IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
[Before Shri N. V. Vasudevan, JM & Shri M. Balaganesh, AM]

I.T.A Nos.1234 & 1235/Kol/2013
Assessment Years: 2008-09 & 2009-10

Batlivala & Karani Securities (India) Pvt. Ltd. (PAN: AABCB4650R) (Appellant)	Vs.	Deputy Commissioner of Income-tax, Circle-5, Kolkata. (Respondent)

Date of hearing: 02.06.2016
Date of pronouncement: 08.07.2016

For the Appellant: Shri Vijay Mehta, CA
For the Respondent: Shri Debasish Lahiri, JCIT, Sr. DR

ORDER

Per Shri M. Balaganesh, AM:

These appeals by assessee are arising out of separate orders of CIT(A)-VI, Kolkata vide Appeal Nos. 220/CIT(A)-VI/Circle-5/10-11/Kol dated 06.02.2013 and 272/CIT(A)-VI/Circle-5/11-12/Kol dated 07.02.2013. Assessments were framed by Addl. CIT, Range-5, Kolkata u/s. 143(3) and 115WE(3) of the Income tax Act, 1961 (hereinafter referred to as the "Act") for AYs 2008-09 & 2009-10 vide his separate orders dated 09.12.2010 and 21.12.2011. As the issues involved in both the appeals are identical , they are taken up together and disposed of by this common order for the sake of convenience.

2. The first issue to be decided in this appeal is as to whether the payments made by the assessee to its UK and Singapore Subsidiaries would fall within the ambit of 'Fees for Technical Services' and if so whether the disallowance u/s 40(a)(i) of the Act could be made in the facts and circumstances of the case.

3. The facts in Asst Year 2008-09 are considered here for adjudication in respect of this issue and decision rendered thereon would apply with equal force for Asst Year 2009-10 also as the issue involved is identical in Asst Year 2009-10 also. The brief facts

of this issue are that the assessee company is a stockbroker company. The assessee carries on business of brokerage on behalf of institutional clients. During the previous year relevant to the assessment year under consideration, the assessee had made payments to two of its wholly owned subsidiaries namely, M/s B&K Securities Ltd. (U.K.) and M/s. B&K Securities Pvt. Ltd. (Singapore). M/s B&K Securities Ltd (U.K.) is engaged in business of providing marketing support services for clientele in U.K. The services rendered by B&K (U.K) were for expansion of assessee's business. For this purpose a 'Representation Agreement' was entered between the assessee and B&K on 15.11.2006. As per the terms of the said agreement lump sum payment of 18,000 pounds per month was made by the assessee to the U.K. company. On the said payment, there is no dispute since TDS was deducted by the assessee while making the said payment. The representation agreement was revised on 03.10.2007 w.e.f. 01.10.2007. As per the said agreement the assessee was to reimburse the cost incurred by the U.K. company and in addition was to pay a mark-up of 29% on cost for the marketing services provided by the U.K. company.

M/s B&K Securities Pte Ltd (Singapore) is engaged in business, inter alia, of research and marketing services for securities/markets locally and overseas. B&K Singapore had provided various services, such as research and marketing services to the appellant. The services rendered by B&K were for expansion of assessee's business not only in Singapore but also in entire South East Asian countries. For this purpose a 'Business Services Agreement' was entered between the assessee and B&K on 01.04.2007 stipulating the terms and conditions. It is submitted that the assessee has deducted TDS on payments made on account of research services. With regard to marketing services, as per the agreement, the assessee was to reimburse the cost incurred by the Singapore company and in addition was to pay a mark-up of 29% on cost for the marketing services provided by the Singapore company.

3.1. The details of payments made to B & K Securities Ltd, U.K. are as below:-

M/s. Batlivala & Karani Securities (India) P. Ltd.
DETAILS OF PAYMENTS MADE TO B&K SECURITIES LTD. U.K.
ON ACCOUNT OF MARKETING SUPPORT SERVICES

Sr. No.	Period	Nature of expenses	Amount	Remarks
1.	01.04.2007 to 30.09.2007	Lumpsum payment of 18,000 pounds per month as per agreement dated 15.11.2006	96,88,845	There is no dispute on this payment
2.	01.10.2007 to 31.03.2008	i) Reimbursement of actual expenses as per agreement dated 01.10.2007 ii) Mark Up @ 29% on expenses reimbursed as per agreement dated 01.10.2007	1,07,09,273 32,25,600	i)No TDS was deducted on the said payment since it was reimbursement of actual expense (except for the period from 01.01.2008 to 31.03.2008 wherein tax was deducted by oversight and paid. ii) Tax was deducted and paid and there is no dispute on this payment.

3.2. The details of payments made to B & K Securities Ltd, Singapore are as below:-

M/s. Batlivala & Karani Securities (India) P. Ltd.
DETAILS OF PAYMENTS MADE TO B&K SECURITIES LTD. SINGAPORE
ON ACCOUNT OF MARKETING SUPPORT SERVICES

Sr. No.	Period	Nature of expenses	Amount	Remarks
1.	01.04.2007 to 30.09.2008	I) Reimbursement of actual expenses as per agreement dated 01.04.2007 ii) Mark up @ 29% on expenses reimbursed as per agreement dated 01.04.2007	1,59,18,988 52,07,491	i)No TDS was deducted from the said payment since it was reimbursement of actual expenses ii) tax was deducted and paid and there is no dispute on this payment.

ON ACCOUNT OF RESEARCH SERVICES

Sr. No.	Period	Nature of expenses	Amount	Remarks
2.	01.04.2007 to 31.08.2007	Payment made as per agreement dated 01.04.2007	46,19,765	There is no dispute on this payment

4. It was submitted before the Assessing Officer that the assessee had deducted TDS on the service fee paid by the assessee to its subsidiaries but not deducted TDS on reimbursement of expenditure since it was not in the nature of income. The Assessing

Officer was of the view that the assessee should have deducted TDS on the entire amount remitted to U.K and Singapore company since the payment made by assessee was on account of fees for technical services and hence taxable in the hands of non-resident. For holding that assessee ought to have deducted tax at source irrespective of the fact whether the payment is taxable in the hands of non-resident in India, the Assessing Officer has relied upon the decision of Transmission Corporation of A.P Ltd. v. CIT [239 ITR 587 (SC)].

4.1. Before the CIT(A), it was submitted that the subsidiaries only rendered marketing support services which were not covered in the definition of fees for technical services as defined under Explanation to S. 9(1)(vii) of the Act. It was contended that TDS is required to be deducted on the income element accruing in the hands of non-resident. It was submitted that the assessee has deducted TDS on the mark up fee charged to its subsidiaries but has not deducted TDS on the reimbursement of expenses. It was submitted that the subsidiaries incur certain expenditure on behalf of the assessee which are reimbursed by the assessee at cost. It was submitted that such reimbursement does not give rise to income in the hands of the subsidiaries as a result no TDS is required to be deducted on the amount paid as reimbursement. In order to support the said contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of G.E. India Technology v. CIT (327 ITR 456). However, the Ld. CIT(A) held that the payments made by the assessee are for consideration of various services provided by the subsidiaries. He held that as per the provisions of S. 195 of the Act TDS is not to be deducted on income but on gross payment. He further held that the assessee is not to see the income or profit of the deductee but only the amount of payment. Hence, he upheld the action of the Assessing Officer and confirmed the disallowance made u/s 40(a)(i) of the Act.

5. Aggrieved, the assessee is in appeal before us for the Asst Year 2008-09 on the following grounds:-

> *"I. That on the facts and in the circumstances of the case, the Ld. CIT(A) erred in affirming the disallowance of Rs.2,17,79,771/- under section 40(a)(ia) of the Act as a result of wrongly applying the provisions of section 195 of the Act;*

II. That on the facts and in the circumstances of the case, the Ld. CIT(A) failed to appreciate that the assessee duly complied with the requirements of section 195 as well as section 40(a)(ia) of the Act by deducting tax from fees payable to the said disburses under the contract for services and therefore, there was no scope for invoking the provisions of section 40(a)(ia) of the Act."

6. Payments to Singapore Subsidiary

Ld. AR. Argued that Singapore subsidiary is engaged in business, inter alia, of research and marketing services for securities/markets locally and overseas. B&K had provided various services, such as research and marketing services to the assessee. The services rendered by Singapore company were for expansion of assessee's business not only in Singapore but also in entire South East Asian countries. For this purpose a 'Business Services Agreement' was entered between the assessee and B&K on 01.04.2007 stipulating the terms and conditions. The services to be rendered by Singapore company to the assessee, and which were in fact rendered about which there is no dispute forming part of Clause 4.1 of this Agreement, which reads as under:

"The provision of research/Marketing services in Singapore in a form that may be mutually agreed upon by the Parties from time to time in respect of the regional markets covering Singapore, Malaysia/ Thailand, Indonesia, Hong Kong and any other jurisdiction or a combination of any such jurisdictions."

For the services rendered by Singapore company and which the assessee utilized for reinforcing its overall business operations, the service provider was to be paid service fees; and in addition granted reimbursement of the expenditure incurred. The relevant clauses from this writing for resolving the disputed issue are reproduced below for the sake of convenience :-

REIMBURSEMENT OF EXPENSES AND SERVICE FEE

5.1 In consideration of the Business Services to be rendered by THE SERVICE PROVIDER under this Agreement THE SERVICE RECIPIENT agrees to reimburse all costs and expenses incurred by THE SERVICE PROVIDER with the prior consent of THE SERVICE RECIPIENT in providing the Business Services and reflected in the books and records of THE SERVICE PROVIDER.

5.2 Additionally, THE SERVICE RECIPIENT agrees to pay a Service Fee equal to 29% of the costs and expenses reimbursed in accordance with 5.1 above."

It was submitted that the subsidiary operates exclusively in respective place of origin in Singapore. No part of the activities takes place in India nor the services they provide

were utilized for carrying on the business in India. They wholly pertain to transactions with the institutional clients abroad. It is submitted that the Company explores the possibility of extending the assessee's sphere of operations by representing the assessee before the assessee and existing and potential institutional clients in Singapore.

7. Payments to U.K. Subsidiary

The Learned AR argued that the U.K. subsidiary is engaged in the business of introducing overseas clients to the assessee. The services rendered by U.K. company were for expansion of assessee's business not only in U.K. but also in entire European area. For this purpose a 'Representation Agreement' was entered between the assessee and U.K. company on 17.11.2006 which was further modified on 03.10.2007 w.e.f. 01.10.2007. It is submitted that as per the earlier agreement dated 17.11.2006 the assessee was to pay lump sum amount of 18,000 pounds per month. The assessee deducted TDS while making the said payment hence, there is no dispute. As per the new agreement dated 03.10.2007 w.e.f. 01.10.2007, the assessee will reimburse the actual expenses incurred by the U.K. company and in addition will pay a service fee @ 29% for the services rendered by U.K. company. It is submitted that no TDS was deducted while making the payment for reimbursement of cost since it was reimbursement of actual expenses and there was no element of income in the said payment.

8. In essence, it was argued that the services rendered by both the subsidiaries are in the nature of marketing support services and not in the nature of ‘fees for technical services’ as alleged by the lower authorities. The Learned AR made his arguments based on the following propositions:-

(a) The payments are not for fees for technical services within the meaning of Article 13 / 12 of DTAA with UK and Singapore as the case may be.

(b) As there is no permanent establishment of UK and Singapore Subsidiaries in India, payments made to them are not taxable in India under Article 7 of DTAA with UK and Singapore.

(c) In any case, payments are not for fees for technical services as per the provisions of the IT Act.

(d) Explanation to section 9(2) has been inserted retrospectively w.e.f. 1.6.1976 vide Finance Act, 2010 and hence, cannot be invoked for imposing TDS obligation in respect of payments already made in F.Y. 2007-08.

(e) In any case, payment falls within the exception provided u/s 9(1)(vii)(b) of the Act as the same is made for earning income from a source outside India.

(f) In any case, TDS provisions are not applicable to payments which are in the nature of reimbursement of expenses.

(g) Since for all the above reasons, payments are not liable to tax in India, there is no TDS obligation u/s 195 of the Act as laid down by the Hon'ble Apex Court in the case of GE India Technology Centre P Ltd vs CIT reported in 327 ITR 456 (SC).

(h) In any case, at the most, this is a case of short deduction and not non-deduction and hence, disallowance cannot be made u/s 40(a)(i) of the Act.

9. The Learned AR argued that the payments made to Subsidiaries do not fall within the definition of fees for technical services as per the provisions of the Act or the DTAA between India & Singapore vide Article 12(4) and India & UK treaty vide Article 13(4). He stated that as per India Singapore treaty, fees for technical services are defined as under:-

> *"4. The 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:*
>
> > *(a) 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: or*
> >
> > *(b) make available technical knowledge, experience, skill know-how or processes, which enables the person acquiring the services to apply the technology contained therein: or*

(c) consist or the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the services to apply the technology contained therein."

Similarly he argued that as per the India U.K. treaty, fees for technical services are defined as under:-

Article 13 (4)

"4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term 'fees for technical services' means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which;

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this Article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

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

He argued that with regard to Singapore Treaty, the payments made would admittedly not fall under Article 12(4)(a) and 12(4) (c). Similarly in respect of U.K. Treaty, the payments made would admittedly not fall under Article 13 (4)(a) and 13(4)(b). He argued that as could be seen from the above definition of 'fees for technical services' that in order to fall under Article 12(4)(b) of Singapore Treaty and Article 13(4)(c) of U.K. Treaty, any consideration paid for services of managerial, technical or consultancy services would be covered under the said definition only if such services make available any technical knowledge, experience, know how or processes. In the present case, as is evident from the facts stated hereinabove, no technical services are being made available to the assessee by its foreign subsidiaries. As a result, even assuming without admitting that the payment is 'fees for technical services' under the Act, the payments made by assessee to its subsidiary companies would not fall within the definition of 'fees for technical services' under the DTAA since there is no technical knowledge made available to the assessee. Instead the subsidiary is only providing marketing services to the assessee. It was submitted that it would also be relevant to state that as per Section 90(2) of the Act, if the Central Government has entered in to a Double Taxation

Avoidance Agreement with the Government of any country outside India, then in relation to the assessee to whom such agreement applies, the provisions of Income-tax Act would apply only to the extent they are more beneficial to the assessee i.e. if the treaty provisions are more beneficial to the assessee, it will prevail over the provisions of the Income-tax Act. It was submitted that, in the present case, treaty between India and Singapore is more beneficial to the assessee and no additional tax liability arises under the shelter of treaty. In view of the above, it was submitted that the payments would not fall under the definition of fees for technical services as per DTAA and hence no tax is required to be deducted on the said payment.

The Learned AR also made various arguments independently in support of various propositions as laid out hereinabove.

10. In response to this, the Learned DR stated that the supplementary agreement entered into by the assessee was only to circumvent TDS provisions wherein actual expenses were sought to be reimbursed plus mark up of 29% was agreed upon as consideration payable by the assessee to its subsidiaries. The nature of business carried out by the assessee is highly technical in nature and hence the services rendered by the subsidiaries of the assessee in order to promote the business of the assessee in India should also be construed only as rendering of technical services and accordingly the consideration paid thereon is to be treated as fees for technical services. The assessee is not carrying on any trading activity in India. Accordingly he vehemently relied on the order of the lower authorities.

11. In defence, the Learned AR stated that the revenue had not disputed the contents of the supplementary agreement entered into by the assessee and they have grievance only on the limited aspect of the compliance with TDS provisions in respect of payments made pursuant to such supplementary agreement. In this scenario, the argument of the Learned DR that the said agreement was entered into to circumvent TDS provisions is to be rejected. He further argued that no technical services, if any, have been made available to the assessee and there was no transfer of technology by the

subsidiaries to the assessee in India in order to fall within the ambit of fees for technical services as per the treaty.

12. We have heard the rival submissions and perused the materials available on record including the paper book filed by the assessee comprising of copy of agreement with B&K Securities Ltd, UK (pages 1 to 6 of PB) ; copy of agreement with B&K Securities Pte ltd (Singapore) (pages 7 to 16 of PB) ; copy of computation of income of assessee (pages 19-21 of PB) ; copy of financial statements of the assessee (pages 22-24 of PB) ; relevant pages of the treaty with Singapore and UK (pages 45-51 of PB) and copies of various judgments relied upon in support of various contentions addressed by the Learned AR (pages 52 to 127 of PB) .

12.1. We find that the moot question to be decided in this appeal is as to whether the payments made by the assessee to its foreign subsidiaries would fall under the ambit of 'fees for technical services' as per the DTAA. We find from the Article 12 of Singapore Treaty and Article 13 of the UK Treaty defining the term 'fees for technical services' , the consideration paid for rendering of managerial, technical or consultancy services would be covered under the said definition only if such services make available any technical knowledge, experience, knowhow, or processes. The nature of services rendered by the subsidiaries to the assessee were in respect of simple marketing services of introducing foreign institutional investors to invest in the capital markets in India so that the assessee would improve its business and income in India. We find that no technical service is being **made available** to the assessee by its subsidiaries and as a result, the payments made to subsidiaries would not fall within the definition of fees for technical services as admittedly no technical knowledge was made available to the assessee by the subsidiaries.

12.2. Article 12(4) and 13(4) of the Singapore and UK treaty respectively reproduced hereinabove is the same as Article 12(4)(b) of DTAA between India and USA. In the Memorandum of understanding to the DTAA between India and USA, a description concerning fees for included services in Article 12 and paragraph 4 (in general) have been given. Examples of services intended to be covered within the definition of

included services and those intended to be excluded have been given. The Memorandum explains how Paragraph 4(*b*) of Article-12 has to be understood. The Memorandum explains that Article 12(4)(b) refers to technical or consultancy services that make available to the person acquiring the services, technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plant or technical design to such person. The Memorandum explains category of services referred to Article 12(4)(b) as narrower than the category described in paragraph 4(*a*) because it excludes any service that does not make technology available to the person acquiring the service. It further explains that generally speaking, **technology will be considered made available when the person acquiring the service is enabled to apply the technology**. **The fact that the provision of the service may require technical input by the person providing the service does not *per se* mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(*b*). Similarly, the use of a product which embodies technology shall not *per se* be considered to make the technology available**. The Memorandum further explains with examples as to how Article 12(4)(b) has to be understood as follows:

> "Typical categories of services that generally involve either the development and transfer of technical plants or technical designs, or making technology available as described in paragraph 4(*b*), include :
>
> *1.* Engineering services (including the sub-categories of bio-engineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical, metallurgical, and industrial engineering) ;
>
> *2.* Architectural services ; and
>
> *3.* Computer software development.
>
> Under paragraph 4(*b*), technical and consultancy services could make technology available in a variety of settings, activities and industries. Such services may, for examples, relate to any of the following areas :
>
> *1.* Bio-technical services ;
>
> *2.* Food processing ;

3. Environmental and ecological services ;

4. Communication through satellite or otherwise ;

5. Energy conservation ;

6. Exploration or exploitation of mineral oil or natural gas ;

7. Geological surveys ;

8. Scientific services ; and

9. Technical training.

The following examples indicate the scope of the conditions in paragraph 4(*b*) :

Example 3

Facts :

A U.S. manufacturer has experience in the use of a process for manufacturing wallboard for interior walls of houses which is more durable than the standard products of its type. An Indian builder wishes to produce this product for its own use. It rents a plant and contracts with the U.S. company to send experts to India to show engineers in the Indian company how to produce the extra-strong wallboard. The U.S. contractors work with the technicians in the Indian firm for a few months. Are the payments to the U.S. firm considered to be payments for included services ?

Analysis :

The payments would be fees for included services. The services are of a technical or consultancy nature; in the example, they have elements of both types of services. The services make available to the Indian company technical knowledge, skill and processes.

Example 4

Facts :

A U.S. manufacturer operates a wallboard fabrication plant outside India. An Indian builder hires the U.S. company to produce wallboard at that plant for a fee. The Indian company provides the raw materials, and the U.S. manufacturer fabricates the wallboard in its plant, using advanced technology. Are the fees in this example payments for included services ?

Analysis :

The fees would not be for included services. Although the U.S. company is clearly performing a technical service, no technical knowledge, skill, etc., are made available to the Indian company, nor is there any development and transfer of a technical plant or design. The U.S. company is merely performing a contract manufacturing service.

Example 5

Facts :

An Indian firm owns inventory control software for use in its chain of retail outlets throughout India. It expands its sales operation by employing a team of travelling salesmen to travel around the countryside selling the companys wares. The company wants to modify its software to permit the salesmen to assess the companys central computers for information on what products are available in inventory and when they can be delivered. The Indian firm hires a U.S. computer programming firm to modify its software for this purpose. Are the fees which the Indian firm pays treated as fees for included services ?

Analysis :

The fees are for included services. The U.S. company clearly performs a technical service for the Indian company, and it transfers to the Indian company the technical plan (i.e., the computer programme) which it has developed.

Example 6

Facts :

An Indian vegetable oil manufacturing company wants to produce a cholesterol-free oil from a plant which produces oil normally containing cholesterol. An American company has developed a process for refining the cholesterol out of the oil. The Indian company contracts with the U.S. company to modify the formulas which it uses so as to eliminate the cholesterol, and to train the employees of the Indian company in applying the new formulas. Are the fees paid by the Indian company for included services ?

Analysis :

The fees are for included services. The services are technical, and the technical knowledge is made available to the Indian company.

Example 7

Facts :

The Indian vegetable oil manufacturing firm has mastered the science of producing cholesterol-free oil and wishes to market the product world wide. It hires an American marketing consulting firm to do a computer simulation of the world market for such oil and to adverse it on marketing strategies. Are the fees paid to the U.S. company for included services ?

Analysis :

The fees would not be for included services. The American company is providing a consultancy service which involves the use of substantial technical skill and expertise. It is not, however, making available to the Indian company any technical experience, knowledge or skill, etc., nor is it transferring a technical plan or design. What is transferred to the Indian company through the service contract is commercial information. The fact that technical skills were required by the performer of the service in order to perform the commercial information service does not make the service a technical service within the meaning of paragraph 4(b).

Paragraph 5

Paragraph 5 of Article 12 describes several categories of services which are not intended to be treated as included services even if they satisfy the tests of paragraph 4. Set forth below are examples of cases where fees would be included under paragraph 4, but are excluded because of the conditions of paragraph 5."

12.2.1. The Memorandum of understanding is a tool to understand as to what meaning was intended to be conveyed in the DTAA between countries. Since the wording of Article 12(4) and 13(4) of the treaty with Singapore and UK respectively and Article 12(4)(b) of the DTAA between India and US are identical, the MOU to the Indo-US treaty can be looked into to see what meaning India and Singapore / UK (as the case may be) would have contemplated in the treaty. The law is settled that a DTAA with one country can be compared with the DTAA with another country in case of ambiguity and in order to understand the true scope and meaning of the concerned DTAA. The *Hon'ble Karnataka High Court in the case of A.E.G. Telefunken v. CIT [1998] 231 ITR 129* compared the DTAA with German Democratic Republic with the DTAA with Finland towards this end.

12.2.2. The *Mumbai Bench of the Tribunal in the case of Raymond Ltd. Vs. DCIT 86 ITD 791 (Mum)* had to deal with a case of payment of commission by an Indian company to a non resident in connection with Public Issue of Global Depository Receipts (GDR) for services rendered outside India. The question before the Tribunal was whether the commission so paid can be said to be "Fees for included services" i.e., Fees for Technical Services under Article 13(4)(c) of the Indo-UK DTAA which is the same as that of Article 12(4)(b) of the treaty between India and Singapore. After considering Article 12(4)(b) of the Indo-US DTAA (which are similar to Article 12(4) and 13(4) of the treaty between India and Singapore / UK (as the case may be)), and after referring to the Memorandum of understanding to the Indo-US DTAA, the Tribunal held as follows:

> " Whereas section 9(1)(vii) of the Act stops with the "rendering" of technical services, the DTAA goes further and qualifies such rendering of services with words to the effect that the services should also make available technical knowledge, experience, skills etc. to the person utilizing the services. These words are "which make available". The normal, plain and grammatical meaning of the language employed, in our understanding, is that a mere rendering of services is not roped in unless the person utilizing the services is able to make use of the technical knowledge etc. by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill etc. must remain with the person utilizing the services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skills etc. from the person rendering the services to the person utilizing the same is contemplated by the article. Some sort of durability or permanency of the result of the "rendering of services" is envisaged which will remain at the disposal of the person utilizing the services. The fruits of the services should remain available to the person utilizing the services in some concrete shape such as technical knowledge, experience, skills etc."

12.3. Applying the definition of FTS in the Treaty to the facts of the present case in the light of the various decisions referred to above, it cannot be said that the rendering of services by the Singapore and UK Subsidiaries to the assessee made available to the assessee , such services , for its future use or utilization on a reasonably permanent basis. Hence the consideration paid thereon by the assessee would not fall under the ambit of fees for technical services as per the treaty.

12.4. Now the provisions of section 90(2) of the Act would have to be seen which states that the provisions of DTAA would prevail over the Act to the extent it is beneficial to the assessee. In view of the aforesaid finding that the payment made is not fees for technical services as per the Treaty, it would be academic to look into the fact whether the said payment would be fees for technical services as per the provisions of the Income Tax Act. The applicability of TDS provisions thereon due to retrospective amendment in Explanation 2 to Section 9(1)(vii) of the Act by the Finance Act 2010 with effect from 1.6.1976 need not be gone into. We also feel that the aspect of applicability of TDS provisions on the reimbursement component also becomes irrelevant in the facts of the case in view of the aforesaid findings. Similarly the applicability of the provisions of section 40(a)(i) of the Act for short deduction of tax at source also becomes academic in nature and no decision is hereby rendered thereon. The question as to whether the payment by the assessee to its subsidiary in UK and Singapore comprised partly of reimbursement of expenses or not also does not require any consideration, in view of the conclusion that the payment in question does not, even otherwise, attract the provisions of Sec.40(a)(i) of the Act.

12.5. Since the payment made by the assessee to its subsidiaries is not fees for technical services, then the same would be construed as only business income in the hands of the subsidiaries which would get taxed in India only in the event of existence of permanent establishment (PE) in India. We find that the Learned AO had categorically stated in more than one place in his order that the Singapore and UK subsidiaries do not have any PE in India. The retrospective amendment in this regard in Explanation 2 to section 195(1) of the Act with effect from 1.4.1962 was inserted by the Finance Act 2012. The obligation to deduct tax at source has to be complied only as per the law that it prevails on the date of payment. Admittedly the payment in question was made by the assessee to its Subsidiaries prior to the Finance Act 2012. It is not possible to fasten an obligation to deduct tax at source on the basis of a retrospective amendment to the law as has been laid down by the Co-ordinate Bench decision of this Tribunal in the case of *DCIT vs Subhotosh Majumder reported in (2016) 65 taxmann.com 42 (Kolkata –Trib.) dated 27.11.2015 wherein it was held that :-*

- *The tax deductor is not expected to know how the law will change in future. A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. The tax withholding obligations from payments to non-residents, as set out in section 195, require that the person making the payment 'at the time of credit of such income to the account payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force.*
- *When these obligations are to be charged at the point of time when payment is made or credited, whichever is earlier, such obligations can only be discharged in the light of the law as it stands that point of time. Section 40(a)(i) of the Act provides that inter alia, notwithstanding anything to the contrary in sections 30 to 38 of the Act, any amount payable outside India, or payable in India to a non-resident, shall not be deducted in computing the income chargeable under the head 'profits and gains of business or profession' on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted. Accordingly, the assessee cannot be faulted for not deducting TDS and consequently, the deletion of disallowance by Commissioner (Appeals) is confirmed. [Para 20]*
- *In the result, the appeal of revenue is dismissed. [Para 21]*

12.6. We find that as per Article 7 of UK and Singapore Treaty, in the absence of PE in India, the business income also would not get taxed in India. Hence we hold that the payment made by the assessee to its subsidiaries is not chargeable to tax in India in the hands of the subsidiaries in India. The provisions of section 195(1) of the Act mandates a requirement that the income should be chargeable to tax in India to assume jurisdiction in India. In the instant case, it is proved beyond doubt that the subsidiaries do not have any income chargeable to tax in India and hence the decision rendered by the *Hon'ble Apex Court in the case of GE India Technology Centre P Ltd vs CIT reported in 327 ITR 456 (SC)* supports the case of the assessee. This decision has been rendered after duly considering the case law vehemently relied upon by the Learned AO on the decision of the *Hon'ble Apex Court in the case of Transmission Corporation of A.P. Ltd vs CIT reported in 239 ITR 587 (SC)* vide para 10 of the judgement at pages 465 & 466. We are also in complete agreement with the arguments advanced by the Learned AR that the various case laws relied upon by the Learned CITA in his order vide paras 7 to 12 were rendered prior to rendering of Hon'ble Supreme Court decision in GE India Technology case on 9.9.2010. Hence we don't deem it fit and appropriate to discuss those case laws for the purpose of adjudication of this issue.

12.7. In view of the aforesaid findings , we have no hesitation in directing the Learned AO to delete the disallowance made u/s 40(a)(i) of the Act in respect of payments made to foreign subsidiaries. In view of the above conclusion, the other propositions advanced by the Learned AR before us are not taken up for consideration. **Accordingly, the Ground Nos. 1 & 2 raised by the assessee for the Asst Year 2008-09 are allowed**.

13. We find that the facts for the Asst Year 2009-10 in respect of the impugned issue are exactly similar except variance in the mark up of 10% instead of 29% in respect of payments made to Singapore Subsidiary. Hence the decision rendered in Asst Year 2008-09 would apply with equal force for the Asst Year 2009-10 also in respect of this issue. **Accordingly, the Ground Nos 1 & 2 raised by the assessee for the Asst Year 2009-10 are allowed**.

14. The next issue to be decided in this appeal is as to whether the Learned CITA is justified in confirming the disallowance made u/s 14A of the Act in the facts and circumstances of the case.

14.1. Briefly stated facts are that during the previous year relevant to the assessment year under consideration, the assessee received exempt income of Rs. 1,68,786/- . The Assessing Officer made a disallowance u/s 14A r.w. Rule 8D of the Act amounting to Rs. 6,45,802/-@ 0.5% of average investments on account of administrative expenses on the premise that the assessee must have incurred certain expenditure for earning exempt income. While calculating the said disallowance the Assessing Officer excluded the investments made in foreign subsidiaries but did not exclude the investments from mutual funds, the dividend of which was taxable. Before the Ld. CIT(A), it was contended that the Assessing Officer has grossly erred in applying Rule 8D while making disallowance u/s 14A of the Act. It was also submitted that the Assessing Officer has wrongly included the value of investment in mutual funds while making the said disallowance. The Ld. CIT(A), in principle upheld the action of the Assessing Officer but granted part relief to the assessee by excluding the value of investment in mutual funds while calculating average investments as per Rule 8D(iii).

14.2. The Learned AR argued that the majority of investments (i.e. 93.20%) in respect of which disallowance has been made by the Assessing Officer are in the subsidiary companies of the assessee. The said fact is evident from the investment schedule on Pg 27 of the P.B. It is submitted that the purpose of investing in the said companies was to acquire controlling stake for the purpose of business and not to earn any exempt income. It is submitted that no disallowance u/s 14A of the Act can be made when investment is in subsidiary companies since the purpose of investment is to gain controlling stake. In response to this, the Learned DR relied on the decision of Hon'ble Calcutta High Court in the case of Dhanuka & Sons reported in (2011) 12 taxmann.com 227 (Cal HC).

15. We have heard the rival submissions. We hold that the investments made in subsidiary companies are to be treated as strategic investments and hence the disallowance u/s 14A of the Act would not operate at all as the investment made thereon is not with an intention to earn any exempt income in the form of dividend but only for obtaining controlling interest in the said companies and to further the business interests of the assessee in the said company. Reliance in this regard is placed on the decision of the co-ordinate bench of Delhi Tribunal in the case of *Interglobe Enterprises Ltd vs DCIT reported in (2014) 40 CCH 0022 DelTrib in ITA No. 1362 & 1032 /Del/ 2013 , ITA No. 1580/Del/2013 dated 4.4.2014 for Asst Years 2008-09 & 2009-10,* wherein it was held that :

> *However, we find that the calculation of disallowance under Rule 8D(iii) made by the Assessing Officer and upheld by Ld CIT(A) is not correct In view of the fact that Assessing Officer had included the value of total investments for calculation of disallowance whereas in our opinion the value of those investments should have been included which were made for the purpose of earning exempt income. The assessee had made significant investments in the shares of subsidiary companies which are definitely not for the purpose of earning exempt income. The Hon'ble Tribunal in I.T.A. No.3349/Del/2011 in the case of Promain Ltd., after relying upon a Kolkatta judgment of Tribunal in I.T.A. No.1331 has held that strategic investment has to be excluded for the purpose of arriving at disallowance under Rule 8D(iii). The Tribunal had relied upon the findings of Kolkatta Tribunal in the case of Rei Agro Ltd. v. DCIT in I.T.A. No./ 1331/Del/2011 dated 29.7.2011. The relevant portion of Tribunal findings as contained in the Kolkata Tribunal are reproduced below:-*
>
> > *"(iii) Further in Rule 8D(2)(ii), the words used in numerator B are "the average value of the investment, income from which does not form or shall not form part of the total income as appearing in the balance sheet as on the first day and in the last day of the previous year". The Assessing Officer was wrong in taking*

into consideration the investment of `.103 crores made during the year which has not earned any dividend or exempt income. It is only the average of the value of the investment from which the income has been earned which is not falling within the part of the total income that is to be considered. Thus,. It is not the total investment at all beginning of the year and at the end of the year, which is to be considered but it is the average of the value of investments which has given rise to the income which does not form part of the total income which is to be considered. The term "average of the value of investment" is used to take care of cases where there is the issue of dividend striping.

iv) Under Rule 8D(2)(iii), what is disallowable is an amount equal to ½ percentage of the average value of investment the income from which does not or shall not form part of the total income/. Thus, under sub clause (iii), what is disallowed is ½ percentage of the numerator B in Rule 8D(2)Iii). This has to be calculated on the same lines as mentioned earlier in respect of Numerator B in the Rule 8D(2)(ii). Thus, not all investments become the subject matter of consideration when computing disallowance u/s 14A read with Rule 8D. The disallowance u/s 14A read with Rule 8D is to be in relation to the income which does not form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income. (A.Y.) (I.T.A. No.1331/Kol/2011 dated 29.7.2011."

Following the above judicial precedents, we held that value of strategic investments should be excluded for the purpose of disallowance under Rule 8D)iii) facts, we direct the Assessing Officer to calculate the disallowance under Rule8D(iii) by excluding the value of strategic investments in the calculation of disallowance. As regards disallowance under Rule 8D(i) and 8D(ii) we have already held that no disallowance is warranted."

We find that the Co-ordinate Bench of this Tribunal in the case of *DCIT vs Selvel Advertising P Ltd reported in (2015) 58 taxmann.com 196 (Kolkata Trib.)* also had taken a similar view.

Respectfully following the judicial precedents relied upon hereinabove, we hereby direct the Learned AO to recomputed the disallowance u/s 14A of the Act after eliminating the strategic investments made in subsidiaries and investments yielding taxable income. **Accordingly the Ground No. 3 raised by the assessee for the Asst Years 2008-09 and 2009-10 is allowed for statistical purposes**.

16. The next issue to be decided in the appeal for the Asst Year 2009-10 is with regard to the disallowance of club expenses to the tune of Rs. 1,36,500/-. The brief facts of this issue are that the payment was made by the assessee on behalf of its director Shri Manoj Murarka on account of membership fee of a club. The Learned AO treated the same as personal expenses and disallowed in the assessment which was upheld by the

Learned CITA. Aggrieved, the assessee is in appeal before us. The Learned AR argued that the same was paid on account of business expediency and for smooth conduct of the business of the assessee.

17. We have heard the rival submissions. We find that the Learned CITA had observed in his order that the assessee had not provided even the basic details as to in whose name the membership is taken and who were the other persons visiting in the name of the Director and whether it was in the name of individual or corporate membership. We find that these facts are crucial for the purpose of deciding the issue. Hence we deem it fit and appropriate to set aside this issue to the file of the Learned AO to decide this issue afresh, in accordance with law, with a direction to the assessee to produce the necessary evidences in support of its claim. Accordingly, the Ground No. 4 raised by the assessee for the Asst Year 2009-10 is allowed for statistical purposes.

18. In the result, the appeals of the assessee in ITA No. 1234/Kol/2013 and ITA No. 1235/Kol/2013 are allowed for statistical purposes.

Order is pronounced in the open court on 08.07.2016

Sd/-	Sd/-
(N. V. Vasudevan)	(M. Balaganesh)
Judicial Member	Accountant Member

Dated : 8th July, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – Batlivala & Karani Securities (India) Pvt. Ltd., 7, Lyons Range, 3rd floor, Room No. ¾, Kolkata-700 001.
2. Respondent –DCIT, Cir-5, Kolkata.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.