IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 377/Mum/2023
(Assessment Year: 2020-21)

Owens Corning Inc., C/o-Owens Corning (India) Pvt. Ltd., 7th Floor, Alpha Building Hiranandani Gardens Powai, Mumbai-400076.	**बनाम**/ Vs.	Dy.CIT (International Tax), Circle-3(2)(2), Air India Building, Nariman Point, Mumbai-400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACO3242R		
(अपीलार्थी /**Appellant**)		(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / **Appellant by** :	Shri Sandeep Bhalla.AR
प्रत्यर्थी की ओर से/**Respondent by** :	Shri Soumendu Kumar Dash.DR

सुनवाई की तारीख / **Date of Hearing**	10/05/2023
घोषणा की तारीख /**Date of Pronouncement**	22/05/2023

आदेश / ORDER

PER PAVAN KUMAR GADALE - JM:

The assessee has filed the appeal against the order of Assessing Officer ("AO") passed under section 143(3)r.w.s144C(13) of the Income Tax Act, 1961 ("the Act") in pursuance to the directions of Ld. Dispute Resolution Panel ("DRP") u/s 144C(5) of the Act dated 28.11.2022.

2. The assessee has raised following grounds of appeal:-

1.0 "Re: Treating fabrication charges received as 'fees for technical services':

1.1 The Assessing Officer (AO)! Dispute Resolution Panel (DRP) has erred in taxing the fabrication charges received by the Appellant of Rs. 15,75,67,856 during the year under consideration by treating the same as 'fees for technical services' in terms of section 9(1)(vii) of the Income-tax Act, 1961 as well as Article 12 of the Double Taxation Avoidance Agreement entered between India and Singapore ("India-Singapore Tax Treaty").

1.2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, the fabrication charges received by it are not 'fees for technical services' either under the Income-tax Act, 1961 or under the provisions of the India-Singapore Tax Treaty. The stand taken by the AO/DRP in this regard is erroneous, misconceived and not in accordance with the law.

1.3 The Appellant submits that the AO be directed to delete the addition of Rs. 15,75,67,856 so made and to re-compute its total income accordingly.

2.0 Re: Taxing income from fees for technical service at the rate specified under the Act:

2.1 Without prejudice, The AO erred in charging tax at the rate of 10% plus surcharge and health and education cess under section 115A of the Act on income from fees for technical services of Rs. 15,75,67,856. 2.2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, as per section 90(2) of the Act, the income from fees for technical services ought to have been taxed at the beneficial tax rate of 10% under Article 12 of India-Singapore Tax Treaty and the stand taken by the AO in this connection is misconceived, incorrect, erroneous and illegal.

2.3 The Appellant submits that the AO be directed to re-compute the tax liability accordingly.

3.0 Re: Levy of interest under section 234B of the Income-tax Act, 1961:

3.1 The AO has erred in levying interest under section 234B of the Income-tax Act, 1961.

3.2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, no interest under section 234B is leviable and the stand taken by the AO in this regard is misconceived, incorrect, erroneous and illegal.

3.3 The Appellant submits that the AO be directed to delete the interest under section 234B so levied on it and to re-compute its tax liability accordingly.

4.0. Re: General

4.1. The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal."

3. The brief facts of the case are that the assessee company is incorporated in Singapore and a group concern of Owens Corning Group of Companies, a leading manufacturer of glass. The assessee is engaged in the business of manufacturer and sale of glass fibers in India. The assessee has filed return of income for Assessment Year ("AY") 2020-21 on 16.10.2020 disclosing a total income of Rs.NIL. Subsequently, the case was selected for scrutiny under CASS and notice u/s 143(2) and 142(1) of the Act along with questionnaire was issued. In compliance of the notice, the assessee has filed the information/details through e-proceedings. The AO found that there are receipts on account of fabrication charges of Rs.15,75,67,856/- from its Indian Associate Enterprises namely OCIPL as non-taxable. The assessee has claimed the income as exempted as the

assessee has neither any Permanent Establishment ("PE") in India as per Article 5 of India-Singapore Treaty nor any business connection in India. The Assessing Officer (AO) found in the earlier years, the income was treated as FTS and was taxed. The assessee has filed the details/information vide letter dated 07.03.2022 referred at Para 2.2 of the order. Whereas for the manufacturing process of glass fibres, the assessee uses "Bushings" made of precious metals such as platinum, and rhodium. The 'Bushings' are electrically heated crucibles containing numerous tiny holes (orifices) through which the molten glass is converted into very fine glass filaments at a very high speed and cooled simultaneously. Further due to the process involved, the orifices of the bushings get enlarged affecting the required diameter/texture of the filaments, thereby leading to glass leakage. The average life of the bushing is around 250 days approx. however premature failures are common in the manufacturing process/operation. Therefore the bushings are required to be furbished/fabricated periodically (ideally after 250 days).Hence Owens Corning India Pvt. Ltd (OCIPL) (hereinafter to be read as OCIPL) sends the bushings by air to 'Owens Corning (Singapore) Pte Ltd for fabrication.

4. In the process of re-fabrication, the existing bushing is melted, additional alloy is added to the extent required to form altogether a new bushing of desired specification etc. Hence the bushings sent to OCIPL lose their

individuality/originality or distinctiveness after every re fabrication. OC Singapore inter alia carries out the following processes in relation to the bushings received by it from OCIPL

- Cutting the bushings into smaller pieces.
- Melting the pieces to form ingots.
- Rolling the ingots into sheet stock.
- Cutting the sheet stock as per specifications.
- Punching the sheet to form the components of the final bushings viz end plates, ears, rails, gussets, screens etc.

Thus as stated above, during the re-fabrication process, additional alloys viz Rhodium and Platinum are used. The above said additional alloys belong to M/s "Owens Corning Inc (OC-US, a tax resident of United States of America) and is made available to Owens Corning Singapore as and when required. Owens Corning Singapore receives the alloys required to from M/s Owens Corning Inc, in the form of ingots, powder form, etc for the re-fabrication process described above as 'additional raw material' without any payment having been made by the receiving party. These alloys, as per the MLA dated 1 April 2007 entered into between Owens Corning Inc and OCIPL, quantify to 100 kgs and 25 kgs of platinum and rhodium respectively. The MLA states that OCIPL had

delivered to Owens Corning Inc these stated alloys in the manner said hereunder: 8 bushings having design no. R20- 2372-TT47B and 2 bushings Design no. R20-2469-TT7. These 10 bushings received from OC Inc were deployed by OCIPL in the manufacturing process during the F.Y. 2006-07 and after every 250 days were sent for re-fabrication and have as such lost their original identity. Upto July 2010, OCIPL sent the bushings to OC Inc for fabrication and so OC Inc billed OCIPL for providing the metal as well as for the fabrication work done.

5. Subsequently the bushings were sent to 'Owens Corning Singapore Pte Ltd' for fabrication since the alloy shop for fabrication of bushings was set up in Singapore in the month of July 2010 and Owens Corning Inc merely billed OCIPL for providing the alloys viz Rhodium and Platinum as may be necessary for fabrication to Singapore. Since fabrication is the primary business of Owens Corning Singapore Pte Ltd no separate agreement has been entered into by it with the applicant for the fabrication. Only invoices were raised for fabrication charges in the normal course of business. There is no agreement between Owens Corning Inc and Owens Corning Singapore for supply of material for fabrication or re-fabrication of the bushings received from the applicant. The company OCIPL pays Owens Corning Inc lease rentals in terms of the MLA (MASTER LEASE AGREEMENT) for additional alloy used in the fabrication

process. No amount is charged by Owens Corning Inc to Owens Corning Singapore Pte Ltd for Alloy used in fabrication process. According to Owens Corning Singapore, the fabrication charges were offered as FTS by them up to AY 2011-12 (FY 2010-11). However in A.Y 2015-16 they have not offered the same for taxation stating that these fabrication charges received are not taxable in India since the company does not have any Permanent Establishment or Business Connection in India. Also these charges are not for any equipment and hence cannot be said to be Royalty in terms of Article 12(3) of the DTAA between India and Singapore. The assessee further states that the same cannot be classified as 'Fees for technical services' for the following reasons.(a) the assessee has not granted any right, property or information to any Indian company in terms of Para 3 or Article 12 and hence the fees received do not fall within the definition of fees for included services as per Article 12(4)(a) of the DTAA. Since as per Article 12(4)(a) of the DTAA 'Fees for Included Services' should be ancillary or subsidiary to the application or enjoyment of the right or property or information. for which a payments are made. Also the services rendered by the company do not make available any technical knowledge, skills, experience etc either to OCIPL or to Owens Corning Industries India Pvt. Ltd and hence does not fall within the definition of fees for included services' as per Article 12(4)(b) of the DTAA.

6. The Assessing Officer was not satisfied with the contentions of assessee and treated assessee's receipts as FTS as per Article-12(4)(a) of the DTAA between India and Singapore. Consequently taxed the same under section 9(1)(vii) of the I.T. Act read with Article-12(4)(a) of the DTAA between India and Singapore and made addition of Rs.15,75,67,856/- and passed order u/s 143(3)r.w.s 144C of the Act dated 23.03.2022. Subsequently, against the draft assessment order passed by the AO, the assessee has filed objections in Form No .35A with the DRP. Whereas the DRP considered the findings of the AO, the DTAA between India and Singapore, objections and earlier years decisions and has rejected the contentions of the assessee and passed order u/s 144C(5) of the Act dated 28.11.2022. Subsequently, the AO has assessed the total income at Rs.15,75,67,860/- and passed the final assessment order u/s 143(3) r.w.s 144C(13) of the Act dated 21.12.2022.Aggrieved by the order of AO, the assessee has filed appeal before the Hon'ble Tribunal.

7. At the time of hearing, the Ld.AR submitted that the order passed by the AO is bad in law and the DRP has not considered the facts of the earlier years, where against the addition made by the AO, treating it as FTS. On appeal the Hon'ble Tribunal has granted the relief and placed copy of the orders of Hon'ble Tribunal. Per Contra, the Ld.DR supported the orders of the lower authorities.

8. We have heard the rival submissions and perused the material available on record. The sole grievance of the assessee that the order passed by the AO in pursuance of directions of DRP is bad in law Over-looking the factual aspects and the decisions of the Co-ordinate Bench of the Honble Tribunal. We find the similar issue was decided by this Honble Tribunal in *ITA Nos.6529/Mum/2018 [AY 2015-16] and 460/Mum/2022 [AY 2018-19] order dated 26.12.2022* at Page 8 Para 13to20 read as under:

> *"13. "Without going into further details, as we have gone through the order of ITAT, Mumbai in assessee's own case vide ITA No. 2050/Mum/2016, ITA No.2049/Mum/2016, ITA No. 5731/Mum/2019 and ITA No. 742/Mum/2021 for AYs 2011-12, 2012-13, 2016-17 and 2017-18 respectively. The issue under consideration has dealt with in detail dealing with the contentions of assessee and Department by ITAT in appeals mentioned (supra).*
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> *14. For sake of further clarity and as we are also agreed and following these orders, the relevant extract of the order arisen out of ITA No. 2049/Mum/2016 dated 06.07.2022, we are reproducing here-in-below:*

"10. There is no dispute that the assessee is entitled to the benefits of the IndoSingapore tax treaty, that the assessee does not have any permanent establishment in India, and that, accordingly, income earned by the assessee cannot be taxed as business profits under article 7 of the Indo Singapore tax treaty/ There is also no, and cannot be any, dispute that once the provisions of the applicable tax treaty are more beneficial to the assessee, the provisions of the Indian Income Tax Act, 1961 cannot be pressed into service. Therefore, as things stand now, everything hinges on the application of the provisions of article 12, dealing with fees for technical services, coming into play. There is also no dispute that refurbishing of bushes does not amount to "making available any technical knowledge, experience, skill, know-how or process" as there is no transfer of technology inherent in the process of rendition of these services, and, it is not even, therefore, the case of the authorities below that the fees received by the assessee can be taxed under article 12(3)(b) of the Indo Singapore tax treaty; their case is confined to the application of Article 12(4)(a) of the Indo Singapore tax

treaty which provides that "(t)he term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services……are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received". On the facts of this case, it is also not in dispute that no such payments, were made to the assessee by its Indian affiliate, which will be covered by Article 12(3) of the Indo-Singapore tax treaty. Yet, taxability under Article 12(4)(a) is invoked, on the ground that one of the group companies, i.e. OC-US, has received such payments from the Indian affiliate. OCIPL, which are covered by Article 12(3) of Indo-Singapore tax treaty, and by invoking Article 9. The stand of the Assessing Officer and the DRP is that since the alloys are provided by the OCUS, which is an associated enterprise under article 9, one has to proceed on the basis that the alloys are provided by the assessee, and as the services are "ancillary

and subsidiary to the application or enjoyment of the right, property or information" for which payment is made to OC-US, these services are taxable as fees for technical services.

11. As far as the role of Article 9 is concerned, it comes into play when "conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises" and remains confined to bringing those profit for taxes which, but for such arrangements, an enterprise in the respective tax jurisprudence would have made. The scope of Article 9 thus is to neutralize the impact of intra- AE relationship vis-à-vis the profits made in dealings with such an AE. Beyond this limited scope, the application of Article 9 cannot restructure the transaction itself. That is, however, precisely what the revenue authorities seek to accomplish by invoking Article 9 in the present case. The alloy lease transaction that the Indian affiliate had with the OC-US, by invoking Article 9, is sought to be treated as a transaction with the assessee, but then,

given the limited scope and role of Article 9, such an exercise is simply impermissible. It would amount to practically rewriting article 12(4) by supplementing the expression "for which a payment described in paragraph 3 is received" with the words by "the enterprise or by any of its associated enterprises anywhere in the world". Neither can we read into the treaty what is not written there, nor would it make any sense anyway. Such an approach is too far-fetched and is neither supported by a plain reading of the treaty provision or by any logical rationale, nor by any commentary or even academic literature. The OC US and the assessee, a Singapore-based entity, are distinct entities and, they have distinct legal existences. The mere fact that these entities are part of the same multinational group does not require, or justify, ignoring the distinct identities of these entities, or the fact that the operations of these entities are in different jurisdictions. It is also not even the case of the revenue authorities that the refurbishing work is not carried out in Singapore. While a lot of emphases is paid by the revenue authorities on the fact that on the same transaction the assessee

had paid taxes in India in the immediately preceding year, and the fact that it is part of overall common arrangements that the leasing is done from one jurisdiction and the refurbishing or bushing is done is another jurisdiction. Nothing, however, turns on these arguments also. The acceptance of tax liability in one year does not constitute estoppel against the assessee for the other years, and it is for the group to organize a multinational group to organize its activity, as long as it is a bonafide arrangement, in a manner as deemed commercially expedient. The question that we have to really consider is whether or not the activity leading to income was actually carried out in that jurisdiction, and there is no dispute on that aspect at all. The fact that an arrangement regarding situs of entities providing different facilities, in connection with a transaction of the multinational group, is done in a tax-efficient manner, cannot be reason enough to disregard the arrangement. We are satisfied that so far as the income of the assessee from the refurbishing of the bushes is concerned, it is not taxable in India as the provisions of Article 12(3)

cannot be invoked in this case, and that, so far as the provisions of Article 12(4)(a) are concerned, these provisions cannot be invoked as the assessee has not rendered these services in connection with the services "for which a payment described in paragraph 3 is received" by the assessee. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee, and delete the impugned addition of Rs 4,84,44,048. The assessee gets the relief accordingly."

15. *In view of these discussions and respectfully following the order of the ITAT, Mumbai in assessee's own case and also bearing in mind the entirety of the case, we allow Ground No.1 raised by assessee.*

16. *As the Ground No.1 which is a core issue in this appeal is allowed. Ground No. 2 & 3 became academic and infructuous.*

17. *Ground No. 2 & 3 are thus, dismissed as infructuous.*

18. *In the result, appeal of assessee is allowed.*

ITA No. 460/Mum/2022 (A.Y. 2018-19)

19. *As regards ITA No. 460/Mum/2022 (A.Y. 2018-19) as the facts and issue involved is exactly the same, hence, what we decide in ITA No.*

6529/Mum/2018 for A.Y. 2015-16 will apply mutatis mutandis.

20. In the result, ITA No. 460/Mum/2022 is also allowed."

9. We find the facts in the present case, are similar and identical as discussed in the above judicial decisions and the fabrication charges received by the assessee from its AE does not fall under the purview of fees for technical services and accordingly fallow the judicial precedence and direct the Assessing officer to delete the addition and we allow the grounds of appeal in favour of the assessee.

10. In the result, the appeal filed by assessee is allowed.

Order pronounced in the open court on 22.05.2023.

Sd/- ***Sd/-***

(B.R. BASKARAN)
ACCOUNTANT MEMBER

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 22/05/2023
Amit Kumar, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त (अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुम्बई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asst. Registrar)
आयकर अपीलीय अधिकरण, मुम्बई / ITAT, Mumbai