INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE
SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 355/Del/2021
Asstt. Year: 2017-18

DCIT, Circle-4(2), New Delhi.	Vs.	Campus Eai India Pvt. Ltd. E-2A, Neb Sarai, Neb Valley, Sainik Farm, Khanpur, South Delhi, New Delhi – 110 062 PAN AACCC5852H
(Appellant)		(Respondent)

Assessee by:	Shri Ajay Wadhwa, Advocate Ms. Ragini Handa, CA
Department by:	Shri Sanjay Kumar, Sr. DR
Date of Hearing:	04.08.2023
Date of pronouncement:	20.10.2023

O R D E R

PER ASTHA CHANDRA, JM

1. The appeal by the Revenue is directed against the order dated 15.09.2020 of the Ld. Commissioner of Income Tax Appeals-2, New Delhi **("CIT(A)")** pertaining to assessment year **("AY")** 2017-18.

2. The Revenue has taken the following grounds of appeal:-

> *"1. On the facts and circumstances of the case, whether the Ld. CIT(A) has erred on facts and in law to delete the disallowances made u/s 40(i)(a) of the Act amounting to Rs. 2,40,27,500/- for payments made to Dubai Leading Technologies ignoring the fact that India-UAE DTAA has no clause on Fee for Technical Services.*

2. *On the facts and circumstances of the case, whether the Ld. CIT(A) has erred on facts and in law to delete the disallowances made u/s 40(i)(a) of the Act amounting to Rs. 4,29,06,250/- for payments made to Brain Point consultants UAE ignoring the fact that India UAE DTAA has no clause on Fee for Technical Services.*

3. *On the facts and circumstances of the case whether the Ld. CIT(A) has erred on facts and in law to delete the disallowances made u/s 40(i)(a) of the Act amounting to Rs. 2,65,03,316/- for payments made to OIT Managed Services Mauritius on grounds that in absence of any specific clause for FTS in the India Mauritius Treaty, the taxability will be determined as per the provisions of Income Tax Act, 1961 and payment made is of the nature of Royalty for transfer of copyright in the 'Work Product' and the associated services and are chargeable to tax as fee for technical services."*

3. Briefly stated the facts of the case are that the assessee is engaged in the business of computer software. The assessee filed its return of income on 07.10.2017 declaring income of Rs. 6,99,57,250/-. The case of the assessee was selected for scrutiny through CASS. Statutory notices along with questionnaire under section 143(2) and 142(1) of the Income Tax Act, 1961 **(the "Act")** were issued to the assessee on various dates online through ITBA asking the assessee to submit the required information which were duly submitted by the assessee online through ITBA which were placed on record.

3.1 During the assessment proceedings, the Ld. Assessing Officer **("AO")** observed that the assessee has made various foreign remittances to multiple entities and no TDS was deducted on such payments which are as under:-

S. No.	**Party**	**Amount**
1.	Brain Point Consultants UAE	Rs. 4,29,06,250
2.	Dubai Leading Technologies UAE	Rs. 2,40,27,500
3.	Coinage Consultants PTE Singapore	Rs. 89,24,500
4.	OIT Managed Services Mauritius	Rs. 2,65,03,316

3.2 The assessee was asked to furnish the details and the purpose of such payments made. In response thereto, the assessee submitted details that payments were made to brain point consultants UAE, Dubai Leading

Technologies, UAE, Coinage Consultants PTE, Singapore and OIT Managed Services Mauritius for services like Development of a mobile application, market survey and analysis etc. The assessee was show caused as to why the said remittances should not be treated in the nature of payments for royalty and fees for technical services **("FTS")** and disallowed as per the provisions of section 40(a)(i) of the Act for non-deduction of TDS. The submissions of the assessee were considered by the Ld. AO, but not found tenable by him. The Ld. AO proceeded to pass the assessment order on 29.12.2019 under section 143(3) of the Act making an addition of Rs. 9,34,37,066/- to the total income of Rs. 6,99,57,066/- returned by the assessee on account of disallowances under section 40(a)(i) of the Act due to non-deduction of TDS on payments made by the assessee to - i) Brain Point Consultants, UAE amounting to Rs. 4,29,06,250/-; ii) Dubai Leading Technologies UAE amounting to Rs. 2,40,27,500/- and iii) OIT Managed Services Mauritius amounting to Rs. 2,65,03,316/- aggregating to Rs. 9,34,37,066/-.

3.3 Aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A) who vide his order dated 15.9.2020 held that the above payments are not chargeable to tax in India and hence the action of the Ld. AO in disallowing the amount under section 40(a)(i) of the Act on account of non-deduction of TDS on such payments is erroneous.

4. Dissatisfied, the Revenue is in appeal before the Tribunal and all the three grounds of appeal raised by the Revenue relate thereto.

Ground No. 1 Disallowance under section 40(a)(i) of the Act in respect of payment made to Dubai Leading Technologies UAE

5. The Ld. DR strongly supported the order of the Ld. AO who by recording his observations and findings in para 6.1.2, 6.1.3, 6.1.4, 6.1.6 of

his order of assessment held that the payment made to Dubai Leading Technologies, UAE is in the nature of FTS for the following reasons:-

i) The payments have been made to Dubai Leading Technologies for development of an android app with features such as integration with calendar, event management and notifications, appointment management with teacher and principal, able to connect to schools other sub systems like attendance marking, assignment submission, geo tagging, school news and help button for calling for help at designated number in case of emergency. The above specifications makes it amply clear that the software has been custom made for the assessee with specific on demand features and requires integration with the other sub-systems of the school.

ii) By referring to certain clauses of the agreement between Dubai Leading Technologies and the assessee (at pages 11 to 13 of the assessment order), the Ld. AO arrived at a conclusion that services of technical nature are being provided for the development of an android app which when becomes the property of the assessee which in turn sells the solution to its clients.

iii) The payment schedule is linked milestones in development of the software, which once develop using the technical services of Dubai Leading Technologies, is owned by the assessee as the agreement does not mention of any licence being given by Dubai Leading Technologies to the assessee or any ownership rights or copyright being retained with itself.

iv) The India-UAE Double Taxation Avoidance Agreement **("India-UAE DTAA")** does not have a clause on FTS and relying on the decision of the Chennai Tribunal in the case of DCIT vs. TVS Electronics Limited (TS-421-ITAT-2012) wherein the Tribunal has observed that in the absence of any specific clause for FTS in the India-UAE Treaty, the taxability will not be determined as per the residuary clause 22 of the Treaty but by the Income Tax Act.

6. The Ld. AR supported the order of the Ld. CIT(A) and reiterated the submissions made before him. He submitted that the assessee has submitted the relevant documents such as TRC, Form 15CA and 15CB before the lower authorities and that the payee/ recipient/ remittee did not have a permanent establishment **("PE")** in India and the activities were utilised for the purpose of making or earning income from a source outside India. Since the provisions under the India-UAE DTAA are more beneficial to the assessee, the same should be applied. He further submitted that the decision of the Chennai Tribunal in the case of TVS Electronics (supra) which has been relied upon by the Ld. AO has been overruled by the Hon'ble Madras High Court in the case of Bankok Glass Industry Ltd. vs. ACIT 34 taxmann.com 77 and by Bangalore Tribunal in the case of Kingfisher Airlines Ltd. vs. DDIT 179 ITD 364.

7. We have heard the Ld. Representatives of the parties and perused the records. The Ld. CIT(A) has recorded his findings and observations on the impugned issue in his appellate order as under:-

"5. During the course of appellate proceedings, the appellant has made the following submissions:-

- *That the amounts remitted were not chargeable to tax, and hence, there was no obligation to deduct u/s 195 of the Act;*
- *The appellant during the course of the assessment proceedings has drawn attention to the following documents / submissions::*

  (I) Tax Residency Certificate, issued by respective countries;
  II) Form 15CA and Form 15CB, evidencing that the payments needed to be remitted without payment of TDS.
  III) That the appellant did not have a Permanent Enterprise (PE);

- *The activity was utilized for the purpose of making or earning income from a source outside India.*
- *The appellant has relied on Section 90(2) of the Act. It is argued that the provisions which are more beneficial - i.e. Treaty provisions or Income-tax Act, i.e. either of the two should be applied;*

- *Further, the appellant has also drawn attention to the fact that the decision of Hon'ble ITAT Chennai in the case of DCIT vs. TVS Electronics (Supra) has been overruled by Hon'ble High Court of Madras in Bangkok Glass Industry Ltd. Vs. ACIT [34 taxmann.com 77, 2013] and by the Banagalore ITAT in Kingfisher vs. DDIT (179 ITD 364).*

6. In the context of the above submissions of the appellant needs to be evaluated in the context of findings given by the AO. The deductibility of TDS will depend on the provisions of DTAA and other relevant factors.

*7. **Analysis of payment made to Dubai Leading Technologies (UAE):**- The nature of transaction is with respect to payment made towards an 'application software'. The nature of the agreement is described as under:-*

*7.1. **Nature of agreement** :-*

PROVIDER shall perform the services within the scope listed below. Following services shall be comprised within the scope of work (the "Services")

Development of mobile app for school process automaton focused on school and other academic provide mobile app developing services for use by contractor its clients.

Phase 1: Mobile App will be developed on Android. It will be having following functionality:

-Integration with calendar.
-Event Management and Notifications
-Appointment management with teacher and principal
-Able to connect to school's other sub-systems like attendance marking, assignment submission
-Geo Tagging.
-School News
-Help button for calling for help at designated number in case of emergency

*7.2 The issue is in respect of remittances to Dubai Leading Technologies who is resident of UAE, whether will be subject to TDS u/s 195 of the Act. The appellant has made payment for development of mobile application software. In the impugned assessment order on consideration of the Double Taxation Avoidance Agreement (hereinafter referred to as "DTAA") between India and UAE in the context of remittances to Dubai Leading Technologies held that payments are in the nature of fees for technical services and therefore section 40(a)(i) of the Act is applicable. Though apparently from the order of assessment that the learned Officer has not disputed that there is no specific clause of fees for technical services in the DTAA between India and UAE. In this context it would be pertinent to refer to the decision of the Bangalore Bench of Hon'ble Tribunal in the case of **Kingfisher Airlines Ltd. v. DDIT reported in 179 ITD 364** has held as under:*

> *"45. As far as payment to M/s. CAE Aviation Dubai, is concerned, the CIT(A) held that the payment is not in the nature of Royalty. The question whether it is FTS does not arise because of the absence of a clause relating to FTS in the DTAA regarding FTS and the settled position of law that in the absence of a clause in a treaty not dealing with a particular item of income, the same should not be regarded as residuary income but income from business and in the absence of Permanent Establishment in India (PE) of the non-resident in India, the same cannot be taxed. We have already made a reference to the decision of the ITAT Bangalore in the case of ABB FZ-LLC which was a case rendered in the context of DTAA between India and UAE. The decision of the CIT(A) is in line with the decision referred to above and is a correct*

interpretation of the treaty. We find no grounds to interfere with the decision of the CIT(A) on this issue.

*7.3 In view of the ratio of decision as enumerated **Kingfisher Airlines Ltd. v. DDIT (supra)**, there is no denying that the said remittance cannot be brought within the ambit of FTS'. Whether the same can be treated as payment towards 'royalty' is a matter which needs to be looked into. The payment for development of mobile application is akin to payment for development / purchase of computer software- it would be relevant to look at the basis for treatment of payment for development of computer Software'. In order to treat the payment for development of mobile application which is akin to payment for development / purchase of computer software as "royalty", the said payment must refer to 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, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience but do not include royalties or other payments in respect of the operation of mines or quarries or exploitation of petroleum or other natural resources.*

7.5 It is evident from the assessment order that the AO has not disputed that there is no specific clause for fees for technical services in the DTAA between India and UAE. The judicial precedents discussed hereinabove establishes the fact that payment made y towards mobile app will not be treated as payment in the nature of royalty.

7.6 As submitted by the appellant, the payment made in the above case is in the nature of business income , as the same is essentially sale of the 'App' to the resident-appellant. Article 7 of the DTAA provides for taxation of business income. It is not in dispute that the appellant does not have a PE in India. Hence, payment made on account of the 'App' is outside the ambit of the said Article.

7.7 The scope and ambit of Section 195 of the Act has been explained by the Hon'ble Supreme Court in GE India Technology Centre (P) Ltd. vs. CIT (2010) 327 ITR 456. In the said case the expression "any other sum chargeable under the provisions of the Act" in Section 195 of the Act was elucidated and explained. It was held that if payment is made in respect of the amount which is not chargeable to tax under the provisions of Act, tax at source (TDS, for short) is not liable to be deducted. Further, the provisions of section 195 needs to be read with the provisions of sections 5 and 9 of the Act. A combined reading would suggest that the payment made not chargeable to tax under the provisions of Act, tax at source was not liable to be deducted. From the discussion hereinabove, it is concluded that the payment cannot be brought within the ambit of FTS, in the absence of an enabling Article in the DTAA with UAE. The payment cannot be classified as 'Royalty', in view of judicial pronouncements enumerated, in the context of facts of the case. This has to be accepted as a business income covered under Article-7 of DTAA. In the absence of a PE, the same is not chargeable to tax in India. Hence, the action of the AO is disallowing the amount u/s 40(a)(i) of the Act is erroneous."

8. It is an undisputed fact that the payee/ remittee do not have a PE in India. We observe that the Ld. CIT(A) has analysed the impugned issue in great detail in para 7.1 to para 7.4 of his appellate order qua the nature of

service agreement dated 3.10.2016 entered into between the assessee and Dubai Leading Technologies for development of mobile app on Android and various judicial precedents (extracted above) inter-alia including therein the decision in the case of Kingfisher Airlines Ltd. (supra). In Kingfisher Airlines Ltd.'s case (supra) the Bangalore Tribunal held that the remittance cannot be brought within the ambit of FTS in view of the absence of a specific clause relating to FTS in the DTAA and the settled position of law that in the absence of a clause in DTAA not dealing with a particular item of income, the payment should not be regarded as residuary income but as business income which is not chargeable to tax in India in the absence of a PE of the non-resident in India. The Ld. CIT(A) relying on this decision in para 7.3 (extracted above) of his appellate order held that the impugned remittances/ payments by the assessee to Dubai Leading Technologies cannot be brought within the ambit of FTS.

8.1 The Ld. AO relied on the decision of Chennai Tribunal in TVS Electronics Ltd. (supra) wherein the Tribunal has observed that in the absence of any specific clause for FTS in the India-UAE Treaty, the taxability will not be determined as per the residuary clause 22 of the Treaty but by the Income Tax Act, 1961. It has been brought to our notice that this decision of the Chennai Tribunal has been reversed by the Hon'ble Madras High Court in the case of Bankok Glass Industry Ltd. (supra). The brief facts in this case are that the assessee, a non-resident company of Thailand, entered into technical assistance know-how agreement with MBDL in India for transfer of glass technology know-how. The assessee received technical know-how fees for five years, which was treated as not taxable as per article 12 of DTAA between India and Thailand. The Assessing Officer took a view that what was transferred was sharing of knowledge and not know-how, and therefore, consideration received was not covered by definition of royalty under Article 12 of DTAA. He also opined that since there was no direct nexus between the income and activities of business of the assessee, it could also not be treated as business profit under article 7. Therefore, he held that consideration could be taxed only or in the contracting State where the

income arose under the residual clause i.e. Article 22 of DTAA. Thus, the income received by the assessee was held to be taxable in India under sections 9(1)(vii) and 115(a)(iii) at 40 per cent of gross amount. On appeal, the Commissioner (Appeals) held part amount to be taxable as royalty under Article 12 and remaining amount representing additional attendance fee was held taxable under Article 7, subject to the condition that assessee had a permanent establishment in India. The Tribunal held that the portion of fees for technical services was not taxable under Article 7 but under Article 22, as per section 9(1)(vii). On further appeal, the Hon'ble Madras High Court held as under:

"19. Even though the Revenue canvassed this issue before the Tribunal, in the absence of any material to read the clauses otherwise rightly the Tribunal came to the conclusion that a sum of 4,79,640 USD alone would fall for consideration under art 12 as royalty income and the other to be assessed as by way of technical services. As already pointed out even herein, with the finding of the assessing authority on the remand order that the assessee had no PE, the said amount cannot be brought under art.7. In the light of the above, we have no hesitation in confirming the order of the Tribunal.

20. As far as the order in art. 22 is concerned, we do not find any justifiable ground to uphold this portion of the order after the discussion on the extent of income falling for consideration under royalty as defined under art. 12 and the amount paid as towards technical services falling for consideration under art. 7. Since the said income does not fall as miscellaneous income, the same cannot be brought under art. 22.

21. Even though learned standing counsel made a submission that the fee paid towards technical services cannot be brought towards business income, yet in the absence of any material to show that the same is not related to the business of the assessee. We have no hesitation in rejecting the said contention. Even assuming for a moment that the assessee is an Indian company given the nature of business of the assessee, if the income earned would qualify for consideration on the normal computation as business income, we do not find that the said character would undergo a change merely on the score that the assessee is not an Indian company.

22. In the light of the above, we allow the assessee's appeals viz, Tax Case (Appeal) Nos. 1187, 1307 and 1342 of 2005, 34 of 2006 and 743 of 2007 and reject the Revenue's appeals viz, Tax Case (Appeal) Nos. 1460 to 1464 of 2005 and set aside the order of the Tribunal as far as its consideration on art. 22 of DTAA is concerned. No costs."

8.2 In ACIT vs. M/s. Chadha Power (ITA No. 3055/Del/2018), the Co-ordinate Bench of the Delhi Tribunal observed and held as under:-

"8. Thereafter, the ld. CIT (A) has referred to the principles laid down by Hon'ble Supreme Court in the case of SA Builders Ltd. reported in 288 ITR 1. As regards the applicability of section 40(a)(i), Id. CIT(A) observed that first of all, expenses claimed in computing the income chargeable under the head 'profits and gains of business or profession' towards royalty, fee for technical services or other sum chargeable under the Act which is payable outside India or in India to a non- resident on which TDS is applicable, is not applicable in the present case for the reason that even if these services are taken as technical services, the DTAA with UAE did not mention anything regarding f fee for technical services, therefore, Article 22 for other income would be applicable and, therefore, no tax is required to be withheld because Article 22 provides that income of a resident of a contracting state wherever arising which is not expressly dealt within the DTAA shall be taxable only in the resident state. Accordingly, he deleted the expenses of Rs. 1,30,51,568/--.

13. Insofar as the disallowance made u/s 40(a)(i) of the Act is concerned, the AO held that the said payment of reimbursement of expenses is in the nature of fee for technical services. As noted by the Id. CIT (A), there is no FTS clause in the India UAE DTAA regarding fee of technical services and, therefore, there cannot be any question of withholding of tax. Accordingly, disallowance u/s 40(a)(i) cannot be made. The aforesaid finding of ld. CIT (A) is accordingly confirmed."

9. We also observe that the Ld. CIT(A) has also considered whether the impugned payments can be characterised as 'royalty' in the hands of the payee. The Ld. CIT(A) arrived at the conclusion that the payments made by the assessee for development of mobile application software is akin to payments for development/purchase of computer software and hence cannot be taxed as royalty payments placing reliance on number of judicial pronouncement on this subject which are mentioned in para 7.4 of his appellate order. Since the Revenue has not disputed the aforesaid finding of the Ld. CIT(A), we have not considered the submissions of the assessee on this aspect of the matter.

10. In the light of the above factual matrix of the case and the legal position set-out above, we do not find any infirmity in the order of the Ld. CIT(A) and uphold his finding that the payments made to Dubai Leading Technologies cannot be brought to tax under Article 22 in the absence of a specific clause for FTS in the India-UAE DTAA. The impugned payments are in the nature of business income which are not chargeable to tax in India in the absence of a PE of the payee/remittee in India. We further uphold the finding of the Ld. CIT(A) that there is no obligation to deduct tax at source under section 195 of the Act as the impugned payments are not chargeable to tax in India as held by the Hon'ble Apex Court in GE India Technology

Centre (P) Ltd. (supra) and hence the disallowance made by the Ld. AO under section 40(a)(i) of the Act is erroneous. Accordingly, ground No. 1 of the Revenue is dismissed.

Ground No. 2 Disallowance under section 40(a)(i) of the Act in respect of payment made to Brain Point Consultants, UAE

11. The assessee entered into an agreement dated 20.08.2016 with Brain Point Consultants, UAE for providing certain market survey and analysis services to the assessee which the Ld. AO has recorded in para 2.2 and 6.2 of the assessment order. After analysing the nature and scope of services as set out in the said agreement, the Ld. AO arrived at a conclusion that-

i) technical services like risk assessment of entering into the market and the exit costs involved, market size estimation, estimation of current and projected annual spents on automation, digitisation etc. by the target institutions, competitive bench marking for determining the strategy, gap analysis and prize bench marking are being provided to the assessee by Brain Point Consultants. Lookingglass and Kryptos are proprietary software services which allow building of customized applications for use across platforms.

ii) Quick Launch SSO provides single sign on facility whereby a user can seamlessly login into multiple devices using one password.

iii) The Assessee also uses the services of Ocullus IT for their Desktop as a service solution which involves processes and algorithms of Ocullus for data security, data migration, disaster recovery, etc.

iv) The Assessee also uses the services of BlackBeltHelp which is an IT and Al based platform for predictive analytics and student support.

v) These are specialised services of the nature of managerial, technical and consultancy services and the payments made by the assessee to Brain Point Consultants, UAE are in the nature of FTS.

vi) The Ld. A.O also has noted that the India-UAE DTAA does not have a clause on fees for technical services (FTS). The Ld. A.O has also made a reference to the decision of the Chennai Tribunal in DCIT vs. TVS Electronics Ltd. [TS 421 ITAT 2012], wherein the Tribunal has observed that in the absence of any specific clause for FTS in the India-UAE treaty, the taxability will not be determined as per the residuary clause 22 of the treaty, but by the Income Tax Act, 1961.

12. The Ld. DR supported the above findings of the Ld. AO. On the contrary, the Ld. AR supported the finding of the Ld. CIT(A) and reiterated the submissions made before the Ld. CIT(A) as stated above in para 6 of this order.

13. We have heard the Ld. Representatives of the parties and pursued the material on record. The contention of the Revenue is that the impugned payments made by the assessee for rendering marketing and sales support services are in the nature of FTS and in the absence of a specific clause on FTS under the India-UAE DTAA, the impugned payments should be taxed under the provisions of Article 22 on "other income" which is residuary clause under the India-UAE DTAA. The facts with regard to this issue remain undisputed and the recipient i.e. Brain Point Consultants does not have a PE in India. The Ld. CIT(A) has dealt with this issue in para 8 to 8.7 of his appellate order. His observations and findings on the impugned issue are extracted below:

"8. Ananlysis of payments made to Brain Point Consultants : *The payment has been essentially made for market-survey outside India. The nature of agreement is enumerated hereunder :-*

8.1 ***Nature of Agreement****: Provider shall perform the services within the scope listed below. Following services shall be comprised within the scope of work (the "Services"):-*

> *Market Survey and analysis for Middle East Asia (MEA Region) at a minimum covering following information in relation to the products and services listed in Exibit B (Products and Services)*

***New Market Sizing**:*
The company is interested to know that market sized ie an reasonable estimate of number of higher education schools, universities and collages in MEA region (Target Institution), their current level of automation, Digitization and computerization of operations and student interfaces

Current and Projected Annual Spends:
The Company is interested assessee the current and projected Annual Spends of (Target Institutions) on automation, digitization and computerization of operations and student interfaces

Competitive Benchmarking:
The purpose competitive bench marking is to gain a level of insight about outreach, size and product capabilities of its comitative products and services currently operating in region of Target institutions that allows
Company to evolve its marketing strategy based on competitive insight and defining it medium to long term strategy gives you more control.

Gap Analysis:
Marketing Company shall identify or help Company to identify the gaps in technological and strategic calculations. It will be supported by a SWAT analysis of the products.

Price Benchmarking
Research report shall include an estimated and/ or survey based price benchmarking for competitive products and alternatives for the products under study.

8.2 The AO held that the payments made to the said foreign entity, will attract the provisions of 195 of the Act. The AO has sought to invoke the residuary clause of Article 22 of DTAA in bringing the payment under the ambit 40(i)(a) disallowance.

8.3 Payment has been made to Brain Point Consultants for the Market Survey and analysis for Middle East Asia (MEA Region) involving services such as Market Size Estimation, Estimation of current and projected annual spends on automation, digitization etc. by the target institutions, competitive benchmarking for determining the strategy. GAP analysis and price benchmarking etc in view of above mentioned detailed discussion none of the services provided by Brain Point Consultants to fit into the terminology "make available", The services offered may be the product of intense technological effort and lot of technical knowledge and experience of the service provider would have gone into it. But, that is not enough to fall within the description of services which make available the technical knowledge, etc. The view is also supported by the order of Authority of Advance Ruling in the case of Ernst & Young (P.) Ltd., In reported [2010] 323 ITR 184 2 (AAR New Delhi), wherein support services were provided by an affiliate in U.K. to EYPL under a global agreement in the Appeal No. 10738/19-201 field of market strategy, knowledge management and sharing, priority accounts strategy, internal communications, public relations, providing global data centre services etc. This Authority observed that 'support services were aimed at providing information and guidelines so as to ensure uniformity and seamless quality in the business dealings of the group entities and by furnishing such services it cannot be held that the technical knowledge and experience possessed by EYK UK. has been made available to the applicant and the other entities. Similar observation of Authority of Advance Ruling in the case of Bharati AXA General Insurance Co. Ltd. reported in 326 ITR 477, wherein it has been held as under:

> *10. Providing comments and suggestions after reviewing the strategies and plans developed by the applicant, giving suggestions to the applicant to improve the product developed by it so as to bring it in line with the common practices followed by other AXA*

entities across the globe, providing HR support assistance, assisting the applicant in choosing cost effective re-insurance partners, reviewing the actuarial methodologies developed by the applicant and providing suggestions and inputs to achieve standard actuarial practices and processing guidelines in connection with the settlement of claims, marketing and risk analysis, fall short of the requirements laid down in the definition of fees for technical services in Tax Treaty between India and Singapore. It will be too much to say that by providing such services (assuming they are technical or consultancy services), the applicant receiving the services is enabled to apply the technology contained therein ie, the technology, knowledge, skills, etc, possessed by the service provider or technical plan developed by the service provider. We do not find anything in the IT support services that answer the description of technical services as defined in the Treaty.

8.4 Furthermore, what is relevant to examine is the fact that the payment was made for a project, which was carried out outside the country by a non- resident. In ***CIT vs Eon Technology P. Limited, (ITA No. 1167/2011)****, the Hon'ble Delhi High Court had an occasion to examine a similar issue. EON Technology Pvt. Ltd was a private limited company engaged in business of development and export of software. During the relevant assessment year 2007-08, the assessee had paid commission of Rs.33,36,068/- to its parent/holding company EON Technologies, U.K., (ETUK, for short) on the sales and amounts realized on export contracts procured by ETUK for the respondent assessee. Commission was paid thereon and no TDS was deducted. The Hon'ble Court held that:-*

"To answer the contention herein we need to examine briefly the scheme of the 1961 Act. Section 4 is the charging section. Under Section 4(1), total income for the previous year is chargeable to tax. Section 4(2) inter alia provides that in respect of income chargeable under sub-section (1), income tax shall be deducted at source whether it is so deductible Appeal No. 10738/19-20 under any provision of the 1961 Act which inter alla brings in the TDS provisions contained in Chapter XVII-B in fact, if a particular income falls outside Section 4(1) then TDS provisions cannot come in.

16. Under Section 5, all residents and non-residents are chargeable in respect of income which accrues or is deemed to accrue in India or is received in India, Non-residents who are not assessable in respect of income accruing and received abroad are rendered chargeable under Section 5(2)(b) in respect of income deemed by Section 9 to accrue in India. "(emphasis supplied)

17. After referring to Eli Lilly (supra) in GE India Technology Centre Private Limited (supra), it has been held:

"17. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in CIT v. Eli Lilly & Co. (India) (P) Ltd. the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the IT Act form one single integral, inseparable code and, therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax under the IT Act. It is true that the judgment in Eli Lilly was confined to Section 192 of the IT Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head 'Salaries". Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under the provisions of the Act", which expression, as stated above, does not find place in other sections of Chapter XVII. It is in this sense that we hold that the IT Act constitutes one single integral inseparable code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the IT Act.

18. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TDS then the consequence would be that the Department would be entitled to appropriate the monies deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the IT Act by which a payer can obtain refund. Section 237 read with Section 199 implies that only the recipient of the sum i.e. the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Governmen would nonetheless collect tax. In our view, Section 195(2) provides a remedy by which person may seek a determination of the "appropriate proportion of such sum so chargeab where a proportion of the sum so chargeable is liable to tax."

18. In view of the aforesaid discussions, it has to be held that there is no error in the findings Appeal No. 10738/19-20 recorded by the Commissioner of Income Tax (Appeals) which have been upheld in the impugned order by the ITAT

8.5 In the above case, it was held by the Hon'ble Court that the income of a non-resident agent from providing marketing and sales support, rendered for overseas client cannot be included u/s 5(1) of the Act and, hence, not liable to TDS. ***In view of the above ratio of decision as stated hereinabove, it can be held that no TDS was required to be deducted by the appellant in the present case.***

8.6 Further, the AO has sought to invoke the provisions of Article 22 in the absence of a specific clause in FTS in the DTAA between India and UAE. This has been undertaken in view of the decision laid down by ITAT Chennai in DCIT vs. TVS Electronics Limited. However, in view of the decision in Kingfisher Airlines vs. DDIT (supra) the same is not being followed here.

8.7 Accordingly, in view of the discussion hereinabove, the action of AO in invoking the provisions of section 40(i)(a) of the Act is held to be erroneous."

14. From the above, it is abundantly clear that the Ld. CIT(A) after considering the impugned issue in detail has given his finding that invocation of the provisions of section 40(a)(i) of the Act by the Ld. AO is erroneous for the reason that the income of a non-resident agent from provision of marketing and sales support services rendered for overseas client cannot be included under section 5(1) of the Act as the same does not deem to accrue or arise in India based on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Eon Technology P. Ltd. (ITA No. 1167/2011) and further holding that in the absence of a specific clause on FTS under the India-UAE DTAA, provisions of Article 22 on residuary/ other income cannot be invoked based on the decision in the case of Kingfisher

Airlines Ltd. (supra). In view of the factual and legal position as well as our findings in respect of ground No.1 (para 8, 8.1, 8.2 and 10 referred), we are inclined to uphold the order of the Ld. CIT(A). Accordingly ground No. 2 of the Revenue is dismissed.

Ground No. 3 Disallowance under section 40(a)(i) of the Act in respect of payment made to OIT Managed Services Mauritius

15. Brief facts involved in this issue are that the assessee entered into an agreement dated 17.10.2015 with OIT Managed Services Mauritius for provision of Amazon Web Service, Hosting Service, Identity and Access Management, Virtual Private Cloud, Virtual Machine Services to the assessee. The relevant clauses of the said agreements are captured by the Ld. AO in para 6.3.1 to 6.3.4 and 6.3.7 of the assessment order.

16. The Ld. DR relied upon the order of the Ld. AO who after considering various clauses of the said agreement arrived at the following finding:-

i) The services being provided are not standalone hosting services, these are Amazon Web Services (AWS) based services which run ultimately on a server of Amazon. The services include creation and configuration of virtual machines, sending alerts, monitoring threshold settings, script configuration for rapid restart of devices, assistance in analysis of the generated reports which are technical in nature and manual intervention is involved. The payment is not for a pail vanilla web hosting service. It is not merely installation and operation of sophisticated equipment but a comprehensive IT solution along with transfer of certain copyright

ii) The payment is of the nature of royalty as consideration has been paid for the transfer of copyright in the 'Work Product' and the associated services are chargeable to tax as fee for technical services.

iii) The Chennai Tribunal in DCIT v. TVS Electronics Ltd. [TS-421-ITAT-2012] has ruled that in absence of any specific clause for FTS in the India

Mauritius treaty the taxability will not be determined as per the residuary clause 22 of the treaty but rather by the Income Tax Act, 1961.

17. On appeal, the Ld. CIT(A) relying on the decisions in the case of Bharti Axa General Insurance Co. Ltd. 326 ITR 477 (AAR) and Rackspace US Inc. vs. DCIT (2020) 113 taxman.com 382 (Mumbai Trib) held that the payment towards web hosting services cannot be held as royalty or FTS.

18. The Ld. AR supported the order of the Ld. CIT(A). He submitted that the impugned issue stands squarely covered by the decisions of Coordinate Bench of the Tribunal in the case of Millenium Infocom Technologies Ltd. vs. ACIT 117 ITD 114 (Delhi Trib.); Rackspace US Inc. (supra) as well as decisions of the Delhi ITAT in the case of MOL Corporation vs. DCIT ITA No. 1554/Del/2016.

19. We have considered the submissions of the parties and perused the records. We observe that the Ld. CIT(A) has duly considered the facts of the present case in the light of the decisions (supra) in Bharti Axa General Insurance Co. Ltd. and Rackspace US Inc.'s case and arrived at the conclusion that the impugned payments cannot be classified as royalty or FTS. The observations and findings of the Ld. CIT(A) are reproduced below:-

"9.1 Nature of agreement:

OIT Managed Services will provide AWS Housing Services
Scope of work
Hosting Service as per services Request raised by Campus EAI

Professional Service includes
a Account creation and IAM Setup
b VPC Setup and configuration
c VM Creation
a Monitoring & Backup Configuration

Monitoring

(a) Inventorying and documenting the IP-addressable devices which will be monitored, such as servers peripherals, and/ or network devices. The documentation includes information on major hardware components, software application, IP address, and other factors which help determine appropriate monitoring settings and thresholds.

(b) Creating a service all maître and methodology, to documents communication contacts and methods for ongoing collaboration and for system-generated alerts
(c)Documenting the named individuals who will be granted access to reporting capabilities
(d) Providing a remote network operations conter that work in conjunction with site based staff to monitor the networked servers and the infrastructure environment
(e) Monitoring of systems. Applications and processes based on thresholds determined by campus EA!
(f) Sending of alerts to on site staff for resolution
(g) Managing the threshold settings on each system and monitoring the collection devices through the length of the contract working with campus EAI to determine optimum settings Monitored devices include IP addressable devices. Database processes, application processes, and/or other routines running on servers. Which can be monitored. Monitoring may also cover specified IP addresses of designated network routers, switches and/or other networked IP devices
(h) Alert Campus EAI by email and/ or text-enabled cell phones when alert threshold have been exceeded or when monitored systems fail to respond
(i) Configuring scripts to provided rapid restarts of devices and processes being monitored, when applicable under the direction of Campus EAI
(j) Providing designated Campus EAI staff with read only access to reporting systems vis an authenticated web-based portal
(k) Assisting in the analysis and interpretation of reports

9.2 So far as payments to OIT Managed Services Mauritius is concerned, the AO concluded on construction of DTAA between India and Mauritius that the payment is in the nature of royalty and therefore, the appellant was obliged to deduct TDS under section 195 of the Act. Hence, the AO made a disallowance under section 40(a)(i) of the Act. In this regard AO in the assessment order has noted that 'the services being provided are not standalone hosting services provided by OIT managed services, these are Amazon Web Services (AWS) based services which run ultimately on a server of Amazon. The services provided by the Mauritius based entity include creation and configuration of virtual machines, sending alerts, monitoring threshold settings, script configuration for rapid restart of devices, assistance in analysis of the generated reports which are technical in nature. The deliverable has been mentioned to achieve availability of 99% and the service level agreement mentions the expected response times which would certainly involve manual intervention as well, the payment is not for a pail vanilla web hosting service. It is not merely installation and operation of sophisticated equipment but a comprehensive IT solution'. The appellant has contested that none of the services provided by 'OIT Managed Services Mauritius' fit into the terminology "make available", The services offered may involve manual intervention But, that is not enough to fall within the description of services which make available the technical knowledge, etc. Some of the judicial pronouncements are enumerated hereunder:-

(i) Authority of Advance Ruling in the case of Bharati AXA General Insurance Co. Ltd. reported in 326 ITR 477 *has held that*

11. Coming to the payments made by the applicant to AXA ARC for providing access to software applications and to the server hardware system hosted in Singapore for internal purposes and for availing of related support services under the terms of the Service Agreement, we do not think that the payment can be brought within the scope of the definition of royalty in Article 12.3 of the India-Singapore Tax Treaty. There is no transfer of any copyright contained in the computer software provided by AXA ARC Applying the principle laid down in Dassault Systems KK. In re (2010) 322 ITR 125 1 (AAR- New Delhi) and the earlier ruling in Fact set Research Systems Inc., in re [2009] 317 ITR 1692 (AAR- New Delhi) etc., we are of view that clause (a) of Article 123 of Tax Treaty relating to use of or right to use copyright of literary/scientific work is attracted The payments made for access to

the system hosted in Singapore is for availing of the facility provided by AXA ARC and it cannot be said that the applicant has been conferred any right of usage of the equipment located abroad, more so when the server is not dedicated to the applicant.

12. The learned departmental representative has contended that AXA ARC provides consultancy services and as a result of the suggestions and sharing of informations with service provider, the applicant utilizes the technology transmitted to the applicant, who can thereby act independently to develop its business is not a convincing argument. This contention cannot be accepted as it amounts to stretching the point to bring the services within the net of FTS as defined in the Treaty. One has to look into the substance and the core of the services availed of by the applicant while giving full effect to the definition contained in the Treaty. This Authority is therefore, of the view that the fee paid to the AXA ARC by the applicant does not amount to fee for technical services within the meaning of India-Singapore Tax Treaty.

(ii) Mumbai Tribunal in the case of Rackspace, US Inc vs DCIT reported in [2020] 113 taxmann.com 382 (Mumbai - Trib.) *wherein the issues before the tribunal was that the Assessee, a US based company, earned income from providing cloud services including cloud hosting and other supporting and ancillary services to its Indian customers therefore whether impugned income earned by assessee could be said to be royalty within meaning of Explanation (2) to section 9(1)(vi) the Hon'ble Mumbai Tribunal has held that income earned from cloud hosting services cannot be treated as "Royalty", relevant extracts, as to the reasons as to why the same cannot be treated as 'Royalty' is enunciated hereunder :-*

"10. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that as per the provisions of section 9(1)(vi) of the Act royalty is taxable in India inter alia if the payer an Indian resident, except where the royalty is payable in respect of a right, property, information or service used for the payer's business outside India or for earning income outside India Explanation 2 to section 9(1)(v) of the Act dealing with the definition of royalty inter alia includes payment for use or night to use an industrial commercial or scientific equipment Considering the fact that Rackspace USA customers only avail hosting services and do not use, possess or control the equipment used for providing hosting services (which are owned and controlled by Rackspace US), the payment for hosting services made by Indian customers to Rackspace USA does not fall within the ambit of the said definition Finance Act, 2012 inserted an amendment in the definition of royalty whereby the definition of royalty was expanded by inserting Explanation 4, 5 and 6 to section 9(1)(v) of the Act (with retrospective effect from 1 June 1976) Explanation of section 907)(v) of the Act reads as under

"For the removal of doubts, it is hereby clanfied that the royalty includes and has always included consideration in respect of any night, property or information, whether or not-(a) the possession or control of such right, property or information is with the payer; (b) such right, property or information is used directly by the payer, (c) the location of such right property or information is in India"

11. The above amendment clarified that any payments made for the use of equipment would be classified as royalties irrespective of the possession or control of the equipment with the payer or use by the payer or the location of the equipment being in India. But under the provisions of section 90(2) of the Act, an assessee can opt be governed by the provisions of the tax treaty to the extent they are more beneficial than the provisions of the Act. We noted the fact that Rackspace USA is tax resident of USA and therefore, is entitled to claim the beneficial provisions of India-USA tax Treaty with respect to the taxability of its income earned from Indian payers The Tax Residency Certificate along

with Form 10F has been submitted by the assessee vide letter dated 29.01.2015 and 13.02.2015 for the years 2011 and 2012

12. We have gone through the provisions of Article 12(3) of the India USA Tax Treaty, wherein the term royalties are defined to mean:

(a) payments of any kind received as a consideration for the list of or the right to Use, any copyright of literary, artistic or scientific work including cinematograph or work on ten, tape or other means of reproduction for use in connection it radio or television broadcasting, any patent, trade mark, design or model, plan secret formula or process, or for information (concerning industrial, commercial or scientific experience including gains derived from the alienation of any such right or property which are Contingent on the productivity, use, or disposition thereof, and

(b) Payments of any kind received as consideration for the use, or right to use, any industrial, commercial or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8' (Emphasis supplied).

13. As may be observed, the definition of royalty under Article 12(3) of the India-USA Tax Treaty in respect of payment for use or right to use equipment is in pari-materia with the pre-amendment definition of royalties in the Act. The said definition of "royalties" is exhaustive and not inclusive and therefore, it has to be given the meaning as contained in the Article itself and no other meaning should be looked upon

14. From the above, it is clear that the services provided by Rackspace USA to that Indian customers are not covered by the above definition of royalties provided in the India USA Tax Treaty since Rackspace USA is providing hosting services to the Indian customers and does not give any equipment or control over the equipment. The term use or right to use' for the purpose of the tax treaty entails that the prayer has a possession/ control over the property and/ or the said property is at its disposal. There is no privilege or right granted to the Indian customers over the servers and other equipment used to provide cloud hosting services. The equipments are not used by the customers and the same are used by Rackspace USA to provide service to the customers. The services provided by the Rackspace USA are in the nature of cloud hosting, data warehousing services etc. which are standard services provided to customers. There is no agreement to hire or lease out any equipment but only a service level agreement.

[2009] 117 ITD 114 (Delhi)
IN THE ITAT DELHI BENCH 'E'
Millennium Infocom Technologies Ltd.

v. Assistant Commissioner of Income-tax, Circle-6(1), New Delhi N.K. KARHAIL JUDICIAL MEMBER AND K.D. RANJAN, ACCOUNTANT MEMBER the payments made on account of rentals for hosting of websites on servers are not in nature of interest or royalties or fee for technical services or other sum chargeable to tax in India. Central Board of Direct Taxes has revised the procedure for deduction of tax at source on remittances made out of the country. The provisions of DTAA are also in favour of the assessee. Accordingly, the assessee was not required to deduct tax at source under section 195 of the Act while making payments outside India.

5. On appraisal of the above mentioned finding, we find that the agreement between the assessee and its customers is for providing hosting and other ancillary services to the customers and not for the use of leasing any equipment. The data centre and the infrastructure therein used to provide

these serves belongs to the assessee. The customers are not having physical control or possession over the servers and right to operate and manage this infrastructure/servers vest solely with the assessee. The agreement is to provide hosting services simpliciter and is not for the purpose of giving the underlying equipment on hire or lease. The customer was not knowing any location of the server in data centre, web mail, websites etc. Accordingly, it cannot be said as royalty within the meaning of Explanation (2) to Section 9(1)(vi) of the Act as well as Article 12(3)(b) of the Indo-USA Data by the AO and DRP Moreover, there is no PE of the assessee in India and hence, no income can be taxed in India in term of Indo-US DTAA. The facts are not distinguishable in this order also. Therefore, the finding above is quite applicable to the facts of the present case. Accordingly, we find that the issue is squarely covered by the decision of Hon'ble ITAT in the assessee's own case(supra), hence, we decide these issues in favour of the assessee against the revenue.

9.3 Therefore, in view of the judicial pronouncements in the context of facts of the case, the payment cannot be held to be Royalty. Accordingly, the disallowance made by AO is erroneous u/s 40(i)(a) of the Act. Therefore, the grounds are allowed."

20. The impugned issue is covered in favour of the assesee in umpteen number of cases. In MOL Corporation's case (supra), the Delhi Tribunal held as under:-

"8 It was submitted for the assessee that Ld. Tax Authorities below have failed to appreciate the functional aspects of Cloud base service while holding the subscription to cloud base service as royalty. In this context, the co-ordinate bench judgment, in which one of the members of this bench was also a member, in M/s. Salesforce.com Singapore Pte. Vs. Dy. D.I.T. Circle-2(2) ITA No. 4915/DEL/2016 [A.Y 2010-11] with six other connected was relied to contend that subscription to the cloud computing services do not give rise royalty income. He also relied the Mumbai Bench judgement in the cases of Rackspace , Us Inc., Usa vs Dcit (It) - 4(1)(1) ITA no 1634//mum/2016, I.T. A Nos.6195 & 4920/Mum/2018 and 5250 (MUM)of 2019 for the same proposition. A The Ld DR supported the findings of Tax authorities below.

8.1 Giving thoughtful consideration to the matter on record, the bench is of considered view that the cloud base services do not involve any transfer of rights to the customers in any process. The grant of right to install and use the software included with the subscription does not include providing any copy of the said software to the customer. The assessee's cloud base services are though based on patents / copyright but the subscriber does not get any right of reproduction. The services are provided online via data centre located outside India. The Cloud services merely facilitate the flow of user data from the front end users through internet to the provider's system and back. The ld. AO has fallen in error in interpreting it as licensing of the right to use the above Cloud Computing Infrastructure and Software (para 10.5 of the Ld. AO order). Thus the subscription fee is not royalty but merely a consideration for online access of the cloud computing services for process and storage of data or run the applications.

*8.2 While dealing with similar question in regard to the case of **M/s. Salesforce.com Singapore Pte. (supra)** where the said assessee was provider of comprehensive customer relationship management servicing to its customer by using Cloud Computing Services / Web Casting Services, the Bench in its order dated 25.03.2022 held as under :*

"28. Considering the facts of the case in totality, in light of the Master Subscription Agreement, we are of the considered view that the customers do not have any access to the process of the service provider i.e. the assessee, and the assessee does not have any access except otherwise provided in the master subscription agreement to the data of the subscriber.

29. In our considered opinion, all the equipments and machines relating to the service provided by the assessee are under its control and are outside India and the subscribers do not have any physical access to the equipment providing system service which means that the subscribers are only using the services provided by the assessee."

8.3 The Mumbai Tribunal in the case of ***DDIT v Savvis Communication Corporation [2016] 69 taxmann.com 106 (Mumbai – Trib.)*** *has held that payment received for providing web hosting services though involving use of certain scientific equipment cannot be treated as 'consideration for use of, or right to use of, scientific equipment' which is a sine qua non for taxability under section 9(1)(vi), read with Explanation 2 (iva) thereto as also article 12 of Indo-US DTAA. The Chennai Tribunal in the case of* ***ACIT v Vishwak Solutions Pvt. Ltd ITA No. 1935 & 1936/MDS/2010 dated 30.01.2015*** *has upheld the findings of CIT(A) that "****the amount paid to the non-resident is towards hiring of storage space."***

8.4 In the case of Rackspace , Us Inc., Usa vs Dcit (It) -4(1)(1), Mumbai, I.T. A Nos.6195 & 4920/Mum/2018 for the Assessment Years 2010-11 & 2015-16 the Mumbai Bench of the Tribunal has also considered similar issue where the assessee filed the return of income and the notes stating therein that the cloud hosting services was not taxable as 'royalties' under Article 12 of the India-US tax treaty as the customers do not operate the equipment or have physical access to or control over the equipment used by the assessee to provide cloud support services and do not make available technical knowledge, experience, skill, know-how etc., to its Indian Customers and the cloud support services are not in the nature of managerial, technical or consultancy services and consequently same do not constitute fees for included services within the meaning of Article 12 of the IndiaUSA Double Tax Avoidance Agreement (DTAA). It was observed by the Bench, while following the assessee's own case judgment for other years that

"5. On appraisal of the above mentioned finding, we find that the agreement between the assessee and its customers is for providing hosting and other ancillary services to the customers and not for the use of leasing any equipment. The data centre and the infrastructure therein used to provide these serves belongs to the assessee. The customers are not having physical control or possession over the servers and right to operate and manage this infrastructure/servers vest solely with the assessee. The agreement is to provide hosting services simpliciter and is not for the purpose of giving the underlying equipment on hire or lease. The customer was not knowing any location of the server in data centre, web mail, websites etc. Accordingly, it cannot be said as royalty within the meaning of Explanation (2) to Section 9(1)(vi) of the Act as well as Article 12(3)(b) of the Indo-USA Data by the AO and DRP. Moreover, there is no PE of the assessee in India and hence, no income can be taxed in India in term of Indo-US DTAA."

8.5 The aforesaid judgments squarely covers the controversy in regard to the present assessee also. In the light aforesaid, the Bench is of considered view that the ld. Tax Authorities below had fallen in error in considering the subscription received towards Cloud Services to be royalty income."

21. In the case of Millenium Infocom Technologies Ltd. (supra), the Delhi Tribunal on the question inter-alia, whether provision of space on the servers by the non-residents for the purpose of hosting of the website would amount to provision of technical service, held as under:-

"8. We have heard both the parties and perused the material available on record. The facts of the case are not in dispute. The assessee had paid Rs. 3,26,386 to four non-resident companies for launching of different websites on their servers located in USA. No tax was deducted while making the remittance on the ground that the amount was not chargeable to tax in India. The assessee claimed deduction in respect of the said amount as revenue expenditure. The AO disallowed the amount under Section 40(a)(i) on the ground that the assessee did not deduct any tax at source at the time of remittance to non-resident. Under Section 40(a)(i) relevant to asst. yr. 2001-02, in the case of any assessee, any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable outside India on which tax has not been paid or deducted under Chapter XVII-B shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession". Proviso to sub-clause further says that where in respect of such sum tax has been paid or deducted under Chapter XVII-B in any subsequent year, such sum shall be allowed as deduction in computing the income of the previous year in which such tax has been paid or deducted. Sub-clause (ia) which contains identical provisions in respect of payments made to a resident has been inserted by the Finance (No. 2) Act, 2004, w.e.f. 1st April, 2005. In this sub-clause words "rent, royalty" have been inserted w.e.f. 1st April, 2006. Provisions of Sub-clause (i) deal with the payments made outside India or to a non-resident whereas Sub-clause (ia) deals with the payments made to residents. Thus w.e.f. 1st April, 2005 payments made to a resident on account of interest or fee for technical services and royalty w.e.f. 1st April, 2006 will also not be allowed as deduction unless tax at source has been deducted. From the language employed in Sub-clause (i) it is clear that the payments made outside India or to a non-resident on account of any interest, royalty, fee for technical services or other sum should be chargeable to tax in India. In the case of assessee, the payments have been made to non-residents on account of rentals for hosting the websites on their servers located in USA. Thus we have to examine nature of the payments made whether they are in nature of interest or royalty or fee for technical services or other sum chargeable to tax in India. Admittedly payments made are not in nature of interest as these are not relatable to any loan/trade advances.

8.1 The expression "Fees for technical services" is defined in Expln. 2 to Section 9(I)(vii) and reads thus:

For the purposes of this clause, 'fee for technical services' means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries'.

This definition shows that consideration paid for rendering of any managerial, technical or consultancy services, as also the consideration paid for the provision of services of technical or other personnel, would be regarded as fees paid for "technical services". The definition excludes from its ambit the consideration paid for construction, assembly, or mining or like project undertaken by the recipient, as also consideration which would constitute income of the recipient chargeable under the head "Salaries".

8.2 Hon'ble Madras High Court in the case of Skycell Communication Ltd. and Anr. (supra) had an occasion to examine the scope of term "technical services". It has been held as under:

Thus while stating that 'technical service' would include managerial and consultancy service, the legislature has not set out with precision as to what would constitute 'technical' service to render it 'technical service'. The meaning of the word 'technical' as given in the New Oxford Dictionary is adjective 1. of or relating to a particular subject, art, or craft or its techniques; technical terms (especially of a book or article) requiring special knowledge to be understood : a technical report, 2. of involving, or concerned with applied an industrial sciences : an important technical achievement, 3. resulting from mechanical failure : a technical fault, 4. according to a strict application or interpretation of the law or the rules : the arrest was a technical violation of the treaty.

Having regard to the fact that the term is required to be understood in the context in which it is used, 'fee for technical services' could only be meant to cover such things technical as are capable of being provided by way of service for a fee. The popular meaning associated with technical' is 'involving or concerning applied and industrial science'.

5. In the modern day world, almost every facet of one's life is linked to science and technology inasmuch as numerous things used or relied upon in every day life is the result of scientific and technological development. Every instrument or gadget that is used to make life easier is the result of scientific invention or development and involves the use of technology. On the score, every provider of every instrument or facility used by a person cannot be regarded as providing technical service.

When a person hires a taxi from one place to another, he uses a product of science and technology, viz., an automobile. It cannot on that ground be said that the taxi driver who controls the vehicle and monitors its movement is rendering a technical service to the person who uses the automobile. Similarly when person travels by a train or in an airplane it cannot be said that the railways or airlines is rendering a technical services to the passenger and, therefore, the passenger is under an obligation to deduct tax at source on payment made to the railways or the airline for having used it for traveling from one destination to another. When a person travels by bus, it cannot be said that the undertaking which owns the bus services is rendering technical service to the passenger and, therefore, the passenger must deduct tax at source on the payment made to the bus service provider, for having used the bus. The electricity to an consumer cannot, on the ground that generators are used to generate electricity, transmission lines to carry the power, transformers to regulates the follow of current, meters to measures that consumption be regarded as amounting to provision of technical services to the consumer resulting in the consumer having to deduct that at source on the payment made for power consumed and remit the same to the Revenue....

Installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefits of the user of such equipments do not result in the provision Lo technical service to the customer for a fee.

On applying the above stated reasoning to the facts of case before us it can be safely concluded that providing of space on the servers by the non-residents for the purpose of hosting of the website will not result in the provision to technical service to the assessee for a fee. Therefore the payments were not made for fees for technical services liable to be taxed in India."

22. Based on the above facts and legal position set out abvoe, we are of the considered view that the web hosting services availed by the assessee do

not constitute royalty or FTS and hence payments made by the assessee to OIT Managed Services Mauritius in consideration of such services are not chargeable to tax in India consequent to which the assessee is not required to withhold any tax on the impugned payments. Having said so, we also hold that the impugned payments are not taxable in India in the absence of any specific clause on FTS in India-Mauritius DTAA for the year under consideration for the reasons recorded in para 8, 8.1, 8.2 and 10 above. Accordingly, ground No. 3 of the Revenue is dismissed.

23. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 20th October, 2023.

sd/-	**sd/-**
(G.S. PANNU)	**(ASTHA CHANDRA)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 20/10/2023
Veena
Copy forwarded to -
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	