee over a period of four years i.e., at the rate of 25%, which means at the end of first year, the employee has a definite right to 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. It is well settled in law that if a business liability has arisen in the accounting year, the same is permissible as deduction, even though, liability may have to quantify and discharged at a future date. On exercise of option by an employee, the actual amount of benefit has to be determined is only a quantification of liability, which takes place at a future date. The tribunal has therefore, rightly placed reliance on decisions of the Supreme Court in Bharat Movers supra and Rotork Controls India P. Ltd., supra and has recorded a finding that discount on issue of ESOPs is not a contingent liability but is an ascertained liability.

10. From perusal of Section 37(1), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of Section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraph 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under Section 37(1) of the Act subject to fulfillment of the condition.

11. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of accounts, which has been prepared in accordance with Securities And Exchange Board of India (Employee Stock

Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.

12. So far as reliance place by the revenue in the case of CIT VS. INFOSYS TECHNOLOGIES LTD. is concerned, it is noteworthy that in the aforesaid decision, the Supreme Court was dealing with a proceeding under Section 201 of the Act for non deduction of tax at source and it was held that there was no cash inflow to the employees. The aforesaid decision is of no assistance to decide the issue of allowability of expenses in the hands of the employer. It is also pertinent to mention here that in the decision rendered by the Supreme Court in the aforesaid case, the Assessment Year in question was 1997-98 to 1999- 2000 and at that time, the Act did not contain any specific provisions to tax the benefits on ESOPs. Section 17(2)(iiia) was inserted by Finance Act, 1999 with effect from 01.04.2000. Therefore, it is evident that law recognizes a real benefit in the hands of the employees. For the aforementioned reasons, the decision rendered in the case of Infosys Technologies is of no assistance to the revenue. The decisions relied upon by the revenue in Gajapathy Naidu, Morvi Industries and Keshav Mills Ltd. supra support the case of assessee as the assessee has incurred a definite legal liability and on following the mercantile system of accounting, the discount on ESOPs has rightly been debited as expenditure in the books of account.”

The Ld.DR relied upon the order passed by the authorities below.

15. We also find that in the case of CIT, LTU vs. Biocon Ltd. (supra), the revenue relied upon the judgment in case of CIT vs. Infosys Technologies Ltd. reported in (2008) 166 Taxman 204/297 ITR 167 which has also been taken care by the Jurisdictional High Court and distinguished to this effect that the question raised therein i.e. the ESOP benefit was not in the provision of law at that material point of time rather the same was inserted by the Finance Act, 1999 w.e.f. 01.04.2000 and

not applicable to the case of CIT, LTU vs. Biocon Ltd. (supra). Finally the Ld.CIT(A) relying upon the jurisdictional High Court order granted relief to the assessee by deleting addition made by the Ld.AO on account of ESOP expenses. Thus taking into consideration the entire aspect of the matter, we also do not find any reason to interfere with the same as the same is found to be just and proper. This ground of appeal preferred by the revenue, thus fails.

This decision will apply *mutatis mutandis* in A.Ys. 2012-13 to 2015-16. Cross Objections filed by the assessee against the order of maintainability has been not pressed. Hence the C.Os. are dismissed on legal issue.

AY 2015-16:

16. Disallowance of provision for doubtful debts has been challenged in the cross objection filed by assessee. The assessee has filed written submission with the following contentions.

*“Ground 3 - Disallowance of Provision for Doubtful debts
[For AY 2015-16]*

3.12 The CIT(A) has erred in confirming the action of the AO in disallowing provision for doubtful debts of Rs.3,03,61,700/- u/s 37 r.w.s 36(1)(vii) of the Act.

3.13 The CIT(A) has not appreciated that the Respondent has reduced the provision for doubtful debts from sundry debtors in the balance sheet (Schedule 2.12 of the financial statement) [Pg No.28 of Paper Book-I for AY 2015-16]. The sundry debtors were shown net of provision for doubtful debts in the balance sheet. Accordingly, the Provision for doubtful debts is allowable as per the decision of Honourable Supreme Court in the case of Vijaya Bank vs CIT [2010] 190 Taxman 257 [Para 7 and 8 at Pg No.47 and 48 of Paper Book-II].

3.14 The CIT(A) has stated that amount of provision for doubtful debts debited to P&L account and amount of provision for doubtful debts reduced from debtors in the balance sheet is not matching [Page 26 of the CIT(A) Order]. The Respondent submits that the CIT(A) has not appreciated that the total provision for doubtful debts reduced from Debtors as on 31.3.2015 includes opening provision [Rs.78,06,193] and current year provision debited to P&L [Rs.3,03,61,700/-] [Page 28 and 31 of Paper Book-I of AY 2015-16]. Thus, contention of CIT(A) is without merit.

3.15 Therefore, Provision for Doubtful debts should be allowed as deduction.

The Respondent Prays that Revenue Appeals be dismissed, and its CO be allowed.”

17. It is the case of the assessee that the Ld.CIT(A) has not appreciated that the assessee has reduced the provision for doubtful debts from sundry debtors in the balance sheet (Schedule 2.12 of the financial statement). In this regard, he has drawn our attention to page 28 of the paper book filed for the year under consideration (2015-16). The sundry debtors were shown net of provision for doubtful debts in the balance sheet. Accordingly, the provision for doubtful debts is allowable in terms of the decision passed by the Hon'ble Supreme Court in case of Vijaya Bank vs. CIT reported in (2010) 190 Taxman 257 as the main contention made by the Ld.AR. A copy of the judgment has also been annexed to the paper book filed before us.

18. On the other hand, it is contended by the revenue that the amount of provision for doubtful debts debited to the P&L account and amount of provision for doubtful debts reduced in

the balance sheet is not matching which is appearing from the order passed by the Ld.CIT(A), observation whereof has been made at page 26 which has also been relied upon by the Ld.DR. In rebuttal, the assessee's contention is this that the total provision for doubtful debts reduced from debtors as on 31.03.2015 includes opening provision of Rs.78,06,193/- and the current year provision debited to P&L account of Rs.303,61,700/- which is appearing at pages 28-31 of the paper book filed by the assessee. In that view of the matter, it was argued by the Ld.AR that the order passed by the Ld.CIT(A) is without any merit and thus not sustainable in the eye of law.

19. In this aspect, we have considered the judgment passed by the Hon'ble Apex Court in the case of Vijaya Bank vs. CIT (supra) as relied upon by the Ld.AR, the relevant observation whereof is as follows:

"5. At the outset, we may state that, in these civil appeals, broadly, two questions arise for determination. The first question which arises for determination concerns the manner in which actual write off takes place under the Accounting principles. The second question which arises for determination in these civil appeals is, whether it is imperative for the assessee-Bank to close the individual account of each debtor in its Books or a mere reduction in the "Loans and Advances Account" or Debtors to the extent of the provision for bad and doubtful debt is sufficient?"

6. The first question is no more res integra. Recently, a Division Bench of this Court in the case of Southern Technologies Limited vs. Joint Commissioner of Income Tax, reported in [2010] 320 ITR 577, [in which one of us [S.H. Kapadia,J.] was a party] had an occasion to deal with the first question and it has been answered, accordingly, in favour of the assessee vide Paragraph (25), which reads as under:

“Prior to April 1, 1989, the law, as it then stood, took the view that even in cases in which the assessee(s) makes only a provision in its accounts for bad debts and interest thereon and even though the amount is not actually written off by debiting the profit and loss account of the assessee and crediting the amount to the account of the debtor, the assessee was still entitled to deduction under section 36(1)(vii). [See CIT v. Jwala Prasad Tiwari (1953) 24 ITR 537 (Bom) and Vithaldas H. Dhanjibhai Bardanwala vs. CIT (1981) 130 ITR 95 (Guj)] Such state of law prevailed up to and including the assessment year 1988-89. However, by insertion (with effect from April 1, 1989) of a new Explanation in section 36(1)(vii), it has been clarified that any bad debt written off as irrecoverable in the account of the assessee will not include any provision for bad and doubtful debt made in the accounts of the assessee. The said amendment indicates that before April 1, 1989, even a provision could be treated as a write off. However, after April 1, 1989, a distinct dichotomy is brought in by way of the said Explanation to section 36(1)(vii). Consequently, after April 1, 1989, a mere provision for bad debt would not be entitled to deduction under Section 36(1)(vii). To understand the above dichotomy, one must understand ‘how to write off’. If an assessee debits an amount of doubtful debt to the profit and loss account and credits the asset account like sundry debtor's account, it would constitute a write off of an actual debt. However, if an assessee debits ‘provision for doubtful debt’ to the profit and loss account and makes a corresponding credit to the ‘current liabilities and provisions’ on the liabilities side of the balance-sheet, then it would constitute a provision for doubtful debt. In the latter case, the assessee would not be entitled to deduction after April 1, 1989.”

7. One point needs to be clarified. According to Shri Bishwajit Bhattacharya, learned Additional Solicitor General appearing for the Department, the view expressed by the Gujarat High Court in the case of Vithaldas H. Dhanjibhai Bardanwala [supra] was prior to the insertion of the Explanation vide Finance Act, 2001, with effect from 1st April, 1989, hence, that law is no more a good law. According to the learned counsel, in view of the insertion of the said Explanation in Section 36(1)(vii) with effect from 1st April, 1989, a mere debit of the impugned amount of bad debt to the Profit and Loss Account would not amount to actual write off. According to him, the Explanation

makes it very clear that there is a dichotomy between actual write off on the one hand and a provision for bad and doubtful debt on the other. He submitted that a mere debit to the Profit and Loss Account would constitute a provision for bad and doubtful debt, it would not constitute actual write off and that was the very reason why the Explanation stood inserted. According to him, prior to Finance Act, 2001, many assessees used to take the benefit of deduction under Section 36(1)(vii) of 1961 Act by merely debiting the impugned bad debt to the Profit and Loss Account and, therefore, the Parliament stepped in by way of Explanation to say that mere reduction of profits by debiting the amount to the Profit and Loss Account per se would not constitute actual write off. To this extent, we agree with the contentions of Shri Bhattacharya. However, as stated by the Tribunal, in the present case, besides debiting the Profit and Loss Account and creating a provision for bad and doubtful debt, the assessee-Bank had correspondingly/simultaneously obliterated the said provision from its accounts by reducing the corresponding amount from Loans and Advances/debtors on the asset side of the Balance Sheet and, consequently, at the end of the year, the figure in the loans and advances or the debtors on the asset side of the Balance Sheet was shown as net of the provision "for impugned bad debt". In the judgement of the Gujarat High Court in the case of Vithaldas H. Dhanjibhai Bardanwala [supra], a mere debit to the Profit and Loss Account was sufficient to constitute actual write off whereas, after the Explanation, the assessee(s) is now required not only to debit the Profit and Loss Account but simultaneously also reduce loans and advances or the debtors from the asset side of the Balance Sheet to the extent of the corresponding amount so that, at the end of the year, the amount of loans and advances/debtors is shown as net of provisions for impugned bad debt. This aspect is lost sight of by the High Court in its impugned judgement. In the circumstances, we hold, on the first question, that the assessee was entitled to the benefit of deduction under Section 36(1)(vii) of 1961 Act as there was an actual write off by the assessee in its Books, as indicated above.

8. Coming to the second question, we may reiterate that it is not in dispute that Section 36(1)(vii) of 1961 Act applies both to Banking and Non-Banking businesses. The manner in which the write off is to be carried out has been explained hereinabove. It is important to note that the assessee-Bank has not only been debiting the Profit and

Loss Account to the extent of the impugned bad debt, it is simultaneously reducing the amount of loans and advances or the debtors at the year-end, as stated hereinabove. In other words, the amount of loans and advances or the debtors at the year-end in the balance-sheet is shown as net of the provisions for impugned debt. However, what is being insisted upon by the Assessing Officer is that mere reduction of the amount of loans and advances or the debtors at the year-end would not suffice and, in the interest of transparency, it would be desirable for the assessee-Bank to close each and every individual account of loans and advances or debtors as a pre-condition for claiming deduction under Section 36(1)(vii) of 1961 Act. This view has been taken by the Assessing Officer because the Assessing Officer apprehended that the assessee-Bank might be taking the benefit of deduction under Section 36(1)(vii) of 1961 Act, twice over. [See Order of CIT (A) at Pages 66, 67 and 72 of the Paper Book, which refers to the apprehensions of the Assessing Officer]. In this context, it may be noted that there is no finding of the Assessing Officer that the assessee had unauthorisedly claimed the benefit of deduction under Section 36(1)(vii), twice over. The Order of the Assessing Officer is based on an apprehension that, if the assessee fails to close each and every individual account of its debtor, it may result in assessee claiming deduction twice over. In this case, we are concerned with the interpretation of Section 36(1)(vii) of 1961 Act. We cannot decide the matter on the basis of apprehensions/desirability. It is always open to the Assessing Officer to call for details of individual debtor's account if the Assessing Officer has reasonable grounds to believe that assessee has claimed deduction, twice over. In fact, that exercise has been undertaken in subsequent years. There is also a flip-side to the argument of the Department. Assessee has instituted recovery suits in Courts against its debtors. If individual accounts are to be closed, then the Debtor/Defendant in each of those suits would rely upon the Bank statement and contend that no amount is due and payable in which event the suit would be dismissed.”

20. We find that the assessee reduced the provision for doubtful debts from sundry debtors in the balance sheet as appearing at page 28 of the paper book filed before us. It further appears that the sundry debtors were shown net of provision for

doubtful debts in the balance sheet. Thus keeping in view the ratio laid down by Hon'ble Supreme Court in case of Vijaya Bank vs. CIT (supra) as narrated hereinabove, we hold that the provision for doubtful debts is allowable and thus the addition made by the revenue are hereby deleted.

In the result, all the appeals filed by the revenue stands dismissed and the cross objections being C.O. Nos. 14 to 16/Bang/2023 filed by assessee stands dismissed and C.O. No. 17/Bang/2023 stands partly allowed.

Order pronounced in the open court on 19th January, 2024.

Sd/-
(LAXMI PRASAD SAHU)
Accountant Member

Sd/-
(MADHUMITA ROY)
Judicial Member

Bangalore,
Dated, the 19th January, 2024.
/MS /

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|---------------|------------------------|
| 1. Appellant | 2. Respondent |
| 3. CIT | 4. DR, ITAT, Bangalore |
| 5. Guard file | |

By order

Assistant Registrar,
ITAT, Bangalore