IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "L", MUMBAI

BEFORE SHRI AMIT SHUKLA (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)

I.T.A. No.1690/Mum/2015
(Assessment Year: 2011-12)

Linklaters LLP C/o Deloitte Haskins & Sells LLP Tower 3, 27-32 Floor, Indiabulls Finance Centre, Elphinstone Mill Compound, Senapati Bapat Marg Elphinstone (West), Mumbai-13	Vs	The Dy.CIT (International Taxation) 3(1)(2), Mumbai
PAN : AABCL5182G		
(Appellant)		(Respondent)

Appellant by	Shri SE Dastur / Niraj Sheth
Respondent by	Shri Jasbir Chauhan, CIT-DR

Date of hearing : 08-11-2016
Date of order : 31-01-2017

O R D E R

Per ASHWANI TANEJA, AM:

This appeal has been filed by the assessee against the final assessment order passed by the Assessing Officer u/s 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 for A.Y. 2010-11 dated 07-01-2014 (there appears to be some typing mistake in printing this date) in pursuance to the order of the Dispute Resolution Panel (hereinafter called as DRP) u/s 144C(5) dated 22-12-2014 on the following grounds:-

''The appellant objects to the order dated January 7, 2014 (notice of demand dated 23 January 2015) passed by the Deputy Commissioner of Income Tax, Range (International Taxation) 3(1)(2), Mumbai ('AO) under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 ('the Act') on the following grounds:

General

The learned AO has erred in deleting the description of services provided by the appellant to the client as mentioned in the draft order. This narration is indicative that the services provided by the appellant are not in the nature of fees for technical services and that the services were utilised outside India.

2 *The AO erred in observing that the appellant had provided services to concerns inside India. This observation was not present in the draft order and is contrary to the fact.*

3 The learned AO erred in computing the total income of the appellant at Rs.50,16,03,621 as against Rs.342,48,138 considered by the appellant.

4 Without prejudice to the other grounds, the learned AO erred in computing the total income at Rs. 50,16,03,621 as against Rs. 47,65,23,440 computed in the draft assessment order.

5 *Without prejudice to the above, the learned AO erred in taxing gross fees received by the appellant without allowing any deduction for the expenditure.*

The learned AO erred in observing the below in the order without any basis/evidence:

Page 12 of *the order:*

Admittedly, the services rendered by the assessee are made use by the recipient in different decision making, financial decision making, legal matters and treasury service etc.

The recipient of the services are making use of the advice, input, experience, contain in the services rendered by the assessee in the various decision making process. On the basis of the input, advice, assistance and service provided by the assessee, the decision is taken by the different clients by selecting suitable solution after considering all the alternatives available. Therefore, it may not be correct to say that what was received by the assessee is not technical advice. The technological input acquired by the assessee through experience and experiment was tested at various stages and process and further it was made available to the assessee so as to enable the assessee to apply/use the same in its decision making process."

Page 13 of ***the order:***

"It is obvious that the technical knowledge, experience, skill possessed by the company with regard to various aspect was made available in the form of advice or service which was made use by the assessee company in the decision making process not only in management but also in financial matters.

Page 15 of the order:

"In the present case, it is a clear case of using the technology, expertise of the foreign company in India for taking various decision and management analysis. The expertise, analysis, technical knowledge supplied by the foreign company remains with the assessee forever and it could be even used in future for the business of the assessee in the process of management decision, financial decision making and risk management analysis

7 ***Fees considered as "fees for technical services" as per the Income Tax Act, 1961***

7.1 The learned AO erred in holding that the fees earned by the appellant is in the nature of fees for technical services' as defined under section 9(1)(vii) of the Act. The learned AC ought to have appreciated that the income earned by the appellant from furnishing of legal services is covered by the provisions of section 9(l)(1) of the Act

7.2 *The learned AO erred in holding that the entire sum*

of Rs.50,1603,621 invoiced by the appellant to its clients is deemed to accrue and arise in India under section 9(1)(vii) of the Act.

7.3 The learned AO ought to have appreciated that in view of the specific provisions of section 9(1)(vii)(c) and also the fact that the services rendered by the appellant were not utilised by the clients in India, the appellants income cannot be considered as deemed to accrue or arise in India.

7.4 The learned AO out to have appreciated that the retrospective amendment to Section 9 of the Act introduced by the Finance Act, 2010 is only applicable in respect of income covered under clauses (v), (vi) and (vii) of Section 9(1) of the Act and not to income covered under clause (i) of Section 9(1).

***7.5** The learned AO at page 17 of the order erred in observing that the services of the appellant were utilised by the Indian companies. The appellant submits that during the relevant previous year the entire services were rendered to non-Indian entities i.e. foreign entities.*

7.6 The learned AO erred in holding that every services which has an Indian connection is liable to tax in India.

8 Denial of India-UK Tax Treaty benefit

***8.1** The learned AO erred in denying benefit of India-UK Double Taxation Avoidance Agreement (DTAA') to the appellant.*

***8.2** The learned AO erred in observing at para 5.1 of the order that the appellant is a firm as against a Limited Liability Partnership incorporated and registered with the Registrar of Companies of England and Wales.*

***8.3** The learned AO erred in holding that the appellant cannot be treated as resident of the UK within the meaning of Article 4(1) of the India-UK DTAA.*

***8.4** The learned AO ought to have appreciated that income*

of the appellant is subject to UK laws and therefore the appellant is "liable to taxation' in the UK.

9 Fees considered as fees for technical services under the India-UK DTAA

9.1 *The learned AO erred in holding that the income of the appellant is in the nature of "fees for technical services" as defined under Article 13(4)(c) of the DTAA.*

9.2 *The learned AO ought to have appreciated that the services rendered by the assessee did not make available technical knowledge, experience, skill, know-how or process and hence fees earned by the appellant is not covered by the Article 13 of the DTAA.*

9.3 *The learned AO ought to have appreciated that merely because the services to be rendered include the technical input does not per se mean that the technology is made available.*

9.4 *The learned AO ought to have appreciated that the definition of fees for technical services" as provided in Article 13(4) of the DTAA is much narrower than the definition provided in section 9(1)(vii) of the Income-tax Act*

9.5 *The learned AO erred in observing that reliance cannot be placed on Para 4(b) of the Memorandum of Understanding to the India-USA Tax Treaty for the explanation of the term make available'.*

9.6 *The learned AO ought to have appreciated that the DTAA has different provisions for taxing fees for technical services and fees for professional income and that the taxability of fees earned by the appellant is governed by the provision of Article 7 i.e. business profits*

9.7 *The learned AO erred in not considering the provisions of Article 13(7) of the DTAA. The learned AC ought to have appreciated that as per Article 13(2) read with the Article*

13(7) of the DTkA fees earned from non-Indian entities who do not have a permanent establishment in India is not liable to tax in India.

10 Income taxable under Article 15 of the India-UK DTAA

10.1 *The AO erred in inserting para 8 in the order which was not present in the draft order Further, the appellant submits that the observations made in para 8 are erroneous.*

10.2 *The learned AO erred in holding that the appellant was liable to tax in India under Article 15 of the India-UK Double Taxation Avoidance Agreement (DTAA'). **The** learned AC ought to have appreciated that Article 15 was applicable only to individuals and was not applicable to the case of the appellant*

10.3 *Without prejudice to the above, in terms of Article 15(1) the learned AO ought to have taxed income only in respect of services rendered in India*

10.4 *The learned AO erred in holding that the appellant had a fixed base in India from which the appellant was performing its activities.*

10.5 *The learned AO erred in holding that appellant's partners and staff, use the hotels or the places provided by clients as an office or place of work and from such premises the appellant provides services to its client.*

11 *Disbursement treated as part of gross receipts*

11.1 *The learned AO erred in taxing an amount of Rs.2,79,48,906 being reimbursement of expenditure The appellant submits that reimbursement of expenditure is not income and therefore the same cannot be brought to tax.*

11.2 *The learned AO erred in not providing an opportunity of being heard before taxing the disbursements*

12 Change in status of the appellant

The learned AO erred changing appellant's status to Limited Liability Partnership as against status stated as a company in the draft assessment order and which was accepted by the Dispute Resolution Panel.

13 Withdrawal of deduction under section 44C

In computing the taxable income the learned AO erred in withdrawing deduction of Rs. 2,50,80,181 allowed under section 440 in the draft assessment order.

14 Rate of tax

14.1 *The learned AO erred in applying tax rate of 42.23% on the gross fees including disbursement earned by the appellant.*

14.2 *Without prejudice to the above the learned AO ought to have considered tax rate at 15% being rate provided in ArticIe 13(2) of the DTAA for fees for technical services*

14.3 *Without prejudice to the above as the learned AO has considered the status of the appellant as "Limited Liability Partnership, the tax rate ought to have been considered at 30.9%.*

15. Levy of interest under 234B

The learned AO erred in charging interest under section 234B of the Income-tax Act, 1961 ('the Act). The appellant denies liability to the interest charged under section 234B of the Act

16 Initiating penalty under section 271(1)(c)

The learned AO erred in initiating penalty proceedings under section 271(1)(c) of the Act."

2. During the course of hearing, detailed arguments were made on behalf of the assessee by Shri S.E. Dastur, Senior Advocate along with Shri Niraj Sheth and by Shri Jasbir Chauhan, Ld. CIT-DR, on behalf of the Revenue.

3. Though Ld. Counsel of the assessee has made elaborate arguments with respect to each of the grounds in exhaustive manner, dealing with all the aspects raised by the AO, however, we shall firstly like to deal with the issues which are crucial for the issues raised before us and if need be, only

then, the remaining issues shall be decided by us. For this purpose, it is necessary to first briefly discuss the brief background of the assessee and the issues raised by the AO in the assessment order.

4. The brief background of the assessee before us is that assessee is a Limited Liability Partnership incorporated under the Laws of United Kingdom (UK). It provides legal services to its clients worldwide. It was stated that all its partners are qualified lawyers in terms of the regulations as applicable in the respective countries. In its return of income pertaining to the year before us, the assessee initially offered to tax a sum of Rs.2,94,432,273/- as income attributable to work performed in India by the Permanent Establishment (PE) of the assessee in India which was created on account of its personnel (employees and other executives) staying in India for more than 90 days. However, during the course of assessment proceedings, the amount of income attributable to work performed in India was revised by the assessee itself to Rs.3,42,48,138 on the ground that when further details were received by the assessee regarding time spent in India by the assessee's employees and other personnel, then it was found that some more amount of fee was attributable to work performed in India, accordingly, an amount of Rs.48,05,865/- (Rs.3,42,48,138 – 2,94,42,273) was added to the returned income by the AO. During the course of assessment proceedings, the assessee provided all its income, income of fee received in respect of services rendered in India and services rendered outside India. Following break up was provided by the assessee:-

Income in respect of services rendered in India- Rs.3,42,48,138

Income in respect of services rendered outside India-	Rs.43,94,06,577
Towards disbursements -	Rs. 2,79,48,9076
	Rs.50,16,03,621
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The aforesaid break up was accepted by the AO during the course of assessment proceedings. However, the AO was of the opinion that entire receipts were in the nature of 'fee for technical services' within the meaning of Explanation 2 to section 9(1)(vii) of the Act as the services were legitimately utilized in India. It was also held by the AO that assessee was not eligible for the benefit of Double Taxation Avoidance Agreement between India and UK (in short, DTAA) on the ground that assessee was a fiscally transparent entity not liable to tax in UK in its own right. In addition to that it was also held by the AO that aforesaid amount of income (fee) were in the nature of 'fee for technical services' as defined in Article 13(4) of the DTAA and were chargeable to tax under Article 13 thereof. The Ld. AO also held that in any case, these amounts were also taxable under Article 15 of the DTAA. Apart from that, the AO also raised few other minor issues which shall be dealt by us at appropriate place.

5. During the course of hearing, detailed arguments were made by both the sides addressing all the issues raised before us. However, we find that if some of the primary issues are decided, the remaining issues will become redundant or subservient to the main issues. In our considered opinion, the primary issue to be decided in this case is – whether, the assessee is eligible to have the benefit of DTAA between India and UK. This issue is of primary significance because an assessee is

entitled to have the benefit of provisions of the Act or DTAA, whichever is more beneficial to it in view of explicit provisions of section 90(2) of the Acts, which reads as under:-

> *" 90(2) Where the Central Government has entered into an agreement with the Government of any country outside India under sub- section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."*

Thus, if it is found that assessee is entitled for the provisions of the DTAA, as has been vehemently claimed by the assessee, then, we may not be required to go into the applicability of provisions of the Act as contained in section 9(1)(vii) as have been invoked by the AO. Therefore, we shall first deal with grounds relating to these issues.

6. Grounds 8 to 8.4 deal with action of AO in denying benefit of India-UK DTAA to the assessee. It is noted from the perusal of the assessment order that AO has held vide paragraph 5 of the assessment order that assessee is not entitled for the benefits under India-UK Tax Treaty, wherein the AO has observed as under:-

> "***5. Benefit of Treaty not available to the assessee.***
>
> *5.1 During the course of hearing, it was noticed that the assessee firm was a fiscally transparent entity and was not liable to tax in UK in its own right. The assessee is a fiscally transparent entity which is not a taxable entity under the laws of the treaty partner country i.e. United Kingdom. In United Kingdom, L.L.P. is not a taxable entity. The assessee is not assessed to tax in UK but only its partners are assessed to tax. The assessee firm has not paid any tax in UK.*

5.2 The definition of 'resident of a contracting state', as set out in Article 4(1), states that resident of a Contracting State means "any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature". It is to be noted that as evident from Article 1(1) of the India UK tax treaty, the treaty can only apply to a person who is resident of one or both the contracting states. Therefore, in view of the provisions of Article 4(1) read with Article (1) and on the facts of this case, unless the assessee can be said to resident of UK, the assessee cannot claim treaty benefits, and unless the assessee is liable to tax in UK, assessee cannot fulfill the requirement of being a resident in UK.

5.3 Thus the assessee cannot be treated as a 'resident of the United Kingdom' within meanings of that term under the India UK tax treaty and the assessee is not entitled to the benefits of the tax treaty at all. On this same issue, the Revenue is in appeal before Hon'ble Bombay High Court for AY 1995-96 and the matter is sub judice. Hence, it is held that assessee is not eligible for treaty benefits in the source country, as it is not taxable in its own right in residence country.

5.4 It is not in dispute that in the United Kingdom, a partnership firm is not taxable unit so far as income of the partnership firm is concerned, and the expression 'liable to tax' cannot include a person who is not a taxable unit. Only such a person whose income is taxed can be covered by the definition of the expression 'liable to tax'. The expression 'liable to tax', according to the learned Departmental Representative, covers only such entities which have tax liability in respect of their own income. Since a partnership firm is not 'liable to tax' in the United Kingdom, the partnership firm cannot be granted treaty benefits in India."

7. Perusal of the order of the AO reveals that AO has denied the benefit of DTAA mainly on the ground that since assessee firm was a fiscally transparent entity and was thus not liable to tax in UK in its own right on the ground that assessee being LLP is not a taxable entity under the laws of UK whereas the main requirement of treaty is that to be

covered under DTAA, a person or entity has to be 'resident' of a contracting state and to fall in that category, the said person or entity should be liable to tax in the said state. As per AO, since the assessee is not liable to tax in UK, it cannot be party entitled to get the benefit of DTAA.

8. During the course of hearing before us, it was stated by the Ld. Sr. Counsel that this issue has already been decided by the Tribunal in favour of the M/s. Linklaters in earlier years, but the AO did not follow the same for the reason that department had filed appeal against the order of the Tribunal which was pending before the Hon'ble Bombay High Court.

9. We have gone through the orders passed by the AO as well as DRP and also the submissions made before us and also the orders passed by the Tribunal in case of M/s. Linklaters for earlier years. With the assistance of both the parties, it was noted that this issue has cropped up in various earlier years in case of M/s. Linklaters i.e. A.Ys 1995-96, 1997-98, 1998-99, 1999-2000 and 2001-02 wherein, the Tribunal has decided this issue in favour of Linklaters by holding that it is eligible for the benefits of India -UK DTAA. Our attention has been drawn upon the orders passed by the Tribunal for all these years. In A.Y.1995-96, the Tribunal vide its order reported in 132 TTJ 20 made elaborate discussion at paras 21 to 28 before arriving at the conclusion at paragraph 79 as under:-

> *"In view of the above discussions, as also bearing in mind the entirety of the case, we hold that the assessee was indeed eligible to the benefits of India-UK tax treaty, as long as entire profits and the partnership firm are taxed in UK – whether in the hands of the partnership firm though the taxable income is determined in relation to the personal characteristics of the partners, or in the hands of the partners directly. To that extent,*

objection taken by the learned Departmental Representative, on the question of admissibility of India-UK tax treaty benefits, is held as maintainable but rejected on merits".

10. Similarly, in other years, the Tribunal has followed its earlier order and held that M/s. Linklaters is eligible for the benefits of India-UK DTAA so long as entire profits of the partnership firm are taxed in UK, whether in the taxable income is determined in relation to personal characteristics of the partners or in the hands of the firm directly. In the year before us, there is no dispute on facts that ultimately tax has been paid either by the said firm or by its partners in UK. No distinction has been pointed out by the Ld. CIT-DR on facts or law. Under these circumstances, respectfully following the orders of the Tribunal in Linklaters's case for earlier years, we hold that the assessee is entitled to claim benefits of India UK- DTAA. Therefore, Grounds 8 to 8.4 are allowed.

11. Having held that assessee is entitled to claim benefits of DTAA, we find it appropriate to examine the taxability of income (fee) received by the assessee in terms of Articles of DTAA since the definition provided in DTAA appears to be more restrictive or narrower as compared to the definition as has been provided u/s 9(1)(vii) of the Act, as has also been held in number of cases.

12. **Grounds 9 to 9.6** deal with the action of AO wherein he has held that income of the assessee is in the nature of 'Fee for Technical Services' as defined under Article 13(4)(c) of the DTAA. During the course of assessment proceedings, it was held by the AO that nature of income earned by the assessee clearly falls within the definition of 'Fee for Technical Services' as provided under Article 13 of the DTAA. It was held that the assessee made available to its clients technical knowledge,

experience, skill in the form of advice or services which were made use by them. The assessee relied upon the judgement of Karnataka High Court in the case of De Beers 346 ITR 467 (Kar) but it was distinguished by the AO on the ground that technology provided by the assessee therein was utilised by the Dutch company in order to provide the services to the assessee therein and he compared the same with the case of assessee before us with the reasoning that in assessee's case also expertise of the assessee was used by its clients in making decisions and, therefore, expertise was made available to the clients. Further, he did not follow the case of Raymonds Ltd 86 ITD 791 (Mum) with the reasoning that marketing services were not technical services. Rather, he relied upon the judgements of AAR in the case of Perfetti 342 ITR 200 (AAR).

13. During the course of hearing before us, Ld. Senior Counsel made detailed arguments and explained that the AO has grossly misunderstood the concept of term 'make available' as has been used in Article 13 of DTAA and misapplied the same on the facts of the case before us. It was submitted that the foremost condition for bringing an item within the scope of this Article is that the service in question should 'make available' technical knowledge, experience, skill, etc. and to explain the meaning of term 'make available', reliance was placed by the Ld. Sr. Counsel on the judgements of Mumbai Bench of the Tribunal in the case of Raymonds Ltd vs DCIT 86 ITD 791 (Mum), CIT vs De Beers India Minerals Pvt Ltd 346 ITR 467 (Kar) and Mahindra & Mahindra Ltd vs DCIT 30 SOT 374 (Mum)(SB). It was submitted that view expressed in these judgments have been followed in many judgments including the following:-

1. CESC Ltd Vs. DCIT 87 ITD 653 (Kol)(TM)

2. KPMG vs JCIT 142 ITD 323 (Mum)

3. DCIT vs Xansa India Ltd (ITA No.2283/Del/2011 & Ors

14. It was also submitted that decision relied upon by the AO are either distinguishable or they were contrary to the views taken by Hon'ble High Court CIT vs De Beers India Minerals Pvt Ltd 346 ITR 467 (Kar), view of the Special Bench in Mahindra and Mahindra's case and the view of the Third Member in CESC Ltd case as well as the view taken by the co-ordinate benches of the Tribunal in aforesaid cases, and therefore, AO's order cannot be upheld. It was submitted that the decision of Intertek Testing Service India Pvt Ltd 307 ITR 418 (AAR) is actually in favour of the assessee, which has been completely misread by the AO. This decision has followed the judgements in the case of Raymonds Ltd & CESC (supra). Similarly reliance placed by AO on another judgement of AAR in the case of Perfetti Ben 342 ITR 200 is misconceived since this ruling has been set aside by Hon'ble Delhi High Court in the judgement reported at 52 Taxmann.com 161. Similarly, reliance on the judgement of Shell India Marketing Pvt Ltd 342 ITR 223 is also of no use since in this case also earlier ruling in the case of Perfetti was followed which has been set aside by Hon'ble Delhi High Court. Thus, impliedly, the said judgment gets overruled by the judgement of Hon'ble Delhi High Court. Similarly, decision in DCIT vs Tata Iron & Steel Co Ltd 34 SOT 83 (Mum) was in context of provisions of section 9(1)(vii) of the Act and does not deal with the provisions of DTAA. Further it was given on altogether different facts.

15. Per Contra, Ld. CIT-DR relied upon the decision of US Technology Resources Pvt Ltd vs ACIT 61 SOT 19 (Cochin ITAT) which was distinguished by the Ld. Counsel of the assessee on the ground that in the said decision,

Tribunal was concerned with the payment made for management services of which legal services was a part, but that would not make the legal services like the one provided by the assessee. It was further elaborated in detail by Ld. Sr. Counsel that in the said case training was given by the US company to the Indian employees which is not so in the present case. A person who is not qualified to practice as an advocate cannot provide legal services. Since the clients to whom the assessee has rendered services are not lawyers, there is no question of the assessee's services making available any knowledge, experience, etc. to the clients. In the case of assessee (i.e. Linklaters LLP), partners are all lawyers qualified in various jurisdictions. The partners practice law under the relevant professional regulations of local Bars (such as England and Wales, New York and Germany) and the Law Society of England and Wales as assessee (Linklaters LLP) is registered in the UK. Linklaters LLP partners do not practice Indian law so no legal services under Indian laws can be rendered by Linklaters LLP in India that can make available technical knowledge, skill or experience tec.

16. Ld. Sr. Counsel also drew our attention upon the brief note appended in the paper book containing detailed description of services provided by the assessee to its clients to impress upon the point that none of the services was of the nature which could be said to be capable of making available any technology, skill, experience or knowledge etc to its clients. Our attention was drawn on the detailed chart submitted before the AO as well as DRP wherein client-wise list was submitted to the lower authorities along with detailed description of the services provided to its clients by the assessee. It was thus submitted that the fees received by the assessee was not covered within Article 13(4)(c) of the DTAA and thus

it could not be characterised as 'Fees for Technical Services' in terms of DTAA.

17. In rejoinder, Ld. CIT-DR again made elaborate arguments and relied upon various judgements in support of his contention that assessee was making available to its clients Technical knowledge and skill etc to enable them to perform their task very well.

18. We have gone through the orders passed by lower authorities, submissions made and judgements relied upon by both the sides before us and also the evidences showing nature of service provided by the assessee to its clients. The AO has treated the fee received by the assessee for the services provided by the assessee which according to the AO are of the nature of Fee for Technical Services as envisaged u/s 9(1)(vii) of the Act. It has been argued before us that the Revenue's case is that the income received by the assessee is of the nature of Fee for Technical Services even as per India-UK DTAA. On the other hand, the assessee's case is that the impugned amount is neither liable to be taxed u/s 9(1)(vii) nor within any of the Articles of India-UK DTAA. We, therefore, find it appropriate to first of all deal with the relevant Articles of India UK-DTAA and if the assessee's contention is found to be correct, then, we may not be required to examine its taxability u/s 9(1)(vii) of the Act, in view of beneficial provisions of section 90(2) of the Act, as discussed above. It is noted that Article 13 of India UK DTAA deal with taxability of 'Fee for Technical Services'. Clause (c) of sub-article (4) of Article 13 stipulates that the term 'Fee for Technical Services' used in the Article means payment of any kind to any person in consideration for rendering of any technical or consultancy services which:-

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

19. Thus, only those services may fall under this Article, which 'make available' to the recipient any technical knowledge, experience, skill, know-how or processes, etc. as a result of rendering of services by the assessee to the recipient of services from whom fee has been received. Therefore, we need to first of all find out whether this condition is complied with in the facts of the case before us. For deciding this issue, we need to first of all understand the true meaning and scope of the expression 'make available', as has been used in this Article. It has been contended before us on behalf of the Revenue that the clients of the assessee have made use of the advice / consultancy given by the assessee, which was not possible unless technical knowledge, experience, skill, know-how or processes, etc was not provided by the assessee to its clients. Ld. CIT-DR elaborated that the services were rendered by the assessee to its clients in most exhaustive manner which also involved rendering of consultancy on various complex issues. Therefore, the assessee parted with its reservoir of rich knowledge, skill and experience with its clients and thus it can be said that assessee 'made available' the same to its clients and thus, the mandatory condition as stipulated in clause (c) of Article 13(4) was duly complied with.

20. We differ with the view expressed by the AO as well as by Ld. DR before us with regard to their understanding of true meaning and scope of the term 'make available' in the context in which it has been used in Article 13 of India-UK DTAA. In our considered opinion expression 'make available' does not mean that when the recipient uses the services, then

that itself amount to making available of technical knowledge, experience, skill, know-how or processes, etc. to the recipient. It is because every service will have an end-use. Thus 'make available' goes beyond mere user. There is a clear distinction between 'user' of the services and making available of technical knowledge, experience, skill, know-how or processes, etc. by the service provider. If we properly analyse the background and the context in which this term has been used in the DTAA, 'make available' postulates that recipient gets equipped to perform similar activity in future without recourse to the service provider. Although, the term 'make available' has not been defined anywhere in India UK DTAA, but it is brought to our notice that some explanation of it has been provided in Memorandum of Understanding appended to Indo-US DTAA. In the Memorandum of Understanding concerning 'Fee for Included Services in Article 12 of US-India Tax Treaty dated 15 May, 1989 following explanation has been provided:-

> *"Paragraph 4(b) of article 12 refers to technical or consultancy services that make available to the person acquiring the services technical knowledge, experience, skill, know- how, or processes, or consist of the development and transfer of a technical plant or technical design to such person. (For this purpose, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.) This category is narrower than the category described in paragraph 4(a) because it excludes any service that does not make technology available to the person acquiring the service.* ***Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology.*** *The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a*

product which embodies technology shall not per se be considered to make the technology available."

21. Few illustrations have also been given in the aforesaid MOU. From perusal of the illustrations so provided we understand that mere rendition of services does not fall within the gamut of the expression 'make available' unless following conditions are also fulfilled:-

- The technical knowledge, skills, etc. remain with the person receiving the services even after the agreement comes to an end.
- The technical knowledge or skills of the provider are imparted to the recipient.
- The recipient is in a position to deploy similar skills or technology or techniques in future without the aid or assistance of the service provider.

22. Our view is duly supported by many judgements wherein this term has been analysed exhaustively on many occasions. In the case of **Raymond Ltd vs DCIT 86 ITD 791** similar issue came up before the Mumbai Bench of the Tribunal wherein the true meaning of the term 'make available' was analysed and explained as under:-

*"**92.** We hold that the word "which" occurring in the article after the word "services" and before the words "make available" not only describes or defines more clearly the antecedent noun ("services") but also gives additional information about the same in the sense that it requires that the services should result in making available to the user technical knowledge, experience, skill etc. Thus, the normal, plain and grammatical meaning of the language employed, in our understanding, is that a mere rendering of services is not roped in unless the person utilising 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. The technical knowledge, experience, skill etc. must remain with*

the person utilising the services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skills etc. from the person rendering the services to the person utilising the same is contemplated by the article. Some sort of durability or permanency of the result of the "rendering of services" is envisaged which will remain at the disposal of the person utilising the services. The fruits of the services should remain available to the person utilising the services in some concrete shape such as technical knowledge, experience, skills etc."

23. Similarly in the case of **CIT vs De Beers India Minerals Pvt Ltd 346 ITR 467 (Kar)**, identical issues came up before the Hon'ble High Court wherein the brief facts were that the said assessee company was engaged in the business of prospecting and mining for diamonds and other minerals. For the purpose of carrying out geo physical services, the assessee engaged a company based in Netherlands which had a team of experts specialized in performing airborne geo physical services for its clients, processed the data acquired during the survey and provided necessary reports. An issue arose whether the services rendered by the said Netherland based company amounted to 'make available' technical knowledge, experience, skill, know-how or processes, etc. or not. Hon'ble High Court analysed the entire facts and Articles of DTAA and held that providing of reports based upon the data processed which were acquired during the course of geo physical survey would not amount to 'make available' technical knowledge, experience, skill, know-how or processes, etc. Relevant part of observations of the Hon'ble High Court containing the reasoning given in this regard is reproduced below:-

"***22.*** *What is the meaning of 'make available'. The technical or consultancy service rendered should be of such a nature that it 'makes available' to the recipient technical knowledge,*

know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive and utilize the knowledge or know-how on its own in future without the aid of the service provider. In other words, to fit into the terminology 'making available', the technical knowledge, skill etc. must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply technology. The fact that the provision of the service that may require technical knowledge, skills, etc. does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical / included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."

24. Similarly, identical issue came up before **Hon'ble Special Bench** of ITAT in the case of **Mahindra & Mahindra Ltd vs DCIT** (supra) wherein the facts involved were identical to large extent in the sense that nature of services provided by the assessee and in the said case were similar. Identical issue arose i.e. whether services received by the said company amounted to making available of technical knowledge, experience, skill, know-how or processes, etc. by the provider of the services (who was based in UK) as envisaged within the Articles of Indo-UK DTAA. In this context, Hon'ble Special Bench, after analyzing the facts and entire law available, observed as under:-

"Clauses (1) and (2) of article 13 in the DTAA with UK clearly provide that the fees for technical services is taxable in India. Clause (4) of article 13 defines the meaning of the term fees for technical services' entire quarrel is about the applicability or otherwise of sub-clause (c) of clause 4 of article 13 as per which fees for making available of the technical knowledge, experience, skill, etc. is included in the definition of this sub- clause. In other words, the technical knowledge, experience or skill, etc., must be made available to the assessee so as to be covered within its scope and mere providing of such services without making them available to the assessee will not serve the purpose and, hence, will be outside the ambit of article. The assessee had ab-initio contended before the authorities below that even the services rendered by the lead managers were held to the technical services but those were not 'made available' to the assessee. 'Rendering of any technical or consultancy services' is followed by 'which make available technical knowledge, experience, skill, know-how'. In this context, it becomes imperative to understand the meaning of the expression 'make available' as used in this article. 'Make available' means to provide something to one which is capable of use by the other. Such use may be for once only or on a continuous basis. In present context, to 'make available' the technical services means that such technical information or advice is transmitted by the non-resident to the assessee, which remains at its disposal for taking the benefit therefrom by use. Even the use of such technical services by the recipient for once only will satisfy the test of making available the technical services to the assessee. If the non-resident uses all the technical services at its own end, albeit the benefit of that directly and solely flows to the payer of the services, that cannot be characterized as the making available of the technical services to the recipient.

It, therefore, follows that making available the technical services to the recipient is sine qua non for treating consideration paid for it as fees for technical services under article 13 of DTAA with UK. Adverting to the facts of the instant case, the lead managers had rendered technical, managerial or consultancy services in the GDR issue, but such services were not made available to the assessee inasmuch as the assessee only derived the benefit from the technical services provided by the lead managers without

getting any technical knowledge, experience or skill in its possession for use at its own. Therefore, article 13 of DTAA with UK did not apply to the instant case and, hence, the management and selling commission could not be taxed in India."

25. Similarly, in the case of **KPMG vs JCIT** (supra), the issue before the Tribunal was identical. The said assessee rendered professional services to its clients and the AO brought the same to tax disregarding relevant articles of Indo US DTAA and India UK DTAA. The brief facts were that the said assessee paid professional fees to various persons in USA, UK and Malaysia in respect of training and professional services without deduction of tax. The assessee claimed that the professionals did not have any fixed base or permanent establishment in India and had stayed in India for less than 90 days. Also, the remittances could not be treated as royalty or fees for included / professional services as there was no 'make available' of technical knowledge, experience, skill, know-how or process. Therefore, in view of Article 15 of Indo-USA DTAA and Article 7 of Indo-UK Treaty, the services were not taxable in India. However, the Assessing Officer disallowed the amounts under section 40(a)(i) for non-deduction of tax. The Commissioner (Appeals) allowed the assessee's appeal. In the appeal before the Tribunal it was held that –

"*Looking to the nature of services rendered by all the persons, it is seen that, firstly, none of these services fall in the nature of make-available of any technical knowledge, experience, skill, know-how or process. The provisions of Indo-U.S. and U.K. treaties are absolutely clear that in case of fees for technical services, it is essential that technical knowledge, skill, know-how should be made available to the assessee and the assessee should be at liberty to use them in its own right. If the service does not result in making available of any such*

thing, then the same would not fall within the ambit of fees for technical service. These payments also cannot be taxed under Article 7 as none of them were having any P.E. or fixed base in India and the duration of their visit in India was also for a very less period."

26. Similarly in the case of **Xansa India Ltd vs DCIT** (ITA 2577/Del/2011) order dated 26-09-2016, the Delhi Bench of the Tribunal held that if fee paid by the said company to M/s Erns & Young, Singapore on account of professional services rendered by them were not in the nature of fee for technical services, but on account of professional services rendered by the said professional firm for the reason that these services did not make available to the assessee any technical knowledge, skill or experience.

27. Thus, in the light of aforesaid legal discussion made by us for understanding the meaning and scope of the term 'make available', we have further analysed the facts of the case to find out the nature of services rendered by the assessee company to its clients so as to ascertain whether any technical knowledge, skill, experience or process etc. was made available as a result of rendering of the services by the assessee to its clients. In this regard, our attention has been brought to the fact that assessee is a law firm engaged in the profession of providing legal professional consultancy to its clients in various areas. The assessee has got team of qualified lawyers as its partners, associates and employees and variety of services are provided with the help of these qualified lawyers. In this regard, it was stated that the clients to whom the assessee had rendered services were not lawyers and thus there was no question of assessee's services making available any technical knowledge, experience, etc to its clients. The assessee's partners are all lawyers

qualified in various jurisdictions. The partners practice law under relevant professional regulations of local bars (such as English & Wales, New York and Germany) and the Law Society of England and Wales as the assessee is registered in UK.

28. It is further noted by us that the common thread available in all the judgements we have discussed above is that the recipient of the services should be in a position to utilise the knowledge, know-how or skill or experience on its own in future with the aid of the service provider. Thus, to fit into the phrase 'make available' the technical knowledge, skill, know-how, experience, etc. must remain with the person receiving the services even after the process of rendering of services comes to an end. These ingredients should be imported and absorbed by the receiver so that the recipient can deploy similar technology or techniques in future without depending upon the service provider. We have analysed various services provided by the assessee to its clients on the basis of details brought before us. Our attention was drawn on various types of services provided to its clients by the assessee which have been tabulated before us in following manner:-

I. Documentation services provided to non-Indian clients in relation to fund raising / lending activities of non-Indian parties for • London listing of non-Indian entity • Financial transaction in international markets-loan documentation • Issuance of debt securities by non-Indian party-documents relating to issuance of subscription agreements, trust deed, agency agreement, set of terms and condition, prospectus. • Drafting preliminary and other documentation for an Initial public officering and listing in Singapore by non-Indian entity. • Voluntary cash general offer of a public listed company in Singapore Exchange.
II. Advising on foreign laws and other non-Indian matters to non-Indian clients, viz. • On EU Law to Geneva based company

• US based corporate in relation to complain submitted to European Commission • America distressed debt investor in relation to German Metal processing company • On bid documentation in Bahrain • Suspected fraud due diligence • Potential takeover bid of Swiss Corporate listed on Swiss Stock Exchange
III. Documentation / advising services provided in connection with M&A activities of non-Indian clients, viz. • Acquisition of stake by UK entity in Indian entity / blocks • Drafting of English law document in relation to exist form Indian business by German entity. • Sale of stake in a Germany entity by German companies • Group reorganization of a German multinational group – no nexus with India • Litigation matter arising from M&A done in past – Litigation on environment contamination of site in Germany • Reviewing documents relating to exist from Indian JV by UK company • Due Diligence for suspected fraud undertaken for UK company • Advising National Grid of UK for potential acquisition in India.
IV. Documentation services provided to non-India client for fund raising activities by Indian party in foreign market • Drafting of placement documents, placing agreements and other documentation in connection with public offering • Drafting of prospectus, issue agreement and other documents. • Drafting of loan documentation
V. Dispute related activities for non-Indian clients – The dispute related to acquisition by Singapore company of a Chinese grain business. The said activity has no nexus with India.

29. We also made client wise analysis on random basis and found that in the case of one of the clients, viz. B.P. Explorations (Alpha) Ltd-UK, the assessee provided advisory services for documenting contracts and other related agreements on its acquisition of a 30% stake of oil and gas production blocs from Reliance Industries Ltd and the formation of a 50-50 joint venture between the two companies for sourcing and marketing of gas in India. Similarly, services were provided to Microsoft Corporation, USA in the form of advisory in relation to a competition law complaint submitted to the European Commission. Services were provided to M/s

VFS Global Services Pvt Ltd, UK in connection with a possible London listing of VFS Global. The assignment included due diligence of investigations into the business. Our attention was brought upon the nature of services provided to many other foreign clients also. It was noted by us that in all the cases, services provided were of the nature of advisory or due diligence for different kind of projects.

30. As per our understanding, for none of these services it can be said that technical knowledge, skill, experience, know-how or process remained with the clients to whom services were rendered by the assessee, even after the rendition of services was completed and agreement came to an end. These services were of purely legal advisory nature; it cannot be said that recipient of the services was in a position to duplicate similar skill or technology or techniques in future without the aid or assistance of the assessee for carrying out similar assignments. These services have been indeed used by the clients for their benefit but the re-application or repetition of the same benefit for future requirements of these clients without involvement of the assessee was not committed by the assessee, as per the facts brought before us. Thus, it cannot be said that by way of rendition of these services, the assessee 'made available' to its clients the technical knowledge, skill, experience, know-how or process, etc.

31. Further, in none of the aforesaid transactions, the Ld. CIT-DR was able to point out as to how there was transfer of technical knowledge, skill, experience or know-how, etc. in such a manner that these recipients were able to utilise and perform these tasks again on their own without falling back upon the assessee for its assistance. If any of these recipients would come up with a new project next time in future, whether identical to the

previous projects or not, it would again need the services of assessee or any other legal advisor for availing advisory on new issues. The Revenue has taken help of few judgments which are not applicable on the facts of the case before us. The case of the assessee is covered by the judgements which have been discussed by us above in earlier part of our order.

32. Thus, in view of the facts brought before us, and in view of the legal position as explained in many judgements as discussed above, we are not in a position to agree with the view taken by the Revenue and thus hold that the income of the assessee would **not** fall in the category of "Fee for Technical Services" as envisaged in Article 13 of India-UK DTAA. Further, since this amount is not taxable under DTAA as FTS, it cannot be brought to tax as FTS as per provisions of section 9 of the Income Tax Act, 1961, in view of section 90(2) of the Act, as discussed above. Thus, with these observations, Grounds 9 to 9.6 are allowed.

33. Now we shall take up grounds 10 to 10.5. In these grounds, the assessee has agitated the action of the AO wherein it was held by the AO that assessee was liable to tax in India under Article 15 of India-UK DTAA.

34. During the course of hearing, it was vehemently argued before us that the action of AO is wrong on law and facts due to many reasons. It was submitted that Article 15 applies only to individuals and not to partnership firms. The assessee being not an individual, therefore, Article 15 could not be applied. It was also submitted that nothing is attributable to the fixed base of the assessee over and above what has already been offered as attributable to fixed base. Reliance was also placed in this regard on the judgment of the Tribunal in case of M/s Linklaters for A.Y. 1995-96 (ITA 4896 and 5085 of 2003 dated July 16, 2010), which is sister

concern of the assessee. Per contra, Ld. CIT DR relied upon the order of the lower authorities.

35. We have gone through the orders passed by the lower authorities and also Article 15 of India-UK DTAA. It is noted by us that Article 15 of DTAA deals with taxability of independent personal services. This Article starts with the words "Income derived by an **individual**.....in respect of professional services or other independent activities of similar character....."It is noted by us that Article 15 shall be applicable for determining taxable income in the hands of individual and not other persons. The assessee is certainly not an Individual. Thus this Article cannot be made applicable on the assessee being not an individual. Similar issue had come up before the Tribunal in the aforesaid case of M/s Linklaters (for AY 1995-96) wherein the Tribunal held at para 106 of the order that Article 15 shall be applicable only when services are rendered by an individual. Thus, respectfully following the order of the Tribunal it is held that impugned amount of fee received by the assessee would not be liable to be taxed under Article 15 of India-UK DTAA. Thus, Grounds 10 to 10.5 are allowed in favour of the assessee.

36. Now we shall take up grounds No. 11 to 11.2. In these Grounds, the assessee has agitated the action of AO in taxing an amount of Rs.2,79,48,906 being reimbursement of expenditure. The AO treated the same as part of gross receipts and therefore, included the same as part of taxable income.

37. The AO treated reimbursements as part of income on the ground that these reimbursements were received in connection with the services

rendered by the assessee. The DRP upheld the action of the AO by making discussion at para 9.17 on page 31 of order passed by it.

38. During the course of hearing it was submitted by the Ld. Senior Counsel that receipt on account of reimbursement is not in the nature of a consideration for rendering of any services. Our attention was drawn on details provided about the nature of the expenditure reimbursed available at pages 10 and 29 of the paper book. It was further submitted that in identical facts and circumstances it has already been held by the Tribunal in case of Linklaters that reimbursement is not part of taxable income in following orders:-

1. A.Y. 1995-96 by Mumbai Tribunal vide order dated 16 July 2010(ITA No.4896/M/03 and 5085/M/03)(Para 133).
2. A.Y. 1997-98 by Mumbai Tribunal vide order dt 8 August 2014 (ITA No.1711/M/04 and 1354/M/04) (Para 8).
3. A.Y. 1998-99 to 2001-02 by Mumbai Tribunal vide order dated September 7, 2015 (ITA No.1355-57/M/04, 2812/M/05, 1712-1714/M/04, 3596/M/05)(Para 12, 21).

39. Per contra, Ld. CIT-DR relied upon the order of the AO on this issue.

40. We have gone through the orders passed by the lower authorities and orders passed in earlier years by the Tribunal in case of Linklaters. The perusal of chart containing details of the expenses clearly shows that all these items are in the nature of expenses. These are apparently not items of revenue. These are mostly expenses of routine nature incurred by the assessee in the normal course of business. It is also noted that this issue has already been decided by the Tribunal in case of Linklaters in the aforesaid judgments. It is noted that Tribunal in AY. 1995-96 held as under:-

"131. *We have noted that while Assessing Officer noted assessee's claim that the reimbursements of expenses are in respect of actual expenditure incurred by the assessee, on behalf of clients, and have no element of mark up or income, he treated 50 per cent of such reimbursements of expenditure as income on the ground that "the assessee has not been able to produce all such bills/invoices and considering the facts these bills do not, in any case, have any supporting evidences" and thus brought to tax an amount of Rs. 2,12,23,219, the CIT(A) upheld the action of the Assessing Officer to the extent of 15 per cent of the total amount of reimbursement. The CIT(A) also held that the reimbursements of expenses received by the assessee constitute income of the assessee. It is also important to bear in mind the fact that the CIT(A) confirmed the disallowance of 15 per cent of reimbursement of expenses on the ground that (a) the appellant was not able to produce all supporting evidences in respect of expenditure incurred; and (b) it may be difficult to bifurcate the expenses between disbursements related to services rendered in India and services rendered outside India. While the Assessing Officer is not in appeal against the disallowance so restricted by the CIT(A), the assessee is not satisfied by the part relief given by the CIT(A) and is in second appeal before us.*

132. *Learned counsel has taken us through meticulous documentation in respect of reimbursements of expenses, and also produced before us samples of supporting evidences in respect of each claim of reimbursement of expenses. He has also extensively referred to the prevailing regulation in the United Kingdom which ensure strict control over possible inflation of such reimbursement claims, as also to the internal control mechanism in respect of these claims. He submits that all requisitions of the authorities below, in respect of supporting evidences for such claims, have been duly complied with, and the CIT(A) has confirmed the partial disallowance only on surmises and conjectures. He urges us to delete the disallowance confirmed by the CIT (A) and hold that the reimbursements of expenses received by the assessee, particularly on the facts of the case, cannot be treated as income in the hands of the assessee. Learned Departmental Representative, on the other hand, relies upon the orders of the authorities below and submits that the*

onus is on the assessee to produce all the evidences of expenditure and that this onus is clearly not discharged by the assesses.

***133**. Having heard the rival submissions and having perused the material on record, we are inclined to uphold the grievance of the assessee. The reimbursements received by the assessee are in respect of specific and actual expenses incurred by the assessee and do not involve any mark up, there is reasonable control mechanism in place to ensure that these claims are not inflated, and the assessee has furnished sufficient evidence to demonstrate the incurring of expenses. 'There is thus no good reason to make any addition to income in respect of these reimbursements of expenses. The action of the CIT(A), as learned counsel rightly contends, is on pure surmises and conjectures. In view of the above discussions, we direct the Assessing Officer to delete the disallowance of expenses as sustained by, the CIT(A) and hold that no part of reimbursements of expenses received by the assessee on the facts of this case, be treated as income of the assessee. The assessee gets the relief accordingly."*

41. It is noted from the perusal of orders passed by the lower authorities that AO did not bring anything on record to show that whether any element of mark-up was involved in the expenses, which have been reimbursed to the assessee. However, that is even not the case of the Revenue. Under these circumstances, it cannot just be presumed that income element was involved in the reimbursement of expenses. Therefore, respectfully following the orders of the Tribunal of earlier years, these grounds are allowed and decided in favour of the assessee. The AO is directed to delete the disallowance made in this regard. As a result, these grounds are allowed.

42. **Ground 12** deals with the action of AO wherein the AO has changed assessee's status to "Limited Liability Partnership" as against the status of

"Company" as was stated by the AO in the draft assessment order and was not disputed by the DRP.

43. During the course of hearing, it was stated that the assessee had filed its return in the status of a Company. The AO, in the draft order accepted the status as "Company". The DRP also mentioned the status as "Company". However, in the final assessment order passed by the AO, the status was inadvertently mentioned as "LLP". As per Ld. Counsel, there appears to be typographical error, since while computing the tax liability, the AO applied tax rate as applicable on the "Company" and not as LLP.

44. We have gone through the orders passed by the lower authorities and submissions made before us. Nothing is coming out as to how contradictions emerged in the orders passed by lower authorities. No reasoning has been given by the AO. Thus, this issue is remitted back to the file of AO to decide this issue after providing adequate opportunity of hearing to the assessee to file requisite details and documentary evidences and to raise any legal or factual issue in this regard. Thus, ground 12 may be treated as allowed for statistical purposes.

45. Grounds 1 to 4: In these grounds, the assessee has challenged the action of lower authorities wherein it was held by the AO that a sum of Rs.43,94,06,577 was also taxable in India since services for earning this income were rendered by the assessee in India. In this regard, it was submitted on behalf of the assessee that in case fees are held as not taxable as 'Fee for Technical Services', but as 'business income', then only that income which has been earned in respect of services rendered in India can be taxed in India, i.e. a sum of Rs.3,42,48,138 which has already

been offered to tax by the assessee himself in its return of income. It was also submitted that this issue has already been decided in favour of the assessee by the Tribunal in case of Linklaters for AYs 1998-99 to 2001-02 vide order dated September 5, 2015 (ITA Nos 1355-57/Mum/2004).

46. Per contra, it was submitted by the Ld. CIT-DR that in this case, the AO had primarily confined himself to the aspect that the impugned amount of fee was Fee for Technical Services and therefore, liable to be taxed in India in view of section 9(1)(vii) of the Income-tax Act, 1961 as well as India-UK DTAA. Therefore, detailed examination was not done by the AO with regard to its taxability as Business Income and facts were not properly verified with respect to rendering of services in India and therefore, this issue needs to go back to the AO for proper examination.

47. We have gone through the orders passed by the lower authorities, submissions made before us as well as orders passed by the Tribunal in earlier years. It is noted that in AY. 1998-99 (ITA No.1712/Mum/2004, the Tribunal observed on this issue as under:-

> *"19. In ground no. 1, the revenue has challenged the taxability of income related to work performed in India. Assessing Officer has taken a view that even where only part of services was performed in India, entire income was taxable in India. Whereas, the Ld. CIT(A) has held that only income in respect of services rendered in India which are attributable to the PE only that income- would be taxable in India. The Tribunal though **in** AY 1995-96 had decided this issue against the assessee after invoking the principle of "force of attraction", however, later on, the Special Bench of the Tribunal in the case of ADIT vs Clifford Chance reported in (143 ITD*

1) has decided the issue in favour of the assessee and against the Revenue, whereby specific finding of the Tribunal on this issue has been reversed. Accordingly, following the binding precedence of Special Bench in the case of ADIT vs Clifford chance (supra), we hold that the profits, which are attributable to the PE can only be assessed in India and thus ground no.1 raised by the Revenue stands dismissed."

48. Thus, in principle, this issue has already been decided in favour of the assessee. But perusal of the orders passed by the lower authorities reveals that no proper examination on facts has been done by the AO in this regard. The assessee has contended that services in regard to impugned amount of fee were not rendered in India. But nothing concrete and tangible has been brought on record in this regard. Therefore, we send this issue back to the AO for the purpose of examination of facts with regard to rendering of services. The AO shall give adequate opportunity of hearing to the assessee to furnish requisite details and documentary evidence in this regard and shall decide this issue after considering the entire material brought on record by the assessee as well as judgements, as may be placed by the assessee in support of its claim including the decisions given by the Tribunal in case of Linklaters. It is reiterated that on legal principle, the AO shall follow the order of the Tribunal for AY 1998-99, as is reproduced above. Thus, with these directions these grounds may be treated as allowed, for statistical purposes.

49. Ground 13: In this ground, the assessee has agitated the action of the AO in not granting 5% deduction of expenses u/s 44C.

50. It was submitted that in the draft order the AO held that the entire receipt of the assessee of Rs.50,16,03,621 was taxable in India. He gave a 5% deduction of expenses on estimated basis – Rs.2,50,80,181 and proposed to assess the income at Rs.47,65,23,440. However, in the final order this deduction was withdrawn without giving any reasons for such withdrawal. It is submitted that a deduction allowed in the draft order which has not been varied by the DRP cannot be disturbed in the final assessment order. Thus, the withdrawal of 5% deduction must in any event be restored.

51. We have gone through the orders passed by the lower authorities. It is noted that the AO has denied the benefit of deduction in the final assessment order without giving any reason. It is also noted that in the draft order such deduction was allowed, but in the final order, the same was not granted without giving any reasoning whatsoever. Therefore, we send this issue back to the file of the AO, who shall, after verifying the facts grant the deduction u/s 44C as per law. Needless to add that adequate opportunity of hearing shall be given to the assessee. This Ground may be treated as allowed, for statistical purposes.

52. **Ground 15** deals with levy of interest u/s 234B. During the course of hearing it was submitted that this issue has already been concluded in favour of the assessee because of judgment of Hon'ble Bombay High Court in the case of NGC Network 313 ITR 187 (Bom) as well as decision of the Tribunal in case of Linklaters in earlier years.

53. Per contra, the Ld. CIT-DR fairly submitted that this issue as on date is covered in favour of the assessee because of judgement of Hon'ble

Bombay High Court and decision of the Tribunal in assessee's own case in earlier years.

54. We have gone through the orders passed by the lower authorities. It is noted that this issue has already been decided by the Hon'ble Bombay High Court in the case of NGC Network (supra). The Tribunal has consistently followed the said judgment and held that interest u/s 234B is not leviable in the case of Linklaters, on the facts and circumstances of the case. Since no distinction has been made on facts or on law, respectfully following the order of the Tribunal for earlier years, we hold that interest u/s 234B is not leviable in the case of the assessee. This ground is allowed.

55. Since we have decided all the primary issues in favour of the assessee, we do not find it necessary to deal with other issues at this stage. Therefore, other remaining issues which were argued at length during the course of hearing and were summarized by way of written note after the conclusion of the hearing are treated as infructuous at this stage and dismissed as such. The assessee will always be within its liberty to raise these issues at appropriate stage, if any need arises.

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

Order pronounced in the court on this 31st Day of January, 2017.

Sd/-	Sd/-
(AMIT SHUKLA)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt: 31st January, 2017

Copy to:

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, L-Bench

(True copy) By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES