आयकर अपीलीय अधिकरण, मुंबई "एल" खंडपीठ

Income-tax Appellate Tribunal "L"Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं रविश सूद, न्यायिक सदस्य

Before S/Sh. Rajendra,Accountant Member & Ravish Sood, Judicial Member

आयकर अपील सं./I.T.A./4844/Mum/2011, निर्धारण वर्ष /Assessment Year: 2006-07

आयकर अपील सं./I.T.A./2768/Mum/2013, निर्धारण वर्ष /Assessment Year: 2008-09

The Astt. CIT-11(2) Room No.479, 4th Floor Aayakar Bhavan, M.K. Road Mumbai-400 020.	Vs.	M/s. Deloitte Haskins & Sells 264-265, Vaswani Chambers Dr. Annie Besant Road,Worli Mumbai-400 030. **PAN:AACFD 4815 A**

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

आयकर अपील सं./I.T.A./5095/Mum/2011, निर्धारण वर्ष /Assessment Year: 2006-07

आयकर अपील सं./I.T.A./6786/Mum/2011, निर्धारण वर्ष /Assessment Year: 2007-08

आयकर अपील सं./I.T.A./2221/Mum/2013, निर्धारण वर्ष /Assessment Year: 2008-09

M/s. Deloitte Haskins & Sells Mumbai-400 030.	Vs.	The Astt. CIT-11(2) Mumbai-400 020.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

Revenue by: Shri P.V. Rajguru- Sr. DR

Assessee by: Shri P.J. Pardiwala and Ms. Vasanti Patel

सुनवाई की तारीख **/ Date of Hearing: 03/01/2018**

घोषणा की तारीख **/ Date of Pronouncement: 23/03/2018**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार- PER RAJENDRA, AM-

Challenging the orders of the CIT (A)-3,Mumbai, the assessee and the Assessing Officer(AO) have filed above appeals.For the AY.s 2006-07 and 2008-09 there are cross appeals,whereas for the AY.2007-08,only the asssessee has filed the appeals.As the issues involved in all these appeals are almost common,so,we are adjudicating them together.

Assessee is a firm of Chartered Accountants.The details of dates of filing of returns of income, returned incomes, dates of assessment and assessed incomes and dates of the orders of the CIT(A) etc. can be summarised as under:

A.Y.	ROI filed on	Returned Income	Assessment dt.	Assessed Income	CIT(A) order date
2006-07	19/10/2006	Rs.4.62 crores	30/12/2008	Rs.5.43 crores	30/03/2011
2007-08	27/10/2007	Rs.10 crores	30/12/2009	Rs.11.14 crores	01/08/2011
2008-09	30/09/2008	Rs.8.99 crores	31/12/2010	Rs.21.29 crores	17/01/2013

ITA/4484/Mum/2011-AY.2006-07:

2.The Departmental Representative(DR)and the Authorised Representative(AR) agreed that the tax effect in the case under consideration was below the tax limit,prescribed by the CBDT for filing appeals before the Tribunal.Therefore,we dismiss the appeal,filed by the AO,for the AY. 2006-07,considering the low tax effect involved.

ITA/5095/Mum/2011,AY.2006-07:

3.During the course of hearing before us,the AR stated that assessee was not interested in pressing ground number four,considering the smallness of the tax effect.It deals with disallowance made u/s.40(i)(a)of the Act for sponsorship fee paid to Deloitte Touche Tohmatsu,Switzerland(DTT SL).We dismiss the ground,as not pressed.

4.First Effective ground of appeal(Gs.AO.1-3),raised by the assessee,is about confirming the disallowance of professional fees paid by it to Deloitte & Touche,Singapore(DTS), Deloitte & Touche,LLP USA(DTL US),Deloitte Touche Tohmatsu Ltd.,Ausralia(DTTL AUS)amounting to Rs. 22.83 lakhs,Rs.1.56 lakhs,Rs.1.64 lakhs respectively.

4.a. During the assessment proceedings,the AO found that assessee had made payment outside India,under the head 'subscription fees'of Rs.36.31 lakhs,that it had not deducted tax at source for such payment,that out payment made to DTT SL of Rs. 31.33 lakhs it had made TDS for payment of Rs.27.23 lakhs,that for balance payment of Rs.4.10 lakhs tax was not deducted before making the payment,He directed it to explain as to why the said payments should not be disallowed for non deduction of TDS.In response,the assessee filed detailed reply on 26.12.2008. After considering the submission of the assessee,he relied upon the order of the then AO for the AY.s 2004-05 and 2005-06 and held that the facts and circumstances pertaining to the issue remained the same.He made a disallowance of Rs. 41.36 lakhs to the income of the assessee.

4.1. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority(FAA)and made elaborate submissions. After considering the available material, the FAA held that while deciding the appeal for the AY.2003-04 the then FAA had deliberated upon the issue at length,that the payment of fee by the assessee was covered under the provisions of section 9(1) of the Act,that payments made by it were liable for deduction of tax at source,that the disputed amounts deemed to accrue/arise in India under section 9 of the Act.

4.1.a. The FAA directed the assessee to file the complete details of nature of services rendered by DTS.After considering the submission,she held that the assessee had made two payments (Rs. 33,117/-and Rs.1.32 lakhs)to Singapore entity in respect of which no specific details were furnished, that the assessee had chosen to withhold the names of the clients and the details of the business arrangements, that it was not possible to ascertain what was the nature of services provided,that in absence of the details it was not clear as to whether Article 12 of the India-Singapore treaty would be applicable for the payments made to DTS.She confirmed the addition made by the AO in that regard.About the payment of Rs. 10.93 lakhs and Rs. 10.24 lakhs,she observed that DTS was appointed reporting accountant for one Indian party, namely Alok Industries Ltd.(Alok),that the services provided by DTS would squarely fall under the provisions of Article 14 of the India-Singapore DTAA,that the Singapore entity was the reporting account-tant of Alok,that it was required to issue an audit opinion in respect of various matters pertaining to Alok,that for issuing financial statements partners of Singapore entity would have visited India,that assessee did not file details in that regard, that it was not explained as to how DTS perform the job of auditing without access to the books of accounts, that Alok head a fixed place in India,that the payment was attributable to the activities carried out by Alok,that the payment was taxable in India,that the AO was justified in disallowing the amount. With regard to payment of two sums(Rs.44,841/-and Rs.1.54 lakhs),the FAA held that the said amounts had not fall within the purview of Article 12/14 of the DTAA, that the disputed payments could not be considered business income/profit,that the condition of existence of Permanent Establishment (PE)was not satisfied.Accordingly,she deleted the disallowance of the said two sums.

4.1.b. With regard to payments(Rs.9.83 lakhs)made by the assessee to DTL US,it was submitted before the FAA that payments were made on seven counts(Rs.1.56 lakhs +Rs.1.45 lakhs + Rs. 2. 93 lakhs +Rs.62,457/-+ Rs. 49,966/-+ Rs.2.31 lakhs+Rs.45,051/-),that the USA entity had rendered professional services outside India,that no tax was deducted at source on the basis of the certificate obtained from a Chartered Accountant,that payment of professional fee was not liable to taxed in India in view of Article XV of the India-USA Tax-treaty.It also made a reference to Article 12 of the DTAA.

After considering the submission of the assessee,the FAA held that Rs. 1.45 lakhs, Rs.2.19lakhs, Rs.62,457/-,Rs.49,966/-and Rs. 45,051/- were paid to review of Form Number F3 for HDFC

bank Ltd, review of Forms Number 20F, 6K and F3 for Rediff.com and review of STC letter for Reddif.com. respectively,that the payments were not made for technical services or independent personal services, as envisaged by Articles 12 or 14 of the tax-treaty,that there was no liability to deduct tax while making remittances.With regard to payment of professional services of Rs. 1.56 lakhs in connection with review of Maillie Falconiero and Zenta Inc,she observed that the AO was justified in disallowing the said payments,invoking the provisions of 40(a)(i) of the Act.

4.1.c. The assessee,during the appellate proceedings before the FAA,submitted that DTLL AUS had rendered professional services outside India,that it made the payment without deducting tax at source on the basis of the certificate obtained from a Chartered Accountant,that the payment was not taxable India as per the provisions of Article XII of the India-Australia text treaty.It referred to Article VII(1) of the DTAA.

The FAA,after considering the details furnished before her,held that Australian entity had rendered services in connection with providing tax advises on assignee of Avaya Globalconnect, working in Australia,that the person in respect of home enquiry was made was not disclosed by the assessee.Referring to the provisions of Article XII(3)(c)and(d)of the India Australia DTAA, she held that the AO had rightly made the disallowance of Rs. 1.64 lakhs.

4.2. Before us,the AR argued that the assessee had made payments to group companies,that in case of DTT AUS,one of the four,non-resident entities,identical issue was decided in favour of the assessee by the Tribunal vide its order dtd.30.11.2016 (ITA.s/5096,5097 and 5094/Mum/ 201,AY.s 2003-04 to 2005-06)..

4.2.a. With regard to the payments made to DTS and DTL US,he stated that the DTAA.s entered into with both the countries contained make available clause,that under the Act the payments were not taxable,that services rendered by both the entities were professional services and not technical services,that both of them did not have Permanent Establishment in India,that the FAA put negative onus on the assessee with regard to disallowance confirmed in the case of DTL US.He referred to page 140 of the PB and Article XII of the DTAA and stated that nothing was made available to the assessee,that no technical services were rendered by DTL US to the assessee.

About DTS,he stated that the assessee had furnished all the necessary details during the assessment proceedings,that out of four bill two bills did not carry the names,that under the provisions of the Act the disputed payments were not taxable,that same were not taxable under the DTAA ,that the services rendered were not exclusionary,He referred to Art.XII of the Tax-treaty and stated that burden was on the AO to prove that income was chargeable to tax under the DTAA.He relied upon the case of Motorala Inc.(95 ITD 269),delivered by the Special Bench of the Tribunal.The DR relied upon the orders of the departmental authorities.

4.3. We have heard the rival submissions and perused the material before us.We find that in case of DTT AUS,identical issue was deliberated upon and decided by theTribunal,while adjudicating the appeal for the AY.s 2003-04 to 2005-06 (supra).We are reproducing the relevant portion of the order,dealing with payment made to Australian entity and same reads as under:

> *"25.As regards second issue raised in ground No.2 the assessee has challenged the disallowance of Rs.1,16,693/- made u/s 40(a) (i) in respect of payment of professional fees made to DTT Australia on the ground that the assessee should have deducted TDS. Admittedly, here in this case also, the observation and finding of the AO as well as CIT(A) are exactly the same. Regarding rendering of professional services by DTT Australia, it was submitted that the assessee had sought professional service in respect of Sydney Strat. "OS Service Centre" audit for one of the assessee"s client namely, Vatico India (Mumbai) for the year ending 31st December, 2002. The entire professional services were rendered outside India. DTT Australia raised invoice for Rs.1,60,693/- which was remitted without deduction of tax at source based on certificate obtained from Chartered Accountant. Similar submission was made by the assessee with regard to this payment. Our finding given in respect of DTT Canada as well as DTT New Zealand will apply mutatis mutandis qua this payment also. In view of our finding given above, the payment of professional fee to DTT Australia is held not to be taxable u/s 9(1)(i) or 9(1)(vii) or in terms of Article 12(4) of DTAA, which has "make available clause" and is similar to India Canada DTAA. Thus, the disallowance made by the AO and as confirmed by the CIT (A) is directed to be deleted. Accordingly, ground No.2 is allowed."*

Respectfully,following above,we hold that the professional fees paid by the assessee to DTLL AUS was not taxable in India,that the FAA and the AO were not justified in invoking the provisions of 40(a)(i)of the Act.GOA.3 is decided in favour of the assessee.

5.1. We would also like to reproduce the findings given by the Tribunal,in the order for the AY. 2003-04 to 2005-06(supra),for payments made to the Canadian and New Zealand entities,under the head professional services.The Tribunal has mentioned about both the entities in the preceding paragraphs and the order is very relevant for deciding the first two grounds.The orders of the AO and FAA for the year under consideration are almost same that of the earlier years.The

AR and the DR had advanced the identical arguments before the Tribunal.We are reproducing the order of the Tribunal for the earlier years(supra)and it reads as under:

> *"16. Now,we shall advert to the second issue of disallowance of payment of "professional fees" in respect of two parties under 40(a)(i)(a)(i); namely: (i) DTT (Deloitte Touche Tohmatsu) Canada of Rs.2,90,000/-; and (ii) DTT (Deloitte Touche Tohmatsu) New Zealand of Rs.1,45,290/- .Regarding payment to DTT Canada, it was submitted that, the assessee was appointed by Punjab Agro Industrial Corporation Ltd., a Government of Punjab enterprise to carry out a study of the dairy sector and assist the Government in development of its business plan. In the process of providing the above services, the appellant availed services of DTT, Canada, who had rendered the "professional services" in respect of providing information of the global environment in the dairy sector in respect of the markets, competition, technology and regulations and other best practices followed by the global players. The entire services in relation to this job were performed outside India by the DTT and in respect of the aforesaid services it raised the invoice dated 23 October 2002 for an amount of USD 6,000. The assessee made remittance to the DTT, Canada without deduction of tax at source based on the certificate obtained from a chartered accountant in a prescribed form. The Ld. Counsel before us had stated that, relationship between the assessee and DTT Canada was occasional and there is absolutely no business connection of DTT Canada in India in terms of section 9(1)(i) and since services have been rendered outside India, therefore, it cannot be taxed in India. The Assessing Officer has made disallowance under 40(a)(i)(a)(i) on the ground that, in some of the cases, the assessee itself has deducted TDS and in some it does not. With regard to this allegation, it has been clarified before us that in respect of other DTT entities, the professional people had come to India for rendering of the services and that is why the assessee had deducted the TDS. But in these two cases, services were rendered outside India, therefore, same is not liable to be taxed in India. Here again, the allegation of the Assessing Officer has been that, assessee should have sought approval under section 195 without giving any cogent reason as why and how such professional fees payable to non-resident entity is taxable either under the Act or in terms of DTAA. The Ld. CIT(A), came to different conclusion and finding that it is in the nature of "fees for technical services‖, which was not the case of AO. She referred to the decision of ITAT Mumbai Bench in the case of Ashapura Minichem vs. ADIT, reported in [2010] 5 taxman.com 57 and after quoting the said decision, she observed that, if "fee for technical services"is rendered outside India the same is taxable in view of retrospective amendment to section 9(1)(vii) brought by Finance Act, 2010, which envisages/clarifies that it is not necessary that services should have been rendered in India. Accordingly, she concluded that, the payment has to be reckoned under section 9(1)(vii) being 'fee for technical services". Not only that, she further held that the payment made to DTT Canada also falls under Article 12(3)(a) and Article 12(4)(a).*
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> *17. From the perusal of the impugned orders and material on record, first of all, we are unable to appreciate the approach of the Assessing Officer for the reason that he has not given any finding as to how the payment of fees for "professional services" which has been paid to DTT Canada is taxable in India either in terms of the provisions of the Act or under any article of the DTAA. If the payment has been made to non-resident, then it has to be seen firstly, whether under the terms of DTAA such a fee or payment is taxable in India or not and if not, then whether it is taxable in terms of Income Tax Act.Without any finding qua the taxability of the payment, how disallowance u/s40(a)(i) can be made.The Ld. CIT(A) too without analyzing the factual aspect and ascertaining the nature of payment has simply came to a conclusion sans any finding by the AO that the impugned payment is taxable as „fee for technical services".*
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> *She simply referred to a decision of Tribunal and held that retrospective amendment which has been brought in section 9(1)(vii) by the Finance Act, 2010, whereby it has been clarified that, if the technical services have been rendered outside India then also same is taxable in India. Before*

coming to this conclusion, she has not given any finding whatsoever how such a payment of fees for rendering of professional services falls within the ambit of fees for technical services. She has also failed to take the note of the fact that, under the DTAA with Canada, there is "make available clause", if this kind of payment is to be reckoned as "fees for included services". For the sake of ready reference Article 12(4) fees for technical services is reproduced hereunder:-

> 4. For the purposes of this Article, 'fees for included services' means payments of any kind to any person consideration for the rendering of any technical or consultancy services (including through the provision of services of 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 or consist of the development and transfer of a technical plan or technical design.

Thus, to fall within the meaning of "fee for included services" or for rendering of any technical or consultancy services it is sine-qua-non that such services should "make available" technical knowledge, experience, skill, knowhow or processes or consist of development and transfer of technical plan or technical design. Here in this case, the professional service has been rendered by DTT Canada only for providing information about the „Diary Sector" and not for the purpose of any "technical services" as defined. In any case there is no"make available"of any of the terms as mentioned in the said Article. Therefore, in terms of Article 12(4) the payment does not fall within the realm of fee for included services. If it is a payment for "independent personal services" in terms of Article 14, then same can be taxed only when in the hands of non-resident, if he has some kind of "Fixed base" or is regularly available in India or his stay for rendering of professional services has exceeded 183 days or there is some kind of PE in India. The term "Professional services" has been defined in para 2 of Article 14, which deals with independent personal services.The Article reads as under:-

> ARTICLE 14: Independent personal services – 1. Income derived by an individual or a firm of individuals (other than a company) who is a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State. However, in the following circumstances, such income may be taxed in the other Contracting State, that is to say
>
> (a) if he has or had a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State; or
>
> (b) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in the relevant fiscal year; or
>
> (c) if the remuneration for the services in the other Contracting State is either derived from residents of that other Contracting State or is borne by a permanent establishment which a person not resident in that other Contracting State has in that other Contracting State and such remuneration exceeds two thousand five hundred Canadian dollars ($2,500) or its equivalent in Indian Currency in the relevant fiscal year.

2. The term 'professional services' includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants. Here in this case, even if the payment is said to be made towards professional services then also same cannot be taxed because, DTT Canada does not have any fixed base, PE or any of its employee have stayed in India for more than 183 days. Thus, under the DTAA, the said payment is not taxable as fee for "professional services" because none of the conditions as mentioned in the aforesaid Para of Article 14 is satisfied.

Once,the"professional fee" is not taxable under DTAA,then, no disallowance under 40(a)(i)(a)(i) can be made. On this ground alone, the disallowance made by the AO and confirmed by the CIT (A) stands deleted.

18. Even otherwise, under the Income Tax Act the payment of "professional fee" to the non-resident cannot be taxed in India in terms of Section 9 (1) (i), because such an income should be received or deemed to be received in India or accrue or arise in India to the non-resident through or from any business connection in India, or through or from any property in India, or through or from any asset, or source of income in India. Here, in the present case one has to see whether the non-resident, i.e. DTT Canada has any kind of „business connection" in India in terms of Explanation 2 to section 9(1)(i). The relationship between DTT Canada and the assessee is on principal-to-principal basis and there is no person who is acting on behalf of DTT Canada in India. Thus, in terms of Section 9(1) (i) no income of DTT Canada has been received or accrued or deemed to have been received or accrued in India as it does not have any kind of „business connection" in India and, therefore, there was no liability for deducting TDS on payment made to DTT Canada.

19. Now, whether such a payment can be said to be in the nature of "fees for technical services" in terms of Section 9(1) (vii). Explanation 2 to Section 9 (1) (vii) defines "fees for technical services" as any consideration for rendering of any managerial, technical or consultancy services.These services are distinct from "professional services" which has been separately defined under the Income Tax Act in Clause (a) to Explanation below Section 194J which for the sake of ready reference is reproduced hereunder:-

> (a)professional services‖ means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purpose of Section 44AA or of this section."

Clause (b) of the same Explanation defines "fee for technical services" as having the same meaning given in Explanation 2 to Section9(1)(vii).Separate definitions of"professional services" and "technical services" under the Act inter-alia indicates that the Statute makes clear distinction between these two terms. The term "profession" alludes to some kind of vocation or occupation which requires special, advanced education, knowledge or skill etc. A person professing any kind of profession requires extensive training and study and mastery of specialized knowledge.A professional person has to conduct himself within specified code of conduct or ethical conduct which is required from his field of profession like legal, medical, accountancy etc. In the case of rendering of technical services, the emphasis is more on giving services which are technical in nature and alludes to some kind of giving advice or consultancy in the field of technology or imparting of technical skills,knowledge, experience, knowhow etc.Here "consultancy" also means some kind of technical consultancy because it is preceded by the word "technical".The term"managerial" is indicative of management of business or something like which is distinct from profession or rendering of professional services. Here in this case, professional services were rendered by DTT Canada in respect of providing information of the Global environment in dairy sector in respect of the markets, competition, regulations and other best practices followed by global players. Thus, the impugned payment cannot be reckoned as fees for rendering of technical services in terms of Section 9 (1) (vii).

20.As regards the "professional fees" paid to DTT New Zealand, the same too were akin to payment made to DTT Canada.The explanation of the assessee before the authorities below qua this payment was as under:-

> We were appointed by Punjab Agro Industrial Corporation Ltd., a Government of Punjab enterprise to carry out a study of the aqua sector and assist the Government in development of its business plan. In the process of providing the above services, we availed services of Deloitte Touche Tohmatsu, New Zealand. Deloitte Touche Tohmatsu, New Zealand is a firm of Certified Public Accountants. Deloitte Touche Tohmatsu, New Zealand rendered professional services of providing information on the global environment in the aqua sector in respect of the markets, competition, technology and regulations and other best practices followed by the global players. The entire services in

relation to this job were performed outside India by Deloitte Touche Tohmatsu, New Zealand. In respect of the aforesaid services, Deloitte Touche Tohmatsu, New Zealand raised the invoice dated 9 October 2002 for an amount of USD 3,000. A copy of the invoice is enclosed at page 72 of the Compilation.

We have made remittance to the Deloitte Touche Tohmatsu, New Zealand without deduction of tax at source based on the certificate obtained from a chartered accountant. With regard to this payment also there is no specific finding by the AO or the CIT (Appeal) as to how it is taxable in India and under which provision of the Act. In this case also the learned CIT (A) has reckoned the payment as "fees for technical services" without elaborating or elucidating the nature of payment. So far as the benefit under India-New Zealand DTAA, the payment of professional fee is not taxable under Article 14, which deals with "Independent personal services".

The language of Article 14 is similar to the language of India-Canada DTAA which has been reproduced hereinabove. Here also DTT New Zealand neither has any fixed base/ PE nor had any of its employees/professionals stayed in India for the period exceeding 183 days in any consecutive twelve months period. Accordingly, under the DTAA the "professional fee" paid to DTT is not taxable in India. However, Article 12(4) of India-New Zealand DTAA dealing with "fees for technical services" imbibes same definition as has been given under the Income Tax Act. Our finding given on the issue of FTS under Section 9 (1) (vii) will apply mutatis mutandis here also. Therefore, in view of our finding given therein, the said payment cannot be held to be taxable in India either under Section 9 (1) (vii) or under Section9(1)(i).

Accordingly,disallowance made by the AO u/s 40(a) (i) is directed to be deleted."

Considering the above,we hold that the professional fees paid by the assessee to DTS and DTL were not taxable in India nor were subject to TDS provisions of Chapter XVII of the Act . Reversing the order of the FAA,we decide Gs.OA 1 and 2 in favour of the assessee.

6.Fifth ground of appeal is about interest payment as per the provisions of section 244A of the Act.During the course of hearing,the AR stated that the AO had granted the interest for the period 01-04.2006 to 21-11-2007,that he should have calculated the interest up to 18.12.2007, that intimation u/s.142(1)was issued on 18.12.2007.He referred to the Circular 200(XXII-II.dtd. 20.08.1968)issued by the Board.The DR left the issue to the discretion of the Bench.

Considering the above,we direct the AO to follow the Circular of the Board, referred to by the AR before us.Last ground of appeal is decided accordingly.

ITA/6786/Mum/11,AY.2007-08:

9.Before us,the AR of the assessee stated that Ground No.2 was infructuous.Hence, we are not adjudicating the same.

10. Ground No.1 is about confirming the addition of Rs.51.06 lakhs out of addition of Rs.58.46 lakhs made by the AO,on the basis of difference between information gathered from Annual Information Return(AIR)and the professional receipts as per the books of account.During the assessment proceedings,the AO found that there was difference in the professional receipts as per

the AIR information books of account.He directed the assessee to reconcile the difference.After considering the submission of the assessee,the AO held that no substantial evidence/ submission were made.So he added an amount of Rs.58,46,445/-to the total income of the assessee.

10.1. Aggrieved by the order of the AO the assessee preferred an appeal before the FAA and made detailed submissions .He called for a remand report in that regard from the AO. Finally, he held that amount of Rs.51.06 lakhs remained unreconciled.

10.2. During the course of hearing before us,the AR stated that in the absence of any contrary material brought on record no addition could be made, that the assessee had not received more than the professional fee reflected in the AIR,that no opportunity was provided to the assessee to examine or rebut the replies made by the parties in response to the notice issued u/s. 133(6)of the Act,the assessee was able to reconcile the entire alleged undisclosed professional fee.He referred to the amounts attributable to Encorn Win Farms (India) Ltd. (Rs.19.09 lakhs+28.41 lakhs) and stated that that the payee vide its letter dtd.29/2/12 had confirmed that the assessee had not issued any invoice, that no payment was made to the assessee towards professional fee. He also referred to the case of Sri Vallabh Lohia(ITA/4120/Mum/2011,dtd.8/8/12) and stated that the assessee was following cash method of accounting and that all the receipts were by cheque. DR stated that matter should be sent to AO for further verification.

10.3. We have heard the rival submissions.We find that major amount under the head professional fee received is from Encorn Win Farms (India) Ltd.,that the payer had, in response to section 13(6)notice,admitted(Pg-53 of the PB)that it had not paid any amount to the assessee, that it also ascertained that no professional services were availed from the assessee.We find that the FAA had brushed aside such an important piece of evidence only on the ground that the figure was appearing in the AIR.Mistakes in the information in AIR is not uncommon.In these circumstances and after considering the Pg-53 of the PB,we are of the opinion that we are of the opinion the FAA was not the justified in confirming the addition of Rs.51.06 lakhs.We would also like to refer to the case of Sri Vallabh Lohia(supra)wherein the issue of non reconciliation of AIR information has been deliberated upon.We are reproducing the relevant portion of the order and it reads as under:

> *"5. In Ground Nos.3 & 4 of appeal, assessee has disputed the order of ld CIT(A) in confirming the addition of Rs.2,66,916 made by the AO as interest received from Rajvaibhav Enterprises Pvt Ltd., based on AIR information.*
> *6. The AO stated that as per AIR information, assessee received interest from Rajvaibhav*

Enterprises Pvt Ltd., amounting to Rs.2,66,916. Further, assessee vide letter dated 18.12.2009 stated that no interest payment was received nor the assessee claimed any TDS in respect of the alleged interest. However, AO did not concur with the contention of the assessee and made this addition to the income of the assessee. In the first appeal, ld CIT(A) confirmed the action of AO. Hence, this appeal by the assessee.

7. During the course of hearing, ld A.R. reiterated the facts as stated before the authorities below. He referred to pages 41 -43 of PB, which is a copy of ledger account of M/s. Steel World and submitted that assessee has not received any interest from Rajvaibhav Enterprises (P) Ltd.,. He submitted that merely on the basis of AIR information and without any evidence that assessee has received any interest from it, hence the amount could not be added to the income of the assessee. Ld D.R. merely relied on orders of authorities below. 8. We have considered submissions of ld representatives of parties and orders of authorities below. 9. We observe that AO has made this addition merely on the basis of AIR information and without bringing any evidence on record that the assessee has actually received the said interest of Rs.2,66,916. It is not the case of the department that the said party was put to cross examination or the ledger account of the assessee in the books of account of the said party were given to the assessee and assessee was confronted thereon. We agree with ld A.R. that merely on the basis of AIR information and without bringing any evidence on record, it cannot be held that interest income has been received by the assessee from Rajvaibhav Enterprises (P)Ltd. Therefore, the said addition is not justified. Accordingly, we delete the addition of Rs.2,66,916 by allowing ground Nos.3 & 4 of appeal taken by the assessee."

Following the above ,we decide Ground No.1 in favour of the assessee.

11.GOA.3 is about confirming the disallowance u/s.40(a)(ia) of the Act of Rs.24.04 lakhs in respect of professional fee paid.During the assessment proceeding,the AO found that the assesee had paid Rs.5.36 lakhs to DTS,that Rs. 8.45 lakhs and Rs.9.15 lakhs were paid to DTLL US and Deloitte Tax LLP respectively,that it had also made payments to Deloitte Belastinga Dviseirs B.V.,Netherlands(Rs.59,008/-); SJMS Associates,Sri Lanka (Rs.48,145/-).The AO directed the assessee to explain as to why the payment made to above entities should not be disallowed for non deduction of tax at source.Relying upon the orders of the earlier AY.s,he made a disallowance of Rs.24,04,395/-,invoking the provisions of section 40(a)(i) of the Act.

11.1.During the appellate proceedings,the assessee made detailed submission before the FAA and relied upon certain case laws.After considering the submission of the assessee,he held that the assessee had paid professional fees Rs.24.04 lakhs to its non-resident entities,that it had remitted amount without deducting the tax at source,that the tax was not deducted on the basis of certificate obtained from CA,that the assessee had not approached the AO for taking no objection or nil certificates under the provisions of section 195 of the Act, that the services rendered by the non-resident entities were of the nature of managerial/consultancy services,that same were covered by the provisions of section 9 (1) (vii) of the Act.The FAA referred to the case of Tata

Iron & Steel Co. (34SOT83); Ashapura Minichem Ltd.(5taxmann. com.57) and held that fees for technical services, is omitted by the assessee without deduction of tax at source, were taxable in view of the provisions of section 9(1)(vii).

With regard to payment made to DTS (Rs. 5.36 lakhs) he held that the nature of the payment was claimed to be summary view and advice on the withholding of tax,that the assessee did not file details in that regard, that it did not disclose the names of the clients home such services were rendered and also the details of services and advice given, that it was not possible to ascertain what was the nature of services provided and as to whether the services were same as considered in the Tax-treaty as technical services including managerial, technical or consultancy nature as per the provisions of article 12 (4) (b) (c) of the DTAA/9 (1) of the Act.He further held that services availed by the assessee were in the nature of consultancy services, that same boat squarely fell under the provisions of Article 14 of the India-Singapore DTAA which pertain to independent personal services, that services rendered by DTS were specific services, that same were utilised in India, that the provisions of section 9(1)(vii) were applicable, that the services rendered by DTS were not covered by any exclusion clause.Finally,he upheld the order of the AO.

With regard to payment to DTLL US,the FAA observed that Tech Mahindra Ltd wanted to list the securities in US market,that the US entity reviewed the GAAP Financial Information prevailing in US so that Tech Mahindra could comply with the US regulations,that Rediff was an audit client of the assessee, that it had made payment to its US entity in connection with Rediff, that assessee did not file necessary details in that regard,that it was not explained as to how the US entity carried out the audit work without access to the books of accounts, that services were availed in India, that it was taxable as per the provisions of section 9(1)(vii) of the Act.

About the payment of Rs.9.15 lakhs to Deloitte tax LLP,USA,the FAA observed that the payments were made for rendering the professional services in the fields of research,that payments were made in connection with consultancy on transfer pricing analysis of Micro Inks Corporation for the fiscal year ended on 31/03/2005,that the services were in the nature of consultancy services.

He further observed that payment to Netherlands entity was made for services availed in connection with providing tax advice on Netherland tax laws, that the payment was in the nature

of consultancy services and that same was covered by the provisions of section 9(1)(vii) of the Act as well as Article 15 (a) of the Tax-treaty, that Article 15 included consultancy services under the definition of fees for technical services,that the assessee had utilised services in India.

With regard to payment made to Sri Lankan entity,he observed that payment was made in connection with consultancy on VAT provisions applicable in that country, that the services were covered by section 9(1)(vii) of the Act, being in the nature of consultancy, managerial services, that the services availed by the assessee were not covered by the provisions of Article 14 of the Tax-treaty, that Tax-treaty between India and Sri Lanka did not have Article for fees for technical services/professional services,that the provisions of Act would prevail, that the payment was made by the resident to the non-resident, that the Indian resident was supposed to deduct tax at source.In short, the FAA upheld the disallowance,made by the AO, in respect of the payments made to 5 non-resident entities.

11.2. Before us,the AR stated that issue of payment of fees to DTS and two US entities stands allowed in favour of the assessee by the order of the Tribunal for the earlier years. He further contended that remittances made by the assessee were based on the certificates obtained from the chartered accountants, that the CA.s had certified that no tax was required to be deducted at source from the aforesaid remittances, that if sum was not chargeable to tax in the hands of the non-resident no tax was required to be deducted, that assessee was not required to obtain order under section 195 (2) of the Act.He relied upon the case of GE India Technology Centre Private Ltd. (327 ITR 456) and referred to circular number 10/2002 dated 910 2002, issued by the CBDT and stated that provisions of section 9(1)(vii) were applicable in respect of income by way of FTS, that the section was not applicable in respect of the fees paid for professional services. He referred to the provisions of section 194J of the Act and stated that the explanation to the section defines that professional services and fee for technical services separately, that the act recognised difference between the professional services and technical services, that the assessee had availed professional services,that payment made for the same was not covered by the provisions of section 9(1). He also made reference to case of NQA Quality System Registrar Ltd (92TTJ 946) and stated that provision fees paid to the non-resident entities were not taxable in India in view of the tax treaties entered into between India and those countries.

11.2.a. With regard to payment to the Netherland entity,he argued that the non-resident entity had

rendered professional services in connection with providing tax advice on Netherlands tax laws, that Article 12 of the Tax-treaty provided payment for royalties and fees for technical services, that sub-clause 5(a) of the Article covered the payment for services which were ancillary and subsidiary to the royalty payment,that Article 12(5)(b) covered those services which would make available technical knowledge, experience, skill, know-how, that Article 12 (5)(b) contained the condition regarding make available,that the Netherlands entity had not made available technical knowledge/experience/skill etc., that the professional services rendered could not be categorised as FTS under Article 12 of the Tax-treaty that as per Article 14 of the DTAA professional fees received by the Netherlands entity was taxable in that country only.He referred to Pgs.109 and 274-280 of the PB.

11.2.b. With regard to payment made to Sri Lankan entity,he stated that the Tax-treaty between India and Sri Lanka did not have Article regarding fee for technical services,that as per Article 14 of the DTAA professional fees received by Sri Lankan tax resident was taxable in that country,that in the new Treaty of 2014 FTS was brought in the provisions of the DTAA, that Sri Lankan entity did not have any presence in India. He referred to case of Bangkok Glass Industries Co. Ltd.(257 CTR 326).The DR supported the order of the FAA.

12. We have heard the rival submissions and persued the material before us.We find that while deciding the appeal for earlier year we have held that provisions of section 40(a)(ia)of the Act were not applicable to payments made by the assessee to DTS and the US entities,that we have referred to the orders of the tribunal delivered for earlier years.Therefore,we reverse the order of the FAA as far as DTS and to non-resident entities of US are concerned.

With regard to Netherland entity we would like to mention that the services availed by the assessee were professional services and not technical services.The non-resident entity had provided some information about tax laws of that country.Naturally,it cannot be held royalty.For applying provisions of Article 12(5)(b)of the DTAA,the first pre condition is that the non-resident should have made available technical knowledge/experience/skill etc. to the assessee. There is no evidence to prove that any knowledge was made available to the assessee that was used by it.Besides, the professional services are to be taxed in the country of receipt,as per the Article 14 of the Treaty.As the non-resident was not having any PE in India,so,the professional fees received by the Netherland would not be taxable in India.We would like to deal with the

liability of deducting tax at source for such payment.In the case of GE India Technology Center P.Ltd. (supra),the Hon'ble Apex Court has held as under:

> *"The most important expression in section 195(1) of the Income-tax Act, 1961, dealing with deduction of tax at source consists of the words "chargeable under the provisions of the Act." A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Act. Section 195 contemplates not merely amounts, the whole of which are pure income payments ; it also covers composite payments which have an element of income imbedded or incorporated in them. The obligation to deduct tax at source is, however, limited to appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. It is for this reason that the CBDT has clarified in Circular No. 728 dated October 31, 1995, that the tax deductor can take into consideration the effect of the DTAA in respect of payments of royalties and technical fees while deducting tax at source.*
>
> *The expression "chargeable under the provisions of the Act" in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. If tax is not so assessable, there is no question of tax at source being deducted."*

Considering the above discussion,we hold that the assessee was not liable to deduct tax at source for the payment made to the Netherland entity and that provisions of section 40(a)(ia)of the Act were not applicable.

12.a. Now,we would like to take up the issue of payment made by the assessee to Sri Lankan entity.We find that before signing of the DTAA of 2014 there was no provisions in the Indo-Sri Lankan DTAA for charging FTS.The non-resident entity had no PE in India and professional fees was to taxed as per Article 14 of the treaty.Considering the facts of the matter,we hold that the FAA was not justified in upholding the order of the AO with regard to the payments made to Sri Lankan entity.

In light of the above discussion,we decide ground no.3 in favour of the assessee.

ITA/2768/Mum/2013,AY.2008-09.

13.In his appeal for the year under consideration,the AO has raised only one ground of appeal and it deals with deleting the addition of Rs. 3.58 lakhs on account of payment to retired partners. During the assessment proceedings, the AO found that the assessee had made payment of Rs.3, 58,14,436/- to 23 ex-partners.After considering the explanation filed by the assessee in that regard,he held that fees were received by the assessee due to the professional activities of individual person in the capacity of the partners of the firm and such fees were of the assessee firm,that same by any stretch of imagination could not be the receipt of income of the individual partners,that it was maintaining its books of account and was declaring the fees as receipts of the

firm and not as the receipt of the individual partners,that it had decided to follow the particular system of accounting,that after retirement from the partnership he could not have any claim or right in the receipts or assets of the partnership except to the extent of the balance in his capital account and the share of the income of the firm till his retirement as per the clauses in the partnership deed,that that the ex-partners or their legal heirs were not party to the agreement i.e. the partnership deed,that they could not sue the firm or the partners of the assessee firm for violation and infraction of any of the terms of the partnership deed,that they had no locus standee,that all the receipts had reached to it without any interruption/hindrance,that it was a case of application of money.The AO further observed that the decision in the case of V. G. Krishnamurthy (203 ITR 249)was squarely applicable to the facts of the case.Accordingly,he held that disputed amount of Rs.3,58,14, 436/- was liable to be disallowed as an expenditure.He further held that at the most it was a gratuitous payment,which could not be treated as business expenditure.

13.1. During the course of hearing before the FAA,the assessee furnished the details in respect of names of the retired partners and spouse of deceased partner covered under Clause 10.m of the Partnership Deed along with the amounts paid to them.After considering the available material,the FAA stated that the assessee was obliged to pay the amount computed under clause 23 before distribution of the same under clause 28 of the partnership deed,that it was not an application of the income by the assessee-firm,that as per the legal obligation the income was diverted before it reached the assessee,that the assessee was in fact in the position of a collector of income on behalf of the persons to whom if was payable and was only paying the amount subsequently,that the payment to retired partners and wives of the deceased partners was made as per provisions of clause 10.m of the partnership deed,that the said payment had a prior and overriding charge on the receipts of the assessee -firm as per the provisions of clause 7.e. of the partnership deed.He further stated that it could not be said that it was a case of diversion of income by overriding title.Referring to the order of C.C. Chokshi & Co. for A.Yrs. 1995-96 to 1997-98 of Mumbai Tribunal which was upheld by the Hon'ble High Court by orders dated 15.07.2008 and 25.07.2008,he further observed that similar disallowances made in the case of C.C. Chokshi & Co. were deleted by the Bombay High Court for AYs. 2003-04 and 2004-05 also. Following the above judgments, he deleted the addition made by the AO.

13.2. Before us,the DR supported the order of the AO.The AR submitted that the professional fees of Rs.3,58,14,4367- was diverted to the retired partners or to the legacy firm or to the spouses/ nominee of the deceased partners by overriding title,that the said sum was reduced from the gross receipts of the firm in the P & L account,that the amount payable to retired partners or their spouses was determined as per the provisions of the partnership deed,that the amount paid to retired partners was determined as per clause 10.n.i to clause 10.n.v.of the Partnership Deed, dated 01.04.2007,that clause 7.e. of the Partnership Deed created prior and overriding charge on receipt of the appellant firm,that payment to the extent of Rs.3.58 crores was diversion of income by an overriding title pursuant to clause 7.e. of the partnership deed,that the same was not included in the professional receipt of the firm,that tax ought to be charged on the real income of the assessee,that all the sums received by the assessee,during the year,would not represent income and cannot be brought to tax,that the amount paid to retired partner and spouses of deceased partners was not the income of the appellant and therefore ought not be taxed,that professional fees received by the appellant belonged to the retired partners or spouses of deceased partners by virtue of clause 10.m of the Partnership deed,that a copy of the Partnership Deed,dated 01.04.2007, was provided to the AO vide letter dated 28.12.2010.He relied upon the case of C C Choksi decided by the ITAT and approved by the Hon'ble Bombay High Court.

13.3. We have heard the rival submissions and perused the material before us.We find that the AO had held that payment made by the assessee to the ex partners or to the spouses/legal heirs of deceased partners was application of money,that the disputed amount was to be taxed in the hands of the assessee,that the payment to ex-partners was made in pursuance of the various clauses of the partnership deed,that during the assessment proceedings a copy of the deed was submitted,that he did not took cognigance of clauses 7 and 10 of the deed,that the deed clearly provided that the ex partners or the spouses of deceased partners would be paid part of the income of the assessee for the services rendered by them,that the FAA had taken note of the relevant clauses of the partnership deed,that he followed the judgments of the Hon'ble jurisdictional High Court delivered in the case of C C Choksi(ITA 193 of 2008,dtd.25.07. 2008), that in that matter the Hon'ble Court had,in the identical situation,held that the payment made to ex-partners or to the spouses of the deceased partners was not application of money,that the FAA had following the judgments had held that it was a case of diversion of income by an overriding

title.In our opinion,the order of the FAA does not suffer from any legal or factual infirmity.So, confirming the same,we decide the effective ground of appeal against the AO.

ITA/2221/Mum/2013,AY.2008-09:

14. First Ground of appeal,filed by the assessee,is about confirming the addition of Rs.1.17 crores on the basis of difference between information gathered from the Annual Inform Return (AIR) and professional receipts as per books of account.During the assessment proceedings,the AO asked the assessee to reconcile the professional fee received as per AIR information with bank statements.As per the AO,the assessee did not reconcile a sum of Rs.7.54 crores inspite of the fact that it was given sufficient opportunity for reconciliation.

14.1. Aggrieved by the order of the AO, the assessee preferred an appeal before the FAA.Before him,it filed additional evidences to reconcile the difference.The FAA called for a remand report. After considering the remand report and submission of assessee the FAA held the assessee could reconcile the difference of Rs.6.36 crore only,that for Rs.1.17crores (Rs.71.06 lakhs+ Rs. 46.13 lakhs) no explanation was filed,that it had filed an affidavit about difference of Rs.46.13 lakhs,that affidavit was a self serving document,that same was not backed by any documentary evidences,that it was not able to furnish the complete details evidencing that disputed transactions were professional receipts only,that for the balance difference of Rs.71.06lakhs the assessee had filed a letter dt.05/07/2011 from M/s. Cummins Research and Technology India Ltd. (CRPIL) and Cummins Exhaust India Ltd. (CEIL)claiming that the professional fee of Rs. 68. 93 lakhs was wrongly shown as payable by them in their books of account, that the assessee had not filed additional evidences in that regards, when the matter was remanded to the AO,that the additional evidences could not be admitted at that stage of appellate proceedings.Finally, he confirmed the addition of Rs.1,17,19, 880/-.

14.2. Before us,the AR contended that the observation of the departmental authorities that the assessee had not filed reconciliation was factually incorrect,that it had submitted all the details,that the FAA was not justified in rejecting the additional evidences filed before him.He referred to pages 246-250 of the Paper Book.The DR supported the order of the FAA.

14.3. We have heard the rival submissions and perused the material before us. We find that the assessee had filed reconciliation,that the FAA had partly allowed the appeal,that he had rejected

the claim of the assessee about two entries,that he did not admit the additional evidence filed by it in the case of CRPIL and CEIL,that both the parties had categorically stated that there were mistakes in their books of accounts.In our opinion,the FAA was not justified in rejecting such a vital peiece of evidence,even if it was filed belatedly.It is said that technicalities and procedures should not get preference over the spirit of the Act i.e. to tax real income and to collect 'due' taxes only.As a representative of the Sovereign,the FAA should ensure that only taxable income, and not hypothetical income,is taxed.He has discarded the relevant evidence on technical ground, so,we are remanding back the matter to the file of the AO for fresh adjudication,as it would be in the interest of justice.The AO would afford a reasonable opportunity of hearing to the assessee before deciding the taxability of the disputed sums.Ground no.1 is partly allowed.

15. Second Ground of appeal,as per the AR,was infructuous.Threfore,we are not adjudicating the same.

16.Next Ground of appeal deals with disallowance made u/s. 40(a)(i) of the Act amounting to Rs.87.85 lakhs paid under the head professional fee.During the assessment proceedings the AO found that the assessee had made payment to Deloitte Tax LL, USA (Rs.9.2 lakhs), Deloitte & Touche LLP,USA-(Rs.28.56 lakhs), Deloitte Consulting LLP-USA (Rs.23.23 lakhs), Deloitte & Touche S.P.A. Italy (Rs.10.48 lakhs), D&T Management Services Pte Ltd. Singapore (Rs.10.08 lakhs), Deloitte and Touche LLP, Puerto Rico (Rs.1.07 lakhs) and Deloitte Belastingconsulenten -Conseils,Belguim (Rs.5.16 lakhs), that the assessee had claimed that non-resident entities had rendered professional services to the assessee that the services were rendered outside India, those entities raised invoices for their services, that the assessee had remitted the amount without deducting tax at source based on certificates obtained from chartered accountants. He directed it to file explanation in that regard. After considering the submission of the assessee dated 28/12/2010,the AO referred to the assessment orders for the earlier years. He disallowed the payment of Rs.87,85,076/- u/s. 40(a)(i) on the ground that no approval u/s.195 or section 197 of the Act was obtained before the remittance made.

16.1. During the appellate proceedings,the FAA considered the detailed submission of the assessee and held that the assessee was resident of India and that payment was made for the services rend -ered outside India,that as per order of the Tribunal in the case of Tata Iron & Steel Co. (supra), the assessee should have deducted tax in case of the 3 non-resident US entities.

16.a. Regarding payment made to the non-resident Italian entity, the FAA held that the payment was made in connection with due diligence activities performed in connection with the project pioneer,as per the engagement letter, dtd.16/01/2007, the assessee and the Italian entity were required to work in close association, that the payment made were to be regarded as FTS, as envisaged by section 9(1)(vii)(b) of the Act,that the services were rendered outside India but were utilized in India, that the services were duly covered by provisions of section 9(1) that same were not covered by the exclusion clause, that after the amendment , by Finance Act, 2010 residents making payment to the non residents have to deduct tax at source for such payment, that the AO had rightly made disallowance for the payment made to Italian entity.About the professional fee paid to Puerto Rico entity,the FAA held that the services were utilised in India,that source of income was from India, that income was generated from Indian source,that the professional fee paid to its counterpart was taxable as per the provisions of the Act, that the AO was justified in making the disallowance.With regard to the payment made to Belgium entity,the FAA held that the AO was justified in making the disallowance,that the services were availed in India.

16.2. During the course of hearing before us,the AR submitted that issue of payments made to the USA entities stands decided by the order of the Tribunal for the earlier AY.s.About the payment made to Italian entity he stated that it was not FTS,that services rendered by the non-resident entity fell in the category of professional services,that even if it was FTS it was not taxable in India as the payment was as per the provisions of section 9(1)(vii)(b) of the Act,that the FAA himself had admitted that services were utilised outside India and that the source was also outside India.About payment made to Petro he stated that services rendered by the non-resident entity could not be considered FTS,that nothing was made available. He further stated that payment made to the Belgian entity was professional fees, that provisions of section 9(1)(vii) were not applicable to such payment.The DR supported the order of the FAA.

16.3. We have heard the rival submissions.As the issue of applicability of the provisions of section 40(a)(i)of the Act in the cases of USA entities stands decided by the order of the Tribuanl ,dtd.30.11.2016,for earlier years(supra)and the fact for the year under consideration are same as that of those AY.s,so,we hold that the FAA was not justified in dismissing the appeal filed by the assessee about the three USA entities. Reversing his order,we hold that there was no need to

deduct tax for the payments made to the US entities,namely, Deloitte Tax LLP,USA, DTLL US and Deloitte Consulting LLP-USA.About the three remaining non-resident entities,we hold that there is no doubt that services were rendered outside India,that nothing was made available to the assessee by those entities,that services availed by the assessee were professional services and not technical services.'Making available'is one of the recognised principle of tax jurisprudence. The phrase envisages that technical knowledge, experience, skill, know-how should be made available to the payer by the provider of the services,so the payer,receiving the services,would be able to apply the technology.In case of remaining three non-residents entities it is clear that they had not made available to the assessee.The basic principle governing the applicability of provisions of section 40(a)(i)of the Act and non deduction of tax at source have been already discussed in the earlier part of our order.Respectfully following the order of the Tribunal for the earlier year(supra)and considering the discussion held in the earlier paragraphs of our order,we decide ground no.3 in favour of the assessee.

As a result,appeals filed by the AO stand dismissed.Appeals filed by the assessee for the AY.s.2006-07 and 2008-09 are partly allowed and appeal for the AY.2007-08 is allowed.

फलतःनिर्धारिती अधिकारी द्वारा दाखिल की गई अपीलें नामंजूर की जाती हैं.निर्धारिती की नि.व. 2006-07 तथा 2008-09 की अपीलें आंशिक रूप से मंजूर की जाती हैं और नि.व.2007-08 की अपील मंजूर की जाती है.

Order pronounced in the open court on 23rd March, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 23 मार्च, 2018 को की गई।

Sd/-	**Sd/-**
(**Ravish Sood /रवीश सूद**)	(राजेन्द्र / **Rajendra**)
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated :23 .03.2018.
Jv.Sr.PS.

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

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR "L " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**