आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री एबी टी. वर्की, न्यायिक सदस्य एवं श्री जगदीश, लेखा सदस्य के समक्ष
BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND
SHRI JAGADISH, ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.1319, 1320, 1321, 1322 & 1323/Chny/2024
निर्धारण वर्ष /Assessment Years:2014-15, 2015-16, 2016-17, 2017-18 & 2020-21

Janet Christine Depenning, 120, Velachery Main Road, Guindy,Chennai – 600 032. [PAN: AEBPD 2408L]	**Vs.**	The Income Tax Officer, International Taxation ward-1(1), Chennai.
(अपीलार्थी/**Appellant)**		**(**प्रत्यर्थी/**Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Shri Sanjeev Aditya, C.A
प्रत्यर्थी की ओर से /Respondent by	:	Smt. G. Saratha, Addl. CIT
सुनवाई की तारीख/Date of Hearing	:	18.11.2024
घोषणा की तारीख /Date of Pronouncement	:	31.12.2024

आदेश / **O R D E R**

PER JAGADISH, A.M :

Aforesaid five appeals filed by the assessee for Assessment Years (AYs) 2014-15 to 2017-18 & 2020-21 arises out of identical orders of Learned Commissioner of Income Tax (Appeals)-16, Chennai [hereinafter "CIT(A)"] dated 06.03.2024.

2. The facts in all the five appeals of the assessee are identical and issues are common hence, we proceed to pass a common order. For brevity, we shall take up the appeal in ITA

No.1319/Chny/2024 for A.Y 2014-15 as lead case. The grounds of appeal raised by the assessee for A.Y 2014-15 are as under:

> *"1. Non-Deduction of tax on foreign payments- Rs.6,06,14,643*
>
> *That on facts and as well as on law, the Hon'ble CIT(A) erred in upholding the decision of the Income Tax Officer in not considering the fact that the payments made to lawyers are not technical in nature and the payments to lawyers are to be considered as a independent personal service/business profit as per the DTAA which do not warrant a tax deduction at source if the Permanent establishment of the payee is not in India*
>
> *2. Period of limitation*
>
> *That on facts, the learned CIT(A) erred in upholding the decision of the Income Tax Officer in not considering the fact that the time limit of 7 years is applicable only for payments to resident and for payments to non-resident specific time limit is not mentioned under the act and therefore ought to have been completed within a reasonable time frame which in any case cannot be seven years and to this extent the order is beyond jurisdiction.*
>
> *For these reasons and for any other reason that may be adduced at the time of hearing, it is prayed that the Hon'ble Tribunal may be pleased to direct that the order of the Income Tax Officer, Internation Taxation Ward 1(1), Chennai to the extent agitated may be set aside insofar as it relates to the demand as against the provisions of the law and contrary to the facts and circumstances of the case and allow the appellant's contention."*

3. Ground No.2 has not been pressed by the assessee therefore, no adjudication is required.

4. The brief facts of the case are that the assessee is individual and engaged in providing services of trademarks, patents and other intellectual property rights. The assessee provides in twin services for

registration of intellectual property by deploying attorneys employed in its own concern as well as by tying up with business entities engaged in the same business abroad and outsourcing the registration process. In order to carry out registration in foreign countries, such foreign parties are engaged and a professional fee is paid for the services rendered by such foreign entities. The ITO, International Taxation, Ward-1(1), Chennai (A.O) in the order passed u/s. 201(1)/201(1A) of the Act has held that the remittances made by the assessee to the foreign attorneys is fee for technical services as per the provisions of Section 9(1)(viii) of the Act and hence, income deemed to be accrued in India and therefore, the assessee ought to have deducted the tax as per the Section 195 of the Act on these payments. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) and the Ld. CIT(A) has confirmed the order of A.O holding the foreign remittances are in the nature of fee for technical services and tax needs to be deducted u/s. 195 of the Act.

5. The Ld. Authorized Representative (AR) of the assessee has submitted that the Ld AO/CIT(A) have not considered the provisions of DTAA that payment made to attorneys in foreign countries are to be considered as independent personal services/business and do not warrant a tax deduction at source if the permanent establishment of

the payee is not in India. The Ld. AR submitted that the Ld AO though observed that relevant DTAA provides the clause of independent personal services which includes legal services, and the assessee is eligible to avail the benefit but has not examined the DTAA and held the payments as fee for technical services as per explanation 2 to section 9(1)(vii) of Income Tax Act.

6. The Departmental Representative (DR), on the other hand, supported the orders of authorities below.

7. We have heard the rival submissions and perused the materials available on record. The assessee is engaged in providing intellectual property service, which requires patents and trade mark to be registered in various countries. The assessee has engaged foreign associate and paid them without deducting the tax u/s 195 of the Act. The assessee has argued that the foreign associates are predominantly individuals and in some cases are body corporate and these services rendered are either professional services or business profit as per respective DTAA. The Ld. AR has argued that these services are taxable in India only if the foreign entity operates through a business connection in India and as per DTAA between India and

the respective counties and based on the status of entity, the services of foreign authorities are covered either under independent personal services (if the individual or firms) are business profit if they are firms of a company. The Ld. AR therefore has argued that there is no liability to deduct the tax. The A.O in the order passed u/s. 201/201(1A), has held the payment as fee for technical services as per Explanation-2 to Section 9(1)(viii) of the Act. Though, the AO in the order has observed that if the relevant DTAA provides the clause of independent personal services which includes legal services, the assessee is eligible to available the benefit. However, he has considered entire amount paid as fee for technical services and levied tax to be deducted of Rs. 60,61,464/- and interest u/s. 201(1A) of the Act of Rs. 53,98,637/- without examining the relevant DTAA. The issue of deducting tax on fee paid to foreign associate has come up before ITAT, Kolkata Bench in the case of ACIT vs. Sri Subhatosh Majumder in ITA No.2006/Kol/2017 for A.Y 2011-12 dated 26.02.2020 (Kol.-Trib.), wherein the Bench while holding the payments as fee for technical services, has directed the A.O to examine whether payments were non taxable in India, because of the beneficial provisions of the DTAAs with respective countries as under:

10. We have heard the rival submissions & perused the written Notes on Arguments furnished by both the parties. We have also carefully gone through the judicial decisions on which reliance was placed by the parties in support of their respective pleadings. We have also examined the orders of the coordinate bench of this Tribunal in assessee's own case for the earlier years in which similar issue was decided in his favour. Having considered these documents, we shall now deal with respective contentions put forth by the parties.

11. In the present case the assessee is a Patent Attorney who renders legal services in his capacity as an Advocate in India. The assessee has a wide client base which inter alia includes multi-national corporations as well as reputed corporate houses of the country. The clients of the assessee hold valuable IPRs which need registrations with the Patent or IP authorities so that IPRs are protected from unauthorized use by others. Since the clients of the assessee have markets beyond the boundaries of India, they seek assessee's assistance for obtaining registrations under the patent laws of the foreign countries where products of the customers are marketed under their IPRs. In order to comply with the legal formalities associated with registration of IPRs with the patent authorities of the respective countries, the assessee seeks assistance of IP attorneys carrying on similar professional activities in the respective countries where the IP registrations are sought to be obtained. For the services rendered by the foreign patent attorneys, the fees are paid by the assessee because their services are engaged by him. It is the assessee's primary contention that the fees charged by the foreign attorneys were reimbursed by his clients along with his own fees. It was therefore his contention that since the amounts paid by the assessee were in the nature of pure reimbursements, no income element was involved in the remittances made to foreign attorneys and therefore no disallowance under Section 40(a)(i) read with Section 195 of the Act was warranted in his case.

12. While supporting the order of the Ld. CIT(A), the Ld. AR of the assessee put much emphasis on the fact that in the assessee's own case for the AYs 2006-07, 2008-09 & 2009- 10, the disallowance u/s 40(a)(i) was made but the same was deleted by this Tribunal in its order dated 27.11.2015. The Ld. AR therefore vehemently claimed on the principle of judicial consistency alone, the order of the Ld. CIT(A) deserved to be upheld since he had granted the relief to the assessee by following the order of his predecessor which was upheld by the Tribunal. After due consideration of the submissions and perusing the order of this Tribunal for AYs 2006-07, 2008-09 & 2009-10, we are unable to agree with the contention put forth by the assessee. It is

settled legal proposition that the principle of res judicata is not applicable in tax proceedings. At the same time, principle of judicial consistency is also equally applicable in the tax proceedings provided that there is no change either in the factual matrix or in the relevant legal provisions governing the transaction during the intervening period. In this regard, useful reference can be made to the following observations of the Hon'ble Supreme Court in the case of Radhasoami Satsang Vs CIT (supra) :

> *"13. We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.*
>
> *14. On these reasonings in the absence of any material change justifying the revenue to take a different view of the matter—and if there was no change it was in support of the assessee—we do not think the question should have been reopened and contrary to what had been decided by the Commissioner in the earlier proceedings, a different and contradictory stand should have been taken." (emphasis supplied)*

13. On examination of the provisions of Section 9(1)(vii) of the Act read with Explanation to Section 9(2) which was substituted by the Finance Act, 2010, we note that prior to the amendment in order to attract the rigors of Section 195 requiring tax deduction at source from 'fees for technical services', it was necessary for the Revenue to show that the technical services as defined in Section 9(1)(vii) of the Act were rendered as well as consumed in India. Since in the earlier years, the Tribunal found as a matter of fact that no services were rendered by the foreign attorneys in India, it was held that as per the law, which existed at the time when the assessee made payments to foreign attorneys, he had no obligation to deduct tax under Section 195 of the Act. Consequently therefore no disallowance was warranted u/s 40(a)(i) of the Act. We however find that at the time when the matter was heard by the Tribunal, amendment to Section 9(2) of the Act, was already in force. Taking judicial note of the amendment which, widened the scope of TDS provisions qua the payments made to foreign attorneys, the Tribunal had observed as follows:

> *"20. From the above facts and circumstances of the case and also precedents cited above, we are of the view that till amendment in Explanation to sec. 9(2) of the Act, the prevailing legal position was that unless the technical services were rendered in India, the fees for such services could not be brought to tax under Section 9(1)(vii) of the Act. The law amended was undoubtedly retrospective in nature but so*

far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax deductor is not expected to know how the law will change in future. A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. The tax withholding obligations from payments to non-residents, as set out in Section 195 of the Act, require that the person making the payment "at the time of credit of such income to the account payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force". When these obligations are to be charged at the point of time when payment is made or credited, whichever is earlier, such obligations can only be discharged in the light of the law as it stands that point of time. Section 40(a)(i) of the Act provides that inter alia, notwithstanding anything to the contrary in sections 30 to 38 of the Act, any amount payable outside India, or payable in India to a non-resident, shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession" on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted. Accordingly, the assessee cannot be faulted for not deducting TDS and consequently, the deletion of disallowance by CIT(A) is confirmed. This common issue of all the three appeals of revenue is dismissed."

14. From the foregoing findings of the Tribunal, it is quite evident that the Tribunal had upheld the assessee's claim for non-deduction of tax at source having regard to the pre- amended provisions of Section 9(1)(vii) read with Section 9(2) of the Act even after taking note of the fact that amendment of 2010 was made retrospectively. In the said decision there was explicit admission that the decision was rendered because of provisions of law during pre-amended era and therefore the same would not hold good once the amended provisions of law came in force and the amended provisions of Section 9(1)(vii) were applicable during the year before us. As rightly pointed out by the Ld. CIT, DR, the amended provisions were brought in the statute on 08.05.2010 and therefore it was applicable to the payments made by the assessee to foreign attorneys during the previous year relevant to AY 2011-12. In the circumstances therefore the assessee could not avail benefit of the order of this Tribunal which was rendered in the context of pre- amended provisions of Section 9(1)(vii) read with Section 9(2) of the Act. We therefore find that the Ld. CIT(A) was legally not justified in following the order of his predecessor for AY 2006-07 when the legal position was materially different.

15. The second limb of the ld. AR's argument was that the payments which the assessee made to foreign patent attorneys did not come within the ambit of the term 'fees for technical services'. According to Ld. AR, the services performed by the foreign attorneys were mere clerical or executionary in nature which did not involve

any specialized knowledge nor it involved rendering of any advisory service. In order to understand the issue, it is first necessary to set out the relevant provisions of Section 9(1)(vii) of the Act, which define the term 'fees for technical services'.

"income by way of fees for technical services payable by—

(a) The Government; or

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

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

16. From the foregoing definition, it is noted that any payment which is made for rendering of technical, consultancy or managerial services, such payment is regarded as 'fees for technical services' and the income embedded therein is deemed to accrue or arise in India. In the present case, admittedly payments were made to foreign attorneys who were professionally qualified to render legal services. It is also well known fact that under the relevant Patent / IP laws, the applicant or attorney representing him is required to comply with the technical formalities as well as legal procedures contained in relevant laws, rules and regulations of the countries where the patent/IPR is sought to be registered. As such, having knowledge, experience and expertise in the specialized field of IP laws is an essential pre-requisite for rendering the services. In fact practicing IP laws is one of the specialized branch of legal practice and only few attorneys are well versed with the intricacies of the IP laws as also with regulations and technicalities of the procedures governing registrations to such rights. The bone of contention however in the present case is whether the services rendered were in the nature of 'consultancy'. It was vehemently argued by the Ld. AR that the services rendered by the foreign attorneys were not even 'consultancy' in nature but purely clerical or executionary in nature and therefore did not come within the ambit of Section 9(1)(vii) of the Act. On the other hand, it was the Ld. CIT, DR's contention that having regard to the nature of services, the foreign attorney did render not only 'consultancy' services but also involved a technical element which enabled the assessee and his clients to comply with the IP laws of the relevant country and obtain IPR registrations in conformity with the relevant rules and regulations of that country. But for provision of advisory and execution services by the foreign attorneys, the assessee could not have successfully provided to his clients IP registrations in the respective countries where patents/IPRs were registered.

17. In our considered view, the moot point to be adjudicated in the present appeal therefore is whether the legal services rendered by the foreign attorneys could be classified as 'consultancy services' so as to bring these payments within the ambit of Section 9(1)(vii) of the Act. In this regard, we note that the term 'consultancy' service is not defined in the Act. In the circumstances one must understand the term as understood in normal commercial parlance. As per Oxford Dictionary, the meaning of the word 'consultancy' is "a professional practice that gives expert advice within a particular field". Further, Wikipedia defines 'consultant' as a professional who provides expert advice in a particular area such as security (electronic or physical), management, education, accountancy, law, human resources, marketing (and public relation), finance, engineering, science or any of many other specialised fields." Applying these definitions, we note that the assessee's services were engaged by his clients having regard to his specialized knowledge and experience dealing with IP laws as well as procedures involved in obtaining IPR registrations. The IP laws of each country contain special provisions and the regulations there under prescribe detailed technical and bureaucratic procedures which need to be complied with before Patent or IPR registrations are granted. It is a well-established fact that the Patents or IP registrations once granted by the authority, confer on the holder very valuable intangible rights which substantially add to the value of the business carried on by the holder. Since the laws conferring IP rights on the parties are complex in nature, rendering of services in the field of IP laws, constitutes specialized branch in the field of legal service. We therefore find that the assessee as well as the foreign associates appointed by him enjoyed expertise and specialized knowledge in the field of IP laws and procedures associated with obtaining legal protections or registrations under the relevant laws governing IP rights in the respective countries. It is with the use and aid of the advice given by the foreign patent attorneys that the assessee and/or his clients were able to prepare technically intricate documentation, necessary for filing Patents and other IP rights applications in the foreign countries in compliance with their respective IP laws. The foreign attorneys not only advised the assessee in preparing the documentation necessary for submission of applications but also represented the applicants before the Patent/IP authorities and provided clarifications and explanations necessary for grant of registration. We therefore note that on the given facts of the case, but for the consultancy or advisory services rendered by foreign attorneys, the assessee or his clients would not have been able to obtain the Patents or IP registrations in the foreign countries.

18. We also find it relevant to hold that the Ld. CIT, DR rightly relied on the judgment of the Hon'ble Supreme Court in the case of GVK Industries Ltd Vs ITO (supra), wherein meaning of the term 'consultancy service' for the purposes of Section 9(1)(vii) after its amendment in 2010 was explained by the Hon'ble Supreme Court. In the said judgment the Hon'ble Court observed as follows:-

> *"34. In the case at hand, we are concerned with the expression "consultancy services". In this regard, a reference to the decision by the Authority for Advance Ruling P. No. 28 of 1999, In re [2000] 242 ITR 208/[1999] 105 Taxman 218 (AAR - New Delhi), would be applicable. The observations therein read as follows:*
>
> *"By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it."*
>
> *35. In this context, a reference to the decision in CIT v. Bharti Cellular Ltd. [2009] 319 ITR 139/[2008] 175 Taxman 573 (Delhi), would be apposite. In the said case, while dealing with the concept of "consultancy services", the High Court of Delhi has observed thus:*
>
> *'Similarly, the word "consultancy" has been defined in the said Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as "ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval from for a proposed action". It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant.'*
>
> *36. In this context, we may fruitfully refer to the dictionary meaning of 'consultation' in Black's Law Dictionary, Eighth Edition. The word 'consultation' has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It means a meeting in which a party consults or confers and eventually it results in human interaction that leads to rendering of advice.*
>
> *37. As the factual matrix in the case at hand, would exposit the NRC had acted as a consultant. It had the skill, acumen and knowledge in the specialized field i.e. preparation of a scheme for required finances and to tie-up required loans. The nature of activities undertaken by the NRC has earlier been referred to by us. The nature of service referred by the NRC, can be said with certainty would come within the ambit and sweep of the term 'consultancy service' and,*

therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be taxable under the head 'fee for technical service'. Once the tax is payable/paid the grant of 'No Objection Certificate' was not legally permissible. Ergo, the judgment and order passed by the High Court are absolutely impregnable."

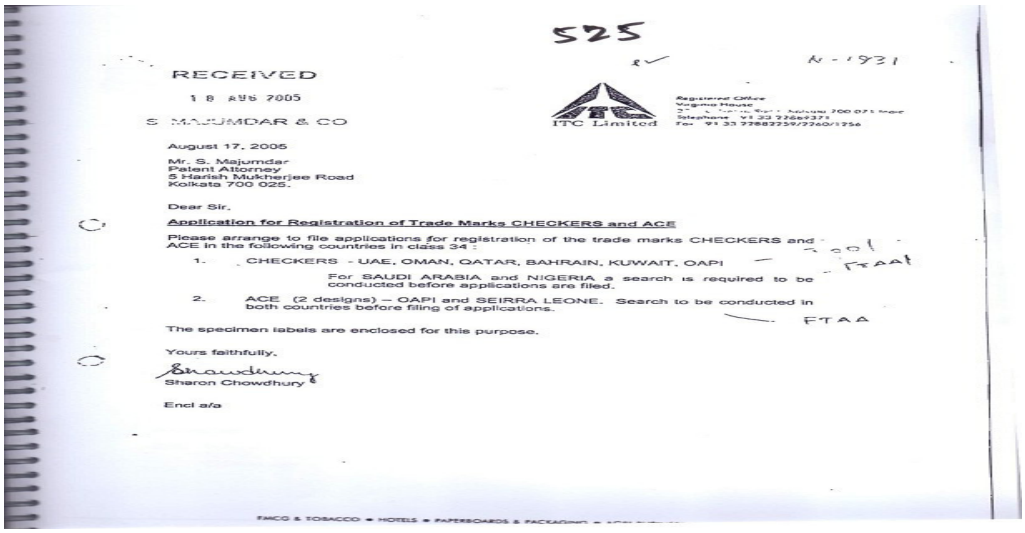
19. Applying the ratio laid down in the judgment (supra), we are of the view that the services which the foreign attorneys rendered to the assessee squarely came within the ambit of Section 9(1)(vii) of the Act. In his rebuttal, the ld. AR sought to distinguish the judgment of the Hon'ble Supreme Court stating that the facts of the assessee's case were distinguishable because unlike in the case before the Hon'ble Apex Court, the non-resident attorneys had merely performed executionary functions which were rendered abroad and also utilized outside India. We are however unable to persuade ourselves to agree with the contention put forth by the Ld. AR of the assessee. In the first instance, the Hon'ble Supreme Court in the case of GVK Industries Ltd (supra) defined the expression 'consultancy services' in the context of Section 9(1)(vii) and the services rendered by foreign attorneys squarely come within the ambit of such definition. This point has not been negated by the Ld. AR in his submissions. Instead the case made out by the Ld. AR is that the services were rendered abroad and utilized abroad and therefore fell within the exception carved out within Section 9(1)(vii)(b) of the Act.We therefore hold that the ratio laid down in the said judgment is very much relevant in deciding the present appeal.

20. We note in assessee's case his services were engaged by the Indian clients for obtaining registration of patents and IPRs owned by them in foreign jurisdictions. Having obtained the mandate from his clients for obtaining the patent registrations in foreign jurisdictions, it was entirely at the discretion of the assessee to find ways and means to complete the job entrusted by the clients. Instead of providing services on his own, the assessee appointed foreign associates for services such as filing of patent applications, making representations before IP authorities, obtaining registrations from statutory authorities of the respective foreign countries etc. The fact however remains that the services of the foreign attorneys were engaged solely at the behest of the assessee for fulfilling his own commitments to his clients while carrying on his professional work in India. The source of income in the assessee's hands was solely located in India and for the purpose of earning income from the Indian source, the assessee had called upon his foreign associates to render certain services for which payments were made by him. We therefore find that the payments made to the foreign attorneys were used by the assessee while discharging his professional commitments in India and therefore the conditions prescribed in Section 9(1)(vii) were satisfied.

21. As regards the Ld. AR's contention that the assessee had acted only as a facilitator or pass through entity while making payments to the foreign attorney and on that ground the payment made were in the nature of pure reimbursement. In support of this averment the Ld. AR referred to the Pages 499 to 1121 of Paperbook – 3 & 4, which contained appointment letters issued by the clients to the assessee, assessee's letters of engagement issued to the foreign associates, correspondences between the assessee and his clients as also between the assessee and the foreign associates. The assessee also furnished copies of the invoices raised by him on his clients in India as also the copies of the invoices which the assessee received from foreign associates, copies of the payment instructions etc. On scrutiny of the documents furnished it however appeared that there was no tangible material available in these documents which substantiated the Ld. AR's contention that the payments which the assessee made to the foreign associates was in the nature of pure reimbursement. In fact it appeared that most of the documents furnished in the paper book did not pertain to the tansactions of the relevant year. In view of these facts, the assessee's case was re-fixed for clarification on 07.02.2020 and the assessee was specifically requested to furnish documents for the relevant year inter alia including the audited financial statements for the FY 2010-11, letters of appointment issued by clients for the work performed during the relevant year, letters of engagement issued to foreign associates in the relation to the payments made to them during the relevant year, corresponding copies of communications between the assessee and clients as also between the assessee and foreign associates and other relevant documents which would substantiate that the payments made were in the nature of pure reimbursement which would prove that there was existed privity of contract between the client and the foreign associates. In response the Ld. AR of the assessee furnished Paper Book – 5 consisting of Pages 1122 to 1185 and a convenience compilation comprising of 113 pages. On scrutiny of the documents so furnished it was however noted that although the assessee has furnished copies of communications between the assessee and clients as also between the assessee and foreign associates along with supporting invoices, there is nothing discernible in these documents on the basis of which it can be held that there existed direct and proximate nexus between the clients and the foreign associates for rendering services and the assessee was to act only as an intermediary. We did not find any letters of appointment issued by the clients in relation to the scope of work to be performed on the basis of which we could hold that the appointment of foreign associates was made by the assessee on the specific instructions or request of the assessee and for which the assessee could be held to be a mere agent requiring him only to facilitate payment. We also note from the copies of the invoices raised by the foreign associates that the privity of work was between the assessee and the foreign associates and the work was

performed by them in terms of the appointment made by the assessee. From the copies of the invoices as also the communication between the parties, it was not discernible that the foreign associates was having any direct contact with the client of the assessee so as to hold that the assessee acted only as an intermediary.

22. In the course of hearing on 7.02.2020, in response to the query, the assessee himself clarified that there may be instances where the appointment letters were issued by the clients in the earlier years but the work was performed in the relevant year and therefore there may not be any direct evidence of appointment which is dated in the period 01.04.2010 to 31.3.2011. In light of the foregoing therefore to ascertain the nature of relationship between the parties, we may refer to the letter of appointment issued by M/s ITC Limited to the assessee (Page 525 of paper book) engaging him to register their patent in several countries:



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S. MAJUMDAR & CO

ITC Limited

Registered Office
Virginia House
37, J. L. Nehru Road, Kolkata 700 071 India
Telephone : 91 33 2288 0371
Fax : 91 33 2288 2329/2240/1256

August 17, 2005

Mr. S. Majumdar
Patent Attorney
5 Harish Mukherjee Road
Kolkata 700 025.

Dear Sir,

Application for Registration of Trade Marks CHECKERS and ACE

Please arrange to file applications for registration of the trade marks CHECKERS and ACE in the following countries in class 34 :

1. CHECKERS - UAE, OMAN, QATAR, BAHRAIN, KUWAIT, OAPI
   For SAUDI ARABIA and NIGERIA a search is required to be conducted before applications are filed.
2. ACE (2 designs) – OAPI and SEIRRA LEONE. Search to be conducted in both countries before filing of applications.

The specimen labels are enclosed for this purpose.

Yours faithfully,

Sharon Chowdhury

Encl a/a

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23. From the above engagement letter, it is evident that M/s ITC Limited had engaged the services of the assessee for filing application for registration of trade marks 'Checkers' and 'Ace' in several foreign countries. From the terms of appointment, it is evident that nowhere the assessee's client had even suggested that for executing the said work, the assessee should engage services of any particular foreign attorney or that the Indian client had identified any particular foreign attorney with whom the assessee was required to coordinate with for fulfilling his professional commitment. In what manner the assessee was to perform and fulfill the assigned tasks was left to the sole discretion of the assessee. We therefore find that the contractual terms between the assessee and his client nowhere prescribed that the client would be reimbursing the costs and expenses incurred by the assessee while discharging his obligations under the terms of engagement. We therefore do not find any material available in the records from

which we can infer that there was direct privity of contract between the clients and the foreign attorneys and the assessee merely acted as a pass through facilitating the payment to the foreign attorneys. In this factual background therefore we are unable to accept the plea of assessee that the payments made by him to his foreign associates were in the nature of pure reimbursement and consequently TDS provisions were not applicable. On the contrary, we find that the foreign attorneys performed the services at the behest of the assessee for which the requisite invoices were raised on the assessee and these were paid by him. It is for this reason that the invoiced amounts were debited by way of assessee's own expenditure in his personal Profit & Loss Account. We also note that prior to making the remittances to the foreign attorneys, the assessee had filed certificates with his banker in prescribed Form 15CB certified by Chartered Accountant. In the said certificate, these payments were characterized as fees for professional services. In the Form A2 accompanying the remittance instruction, the purpose of payment was described as "Associate Fee". We thus note that the plea of the assessee that these payments were in the nature of 'pure reimbursements' and hence did not require tax deduction u/s 195 of the Act due to absence of income element stands disproved by the contemporaneous documents which the assessee himself produced before us.

24. The Ld. AR further sought to avail the benefit of the exception carved out in Section 9(1)(vii)(b) of the Act on the premise that by obtaining patents/IPR registrations abroad, the clients of the assessee created sources of income outside India and since the services were rendered by the foreign attorneys in connection with such foreign source, the income did not deem to accrue or arise in India warranting deduction of tax u/s 195 of the Act. As we observed in the preceding paragraph 20, the services of the foreign attorneys were not engaged by the assessee's clients in whose favour the patents or IPRs were registered in foreign countries. Instead the services were engaged by the assessee while in discharge of his professional obligations in India. As such, the source of income in connection with which the services of foreign attorneys were used, was located in India. We also note that the mere fact that the Patents or IPs registrations in foreign countries granted protection to the Indian clients within the foreign territories, did not create any 'source of income' for such clients outside India. The protection under the foreign IP laws did not by itself connstitute "source" of any income in a foreign country. Nothing has been brought on record by the assessee to show that the clients on whose behalf these Patents/IP were registered had established PEs/branch etc. in such foreign countries so as to hold that the payments were made in relation to source of income located outside India. Viewed from any angle therefore we are

unable to agree with the Ld. AR's submissions that the payment made to foreign attorneys fell within the exception carved out Section 9(1)(vii)(b) of the Act.

25. The Ld. AR placed heavy reliance on the fact that the ADIT(IT)-2(1), Kolkata had granted a certificate u/s 195 of the Act authorizing the assessee to pay legal & professional fees to Merchant & Gould, United Trademark & Patent Services, Saba& Co., Elisabet Berbery & Wuesthoff & Wueshoff without deduction of tax on 09.09.2010. Since the said certificate was issued after the amendment in Section 9(2) of the Act by the Finance Act, 2010 came in force, the Ld. AR claimed that the Revenue had in principle accepted the assessee's contention that he had no obligation to deduct tax u/s 195 before remitting the foreign attorney fees. The Ld. AR therefore argued that by the principle of estoppel, the AO was precluded from making disallowance u/s 40(a)(i) because the alleged default of non- deduction of the tax u/s 195 was not attributable to the assessee. The Ld. CIT, DR placed before us the submissions filed by the assessee in the course of proceedings u/s 195 of the Act wherein the assessee had inter alia claimed that the payment was in the nature of pure reimbursement having no income element. In the said letter, the assessee had compared himself with an airline agent who issues air tickets in favour of his customers. The Ld. CIT, DR therefore submitted that since the assessee did not fairly and correctly set out the true and correct facts the certificate u/s 195 was erroneously granted. He submitted that while adjudicating the appeal, the Tribunal should decide the issue taking into consideration true and correct facts and applicable legal provisions of the Act. Having considered the material facts and evidences before us, we note that assessee's contention that the payments made by him to foreign attorneys were in the nature of 'pure reimbursements' is found to be factually incorrect. We note that the certificate u/s 195 was issued by the ADIT(IT)-2(1), Kolkata only in respect of payments of USD 3722.28, USD 3815.00, USD 380.00, USD 3793.85&Euro 10217.00 to Merchant & Gould, United Trademark & Patent Services, Saba& Co., Elisabet Berbery and Wuesthoff & Wueshoff respectively. In our considered opinion, no disallowance under Section 40(a)(i) was warranted in respect of the aforesaid three payments for which the assessee had obtained NIL certificates u/s 195 of the Act from the ADIT(IT)-2(1), Kolkata. However the mere fact that the assessee obtained certificates u/s 195 of the Act in relation to three specific payments by itself did not grant blanket immunity to the assessee in respect of other remittances made to the foreign attorneys. In adjudicating the question of allowability of the expenditure, where tax was admittedly not deducted u/s 195 nor certificate u/s 195 was obtained, we need to take into consideration the relevant facts and applicable legal provisions. As rightly stated by the Ld. CIT, DR; there is no estoppel

in law and therefore merely because in few cases the Department had issued NIL tax deduction certificate u/s 195 cannot be the sole reason for claiming that every payment made by the assessee to foreign attorneys was not liable to tax in India.

26. In this regard, useful reference can be made to the decision of the Hon'ble Karnataka High Court in the case of CIT Vs Bovis Lend Lease (I) Ltd (208 Taxman 168) wherein the Hon'ble High Court while holding that the certificate granted u/s 195/197 in only applicable to the consideration payable for which such certificate is obtained also held that such certificate does not preclude the Assessing Officer to re-examine the chargeability of income in a regular assessment proceedings. The relevant observations are extracted below:

> *"15. Under the aforesaid provision, there is no obligation on the part of the payer to pay tax as long as the said certificate is in force and rest cancelled. Even if tax is payable under the Act, the payer cannot be treated as an assessee in default. If in a regular assessment, an order is passed holding that the said income is liable to tax, the issue of such a certificate under the aforesaid provision would not come in the way of levying and collecting tax. However, the payer cannot be treated as an assessee in default and he cannot be proceeded with. It is because as long as the said certificate stands, the payer shall not make any payment and shall not deduct from the consideration payable to the recipient. However, the said certificate is tentative or provisional or interim in nature. It does not have any effect beyond providing immunity under Section 201 of the Act. The immunities stop at that stage. It does not preclude the Assessing Officer to either reexamine the chargeability of income in a regular assessment proceedings or to recover taxes from the payer in his representative capacity. It is only in the nature of a protection against the consequences that may follow out of non-deduction."*

27. Same view is expressed by the Hon'ble Delhi High Court in the case of National Petroleum Construction Company Vs Dy. CIT (W.P. 8527/2019) dated 20.12.2019.

28. As far as the Ld. AR's reliance on the decision of Hon'ble Delhi High Court in the case of DIT Vs Panalfa Auto electrik Ltd (49 taxmann.com 412) and the coordinate Bench of this Tribunal in the case of Credit Lyonnais Vs ADIT(IT) (80 TTJ 191) is concerned, it is noted that in the decided cases the issue before the judicial forums was whether commission or fee paid to marketing agents fall within the scope of 'fees for technical services' as defined in Section 9(1)(vii) of the Act which is not the issue involved in the assessee's case. Accordingly the judgments relied upon by the Ld. AR are found to be factually distinguishable.

29. We have also gone through the decisions of the coordinate Benches of the Tribunal in the cases of Wipro Ltd Vs ACIT reported in 80 TTJ 191, Ajappa Integrated Project Management Consultants (P.) Ltd. Vs ACIT reported in 52 SOT 612 and Aqua Omega Services (P.) Ltd Vs ACIT reported in 141 ITD 134; relied upon by the Ld. AR of the assessee. It is noted that the nature of services and facts involved in these cases are not similar with that of the assessee's case. Moreover these decisions have been rendered in the context of the pre-amended Section 9(1)(vii) of the Act as it stood prior to the insertion of Explanation (2) by the Finance Act, 2010 and therefore the ratio laid down therein are not applicable in the relevant year in consideration.

30. For the reasons set out in the foregoing paragraphs therefore, we hold that the payments which the assessee made to his foreign associates or foreign attorneys came within the ambit of Section 9(1)(vii) of the Act in terms of which the income by way of fees for technical services deemed to accrue or arise in India and consequently therefore the assessee had obligation to deduct tax at source under the provisions of the domestic tax laws. The Ld. AR of the assessee however raised an alternate contention that if under the domestic tax provisions, the payments are held to in the nature of 'fees for technical services', even then the assessee did not have obligation to deduct tax source since payments did not come within charging provisions of the DTAAs with the respective countries of which the foreign attorneys were residents. The Ld. AR submitted that the relevant DTAAs contained specific provisions defining the terms such as 'fees for technical services', 'fees for included services', 'independent personal services' etc. and the payments made by the assessee could fall under different categories defined in DTAAs and consequently therefore payments made did not include element of income chargeable to tax in India, requiring deduction of tax u/s 195 of the Act. The Ld. AR submitted that in accordance with the provisions of these DTAAs, the payments made by the assessee to foreign attorneys were liable to be assessed only in the Country of Residence and therefore India being source country did not have right to tax such payments under the respective DTAAs. Having considered the said alternate plea of the ld. AR, we find merit in the same. We however note that before the Ld. CIT(A)/AO this aspect was neither raised by the assessee nor considered and adjudicated by the Ld. CIT(A)/AO. In the circumstances therefore, to meet the ends of justice, we deem it fit and proper to restore this alternate plea raised for the first time before us to the file of the AO. He is directed to examine the assessee's plea that payments were non-taxable in India because of the beneficial provisions of the DTAAs with respective countries. While doing so, the AO shall grant adequate opportunity of being heard to the assessee and will also permit him to

furnish necessary documents and evidences in support of his claim.

31. In the result, the appeal of the Revenue is allowed for statistical purpose."

7. We find that the facts in the present cases are identical and the Ld CIT(A)/AO have not examined the respective DTAAs. We, therefore set aside the orders of AO and Ld CIT(A) and direct the A.O to examine the assessee's plea that payments were non taxable in India because of the beneficial provisions of the DTAAs with respective countries in accordance the order of ITAT, Kolkata Bench in the case of *ACIT v. Sri Subhatosh Majumder,* supra, and pass fresh order. The A.O shall grant adequate opportunity of being heard to the assessee and will also permit him to furnish necessary documents and evidences in support of his claim. In view of the above, the appeal filed by the assessee is allowed for statistical purposes only.

8. We find that the identical issue is involved in assessee's appeals for A.Ys 2015-16, 2016-17, 2017-18 & 2020-21 also and accordingly, our adjudication above in A.Y 2014-15 is *mutatis mutandis* applies therein also. Therefore, for the similar reasons, these four appeals in ITA Nos. 1320, 1321, 1322 & 1323/Chny/2024 are also allowed for statistical purposes only.

9. In the result, all the five appeals filed by the assessee are allowed for statistical purposes.

Order pronounced on 31st December, 2024.

Sd/-	Sd/-
(एबी टी. वर्की)	**(जगदीश)**
(ABY. T. Varkey)	**(Jagadish)**
न्यायिक सदस्य / Judicial Member	**लेखा सदस्य /Accountant Member**

चेन्नई/Chennai, दिनांक/Dated: *31st* December, 2024.

EDN/-

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT, Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF