IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

Before Dr. B. R. R. Kumar, Accountant Member,

Ms. Madhumita Roy, Judicial Member

ITA No. 3998/Del/2017: Asstt. Year: 2011-12
ITA No. 3999/Del/2017: Asstt. Year: 2012-13

M/s QAI India Ltd., 1010-12, Ansal Towers, 38, Nehru Place, New Delhi-110019	Vs	DCIT, Circle-14(1), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAACQ0883C		

Assessee by : Sh. Ved Jain Adv. &
Ms. Supriya Mehta, CA
Revenue by : Sh. Saurabh Anand, Sr. DR

Date of Hearing: 09.05.2024		Date of Pronouncement: 05.08.2024

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee against the orders of ld. CIT(A)-7, New Delhi dated 28.03.2017.

2. In ITA No. 3998/Del/2017 for A.Y. 2011-12, the assessee has filed following concise grounds of appeal:

> *"1. On the facts and circumstances of the case, the order passed by the Commissioner of Income Tax (Appeals) [CIT(A)] is bad, both in the eye of law and on the facts.*
>
> *2. (i) On the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and in law in giving part relief and setting aside the issue of payment made to following parties to AO for verification despite the fact such disallowance made by AO is wholly untenable in the eyes of law as these payments are not liable for deduction of tax at source:*
>
> *a. Intertec Systems LLC : Rs.53,73,994/-.*
> *b. Invico Capital Corporation AG : Rs.86,88,215/-*

(ii) That the aforesaid act of the CIT(A) is in violation of the provision of Section 251(1)(a) of the Act and therefore bad in law.

3. On the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and in law, having held that the payments are not in the nature of fee for technical services u/s 9(1)(vii) of the Act, and hence not liable for Tax deduction at source and thereafter giving direction to AO to invoke provision of section 192 for disallowing such payments.

4. On the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and law in confirming the disallowance of Rs. 5,48,090/- in respect of expenses paid to QAI Singapore Pte. Ltd. in relation to the services rendered for earning income from overseas ignoring the explicit provision of Section 9(1)(vii)(b) of the Act.

5. On the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and law in confirming the disallowance of Rs. 91,230/- in respect of expenses paid to KCS Hong Kong Ltd. for earning income outside India.

6. On the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and law in confirming the following disallowances in respect of payment made to the following University/School:

a) Carneige Mellon University : Rs. 16,56,580/-
b) Call Centre School LLC. : Rs. 3,89,089/-

7. On the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and law in confirming the disallowances made by AO u/s 40(a)(i) of Rs. 23,02,094/- paid to The APM Group Ltd. for purchase of course material.

8. On the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and law in confirming the disallowance made by AO u/s 40(a)(i) of Rs. 76,446/- being expense paid to Call Centre Industry Advisory Council.

9. On the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and law in confirming the disallowance made by AO u/s 40(a)(i) of Rs. 4,45,809/- being the payment made to The British Computer Society towards examination fees.

10. On the facts and circumstances of the case, the Ld. CIT(A) has erred both on facts and law in confirming the disallowance made by AO u/s 40(a)(i) of Rs. 33,80,005/- being payment

made to QAI Singapore Pte Ltd. towards reimbursement of salary paid to Mr. Roland Rozario.

3. In ITA No. 3999/Del/2017 for A.Y. 2012-13, the assessee has filed following grounds of appeal:

"1. On the facts and circumstances of the case, the order passed by the Commissioner of Income Tax (Appeals) [CIT(A)j is bad, both in the eye of law and on the facts.

2. On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in disregarding the assessee's contention that the amount payable outside India in respect of services utilized in earning any income from any source outside India is not subject to tax in India in view of the exception carved in Section 9(1)(vii)(b) of the Act.

3.(i) On thefacts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in confirming the disallowance of Rs. 134.22 Lacs made by the Id. AO by invoking the provisions of Section 40(a)(i) read with Section 195 of the Act.

(ii) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in assessing the aforementioned sum to tax in India despite of the sum is covered by the exception to Section 9(1)(vii)(b) of the Act.

4. (i) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in confirming the disallowance of Rs.26.80 Lacs on account of payment made to Carnegie Mellon University, USA and The Call Centre School, LLC, invoking the provisions of Section 40(a)(i) of the Act.

(ii) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in construing the payment made, for services rendered outside India for the purpose of income earned outside, as chargeable to tax in India.

(iii) On the facts and circumstances of the case, the Id. CIT(A) has erred, both in facts and in law, in confirming the disallowance in spite of the fact that the same is covered under the exception clause to Section 9(1)(vi)(b) of the Act.

5 (i) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in sending the issue of disallowance of Rs. 58.19 Lacs on account payment made to Intertek Systems Agency, UAE towards reimbursement of

expenses and payment of service charges, to the Id. AO for further verification.

(ii) That the abovesaid act of the Id. CIT(A) is in violation to Section 250(4) of the Act and therefore bad in law.

(iii) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in holding the abovesaid despite the fact that the payments being covered under the exception clause to Section 9(1)(vii)(b) of the Act, the same does not amounts to sum chargeable to tax, hence the provision of Section 40(a)(i) is not applicable on the same.

6 (i) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in sending the issue of disallowance of Rs. 39.80 Lacs on account payment made to Invico Capital Corporation AG towards reimbursement of expenses and payment of service charges, to the Id. AO for further verification.

(ii) That the abovesaid act of the Id. CIT(A) is in violation to Section 250(4) of the Act and therefore bad in law.

(iii) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in holding the abovesaid despite the fact that the payments being covered under the exception clause to Section 9(1)(vii)(b) of the Act, the same does not amounts to sum chargeable to tax, hence the provision of Section 40(a)(i) is not applicable on the same.

7 (i) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and circumstances of the case, in confirming the actions of the Id. AO in disallowing a sum of Rs. 5.34 Lacs on account of royalty paid to M/s RADTAC Ltd. towards Certified Scrum Master Training.

(ii) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in confirming the aforesaid despite the fact that the payment is being covered by the exception to Section 9(1)(vi)(b) of the Act, hence the provisions of Section 40(a)(i) are not applicable on the same.

8 (i) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in confirming the actions of the Id. AO in disallowing a sum of Rs. 2.57 Lacs paid to Mr. Tajinder Pal Singh for training and/or consultancy services.

(ii) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in confirming the aforesaid despite the fact that the payment is being covered by

the exception to Section 9(1)(vii)(b) of the Act, hence the provisions of Section 40(a)(i) are not applicable on the same.

9 (i) On the facts and circumstances of the case, the Id. CIT(A) has erred both on facts and in law, in confirming the actions of the Id. AO in disallowing a sum of Rs. 5.98 Lacs paid to AFA Project Management and The APM Group Ltd on account of purchase of course material and examination fee.

(ii) On the facts and circumstances of the case, the Id. CIT(A) has erred, both on facts and in law, in confirming the aforesaid despite the fact that the payment is being covered by the exception to Section 9(1)(vi)(b) of the Act, hence the provisions of Section 40(a)(i) are not applicable on the same.

(iii) That the Id. CIT(A) has erred, both on facts and in law, in construing the said payment in the nature of royalty.

(iv) That the payment made on account of purchase of course material and examination fee does not fall within the purview of right, property or information used as defined under Section 9(1)(vi)(b) of the Act.

10. Without prejudice to the above and in the alternative, the Id. CIT(A) has erred, both on facts and in law, in not considering the provisions of the relevant double taxation avoidance agreement entered by India with the other contracting states."

4. Brief facts of the case are that the assessee is engaged in the business of providing workforce development and consulting services to information technology, information technology enabled/BPO and knowledge intensive organizations worldwide. The case of the assessee was selected for scrutiny assessment and disallowances/additions totaling to Rs.2,34,44,308/- were made to the income of the assessee u/s 40(a)(i) of the Act on account of non-deduction of tax at source on payments made to Non-Residents.

5. Aggrieved by the order passed by AO, the assessee filed an appeal before CIT(A) who partly allowed the appeal of the

assessee and sustained the additions made by AO to the extent of Rs. 1,76,30,307/-.

6. Aggrieved by the order of the CIT(A), the assessee filed appeal before the Tribunal.

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Reimbursement of Expenses – Rs.87,40,964/-:
Reimbursement of salary – Rs. 33,80,005/-:

7. During the year under consideration, the assessee had paid Rs.53,73,994/- and Rs.86,88,215/- to Intertec System LLC, Dubai and Invico Capital Corporation AG, Zurich respectively for the following services:

8. Services agreed to be provided by Intertec System LLC, Dubai (PB 26- 32)

i. Employment visas

ii. Salary/pay roll administration

iii. Medical and accidental insurances

iv. Labour guarantees

v. Other statutory compliances

vi. Arranging for accommodation

9. Services agreed to be provided by Invico Capital Corporation AG, Zurich (PB 22-25)

i. Accounting services

ii. Application of work permits

iii. Administration of HR requirements

iv. Corporate services

v. Providing management services as required

10. The salary being paid by these two companies to the employees of the assessee working abroad was subsequently reimbursed to these companies on receipt of invoices therefor. A copy of such invoices raised by Intertec System LLC, Dubai and Invico Capital Corporation AG, Zurich are available at PB 116-149 depicting the salary portion being claimed as reimbursement from the assessee.

11. Therefore, it is hereby held that the payment made by the assesseee to Intertec System LLC, Dubai and Invico Capital Corporation AG, Zurich constitutes pure reimbursement of expenses and can in no manner be construed as income of the recipient. Therefore, no TDS is liable to be deducted u/s 195 of the Act on reimbursement of expenses.

12. Reliance is placed on the following judicial pronouncements in this regard:

- Ge India Technology Centre Private Ltd. Vs. CIT, 2010 (9) TMI 7 - Supreme Court Dated 9-9-2010
- Abbey Business Services (India) (P.) Ltd. Vs. DCIT, 2012 (7) TMI 702 - ITAT Bangalore Dated 18-7-2012.
- Tata Iron & Steel Co. Ltd. Vs. Union of India, Supreme Court order dated 30-11-2000

13. Considering the facts of the case, above mentioned provisions of the Act and case laws relied upon by the assessee, the disallowance made by the AO and the ld. CIT(A) u/s 40(a)(i) of the Act is unwarranted and liable to be deleted.

14. In the result, the appeal of the assessee on this ground is allowed.

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Payments to QAI Singapore Pte Ltd. and KCS Hong Kong Ltd.:

15. These disallowances made by the AO and confirmed by the ld. CIT(A) u/s 40(a)(i) of Rs.7,30,550/- are regarding the amounts paid to QAI Singapore Pte. Ltd. of Rs.5,48,090/- and KCS Hong Kong Ltd. of Rs.91,230/- in relation to services rendered for earning income from outside India which specifically falls under the exclusionary provision of Section 9(1)(vii)(b) of the Act.

16. It is relevant to note here that the assessee had utilized the services of QAI Singapore Pte. Ltd. and KCS Hong Kong Ltd. in order to deliver the SCAMPIA appraisal services to its clients in Vietnam. The services have been rendered in Vietnam for the purpose of earning income from a source which is outside India.

17. Therefore, the services rendered by QAI Singapore Ltd. and KCS Hong Kong Ltd. have been utilized in Vietnam i.e. outside India and the payment which has been made to QAI Singapore Ltd. and KCS Hong Kong Ltd. is for the purpose of earning income from a source outside India which specifically

falls under the exclusionary provisions of Section 9(1)(vii)(b) of the Act. Reliance is also placed on the following judicial pronouncements in this regard:

- DCIT Vs. M/s Hofincons Infotech and Industrial Services Pvt. Ltd. 2015 (3) TMI 876 - ITAT Chennai Dated: -18-8-2014

  "7. We have heard both parties, perused the case file and the judicial precedents quoted hereinabove. The question before us is as to whether the assessee's payments made towards services rendered in Qatar for its Nigerian projects were liable for TDS deduction or not. The assessee is a consultancy firm. Its payments had been made in respect of services utilized outside India. The source of income happens to be the Nigerian Projects situated outside India. The ld. CIT(A) has held that the payments in question are 'fee for technical services' and they are covered by exclusion u/s 9(1)(vii) of the Act. Reference has been made to the case law of Ajapa Integrated Project Management Consultant Pvt. Ltd. (supra). The Revenue's plea is that its appeal is pending u/s 260A of the Act. It does not point any distinction on facts. So, there is no ground to adopt a different approach in the present case."

- Aqua Omega Services (P.) Ltd. Vs. ACIT, 2013 (10) TMI 748 - ITAT Chennai Dated: 15-1-2013

  "17. It is clear from the above that the payments made by the assessee to non-resident consultants, were directly related to the Nigerian projects of the assessee. Assessee being engaged in consultancy business, the fees paid to such consultants on its projects abroad has to be considered as fees paid for services utilized in the business of the assessee outside India. Therefore, clearly Section 9(1)(vii)(b) of the Act applied and the income earned by such non-residents cannot be deemed to accrue or arising in India. Therefore, assessee had every reason to hold a bonafide belief

that no part of the payment had any element of income which was chargeable to tax in India. When the assessee held such a bonafide belief, it is clearly covered by the decision of Hon'ble Apex Court in GE India Technology Centre Pvt. Ltd. (supra) and decision of Special Bench of this Tribunal in Prasad Productions Ltd. (supra). This being so, assessee could not be put in a position where it can be visited with the rigours associated with non-deduction of tax at source. It cannot be fastened with any liability associated with non-deduction of tax at source on such payments. In these circumstances, application of Section 40(a)(i) of the Act was not called for. Ld. CIT(Appeals) was right in deleting the addition. No interference is called for. Ground No.3 raised by the Revenue is dismissed."

- Titan Industries Ltd. Vs. ITO, 2006 (6) TMI 423 - ITAT Bangalore Dated: 02-6-2006

"12. Keeping in view the fact that patent was registered outside country for making an income from a source outside the country. The amounts paid are covered in exception provided in section 9(1)(vii)(b).Hence, the assessee was not required to deduct tax at source. Moreover, it is not the case of revenue that professional fees paid to M/s Chang Leung Hvi and Li C PA Ltd., Hongkong are taxable in India and steps have been taken to tax the same. If the receipts are not taxable in the hands of recipient then payee is not required to deduct tax at source as per provisions of section 195 of the Income-tax Act."

18. Considering the facts of the case, above mentioned provisions of the Act and case laws relied upon by the assessee, the disallowance made by the AO and the ld. CIT(A) u/s 40(a)(i) of the Act is unwarranted and liable to be deleted.

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Payments to Carnegie Mellon University and Call Centre School LLC:

19. These disallowances made by the AO and confirmed by the ld. CIT(A) u/s 40(a)(i) of Rs.20,45,669/- are regarding the amounts paid to Carnegie Mellon University of Rs. 16,56,580/- and Call Centre School LLC of Rs.3,89,089.

20. It is relevant to note here that the assessee had entered into an agreement with Carnegie Mellon University, a non-profit Pennsylvania Corporation. As per such agreement, the employees were to undergo a course study with Carnegie Mellon University, wherein they achieve expertise in CMMI v1.2 course and become SEI Authorized Instructors to further grant the certification to assessee's customers.

21. These qualified and licensed instructors, who are employees of the assessee, impart trainings to the employees of assessee's customers and accordingly royalty is paid by the assessee to Carnegie Mellon University for the licensed trainings of each of such employees of assessee's customers.

22. Similarly, another agreement was entered with The Call Centre School LLC for using the trademarks of The Call Centre School LLC in the course of imparting licensed trainings conducted by the assessee through its certified employees to each of the employees of assessee's customers, against which royalty was paid by the assessee.

23. The assessed has duly furnished the details of rendering of such trainings. It is evident from such details that none of the trainings were rendered in India. The assessee has also furnished copy of invoices issued by both of these universities.

24. The AO has misinterpreted the nature of above mentioned transactions by holding it as a Fee for Technical Services. It is relevant to note the definition of Fee for Technical Services as enumerated in Explanation 2 to Section 9(1)(vii) of the Act which is also reproduced below for the sake of ready reference:

> *"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—*
>
> *…………….*
>
> *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".*

25. From a plain reading of the above, it is clear that the transaction entered into by the assessee nowhere falls within the definition of Fee for Technical Services. Therefore, the addition made by the AO by holding such amount as Fee for Technical Services is absurd and without any basis and is thus liable to be deleted.

26. Without prejudice to the above, it is to be noted here that the payments made by the assessee fall under the exclusionary provision of Section 9(1)(vi)(b) of the Act which is also reproduced hereunder:

> *"9. (1) The following incomes shall be deemed to accrue or arise in India:—*
>
> *(vi) income by way of royalty payable by—*
>
> *(a) the Government; or*
>
> *(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of 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 royalty is payable in respect of any right, property or information used or services utilized for the purposes of 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:"*

27. In the present case, trademarks have been used for imparting trainings to the employees of assessee's clients outside India and for the purpose of earning an income from a source outside India. No defect or discrepancy has been pointed out by the AO or the ld. CIT(A) in the chart furnished by the asseSSee. It is also not the case of the AO or the ld. CIT(A) that the details mentioned in the chart are vague or arbitrary. Thus, the income was even otherwise not taxable in the hands of the recipient in view of the specific exclusionary provisions of

Section 9(1) (vi)(b) of the Act. Reliance is placed on the following judicial pronouncements in this regard:

- Commissioner of Income-tax vs. Aktiengesellschaft Kuhnle Kopp and Kausch W. Germany by BHEL [2002] 125 TAXMAN 928 (MAD.) HIGH COURT OF MADRAS NOVEMBER 6, 2002

  "8. As far as royalty on export sales is concerned, that amount is also exempt under section 9(1)(vi). Though the royalty was paid by a resident in India, it cannot be said that it was deemed to have accrued or arisen in India as the royalty was paid out of the export sales and hence, the source for royalty is the sales outside India. Since the source for royalty is from the source situate outside India, the royalty paid on export sales is not taxable. The Appellate Tribunal was therefore correct in holding that the royalty on export sales is not taxable within the meaning of section 9(1)(vi).

  9. Accordingly, we answer the question of law referred to us in the affirmative, in favour of the assessee and against the revenue. No costs. "

28. Considering the facts of the case, above mentioned provisions of the Act and case laws relied upon by the assessee, the disallowance made by the AO and the ld. CIT(A) u/s 40(a)(i) of the Act is unwarranted and liable to be deleted.

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<u>Payments to the APM Group:</u>

29. This disallowance made by the AO and confirmed by the ld. CIT(A) u/s 40(a)(i) is regarding the amount of Rs.23,02,094/- paid to The APM Group on account of purchase of course material.

30. During the course of assessment proceedings, the AO has disallowed the above-mentioned expense by holding it to be of the nature Fee for Technical Services and alleging that since tax has not been deducted at source u/s 195 of the Act, the payment made to The APM Group is disallowed u/s 40(a)(i) of the Act. It is relevant to note the definition of Fee for Technical Services as enumerated in Explanation 2 to Section 9(1)(vii) of the Act.

31. From a plain reading of the above section, it is clear that the transaction entered into by the assessee nowhere falls within the definition of Fee for Technical Services. Therefore, the addition made by the AO by holding such amount as Fee for Technical Services is absurd and without any basis and is thus liable to be deleted.

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Payments to Call Centre Industry Advisory Council :

Payments to the British Computer Society:

32. This disallowance made by the AO and confirmed by the ld. CIT(A) u/s 40(a)(i) is regarding the amount of Rs.76,446/- paid to Call Centre Industry Advisory Council on account of online examination fee and Rs.4,45,809/- to the British Computer Society.

33. During the course of assessment proceedings, the AO has disallowed the above-mentioned expense by holding it to be of the nature Fee for Technical Services and alleging that since tax has not been deducted at source u/s 195 of the Act, the

payment made to The APM Group is disallowed u/s 40(a)(i) of the Act.

34. Article 12 of the DTAA with USA defines Fee for Included Services which is also reproduced below:

"4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

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

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

Notwithstanding paragraph 4, "fees for included services" does not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a);

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals making the payments; or

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for

professional services as defined in Article 15 (Independent Personal Services).

35. From a plain reading of the above mentioned provisions of the Act as well as DTAA, it is clear that the transaction entered into by the assessee do not postulate any kind of services in the nature of technical, managerial or consultancy. As per DTAA, simple rendering of services is not sufficient for a service to qualify as Fee for Technical Service when the expression "Make Available" is used within the definition of Fee for Technical Services. Rather, the provision of services should enable the recipient to make use of the technical knowledge etc. by himself without taking help from the provider of the services.

36. Reliance is also placed on the following judicial pronouncements in this regard:

- Raymond Ltd. Vs. DCIT 2002 (4) TMI891 - ITAT Mumbai Dated 24-4-2002

"91. Now we have to see if the meaning ascribed to the words "make available" by Mr. Dastur is acceptable or reasonable. Whereas section 9(1)(vii) stops with the "rendering" of technical services, the DTA goes further and qualifies such rendering of services with words to the effect that the services should also make available technical knowledge, experience, skills etc. to the person utilizing the services. These words are "which make available". The meaning ascribed by Mr. Kapila for the Department is that these words merely mean "to allow somebody to make use of, whether actually made use of or not", but in our opinion and with respect, this meaning does not take due note of the addition of such words to the "rendering of any technical or consultancy services". The meaning suggested by Mr. Kapila is embedded in the "rendering" of the services itself. When somebody "renders" services, it presupposes that somebody

else is "making use" of the same. But the "making use of" should be contrasted with the "making available". The "making available", in our opinion, refers to the stage subsequent to the "making use of stage. The qualifying word is "which" - the u§p of this relative pronoun as a conjunction is to denote some additional function the "rendering of services" must fulfill. And that is that it should also "make available" technical knowledge, experience, skill etc."

- Mahindra and Mahindra Limited Vs. DCIT 2009 (4) TMI 207 - ITAT Bombay Dated 9-4-2009

"In this context it becomes imperative to understand the meaning of the expression "make available" as used in this article. Make available means to provide something to one, which is capable of use by the other. Such use may be for once only or on a continuous basis. In our context to make available the technical services means that such technical information or advice is transmitted by the non-resident to the assessee, which remains at its disposal for taking the benefit therefrom by use. Even the use of such technical services by the recipient for once only will satisfy the test of making available the technical services to the assessee. If the non-resident uses all the technical services at its own end, albeit the benefit of that directly and solely flows to the payer of the services, that cannot be characterized as the making available of the technical services to the recipient."

- Bovis Lend Lease (India) (P.) Ltd. Vs. ITO, International Taxation, Ward - 19 (1), Bangalore 2009 (8) TMI 853 - ITAT Bangalore Dated 28-8-2009

"57. The term "make available" has a distinct meaning under the Treaty. It 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."

- Intertek Testing Services India Pvt. Ltd. 2008 (11) TMI 9 - Authority for Advance Rulings Dated 5-11-2008

"10.5. Let us now analyse clause (c) of Article 13.4 and then explore the meaning of the crucial phrase "make available". There are three ingredients or requirements in clause (c). The first requirement is that the payment is made by way of consideration for the rendering of technical or consultancy services (including the provision of services of technical or other personnel). The second requirement is that those services should make available technical knowledge, skills, etc. to the recipient of services". The third part of the definition speaks of "development and transfer of a technical plan or technical design" with which we are not concerned."

37. In view of the above mentioned facts of the case and case laws relied upon by the assessee, the addition made by the AO by holding such amount as Fee for Technical Services is absurd and without any basis and is thus liable to be deleted.

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Payments to RADTAC:

38. This disallowance made by the AO and confirmed by the ld. CIT(A) u/s 40(a)(i) is regarding the amount of Rs.5,33,527/ paid to RADTAC in relation to services rendered for earning income from outside India which specifically falls under the exclusionary provision of Section 9(1)(vii)(b) of the Act.

39. The facts reveals that the assessee had utilized the professional services of RADTAC in order to deliver the Certified Master Training under the terms of agreement dated 10.11.2011. Therefore, the services rendered by RADTAC have been utilized outside India and the payment which has been made to RADTAC is for the purpose of earning income from a source outside India which specifically falls under the exclusionary provisions of Section 9(1)(vii)(b) of the Act.

40. Reliance is also placed on the following judicial pronouncements this regard:

- DCIT Vs. M/s Hofincons Infotech and Industrial Services Pvt. Ltd., 2015 (3) TMI 876 – ITAT Chennai dated 18.8.2014
- Aqua Omega Services (P.) Ltd. Vs ACIT, 2013 (10) TMI 748 – ITAT Chennai dated 15.1.2013
- DCIT Vs. Ajapa Integrated Project Management Consultants (P.) Ltd., 2012 (6) TMI 404 – ITAT Chennai dated 22.6.2011
- Titan Industries Ltd. Vs. ITO, International Taxation, 2006(6) TMI 423 – ITAT Bangalore dated 2.6.2006

"12. Keeping in view the fact that patent was registered outside country for making an income from a source outside the country. The amounts paid are covered in exception provided in section 9(1)(vii)(b). Hence, the assessee was not required to deduct tax at source. Moreover, it is not the case of revenue that professional fees paid to M/s. Chang Leung Hvi and Li C PA Ltd., Hong kong are taxable in India and steps have been taken to tax the same. If the receipts are not taxable in the hands of

recipient then payee is not required to deduct tax at source as per provisions of section 195 of the Income-tax Act."

41. Considering the facts of the case, above mentioned provisions of the Act and case laws relied upon by the assessee, the disallowance made by the AO and the ld. CIT(A) u/s 40(a)(i) of the Act is unwarranted and liable to be deleted.

Payments to Mr. Tejinder Pal Singh:

42. This disallowance made by the AO and confirmed by the ld. CIT(A) u/s 40(a)(i) is regarding the amount of Rs.2,56,585/- paid to Mr. Tejinder Pal Singh in relation to services rendered for earning income from outside India which specifically falls under the exclusionary provision of Section 9(1)(vii)(b) of the Act.

43. It is relevant to note here that the assessee had utilized the services of Mr. Tejinder Pal Singh, a person resident of USA for provision of services, in terms of agreement dated 15.10.2011. Therefore, the services rendered by Mr. Tejinder Pal Singh have been utilized outside India and the payment which has been made to Mr. Tejinder Pal Singh is for the purpose of earning income from a source outside India which specifically falls under the exclusionary provisions of Section 9(1)(vii)(b) of the Act.

44. Reliance is also placed on the following judicial pronouncements in this regard:

- DCIT Vs. M/s Hofincons Infotech and Industrial Services Pvt. Ltd., 2015 (3) TMI 876 – ITAT Chennai dated 18.8.2014

- Aqua Omega Services (P.) Ltd. Vs ACIT, 2013 (10) TMI 748 – ITAT Chennai dated 15.1.2013
- DCIT Vs. Ajapa Integrated Project Management Consultants (P.) Ltd., 2012 (6) TMI 404 – ITAT Chennai dated 22.6.2011
- Titan Industries Ltd. Vs. ITO, International Taxation, 2006(6) TMI 423 – ITAT Bangalore dated 2.6.2006

45. Article 12 of DTAA entered into with USA specifically excludes the service rendered from the definition of Fee from Included Services. Such Para of Article 12 is reproduced below for the sake of ready reference:

ARTICLE 12

ROYALTIES AND FEES FOR INCLUDED SERVICES

4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

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

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

5. Notwithstanding paragraph 4, 'fees for included services'' does not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a) ;

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(o) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals making the payments ; or

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services)."

46. It is clear from a plain reading of the above that Para 5 has specifically excluded the similar payment made to individuals for professional services which are governed by Article 15 of DTAA from the definition of Fee for Included Services.

47. Article 15 of the DTAA with USA are reproduced hereunder for the sake of ready reference:

ARTICLE 15

INDEPENDENT PERSONAL SERVICES

1. Income derived by a person who is an individual or firm of individuals (other than a company) who is a resident of a Contracting State from the performance in the other Contracting State of professional services or other independent activities of a similar character shall be taxable only in the first-mentioned State except in the following circumstances when such income may also be taxed in the other Contracting State:

> *(a) if such person has a fixed base regularly available to him in the other Contracting State for the purpose ofperforming his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or*
>
> *(b) if the person's stay in the other Contracting State is for a period or periods amounting to j or exceeding in the aggregate 90 days in the relevant taxable year."*

48. Thus, from a plain reading of the above mentioned provisions it is clear that income derived by an individual being resident of a contracting state is taxable in that contracting state only i.e. country of domicile except where such individual has a fixed base in other contracting state or period of stay of such individual in other contracting state exceeds 90 days in the relevant taxable year.

49. The fact reveals that Mr. Tejinder Pal Singh does not have a fixed base in India nor does his stay in India has exceeded a period of 90 days.

50. Thus, the income earned by Mr. Tejinder Pal Singh is taxable in the country of his residence i.e. USA and not chargeable to tax in India. Therefore, no TDS u/s 195 ought to have been deducted by the assessee on making such payment to Mr. Tejinder Pal Singh.

51. Considering the facts of the case, above mentioned provisions of the Act and case laws relied upon by the assessee, the disallowance made by the AO and CIT(A) u/s 40(a)(i) of the Act is unwarranted and liable to be deleted.

52. In the result, the appeals of the assessee are allowed.

Order Pronounced in the Open Court on 05/08/2024.

Sd/-	**Sd/-**
(Madhumita Roy) **Judicial Member**	**(Dr. B. R. R. Kumar)** **Accountant Member**

Dated: 05/08/2024
Subodh Kumar, Sr. PS
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR