

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

**BEFORE SHRI VIMAL KUMAR, JUDICIAL MEMBER
AND
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER**

**ITA No.7526/Del/2019
[Assessment Year: 2013-14]**

M/s Timex Group India Ltd. 106-107, Ambadeep Building, Kasturba Gandhi Marg, New Delhi-110001	Vs	Additional Commissioner of Income Tax, Special Range-9, New Delhi-110002
PAN-AAACT0773C		
Assessee		Revenue

**ITA No.7598/Del/2019
[Assessment Year: 2013-14]**

Additional Commissioner of Income Tax, Special Range-9, New Delhi-110002	Vs	M/s Timex Group India Ltd. 106-107, Ambadeep Building, Kasturba Gandhi Marg, New Delhi-110001
		PAN-AAACT0773C
Revenue		Assessee

Assessee by	Shri Tushar Jarwal, Adv. Shri Aayush Nagpal, Adv. & Shri Vikrant Maheshwari, Adv.
Revenue by	Shri Rohit Garg, CIT-DR

Date of Hearing	01.07.2025
Date of Pronouncement	26.09.2025

ORDER

PER BRAJESH KUMAR SINGH, AM,

These are cross appeals filed by the assessee as well as by the Revenue, against the order of the Ld. Commissioner of Income Tax (Appeals)-44, New Delhi, dated 28.06.2019 arising from the Assessment Order dated 07.02.2017 passed under

section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to Assessment Year 2013-14.

1.1. The assessee has raised following grounds of appeal in ITA No.7526/Del/2019:-

1. *The order passed by the Ld. Commissioner of Income Tax (Appeals) -44, New Delhi (hereafter referred as the 'CIT(A)') partly upholding the assessment order passed by the Assessing Officer (hereafter referred as the 'AO') in pursuance to the transfer pricing adjustment proposed in the order of the Transfer Pricing Officer (hereafter referred as the TPO) passed under Section 92CA (3) of the Act and upholding the disallowance for alleged default in deduction of tax at source under Section 40(a)(i) of the Act by the AO is bad in law to the extent the same is detrimental to the Appellant.*
2. *That on the facts and circumstances of this case, the Ld. CIT (A) has erred in partly confirming the action of the AO in computing the assessed loss of INR (20,90,96,770/-) as against INR (35,23,15,314/-) declared in the income tax return.*
3. *That the Ld. CIT(A) erred in providing an opportunity of being heard before passing the impugned order which is a breach of principles of natural justice, equity and fair play.*
4. *That on facts and circumstances of the case and in law, the Ld. CIT(A), while passing the impugned order, has erred in not placing correct reliance on the order of the Hon'ble Income Tax Appellate Tribunal (hereafter referred as the 'ITAT') in the case of the Appellant for AY 2011-12 in ITA No. 845/Del/2016 dated 20.12.2018.*
5. *That on facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that advertisement, marketing and sales promotion expenses (hereinafter referred to as the AMP expenses'), unilaterally incurred by the Appellant in India could not be characterized as an international transaction as per section 92B of the Act, in the absence of any proved understanding / arrangement between the Appellant and the associated enterprise (hereinafter referred to as 'AE'), so as to invoke the provisions of section 92 of the Act*
6. *Without prejudice to ground no 5 and on the facts and circumstances of this case, the Ld. CIT (A) has erred in the approach of computing a substantive adjustment by*

aggregating the AMP expenses of the distribution and manufacturing business for the purpose of benchmarking under composite TNMM analysis and making a transfer pricing adjustment amounting to INR 11,46,90,000/-.

7. Without prejudice to ground no 5 and on the facts and circumstances of this case, the Ld. CIT (A) has erred in arbitrarily adopting comparable set for benchmarking the AMP expenses of both distribution and manufacturing segment under a composite analysis.

8. Without prejudice to ground no 5 and on the facts and circumstances of this case, the Ld. CIT (A) has erred in applying a markup on the alleged excessive AMP expenditure incurred by the Appellant and further erred in upholding the order of the AO/ TPO in adopting an inappropriate set of comparable companies for computing the mark-up

9. That on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in questioning the commercial decisions of the Appellant in relation to the expenses incurred for AMP activities. The said expenses are incurred considering the best interest of the business and the same should be considered from the point of a view of a prudent businessman.

10. That on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in not placing correct reliance on OECD Transfer Pricing Guidelines, OECD BEPS Action Plan 8-10 and other international commentaries, particularly with reference to determination of arm's length price for marketing intangibles.

11. That on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in upholding the action of the AO in disallowing the payments made by the Appellant to its AEs on account of cost recharges for receipt of IT services and product design services amounting to INR 1,63,36,548/- under Section 40(a)(l) of the Act alleging default in deduction of tax at source.

12. That on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in upholding the action of the AO in alleging that the cost recharges earned by the non-resident parties, were liable to tax in India in the hands of such non-resident parties.

13. That on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in upholding the action of the AO in holding that the amount of cost recharges are in the nature of fee for included services and fee for technical services

under respective DTAA's and alleging that the Appellant was under the obligation to deduct tax under Section 195 of the Act.

14. That on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in upholding the action of the AO in alleging that the services were made available' to the Appellant as per the provisions of respective DTAA's, hence, the Appellant was under an obligation to deduct tax under Section 195 of the Act, on such cost charges.

1.2 The Revenue has raised following grounds of appeal in ITA No.7598/Del/2019:-

I. *"Whether on facts of the case and law, the Ld. CIT(Appeal) was correct in holding the Bright Line Methodology as inappropriate despite the fact that the orders of the jurisdiction High Court, on which Ld. CIT(Appeal) had relied, was not accepted and Department had filed SLP against the aforesaid High Court order."*

II. *"Whether, on the facts and circumstances of the case, the Ld. CIT(Appeal) is justified in its decision of treating BLT method for AMP adjustment as unsustainable when the matter is sub-judice and is pending with the Apex Court.*

III. *"Whether, on facts and circumstances of the case and in law, the Ld. CIT(Appeal) was justified in holding that the 'Bright Line Test' was not mandated in law and hence impermissible without considering the fact that BLT was not used as a method to determine the price but only as an economic tool to arrive at the cost of services rendered to the foreign enterprise by the Indian entity and the TPO has the mandate to 'determine' such 'cost' as a primary step in ALP determination as provided under the Rules."*

IV. *Whether, the Ld. CIT(Appeal), in the facts and circumstances of the case and in law, was justified in holding that trade discounts are in the nature of selling expenses and hence should be out of the purview of AMP expense disregarding the Revenue's proposition. That this cannot be so when Trade Discounts emanate from the overall strategy of the A.E. to penetrate the market or to promote the brand*

V. *Whether the Ld. CIT(Appeal) was justified in laying down stringent standards of comparability and attempting to identify exact replica of the taxpayer for comparability analysis, whereas the Indian law and the international jurisprudence recognize the reality that there cannot be an exact comparable in a given situation without any differences without*

appreciating that such stringency will defeat the purpose of flexibility provided in comparability analysis for determination of ALP ?

VI. Whether the Ld. CIT(Appeals) was right in fact and in law in rejecting the comparable M/s Opal Luxury Time products Limited on the ground that this comparable is functionally dissimilar when the TPO has chosen this comparable from the list selected by the assessee and had also established functional similarity under TNMM, a Transfer Pricing method provided in section 92C under which strict similarity is not mandated as in other TP methods ?

2. In this case, the assessment was completed u/s 143(3) of the Act on 07.02.2017, making the following addition/disallowance:

- (i) An adjustment of Rs. 12,68,82,000/- u/s 92CA of the Act
- (ii) Disallowance of u/s 40(a)(i) of the Act – 1,63,136,548/-.

2.1 The Assessee as well as the Department have filed cross appeals on the issue of TP adjustment under Section 92CA of the Act. In the appeal filed by the department as stated above, the entire grounds of appeal being (i) to (vi) relate to TP issues only. At the outset, the Ld. AR referring to its letter dated 02.04.2025 placed before us submitted that the assessee has entered into unilateral Advance Pricing Agreement (APA) under Section 92CC of the Act, (hereinafter referred to as the 'Act') dated 29.11.2019 relating to AMP expenses subject matter of dispute in the department's appeal in Gr. No. (i) to (vi) and in

2.3 The Ld. CIT(DR) did not object to the above contention of the assessee.

3. We have carefully considered the submission of the assessee. We have heard both the parties and perused the material available on record. The assessee has entered into unilateral APA dated 29.11.2019 which covers AYs 2016-17 to 2020-21 and is also rolled back for AYs 2012-13 to 2015-16, and therefore, the present assessment year being AY 2013-14 is also covered by the aforesaid AP agreement, on the issue of 'Reimbursement of AMP expenses'. Therefore, by virtue of the above agreement grounds no. 1 to 10 of the assessee's appeal (ITA No 7526/De/2019) along with grounds no. (i) to (vi) of the department's appeal (ITA No.- 7598/Del/2019), being related to the issue of 'Reimbursement of AMP expenses' are dismissed.

4. Now we proceed to deal with the ground nos. 11 to 14 of the Assessee's appeal. Brief facts of the case: The AO noted that the assessee had made payments to following non-residents without deduction of TDS as per the details below:

Sr. No.	Name of the entity	Amount (in Rs.)	Nature of services
1.	Timex Group USA Inc.	6436712/-	Cost recharge for IT services

2.	<i>Times Netherlands BV</i>	9707807/-	<i>Design Charges, cost recharged</i>
3.	<i>Timex Group luxury watches BV Netherlands</i>	192029/-	<i>Cost recharge for IT services</i>
	Total	1,63,36,548/-	

4.1 The AO asked the assessee to furnish the details of TDS made and it was stated by the assessee that no TDS was deducted on such payments. According to the AO, the above payments were covered under the TDS provision u/s 195 r.w.s. 5 and 9 of the Act, and the assessee asked to show cause why the same should not be disallowed.

4.2 In reply, the assessee submitted as under:

“Facts

1.1 A brief facts of services provided by the related parties to assessee during the year are as below:

a) Timex Group USA Inc.: amount paid Rs 64,36,712/-

Nature of services received by assessee: Cost recharge for LT support services. (nature of services also certified by auditor in TP report and form 3CEB)

b) Timex Group Luxury Watches BV (Netherlands). Rs 192029/- Services: Cost recharge for IT Support Services. (Nature of services also certified by auditor in TP report and form 3CEB)

Timex Netherlands BV Rs. 9707807/-

Nature of services received by assessee: Design Charges cost recharged. (Nature of services also certified by auditor in TP report and form 3CEB)

Brief of services:

Information technology ("IT") - This includes charges on account of the following services-

IT support/services: This represents time cost spent by IT personnel (outside India) in providing 24/7 IT related support/ services to Timex India on a daily basis.

Server/ database management services: This represents proportionate share of costs allocated to Timex India for management of database server located in Singapore. Timex India does not have

any physical access, control or possession rights over the server or any part of its functionality. Further, Timex India does not have the right to use any intellectual property rights such as copyrights in certain software (such as Oracle, etc) stored on such server.

Above service description may further be classified into the following two-folds:

i) Cost allocation for IT products such as maintenance charges of routers and switches, etc:

Since, such cost is being allocated by Timex Group entities only on a cost to cost basis i.e. without any mark-up (i.e. income element), such allocation should not be subject to tax in India. Therefore, no tax would be required to be withheld on consideration attributable to the subject service. However, Timex India would be required to demonstrate with adequate documentation that such arrangement does not contain any income element, chargeable to tax in India.

ii) Cost allocation for database management systems, software (such as email management systems, reporting systems) and other software licenses

- Under this arrangement, Timex Group entities allocate the cost of various global software/ licenses procured by the Timex group entity for use by various entities worldwide including Timex India. It is the understanding that Timex India neither owns any IPR's in such licenses/ software nor has the right to commercially exploit such licenses/ software in India and Timex India is only provided access to these software by Timex group entities on the basis of number of users in India.
- Further Timex India is not conferred with any right to use the copyright for commercial exploitation of such software licenses.
- Product design charges cost recharge: Product designs in relation to Helix time pieces are developed by Timex India team which possesses the requisite technical knowledge, expertise, skill, and know-how to develop such designs.
- These product designs are developed by Timex India team based on certain guidelines provided by Mr. Georgio Gali. These guidelines do not contain any technical specifications or attributes, and are merely standards (for example color combinations, font size and color, etc) which the Timex India team needs to adhere to in order to ensure consistency with global Timex designs. No skill, knowledge or knowhow is passed on to the Timex team in India for the purposes of designing the watches. The watches once designed are sent to Mr Georgio Gali and his team in Italy for review to ensure that such designs meet the standards globally followed by the Timex group entities.
- It is further submitted that Mr Gali and his team neither make any changes to such designs nor provide any technical inputs on such designs; Mr Gali and team only provide certain suggestions in line with the guidelines issued in respect of designs developed by Timex India team to ensure that such

designs meet the quality and consistency standards globally followed by the Timex Group entities.

- *Further, we understand that the changes suggested by Mr Gali do to involve any deviations as such to the Helix time piece design prepared by the Timex India Team, 30 as to result in the development and transfer of a new design itself.*

1.2 All such services are provided from outside India to the assessee company in India.

1.3 All overseas entities involved in rendering such services, do not have any permanent establishment In India in any manner.

2. The obligation of the remitter to deduct tax at source is casted in section 195 of the income Tax Act (Act), at the outset, reproduced herein below the relevant provisions of section 195,

"195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest on securities) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head 'Salaries') shall, at the time of credit of such income to the account of the 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:

(2) Where the person responsible for paying any such sum chargeable under this Act (other than interest on securities and salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorizing him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1)."

Also quote herein below section 195(6) as inserted by the Finance Act, 2008, with effect from April 1, 2008.

"195.(6) The person referred to in sub-section (1) shall furnish the information relating to payment of any sum in such form and manner as may be prescribed by the Board."

The most important expression in section 195(1) consists of the words "chargeable under the provisions of the Act". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not charge-able to tax under the Income-tax Act. For instance,

where there is no obligation on the part of the payer and no right to receive the sum by the recipient and the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the Income-tax Act.

3. It may be noted that section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which have an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act.

4. This obligation being limited to the appropriate proportion of income flows from the words used in section 195(1), namely, "chargeable under the provisions of the Act". It is for this reason that vide Circular No. 728 dated October 30, 1995 the Central Board of Direct Taxes has clarified that the tax deductor can take into consideration the effect of the DTAA in respect of payment of royalties and technical fees while deducting TAS (Tax at source).

5. In none of the other provisions of deduction of tax under this chapter in the Act, one finds the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in section 195(1). Therefore, one has to refer to the interpretation given by courts, Hon ble Supreme Court in the case of **GE India Technology Centre P. Ltd. Vs Commissioner of Income-tax ([2010] 327 ITR 0456)** gave meaning and effect to the said expression. It was observed, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the Income-tax Officer (TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, section 195 has to be read in conformity with the charging provisions, i.e., sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in section 195(1).

6 As per section 5 of the Act, a non-resident is subject to tax in respect of income which is received or accrues or arises or is deemed to accrue or arise in India. Further, section 9 of the Act lays down provisions with respect to the income which is deemed to accrue or arise in India. Section 9 (1) clause vi & vii has defined the conditions under which income from Royalty and Fee for Technical Services may be deemed to have been accrued, arise or received or deemed to receive in India in case of a foreign enterprise under the provisions of Income Tax Act.

7. Further provisions of section 90(2), the taxability of non-resident is governed by the provisions of the Act or provisions of the respective tax treaty, whichever is more beneficial to the non-resident, as such it entitles he payee to opt for the advantageous tax position under the Income Tax Act provisions or DTA with relevant country whichever is advantageous.

8. Assessee has relied on the provisions of DTA to arrive at whether the overseas enterprise is liable to tax in India on the amounts received by it towards cost recharge of the various services rendered to it.

9. Applicability of relevant provisions of DTA is given below and consequent taxability in brief are tabulated below:

Nature	Taxability relevant tax treaty	Withholding tax obligation	Withholding tax rate
<i>product design charges for Helix time pieces</i>	<ul style="list-style-type: none"> Such cross-charges should not to be taxable as Fees for Technical Service ("FTS") by the virtue of the restrictive applicability of Article 12 of India-Netherlands tax treaty (ie services do not 'make available' technical skills or knowledge to Timex India) Also, in the absence of PE or any presence in India, consideration for such 	No withholding obligation on Timex India as consideration received by overseas Timex Group enterprise should not be taxable in India	NA
Information technology ("IT") services			
<i>IT support services</i>	<ul style="list-style-type: none"> Provision of such services should not be taxable as FTS under the purview Article 12 of the applicable tax treaties due to its restrictive applicability (ie services do not 'make available' technical skills or knowledge to Timex India) Also, in the absence of PE or any presence in India, consideration received for such services should not be taxed, 	Since, consideration received by Timex group entities is not taxable in India, Timex India should not be required to withhold tax on such payments	NA
<i>IT third party charges</i>	Taxability of such charges may be classification into the following two folds:		
<i>i) Cost allocation for IT products such as maintenance charges of routers and switches etc:</i>			
	<ul style="list-style-type: none"> Should be considered as reimbursement on cost to cost basis and in the absence of any income element in such charges, consideration should not be chargeable to tax in India, consequently no TDS liability. 	Since, consideration received by Timex group entities should not taxable in India, Timex India should not have any obligation to withhold tax on such payments	NA

<i>ii) Cost allocation for database management systems, software (such as email management systems,</i>			
	<ul style="list-style-type: none"> In the absence of any right to use the copyright conferred upon Timex India, for the purpose of commercial exploitation, such consideration should not be taxable as 'royalty' in India. 	Since, such consideration should not be taxable in India, Timex India should not be obligated to withhold tax on such allocations.	NA

4.3. The AO noted that the assessee has claimed that non-residents have not 'made available' these services to the assessee in India, and, therefore, the payments for these services are not taxable as 'fees for included services' as per India-USA DTAA or as 'fee for technical services' as per the provisions of India-Netherlands DTAA. The AO further noted that the assessee has claimed that since the payments represent reimbursement of costs, without any mark-up actually incurred by the non-residents, are not taxable in India. The assessee has further argued that the non-resident companies do not have a PE in India, and hence, the income of the non-residents was not taxable in India. Accordingly, the assessee claimed that it was not required to deduct tax at source while making payment to the non-residents and that there was no default u/s 40(1)(i) of the Act.

4.4 However, the AO did not accept the above submission of the assessee in respect of the above payments to and noted that in the instant case, the assessee, Timex, is in the business of manufacturing watches for a number of years and the services provided by the above non-residents provide an enduring benefit to Timex India. It was noted by the AO that the non-residents make available its technical experience,

knowledge or skill which go a long way in designing, developing or standardizing a product of the assessee and such experience; knowledge or skill helps the assessee to eliminate the possibility of committing an error in future. According to the AO, thus, the services provided by the non-residents remain at the disposal of the assessee much after the services have been rendered and the assessee can utilize this knowledge or knowhow in its future operations. In view of these facts, the AO held the non-residents have carried out technical services which are 'made available' to Timex India and, accordingly, the payments thereof are FTS / FIS within the meaning of Article 12(5) of the DTAA between India and the Netherlands or Article 12(4) of the India-USA DTAA.

4.5. Regarding the claim of the assessee that the payments to the non-residents are only cost recharge, the AO relying upon various case laws held that the claim of the assessee that the payments made by it to the non-resident was merely reimbursement of costs and hence non-taxable in the hands of the assessee in India was not acceptable. According to the AO, the nomenclature used to describe such a payment, and the claim that there was no profit mark-up, does not alter the nature of payments. Regarding the claim of the assessee that

the payment was also not 'royalty' was not acceptable by the AO.

4.6 The AO noted that in the present case, non-resident has given the access and user rights in the software got designed from third parties and such grant of access in the software to its group entities/agents is possible only when non-resident has transferred the rights to its group entities/agents to commercially exploit. The AO further held that it was akin to licensing by non-resident to its group entities/agents for access to the software. Further, according to the AO every time the non-resident allows its group entity to access and use of the software, the non-resident is in a way issuing copies to public not already being in circulation as such software is not available to any public without allowing access by non-resident for a fee. The AO further held that the non-resident does not pass the ownership right and only gives limited access to use as the software always remains the property of the non-resident and hence the grant of access to group entity for use is akin to allowing commercial rental of the copy of the software program, which is also one of the copyright privileges under section 14 of the copyright Act and once the non-resident has

allowed this commercial use, it is a manifestation of transfer of some rights in copyrights too.

4.7 In view of the above facts the AO held that the payment received by the non-resident for network access and other IT-related services are for the right of access and use of software (the intellectual property rights of which belong to the non-resident), and qualifies as royalty under DTAA between India and the USA/Netherlands.

4.8 The AO held that thus, the payments made by the assessee to the non-residents for the 'use' or 'access' to the IT Infrastructure/Facility of the non-resident is royalty within the provisions of the Act as well as the DTAA and such payment was liable to be taxed in India and, accordingly, qualifies as the sum chargeable under the Act' within the meaning of section 195 of the Act.

5. Aggrieved with the said order, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) held that the TPO has given detailed reasons for holding that the non-residents had 'made available' its technical experience, knowledge or skill to the assessee, which was taxable as FTS/ FIS as per the provisions of Article 12(5)/ 12(4) of the DTAA between India and

Netherlands/ USA and hence, the assessee was liable to deduct tax at source on the payments made to the non-residents which it had failed to do so. Hence, the Ld. CIT(A) held that the provision of section 40(a)(i) of the Act was applicable on such payments and dismissed the appeal of the assessee. The relevant finding of the Ld. CIT(A) is in respect of the issue contested in ground no. 3 (including 3.1 to 3.4 in para no. 6.29 to 6.31 of the appeal) is reproduced as under:

“ 6.29 Ground No. 3 (including 3.1 to 3.4) pertains to the contention of the appellant that the AO had erred in making a disallowance of Rs. 16,336,548 u/s 40(a)(i) of the Act for payments made to AEs on account of cost recharges for receipt of IT services and product design services for default in deduction for tax at source. The main contention of the appellant is that the cost recharges were not in the nature of fee for including services / fee for technical services under the respective DTAAAs and that services were not "made available" to the taxpayer as per the provisions of the respective DTAAAs. It has also been contended that the AO had incorrectly re-characterized the cost recharges in relation to receipt of IT services as payments for royalty holding that the appellant was under an obligation to deduct tax at source u/s 195 of the Act.

6.30 The TPO has given detailed reasons for holding that the non-residents had "made available" its technical experience, knowledge or skill to the appellant which was taxable as FTS/FIS as per the provisions of Article 12(5)/12(4) of the DTAA between India and Netherlands/USA. Hence, the appellant is liable to deduct tax at source on the payments made to the non-residents which it had failed to do so. Thus, the payments were liable to be disallowed under the provisions of section 40(a)(i) of the Act. Hence, the contention of the appellant is not accepted.”

6. Aggrieved with the said order, the assessee filed an appeal before the Tribunal.

7. During the hearing before us, the Ld. AR filed a written submission which is reproduced as under:

“Grounds 11-14, Pg. 5 are to be decided in Assessee's appeal which pertain to Sec. 40(a)(i) disallowance for non-deduction of tax at source u/s 195 with respect to cost recharge for IT services and product design charges; Table depicts the details:

S. no	Amount paid to	Amount Paid	Nature of Service	Form 3CEB (PB-Pg-113-125)	Assessment Order (07.02.2017) (pg.75-110) of appeal, relevant @ pg- 80-107)	CIT(A) order (28.06.2019) (pg.-7-69) of appeal, relevant @ pg.-68-69)
1.	Timex Group USA Inc. (US Co.)	64,36,712/-	Cost recharge for IT services	Pg. 118 (Cost Recharge; other Method)	Submission (pg. 81 – 89) Finding on FIS /FTS (pg. 89-96, relevant @ 93-94)	Grounds (para 3-3.4, pg 8-90) Facts (para 3-3.4, pg. 10)
2.	Timex Netherlands BV (Dutch Co.)	97,07,807/-	Design charges, cost recharged	Pg. 118 (Cost Recharge; other Method)	Finding on cost recharge (pg. 96-98, relevant @98)	Submission (para 2 onwards Pg 23-32 findings (para 6.29-6.31, pg. 68-69)
3.	Timex Group Luxury Watches BV Netherlands (dutch Co.)	1,92,029/-	Cost recharge for IT services	Pg. 11 (Cost Recharge; other Method)	Finding on Royalty (pg. 98-107, relevant @ 106)	
	Total	1,63,36,548 /-				

Product Design Charges for Helix time pieces since product developed by the Assessee is required to meet certain guidelines provided by Mr. Georgio Galii, Creative Director through Timex Netherlands BV

S. No.	Agreement	Between	Date of Agreement	Services covered	Remuneration
1	Services Agreement (Pg. 103-107 of PB)	Timex Group USA. Inc. & Assessee	15.02.2014 (Pg.106) until (Art.4A, Pg.104) terminated	Designated Services included but not limited to email hosting, software and online meeting platform, human	IT Services Cost-5% based on time spent by IT personnel If by third party no markup (Pg. 107)

				resources information services, finance, legal, tax and IT	
2	Services Agreement (Pg. 108- 112 of PB)	Timex Nederland BV and Assessee	15.02.2014 (Pg.111) until (Art.4A, Pg.104) terminated	Designated services- website design & hosting, brand management & planning, marketing & advertising, product design, other directly allocable third party costs	Product design No markup. TNBV pays 10% on product design services received by an affiliate (Pg.112)

SUBMISSIONS:

1. CIT(A) order is not a speaking order as CIT(A) does not deal with elaborate submissions of the Assessee. Also, erroneously states that TPO has given detailed findings for holding payments to be taxable as FIS/FTS in the hands of non-resident payee whereas TPO has not even dealt with this issue. (Pg.69)

IT support services are neither taxable as FTS nor royalty

2. EY Global Services Ltd. v. ACIT, [2022] 441 ITR 54 (Del) (Para 12-18) followed by ITAT in EY Global Services Ltd. v. ACIT, Order dt. 01.06.2022 in ITA No. 7017-7020/2019 (Para 11). (Upheld by Delhi HC in ITA No. 444/2022 vide Order dt. 11.11.2022 against which SLP pending in SLP No. 24397/2024, notice not issued)

3. Delhi HC in CIT(IT) v. Bio Rad Laboratories (Singapore) Pte. Ltd., [2023] 459 ITR 5 (Del.) (Para 4) held dismissed Revenue's appeal where long term service contract was in play between the Indian and the foreign company and Revenue took the plea of fulfilment of "make available" clause.

4. ITAT Delhi in Invesco Holding Company (US) Inc. v. ACIT in ITA No. 784 & 785 of 2023, Order dt. 23.07.2024 (Para 7-8) held that reimbursement IT support services does not attract taxability as FTS and alternatively, accepted assessee's plea based on DIT v. A.P. Moller Maersk AS (2017) 5 SCC 651 (Para 9) that payments in the nature of reimbursements are not taxable."

Product Design Charges do not satisfy "make available" clause and are reimbursed on cost basis

5. *The product design services are provided by specifically by Mr. Georgio Galli by applies his technical skills and aesthetic standards which cannot be imparted to anybody by merely giving approval to the watch designs or by laying down certain standard guidelines to be followed by the Assessee for making Helix watches. These are ex facie independent personal services provided by Mr. Georgio Galli within the meaning of Article 14 of India-Netherlands DTAA for being independent scientific and artistic in nature and therefore, cannot be taxed as FTS by virtue of exclusion under Article 12(6)(d) of India-Netherlands DTAA.n*

6. *Delhi Bench in Sujan Luxury Hospitality (P.) Ltd. v. Assistant Commissioner of Income-tax, IT Appeal No. 2844 (Delhi) of 2019. Order dated 25.04.2025 (Para 13-13.10) (authored by Shri Brajesh Kumar Singh, AM) held that spa' consultancy and management services provided by an individual fell within the ambit of independent personal services under India-Srilanka DTAA and could not be taxed as FTS under Section 9(1)(vii) of the Act.*

7. *With respect to taxability as FTS, it is submitted that the "make available" clause under Article 12(5)(b) of India-Netherlands DTAA is required to be satisfied. Assessee only follows the guidelines provided by Mr. Georgio Galli while manufacturing Helix watches. The guidelines are in the nature of standards to be followed and does not empower the Assessee with any kind of technical know how, skill or technical knowledge. Therefore, "make available" clause is not satisfied and no TDS requirement falls on the Assessee.*

8. *Delhi Bench in ITO, TDS v. Nokia India Pvt. Ltd., [2016] 156 ITD 307 (Delhi-Trib.) (Para 8-10) held that services of review of systems description, diagrams, cost estimates, system design and quality control, etc. provided by Olof Granlund (Finnish consultant) were not driven to impart any technical knowledge or experience to Nokia which could be used by Nokia independently in its business without recourse to Olof Granlund. Thus, make available clause was found not to be satisfied and no TDS liability fell on Nokia.*

9. *Delhi Bench in Korn Ferry (US), California, United States v. ACIT, International Taxation, IT Appeal No. 3012 (Delhi) of 2023, Order dated 31.01.2025 (Para 10-11) (authored by Shri Brajesh Kumar Singh, AM) held that taxability as FTS does not arise on mere rendering of services unless "the person utilizing the services is able to make use of the technical knowledge, etc., by himself in his business or for his own benefit and without recourse to the performer of the services in future."*

10. *The payment is on cost basis which is devoid of any income element, therefore, no tax is required to be deducted at source as per SC judgment in GE India Technology Pvt. Ltd. v. CIT, (2010) 10 SCC 29 (Para 20-24) and Engineering Analysis Centre of Excellence Pvt. Ltd. v. CIT, (2022) 3 SCC 321 (Para 29-36).*

(emphasis supplied by us)

7.1 The CIT(DR) relied upon the orders of the authorities below.

8. We have heard both the parties and perused the material available on record. The assessee briefly explains the services for which the above payments have been made as under:

“1.2 During the year, there was no agreement among the parties although the understanding of the parties was later on capture in agreeemnts, terms and descriptions of services the same, for reference a copy of agreement substantially entered into between the parties is enclosed herewith along with the copies of relevant bills.

1.3 A brief facts of services provided by the related parties to assessee during the year are as below:

a) Timex Group USA Inc.: amount paid Rs 64,36,712/-

Nature of services received by assessee: Cost recharge for I.T support services. (nature of services also certified by auditor in TP report and form 3CEB)

b) Timex Group Luxury Watches BV (Netherlands). Rs 192029/- Services: Cost recharge for I.T Support Services. (Nature of services also certified by auditor in TP report and form 3CEB)

Timex Netherlands BV Rs. 9707807/-

Nature of services received by assessee: Design Charges cost recharged. (Nature of services also certified by auditor in TP report and form 3CEB)

“

Brief of services:

Information technology ("IT") - This includes charges on account of the following services-

IT support/services: This represents time cost spent by IT personnel (outside India) in providing 24/7 IT related support/ services to Timex India on a daily basis.

Server/ database management services: This represents proportionate share of costs allocated to Timex India for management of database server located in Singapore. Timex India does not have any physical access, control or possession rights over the server or any part of its functionality. Further, Timex India does not have the right to use any intellectual property rights such as copyrights in certain software (such as Oracle, etc) stored on such server.

Above service description may further be classified into the following two-folds:

i) Cost allocation for IT products such as maintenance charges of routers and switches, etc:

Since, such cost is being allocated by Timex Group entities only on a cost to cost basis i.e. without any mark-up (i.e. income element), such allocation should not be subject to tax in India. Therefore, no tax would be required to be withheld on consideration attributable to the subject service. However, Timex India would be required to demonstrate with adequate documentation that such arrangement does not contain any income element, chargeable to tax in India.

ii) Cost allocation for database management systems, software (such as email management systems, reporting systems) and other software licenses

- Under this arrangement, Timex Group entities allocate the cost of various global software/ licenses procured by the Timex group entity for use by various entities worldwide including Timex India. It is the understanding that Timex India neither owns any IPR's in such licenses/ software nor has the right to commercially exploit such licenses/ software in India and Timex India is only provided access to these software by Timex group entities on the basis of number of users in India.
- Further Timex India is not conferred with any right to use the copyright for commercial exploitation of such software licenses.
- Product design charges cost recharge: Product designs in relation to Helix time pieces are developed by Timex India team which possesses the requisite technical knowledge, expertise, skill, and know-how to develop such designs.
- These product designs are developed by Timex India team based on certain guidelines provided by Mr. Georgio Gali. These guidelines do not contain any technical specifications or attributes, and are merely standards (for example color combinations, font size and color, etc) which the Timex India team needs to adhere to in order to ensure consistency with global Timex designs. No skill, knowledge or knowhow is passed on to the Timex team in India for the purposes of designing the watches. The watches once designed are sent to Mr Georgio Gali and his team in Italy for review to ensure that such designs meet the standards globally followed by the Timex group entities.
- It is further submitted that Mr Gali and his team neither make any changes to such designs nor provide any technical inputs on such designs; Mr Gali and team only provide certain suggestions in line with the guidelines issued in respect of designs developed by Timex India team to ensure that such designs meet the quality and consistency standards globally followed by the Timex Group entities.
- Further, we understand that the changes suggested by Mr Gali do to involve any deviations as such to the Helix time piece design prepared by the Timex India Team, 30 as to result in the development and transfer of a new design itself.

(emphasis supplied by us)

8.1 Further, the assessee explains the applicability of relevant provisions of DTAA and consequent taxability in brief in a tabular form, which is reproduced as under:

<i>nature</i>	<i>Taxability relevant tax treaty</i>	<i>Withholding tax obligation</i>	<i>Withholding tax rate</i>
<i>product design charges for Half time pieces</i>	<p>Such cross-charges should not to be taxable as Fees for Technical Service ("FTS") by the virtue of the restrictive applicability of Article 12 of India-Netherlands tax treaty (ie services do not 'make available' technical skills or knowledge to Timex India)</p> <p>Also, in the absence of PE or any presence in India, consideration for such services should not be taxed as treated as 'business income'</p>	No withholding obligation on Timex India as consideration received by Timex Group entities should not be taxable in India	NA
<i>Information technology ("IT") services</i>			
<i>IT support services</i>	<p>Provision of such services should not be taxable as FTS under the purview Article 12 of the applicable tax treaties due to its 'restrictive' applicability (ie services do not 'make available' technical skills or knowledge to Timex India)</p> <p>Also, in the absence of PE or any presence in India, consideration received for such services should not be taxed, treated as 'business income'.</p>	Since, consideration received by Timex group entities is not taxable in India, Timex India should not be required to withhold tax on such payments	NA
<i>IT third party charges</i>	Taxability of such charges may be classification into the following two folds:		
	<i>i) Cost allocation for IT products such as maintenance charges of routers and switches etc:</i>		

	Should be considered as reimbursement on cost to cost basis and in the absence of any income element in such charges, consideration should not be chargeable to tax in India, consequently no TDS liability.	Since, consideration received by Timex group entities should not be taxable in India, Timex India should not have any obligation to withhold tax on such payments	NA
	<i>ii) Cost allocation for database management systems, software (such as email management systems, reporting systems) and other software licenses:</i>		
	In the absence of any right to use the copyright conferred upon Timex India, for the purpose of commercial exploitation, such consideration should not be taxable as 'royalty' in India.	Since, such consideration should not be taxable in India, Timex India should not be obligated to withhold tax on such allocations.	NA

8.2 Further, the assessee explaining the provisions of Article 12(4) of the India-Netherlands defining royalty submitted as under:

*"12.2 Further, Article 12(4) of the **India-Netherlands tax treaty** defines royalty, as following:*

"4 the term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience"

12.3 Under this arrangement, Timex Group entities allocate the cost of various global software/licenses procured by the Timex group entity for use by various entities worldwide including Timex India. It is the understanding that Timex India neither owns any IPR's in such licenses/ software nor has the right to commercially exploit such licenses/ software in India and Timex India is only provided access to these software by Timex group entities on the basis of number of users in India.

12.4 Since Timex India is not conferred with any right to use the copyright for commercial exploitation of such software licenses, consideration for such allocation should not be taxable as 'royalty' in India

12.5 Cost allocation in this arrangement for the software/licenses, etc does not contain any income element and is made purely on a cost to cost basis.

13. The provision of services by Mr Georgio Gali may be classified as a 'technical' or 'consultancy' service under Article 12 of the India Netherlands tax treaty, depending upon the technical inputs/advice given by Mr Gali on the Helix time piece designs prepared by the Timex India team. However, since such services, prima-facie, do not make available technical knowledge, experience, skill, know-how or process or consist of the development and transfer of a technical plan or technical design to the service recipient (i.e. Timex India), the consideration attributable towards such service should not qualify as FTS under the India-Netherlands tax treaty.

13.1 Further, that in the course of rendering of such services and for thereafter, Timex India does not acquire any technical skill or knowledge which it can apply for its benefit without having recourse to the service provider (Le. Timex Group entity/s). Further, this view is based on the understanding that the changes

suggested by Mr Galli are not substantial enough to result into development and transfer of a new design [which is clearly distinct from Helix designs prepared by the Timex India team].

13.2 Further, the consideration attributable to the subject service should also not be taxable as business income in India under Article 7 of the India-Netherlands tax treaty in absence of any PE/ presence in India (through an office or employees/ other personnel) in India since the subject service has been rendered from outside India,

13.3 In view of the above, since the consideration for the subject service should not be taxable (either as FTS or Royalty or as business income) in India, there should be no requirement to withhold tax on consideration attributable to the subject services.”

(emphasis supplied by us)

8.3 In the submissions, before the Assessing Officer, as well as the Ld. CIT(A) and before us, it is submitted that the cost allocation in the arrangements for the software / licences etc. does not contain any income element and is made on purely on cost-to-cost basis (para 12.5 of its submissions duly highlighted). Regarding the provisions of services by Mr. Georgio Gali it is submitted that such services do not make available technical knowledge, experience, skill know or process or consist of the development and transfer of a technical plan or technical design to the service recipient (i.e. Timex India), and the consideration towards such services will not qualify as FTS under the India-Netherlands tax treaty.

8.4 Further, the assessee submits in para 13.1 of its submissions as reproduced above, that as per their

understanding the changes suggested by Mr. Gali are not substantial enough to result into development and transfer of a new design [which is clearly distinct from Helix designs prepared by the Timex India team].

8.5 However, in the written submissions made by the assessee before us and reproduced earlier in this order on page no. 18 and 19 of this order, it is stated under the head 'Remuneration', that for the IT services cost +5% based on time spent by IT personnel is paid. Thus, it is seen that the assessee pays a mark-up of 5%, on the payment for IT services. Further, the assessee states that no mark-up has been paid on product design service but its AE Timex Netherland BV(TNBV) pays a markup of 10% on product design services received by an affiliate.

8.5 Further, it is seen from the highlighted portion of the above submission of the assessee (para no. 12.3 as referred above in para no. 8.2 of this order), wherein the assessee has not categorically denied that it does not own any IPR in such licences / software nor has the right to commercially exploit such licenses/ software in India and Timex India is only provided access to this software by Timex group entities as the

basis of number of users in India but it was only based upon their understanding.

8.6 Further, regarding the services provided by Mr. Georgio Gali on the Helix time piece designs prepared by the Timex India team, it only states that services, prima-facie, do not make available technical knowledge, experience, skill, know-how or process or consist of the development and transfer of a technical plan or technical design to the service recipient (i.e. Timex India), the consideration towards such services should not qualify as FTS under the India-Netherlands tax treaty. Further, as highlighted above in para no. 12.3 of its submission, it submitted their view is based on the understanding that the changes suggested by Mr. Gali are not substantial enough to result into development and transfer of a new design which is clearly distinct from Helix designs prepared by the Timex India Team and the denial of the same is not categorical by the assessee.

8.7 Therefore, in the present case, we find that the full facts regarding the exact nature for which payments amounting to Rs. 1,63,36,548/- has been made by the assessee to the non-residents has not been brought on record either in the case of IT services or the product design, whereas the submission

made before us and the case laws relied upon by the assessee will be applicable only when there reimbursement is purely on cost basis with no markup on IT services and the product design charges do not satisfy 'make available' clause and was reimbursed on cost basis whereas such facts are not clearly on record as discussed above. The submission of the assessee that the cost allocation in the arrangement for software / licensing etc. does not contain any income element and is made purely on the cost-to-cost basis is also not backed up by the details of markup payment made by the assessee as stated above, in the 'Remuneration' column of its written submission filed before us. Therefore, the entire claims made the assessee as discussed above, require re-verification by the Assessing Officer, in view of the above observations. We therefore, set aside the order of the Assessing Officer and the Ld. CIT(A) and restore the matter back to the file of the Assessing Officer for fresh adjudication, keeping in view our above observations and as per law.

8.8 In the result, the appeal of the assessee is partly allowed.

9. To sum up, the appeal of the Department in ITA No. 7598/Del/2019 is dismissed and the appeal of the Assessee in ITA No. – 7526/Del/2019 is partly allowed.

Order pronounced in the open court on 26th September, 2025.

Sd/-

**[VIMAL KUMAR]
JUDICIAL MEMBER**

Sd/-

**[BRAJESH KUMAR SINGH]
ACCOUNTANT MEMBER**

Dated 26.09.2025
Pooja/

Copy forwarded to:

1. Assessee
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi,