आयकर अपीलीय अधिकरण पुणे न्यायपीठ "सी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA Nos.1857 to 1859/PUN/2014
निर्धारण वर्ष / Assessment Years : 2009-10 to 2011-12

The Dy. Director of Income Tax
(International Taxation) II, Pune .... अपीलार्थी/Appellant

Vs.

Tetra Pak India Pvt. Ltd.,
Ground Floor,
Mayfair Towers,
Mumbai – Pune Road,
Shivaji Nagar,
Pune – 411005 .... प्रत्यर्थी / Respondent

PAN: AAACT3467B

आयकर अपील सं. / ITA Nos.1864 to 1866/PUN/2014
निर्धारण वर्ष / Assessment Years : 2009-10 to 2011-12

Tetra Pak India Pvt. Ltd.,
Ground Floor,
Mayfair Towers,
Mumbai – Pune Road,
Shivaji Nagar,
Pune – 411005 .... अपीलार्थी/Appellant

PAN: AAACT3467B

Vs.

The Dy. Director of Income Tax
(International Taxation) II, Pune .... प्रत्यर्थी / Respondent

Assessee by : S/Shri Nikhil Pathak and Sunil Tambe
Revenue by : Ms Amrita Misra, CIT

सुनवाई की तारीख / **Date of Hearing : 25.06.2019**		घोषणा की तारीख / **Date of Pronouncement: 09.09.2019**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This bunch of cross appeals filed by Revenue and assessee are against consolidated order of CIT(A)-IT/TP, Pune, dated 28.07.2014 relating to assessment years 2009-10 to 2011-12 against respective orders passed under section 201(1) and 201(1A) of the Income-tax Act, 1961 (in short 'the Act').

2. The cross appeals filed by Revenue and assessee against assessment years 2009-10 to 2011-12 were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. In all these appeals, the issue which arises is against order passed under section 201(1) and 201(1A) of the Act i.e. demand raised and interest charged on failure of assessee to deduct tax at source on different items. So, first we take up the appeal for assessment year 2009-10.

4. The Revenue in ITA No.1857/PUN/2014, relating to assessment year 2009-10 has raised the following grounds of appeal:-

1. *On the facts and circumstances of this case, the Ld. CIT(A) was not correct in deleting the additions made on account of payment for design services and technical consultancy charges since the assessee company could not prove whether the recipient was the beneficial owner of the royalties or fees for technical services as per Article 12 of the DTAA with Singapore and Switzerland.*

2. *The CIT(A) erred in not considering the fact that the payment for design services and technical consultancy charges was rightly treated by the AO as FTS under the Act as well as relevant DTAA.*

3. *The CIT(A) erred in law by concluding that, if the payment, made for design services and technical consultancy charges, is treated as FTS, the same will not satisfy the "make available" clause without discussing the facts as mentioned by the AO in his order.*

4. The CIT(A) erred in law in concluding that sec 206AA is not applicable in case of non-residents as the DTAA overrides the Act as per section 90(2).

5. The decision of the CIT(A) is not according to the law and erred in ignoring the memorandum explaining the provisions of the Finance (No. 2) Bill, 2009 which clearly states that the sec 206AA applies to non-residents and also Press Release of CBDT No.402/92/2006-MC (04 of 2010) dated 20.01.2010 which reiterates that sec. 206AA will also apply to all non-residents in respect of payments/remittances liable to TDS.

6. The CIT(A) is erred in ignoring the decision of the ITAT Bangalore in the case of Bosch Ltd. vs ITO, ITA No.552 to 558 (Bang.) of 2011 dated 11.10.2012, in which it was held that if the recipient has not furnished the PAN to the deductor, the deductor is liable to withhold tax at the higher rates prescribed u/s.206AA.

7. On the facts and circumstances of the case the Ld CIT(A) was not correct in deleting the additions made on account of grossing up u/s 195A of the IT Act, 1961 on account of amounts paid to foreign companies under the head of Royalties/FTS within the meaning of section 9(1)(vi)/9(1)(vii) of the Act as well as Article 12 of the DTAA between India and Switzerland / Singapore as such.

8. On the facts and circumstances of this case, the Ld. CIT(A) was not correct in holding that since the assessee did not produce any agreement regarding to grossing up / non grossing up of the amounts liable for deduction u/s 195 the AO was wrong in grossing up the amounts paid.

9. The Ld CIT(A) erred in not considering the fact that the assessee had not deducted TDS u/s 195 from the payment of Royalty/Fees for technical services which clearly shows that the entire payment was made to the AE and no recovery on account of TDS liability u/s 195 has been made by the assessee from the AE and hence it transpires that the TDS liability is borne by the assessee.

5. The assessee in ITA No.1864/PUN/2014, relating to assessment year 2009-10 has raised the following grounds of appeal:-

The following Grounds are taken without prejudice to each other. On the facts and in law,

1.1 The learned CIT(A) - IT / TP erred in holding that the assessee company should have deducted TDS on the payments made to Tetra Pak Global Information Management, Singapore of Rs.20,29,919/- on account of software license fees and IT support services on the ground that the same was taxable under the Income Tax Act as well as under the DTAA as Royalty.

1.2 The learned CIT(A) erred in not appreciating that the amount of Rs.20,29,919/- was not covered under Royalties and / or fees for technical services of the DTAA between India and Singapore and that the Appellant Company was not required to withhold tax u/s. 195 on above amounts.

1.3 The learned CIT(A) ought to have appreciated that the payments made to Tetra Pak Global Information Management, Singapore was on account of reimbursement of software license fees and IT support services and since there was no income earned by the said entity, no TDS was required to be deducted on such reimbursement of expenditure.

2.1 The learned CIT(A) erred in holding that the assessee company should have deducted TDS on training charges paid of Rs.1,12,05,118/- to various entities without appreciating that the said amount was not taxable in India and accordingly, the assessee was not required to deduct any TDS on the said payments.

2.2 The learned CIT(A) - IT / TP erred in not appreciating that the payment of Rs.1,12,05,118/- for training was not covered under clause "fees for technical services" of the DTAA between India and the respective countries of which the payees were resident and hence the Appellant Company was not required to withhold tax u/s.195 on above amounts;

2.3 The learned CIT(A) - IT / TP erred in not appreciating that in most of the remittances no Technical Knowledge, plan or design is given and hence the amount remitted is not covered under Article "fees for technical services" / "fees for included services" under the respective DTAA's.

2.4 The learned CIT(A) - IT / TP erred in not appreciating that the remittances towards training were in the nature of reimbursement or alternately charged under cost allocation agreement and that no tax was deductible at source thereon.

2.5 Without prejudice to above, the learned CIT(A) - IT / TP erred in not appreciating that the remittance of Rs.1,12,05,118/- included various reimbursements of air fare, hotel and other actual expenses which were grouped under this head and that the said reimbursements had to be excluded for the purpose of working of the tax deductible at source.

3. The learned CIT(A) - IT / TP erred in not appreciating that the payment of Rs.2,16,944/- for design expenses was not covered under Royalties and / or Fees of Technical Services of the DTAA between India and the respective countries of which the payees were resident and hence the Appellant Company was not required to withhold tax u/s.195 on above amounts;

4. The learned CIT(A) - IT / TP erred in holding that the assessee company should have deducted TDS on the repairs and maintenance payments of Rs.6,49,343/- without appreciating that the said payments were not covered under "Fees for Technical services" of the DTAA between India and the respective countries of which the payees were resident and / or u/s 9(1)(vii) of the Income Tax Act, 1961 and hence the Appellant Company was not required to withhold tax u/s. 195 on above amounts.

6. The learned Authorized Representative for the assessee at the outset pointed out that majority of the issues raised in the present appeals stands covered by the order of Tribunal in the case of John Deere India Pvt. Ltd. (2019) 70 ITR (Trib) 73 (Pune). Referring to grounds of appeal No.1.1 to 1.3

raised in assessment year 2009-10, the learned Authorized Representative for the assessee pointed out that the issue raised was against non deduction of tax on payment for software licenses and IT support services. The assessee had made the aforesaid payments for the acquisition of software licenses, wherein the assessee had acquired copyrighted article and hence, such payments were not taxable as royalty in India, as per DTAA between India and Singapore. He further stated that the CIT(A) in turn, had relied on the decision of Pune Bench of Tribunal in the case of Cummins Inc for assessment years 2004-05 and 2006-07 in ITA Nos.73 & 74/PN/2011, order dated 08.08.2013. The learned Authorized Representative for the assessee submitted that the said issue is squarely covered by the decision in the case of John Deere India Ltd. reported in 70 ITR (Trib) 73 (Pune) and there was no requirement to deduct tax out of such payments and hence, the assessee had not defaulted.

7. Coming to the next issue i.e. grounds of appeal No.2.1 to 2.5, the learned Authorized Representative for the assessee pointed out that the dispute was relating to deduction of tax at source out of training charges paid. The total training charges were ₹ 1.19 crores, out of which the assessee had deducted TDS of ₹ 7,72,418/-, against which the CIT(A) had granted relief and the balance amount was ₹ 1.12 crores. The learned Authorized Representative for the assessee pointing out to the order of CIT(A) at page 32 and then at page 38, stated, that the CIT(A) had referred to India's DTAA with Malaysia, Thailand, Indonesia, UAE and Saudi Arabia and pointed out that there was no Article on FTS and had observed that in such circumstances, taxability under the DTAA would be as per provisions of the Income Tax Act. In this regard, reliance was placed on the decision of Hon'ble High Court of Calcutta in the case of CIT Vs. Davya Ashmore India Ltd. (1991) 190 ITR 626 (Cal) and

Chennai Bench of Tribunal in DCIT Vs. TVS Electronics Ltd. (2012) 52 SOT 287 (Chennai-Trib.). The learned Authorized Representative for the assessee stated that the said decision of Chennai Bench of Tribunal has been reversed by the Hon'ble High Court of Madras. The learned Authorized Representative for the assessee referred to the provisions of section 9(1)(vii) of the Act pointed out that it refers to managerial services and once it is not covered by DTAA, then it would become business income in the hands of assessee. He further pointed out that since all these concerns had no Permanent Establishment (PE), then there no business income arises in India and reliance was placed on Article 7 to the DTAA. The learned Authorized Representative for the assessee pointed out that the issue stands covered in favour of assessee by Pune Bench of Tribunal in the case of Bramhacorp Hotels & Resorts Ltd. Vs. DDIT-(IT) (2015) 61 taxmann.com 186 (Pune-Trib.), Ahmedabad Bench of Tribunal in the case of DCIT-(IT) Vs. Welspun Corporation Ltd. (2017) 77 taxmann.com 165 (Ahmedabad-Trib.) and stressed that in the absence of any PE, there was no question of any taxability under Article 7 of DTAA. The second plea which was connected was that in case there was no Article on FTS, then whether the receipts could be taxed under Article 22 of DTAA, which was the proposition raised by Assessing Officer and CIT(A). In this regard, he again referred to the decision of Ahmedabad Bench of Tribunal in the case of DCIT-(IT) Vs. Welspun Corporation Ltd. (supra) and pointed out that in the said decision, it was also held that Article 22 of DTAA would not apply. He also pointed out that CIT(A) had relied on the decision of Hon'ble High Court of Calcutta and this issue was not there before the Hon'ble High Court.

8. Coming to para 2.5.19 at page 39 of appellate order, wherein the CIT(A) refers to the payments made to companies located in Italy, China, Denmark

and Germany and in the DTAAs with these countries, there is an Article providing taxability of FTS without 'make available' condition. The CIT(A) thus, observed that the provision taxing FTS under the Income Tax Act and under DTAA with these countries were same and hence, the payments made to companies located in the said countries would be taxable under the DTAA with respective countries. In this regard, the learned Authorized Representative for the assessee relied on its submissions made before the CIT(A).

9. Coming to the list of countries which are referred in para 2.5.20 at page 39 of appellate order by the CIT(A) i.e. India's DTAA with Singapore, USA, Switzerland and Sweden, wherein the case of CIT(A) was that the same was governed by make available condition. The learned Authorized Representative for the assessee here stressed that the question which arises is whether in providing training, the clause of 'make available' was satisfied. He stressed that in the absence of any technology being transferred and where it was case of general training or attending seminar, then the 'make available' condition as provided in DTAA does not get satisfied and there is no question of holding the aforesaid payments as liable for tax deduction at source. The learned Authorized Representative for the assessee placed reliance on the decision of Ahmedabad Bench of Tribunal in ITO Vs. Veeda Clinical Research (P.) Ltd. (2013) 35 taxmann.com 577 (Ahmedabad Trib.). He stressed that transfer of technology *perse* was necessary in order to attract the aforesaid provisions.

10. Vide ground of appeal No.3, the issue raised was with regard to receipts under the head 'Designing Charges' of ₹ 2,16,944/- which were held to be 'Fees for Technical Services'. The learned Authorized Representative for the assessee pointed out that the aforesaid payments were made to entities in

Indonesia with which country, India had DTAA but there was no FTS clause. Hence, in the absence of any FTS clause, there was no merit in the orders of authorities below in holding the assessee liable to deduct tax at source.

11. Coming to the last ground of appeal No.4 i.e. with regard to testing, technical consultation charges paid by assessee, it was pointed out that the aforesaid payments were made to Tetra Pak (Philippines) Inc, with which India had DTAA but it had no FTS clause and hence, was category 1 country as argued earlier. In respect of second payment i.e. to an entity in China, it was pointed out that it was a country with which it had DTAA in which FTS clause was there, but without make available condition and hence, was category 2 country as argued earlier.

12. The learned Departmental Representative for the Revenue pointed out that the assessee had failed to submit any details before the Assessing Officer as evident from paras 46 and 50 of assessment order and all these details were filed before the CIT(A). He placed reliance on the order of Assessing Officer / CIT(A).

13. We have heard the rival contentions and perused the record. The assessee is in appeal before us against order passed under section 201(1) r.w.s. 201(1A) of the Act. The assessee during the year under consideration had made certain payments to the non-resident / foreign companies. The Assessing Officer was of the view that provisions of section 195 of the Act were squarely applicable to the payments made by the assessee to non-resident suppliers / foreign companies and the assessee was bound by law to deduct tax before remitting the money to non-residents. However, the assessee had

failed to deduct tax or withhold the tax and as such had committed default in terms of section 201(1) and 201(1A) of the Act. The Assessing Officer tabulated the payments made by the assessee, which are annexed to the assessment order and held the assessee liable to deduct tax @ 20% and also grossing up the amount and charged interest under section 201(1A) of the Act. The CIT(A) passed consolidated order for assessment years 2007-08, 2009-10 to 2011-12. The breakup of foreign remittances made by assessee year-wise are tabulated in the appellate order and for assessment year 2009-10, which reads as under:-

AY 2009-10

Particulars	*Amount (Rs)*
Software licence and IT Support services	*24,64,643*
Leased line charges	*1,19,77,536*
Payment for training	*25,66,504*
Inspection fees, repairs and maintenance and service charges	*22,03,728*
Total	*1,92,12,411*

14. The CIT(A) in view of retrospective amendment to section 9(1)(vi) Explanation 4 of the Act held that the payments made for use of inhouse software constitutes royalty under the Income Tax Act. Further, it was held that right to use copyright was to be taxed as royalty under the relevant Article of DTAA. In this regard, reliance was placed on the ratio laid down by Pune Bench of Tribunal in the case of Cummins Inc for assessment years 2004-05 and 2006-07 and also the decision of Mumbai Bench of Tribunal in the case of DDIT Vs. Reliance Infocom/Luscent Technologies (TS-433-ITAT-2013(Mum). As far as taxability of payments made for the use of third party software was concerned, the case of assessee was that it was reimbursement and hence, not taxable. The CIT(A) notes that payment was not made to the software license supplier but to the intermediary, who in turn, made payments to the software supplier. But this situation would not affect the TDS liability and held

that the assessee ought to have deducted tax at source on such payments made for reimbursement of software expenses. Similarly, regarding taxability of IT support charges which were paid along with payments made for acquiring the software licenses was held to be royalty in accordance with clause 6 of Explanation 2 to section 9(1)(vi) of the Act being services rendered in connection with right to use software license. The CIT(A) held the receipt to have characterization of royalty under the domestic law and also under DTAA, the assessee was liable to deduct tax at source.

15. Coming to the next item i.e. payment towards leased line charges, the plea of assessee was that the aforesaid payments could not be taxed as royalty under Article 12 of India-Sweden DTAA as it could not be taxed as payment for use of equipment nor it taxed as payment for the use of secret process. Reliance on various decisions was not accepted. The CIT(A) referred to the retrospective amendment to section 9(1)(iva), Explanation 6 of the Act, which was inserted by the Finance Act, 2012 and held that leasing out the computer and use of server was undoubtedly, constituted use of equipment; hence, the entire payment was taxable as royalty both under the Income Tax Act and DTAA.

16. The next item was the payment for training, wherein the assessee had made the aforesaid payment to different entities in different countries, which are tabulated at page 32 of the appellate order. The CIT(A) was of the view that the aforesaid payments were on account of reimbursement of airfare, hotel and other actual expenses were grouped under staff training, were taxable as FTS considering the description given by assessee as the training imparted to the employees of assessee was technical in nature, under section 9(1)(vii) of the

Act. The plea of assessee that in the absence of any technical knowledge being imparted, was not accepted in the absence of details and evidences being filed in this regard. Then, he referred to various case laws i.e. Hon'ble High Court of Calcutta in the case of CIT Vs. Davya Ashmore India Ltd. (supra) and Chennai Bench of Tribunal in DCIT Vs. TVS Electronics Ltd. (supra) and also in the case of Gearbulk AG, in re (2009) 184 Taxmann.383 (AAR) and held that the payments made to companies located in different countries would be taxable under DTAA with respective countries.

17. The last issue which was decided was the payment for design services and technical consultancy services. The plea of assessee was that it was engaged in the manufacturing of packaging material and basic artwork was provided by the client and finally it was converted in polymer plates for printing, cost incurred in its process was design expenses. The plea of assessee was not accepted and the CIT(A) held that payments were services of technical in nature, which were to be taxed as FTS under section 9(1)(vii) of the Act and were also taxable under DTAA as it had Article governing the payments made as FTS. The CIT(A) however held that payments made to companies located in Switzerland and Singapore were concerned, these treaties had 'make available' condition and since the services did not satisfy 'make available' condition in DTAA, he held that payments made to above companies located in Switzerland and Singapore could not be taxed and he deleted the demand of tax and interest raised towards such payments under the head 'design and technical consultancy'.

18. The last item was the payment made on account of testing charges and technical consultation charges. The CIT(A) with regard to the aforesaid

payments made towards inspection fees, technical consultancy and testing, repairs and maintenance and other services held that payments were taxable under section 9(1)(vi) of the Act. It was further held that with respect to the taxability under DTAA, the payment made to the companies located in Australia, Singapore, USA, Switzerland and Sweden were governed by FTS Article with 'make available' condition. Since no services were made available to the assessee, the CIT(A) deleted the demand of tax and interest relatable to the said payments made to the companies in the said countries. With respect to DTAAs with China, Denmark and Germany, it held that since the Article on FTS in DTAA had no 'make available' condition, its taxability of technical services in the DTAA were same under the Income Tax Act and he confirmed the demand of tax and interest relatable to the payments made to the companies in such countries.

19. Coming to the next list of payments made to the companies located in Indonesia and Philippines, wherein there is no Article in the DTAA with such countries. The CIT(A) held that the taxability under the Income Tax Act would prevail and thus, he held the payments were taxable. The payments which were made by assessee towards material purchase, freight charges and machinery parts and repair charges, the CIT(A) directed the Assessing Officer to verify the assessee's contention in not to tax the said payments.

20. Now, coming to last issue of grossing up of the amount as the assessee had to bear the tax liability and since the assessee had already remitted the full amounts, the assessee was held to be liable to pay simple interest for every month of the default. The plea of assessee was that it had not undertaken to bear taxes of non-resident payees and hence, there was no need to gross up

the payments for the purpose of computing TDS liability. The CIT(A) held that in respect of foreign companies, there was nothing on record to come to conclusion that the assessee had agreed to bear the tax liability and hence, the Assessing Officer was directed to apply the provisions of section 195A of the Act.

21. The last issue which was decided by the CIT(A) was with regard to application of section 206AA of the Act i.e. charging of tax at source @ 20%. The CIT(A) held that provisions of section 206AA of the Act could not override the provisions of DTAA. The assessee could not be held to be in default, if it had deducted taxes at the rates provided in DTAA. He accordingly, deleted the demand and interest raised by the Assessing Officer only on application of section 206AA in absence of PAN of the deductees.

22. The assessee is in appeal against order of CIT(A). The Revenue is also in appeal against the relief granted by CIT(A).

23. We have already referred to the arguments of the learned Authorized Representative for the assessee and the learned Departmental Representative for the Revenue at the outset and proceed to decide the issue raised in the present appeal.

24. The issue in the present appeal is against liability of assessee to deduct or withhold the tax in respect of payments made to its AE concerns or foreign companies, while remitting certain payments for the services availed from them. The assessee admittedly, had not deducted the aforesaid tax out of such payments and the authorities below were of the view that the assessee as such

had defaulted both under the provisions of Income Tax Act and DTAA with respective countries and hence, was liable to the demand raised under section 201(1) of the Act and interest charged under section 201(1A) of the Act.

25. Now, let us look at the payments made by assessee head-wise. Before taking up the appeals for the respective assessment years, let us take up the issue of head-wise as the issue raised in all the years is similar / common. The first issue which has come up for adjudication is whether the assessee is liable to deduct tax at source on the purchase of software, which has admittedly, is copyrighted article purchased by assessee and the assessee has not acquired any copyright in the said article. The linked issue is the payment made for IT support charges which are connected to the software purchased by assessee. The case of Revenue in this regard is that because of retrospective amendment by the Finance Act, 2012 to section 9(1)(vi) of the Act, the aforesaid payments fall in the realm of term 'royalty' and thus are liable for tax deduction at source. In respect of DTAA also, the authorities below have held the assessee to be in default as under the terms of DTAA with the respective countries the assessee was liable to deduct tax at source and for such non deduction, the assessee is in default.

26. The CIT(A) has mainly relied on the ratio laid down by the Tribunal in Cummins Inc (supra) and also the decision of Mumbai Bench of Tribunal in the case of DDIT Vs. Reliance Infocom/Luscent Technologies (supra). It may be pointed out herein itself that the decisions in both the cases were subjected to Miscellaneous Application and the matters were recalled and decided. Vide order dated 06.12.2017 in MA Nos.28 & 29/PUN/2017, relating to assessment years 2004-05 & 2006-07 in the case of Cummins Inc Vs. ACIT, Tribunal has

held that there was a mistake apparent from record in the order of Tribunal, which needs to be rectified, wherein the Tribunal in its order had failed to consider the decision of Co-ordinate Bench in the case of Allianz SE Vs. ADIT (2012) 51 SOT 399 (Pune) and also the decision of Hon'ble High Court of Delhi in DIT Vs. Ericsson A.B. & two others (2012) 343 ITR 470 (Del). Thus, the Tribunal vide order dated 06.12.2017 has recalled its order in Cummins Inc. (supra). It may also be noted that Mumbai Bench of Tribunal in bunch of Miscellaneous Applications had also recalled its order in DIT Vs. Reliance Infocom Ltd. / Lucent Technologies Hindustan Ltd., against which the Revenue filed Writ Petition before the Hon'ble Bombay High Court, which was also dismissed by the Hon'ble High Court vide order dated 08.08.2017 and approved the decision of Tribunal in recalling its earlier order in proceeding under section 254(2) of the Act. Once both the decisions on which the CIT(A) had relied on to dismiss the plea of assessee stands recalled, then we need to re-look at the issue.

27. We find that we have elaborately discussed the aforesaid issues arising in the present bunch of appeal in the case of John Deere India Pvt. Ltd. (supra). The Tribunal in the case of John Deere India Pvt. Ltd. (supra) has held as under:-

> *"90. In conclusion, we hold that purchase of software by the assessee being copyrighted article is not covered by the term 'royalty' under section 9(1)(vi) of the Act. Where the assessee did not acquire any copyright in the software, is not covered under Explanation 2 to section 9(1)(vi) of the Act. We further hold that amended definition of 'royalty' under the domestic law cannot be extended to the definition of 'royalty' under DTAA, where the term 'royalty' originally defined has not been amended. As per definition of 'royalty' under DTAA, it is payment received in consideration for use or right to use any copyright of literary, artistic or scientific work, etc.; thus, purchase of copyrighted article does not fall in realm of 'royalty'. We also hold that since the provisions of DTAA overrides the provisions of Income Tax Act and are more beneficial and the definition of 'royalty' having not undergone any amendment in DTAA, the assessee was not liable to deduct tax for payments made for purchase of software. In such scenario, the assessee cannot be held to be in default and the demand created under section 201(1) and interest charged under section 201(1A) of the Act is thus, cancelled.*

> *91. Now, coming to second part of grounds of appeal No.1 to 3, wherein the payment made by the assessee with regard to provision of IT support charges i.e. internet charges, use of e-mail charges, backup support services, etc. was held to be 'royalty', in view of the ratio laid down by the Pune Bench of Tribunal in the case of Cummins Inc (supra). The said decision has been recalled by the Tribunal in Miscellaneous Application filed and hence, the said proposition was not applicable. In the facts of the case, the main server of the group was established in USA and that server was used for storing data, which was admittedly not under the domain of assessee. The question which arises is that whether the payments made by the assessee for use of such facility would amount to 'royalty'. First of all, we hold that the aforesaid payments of IT support services, support charges are not in the realm of 'royalty' as no technology was made available to the assessee. It is service provided to the assessee by associate entity in USA and there is no merit in holding that the assessee was liable to deduct tax at source out of such payments to its associated enterprises. In this regard, we find support from the ratio laid down by the Pune Bench of Tribunal in Sandvik Australia Pty. Ltd. Vs. DDIT (supra), by Ahmedabad Bench of Tribunal in DCIT Vs. Bombardier Transportation India (P.) Ltd. (supra) and also on the ratio laid down by Chennai Bench of Tribunal in ACIT Vs. Vishwak Solutions (P.) Ltd. (supra), wherein it has been held that payments made for data storage charges were not in the realm of 'royalty'. The Pune Bench of Tribunal in Sandvik Australia Pty. Ltd. Vs. DDIT (supra), wherein agreement existed for providing backup services and IT support services and the Non-resident company receives payment thereof, since no technical knowledge had been made available to the Indian subsidiary, then such services rendered by Non-resident company to its Indian group company were held to be not covered under para 3(g) of Article 12 of India-Australia Treaty and hence, was not taxable in India. The Tribunal had clearly elaborated upon the term 'make available' and held as under:-*
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> > *"13. We are concerned with para No.3 of Article 12, which defines the term Royalty. Under the IT Act, the term royalty and expression FTS are classified as two different connotations, i.e. 9(1)(vi) and 9(1)(vii). So far as Article 12 is concerned, FTS is included in the term "royalty" for the purpose of deciding in which contracting state the income from the same is to be taxed. Clause (g) in Article 12(3) goes to the roots of the issue. Main thrust of the argument of the Ld. Counsel is that it is not only sufficient to render the services but the same should be made available to the recipient and this particular important aspect is missed by the DRP/TPO. We find that the expression "making available" is very much important to decide in which contracting state the amount received for rendering the services relating to the technical know-how is to be taxed. The expression "make available" is used in the context of supplying or transferring technical knowledge or technology to another. It is different than the mere obligation of the person rendering the services of that persons own technical knowledge or technology in performance of the services. The technology will be considered as made available when the person receiving the services is able to apply the technology by himself."*

28. Applying the said parity of reasoning to the facts of present case, we hold that the payment made for the use of copyrighted article was not royalty. The definition of 'royalty' under DTAA had not been amended though there is

retrospective amendment to section 9(1)(vi) of the Act but since the provisions which are more beneficial to the assessee are to be applied, then as per un-amended provisions of royalty under DTAA, the assessee having purchased copyrighted article and not having purchased copyright in the article cannot be said in default for non deduction of tax at source out of such payments made to different entities in different countries. The assessee had only purchased internally developed software by the Sweden entity and it had not passed the copyright and only 'right to use' had been given to the assessee and as such 'right to use' is akin to purchase of copyrighted article and in the absence of purchase of any copyright in the article, the assessee cannot be held liable to deduct tax at source out of such payments. Hence, the assessee has not defaulted in not deducting the tax at source. Accordingly, we hold so in respect of payments made for purchase of software and also in respect of IT support service charges.

29. The next issue is the training fees charges paid by assessee. The details and breakup of which year-wise are available at page 32 of appellate order. The perusal of aforesaid details which are referred, reflects the payments being made to different entities in different countries. The CIT(A) in respect of assessment year 2009-10 had allowed relief in respect of TDS of ₹ 7,72,448/- as the assessee had deducted the said TDS and the balance payment for assessment year 2009-10 was ₹ 1.12 crores (approx.). The plea of assessee is that it had not received any technical services as defined in the Act and hence, there was no requirement to deduct tax at source as it did not fall within realm of Fees for Technical Services as defined in section 9(1)(vii) of the Act. In this regard, the CIT(A) has referred to DTAAs with different countries and segregated the countries as per clause/s in DTAA. So in order to

adjudicate the issue, we would be referring to the relevant paras of CIT(A) in this regard.

30. The first issue which needs to be decided is whether the aforesaid payments for training fees i.e. on account of reimbursement of cost of air tickets travel, imparting training is to be treated as Fees for Technical Services or managerial services as provided in section 9(1)(vii) of the Act.

31. The case of CIT(A) was that in the absence of any Article in DTAA, provisions of Income Tax Act would prevail and in this regard, he has placed reliance on three decisions. The case of assessee before us is that in case the said services were not covered by DTAA between the countries, then at best it would be business income and for taxing the business income in the hands of assessee, it has to be established whether foreign entities had PE in India. In the absence of any PE, no business income could be added in the hands of assessee as Article 7 to DTAA would not be attracted. In this regard, reliance was placed in Bramhacorp Hotels & Resorts Ltd. Vs. DDIT-(IT) (supra), wherein it was held that in case the DTAA did not provide for taxability of technical services, then beneficial provisions of DTAA shall prevail having regard to the definition of PE provided in the Article 5 of India-Thailand DTAA. It could not be said that where recipient concern had no PE in India, so as to bring impugned income to tax as business profits in India as per Article 7 of DTAA. The relevant para 13 reads as under:-

> *"13. In Ground Nos. 2 to 6 of the appeal, the Revenue has assailed the findings of Commissioner of Income Tax (Appeals) is holding that the payments made to KTGY Inter Associates Ltd. and P49 Deesign and Associate Co. Ltd., Thailand are not taxable in India. The ld. AR of the assessee has placed on record a copy of order of Co-ordinate Bench of the Tribunal in the case of Dy. Director of Income Tax (I.T.) Vs. Sparsh Infratech (supra), where identical grounds were raised by the Revenue. We observe that one of the party i.e. KTGY Inter Associates Ltd. was one of the payee company in the case relied*

upon by the ld. AR. The Co-ordinate Bench of the Tribunal decided the issue as under:

> *"11. Now, we may address the merits of the controversy before us. In this context, we find that the CIT(A) in para 2.1 of his order has tabulated the services provided by the three payees to the assessee. In the course of hearing, learned counsel for the assessee has furnished copies of agreements with the respective foreign concerns as also the invoices raised by the said concerns on account of the services rendered to the assessee. The inference drawn by the CIT(A) is that the services rendered by the recipient foreign concerns are taxable as "fees for technical services" u/s 9(1)(vii)(b) of the Act. In the context of the above finding of the CIT(A), we have perused the scope of work undertaken by the three recipient concerns as per the respective agreements, whose copies have been placed in the Paper Book. It is quite evident from the perusal of the agreements as also the scope of work enumerated by the CIT(A) in para 2.1 of his order that it involved provision of architectural, designs and drawings services. Factually speaking, the aforesaid finding of the CIT(A) that the services rendered by the recipient concerns to the assessee company in India fall for consideration as "fee for technical services" u/s 9(1)(vii)(b) of the Act is not in dispute, and therefore, we do not dwell at length on this aspect of the matter. In any case, we are in agreement with the above findings of the CIT(A), having regard to the scope of work envisaged in the respective agreements with the recipient concerns.*
>
> *12. On the basis of the aforesaid, the CIT(A) took note of assessee's plea that having regard to the provisions of IndoThailand DTAA, the taxability of such incomes is to be governed by the terms of DTAA between India and Thailand because the same was favourable and envisaged no tax liability in comparison to the normal provisions of the Act. The CIT(A) found that the impugned payments were not taxable in terms of Indo-Thailand DTAA as the said DTAA did not have any provision for taxing "fee for technical services". The aforesaid conclusion of the CIT(A), in our considered opinion, is in accord with the provisions of section 90(2) of the Act. Section 90(2) provides that where Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax, or as the case may be avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to that assessee. Since the Indo-Thailand DTAA does not provide for taxability of "fee for technical services" in the case of the three recipients, who are residents of Thailand, the beneficial provisions of the DTAA shall prevail. In-fact, before us this aspect of the matter is also not in dispute.*
>
> *13. However, Revenue has contended that the CIT(A) erred in considering that there is no separate Article in the DTAA to deal with "fee for technical services". As per the Revenue, CIT(A) ought to have considered Article 22 of the DTAA which was a residual clause and that such clause covered the taxability of the impugned sums. In our considered opinion, the aforesaid plea of the Revenue is not justified. In situations like the present, it cannot be said that the impugned income is a miscellaneous income so as to justify invoking of Article 22 of the DTAA. The judgement of the Hon'ble Madras High Court in the case of Bangkok Glass Industry Co. Ltd. vs. ACIT, (2013) 34 taxmann.com 77 (Madras), which has been rendered in the context of Indo-Thailand DTAA, supports the above proposition. According to the Hon'ble High*

Court, "fee for technical services" cannot be taxed under residual Article 22 of Indo-Thailand DTAA.

14. Further, as per the Revenue, CIT(A) erred in not appreciating Article 14 of the DTAA which provides for taxation of income on account of professional services. In this context, it is to be appreciated that the Article prescribes for taxation of professional services only in a case where the recipient is present in India for more than 183 days or it maintains a fixed base/permanent establishment in India. In the present case, there is no material to suggest that the recipient concerns have a permanent establishment in India or that they were present in India for a period exceeding 183 days during the previous year relevant to the assessment year under consideration. In this context, learned counsel for the assessee furnished appropriate certificates from the three recipient concerns tabulating the period for which their representatives were present in India during the relevant period which show that the presence in India was for less than 183 days. Therefore, on this aspect also, we find no merit in the plea of the Revenue and the discussion made by the CIT(A) in para 3.8 of his order in this context is hereby affirmed.

15. Similarly, Revenue has raised a plea that the CIT(A) has not considered the taxability of the impugned income as 'business income' under Article 7 of the DTAA. Article 7 of the DTAA deals with business profits to be considered for taxation. The said Article states that the income or profits of the enterprise of a contracting State shall be taxable only in that State unless the enterprise carries on business in the other contracting State through a Permanent Establishment (PE) situated therein. The taxability is only of so much income as is attributable to that PE for the sales in that other State of the goods or merchandise. In this context, having regard to the definition of PE provided in Article 5(2)(j) of the Indo-Thailand DTAA, we find that the three recipient concerns cannot be said to have any PE in India so as to bring the impugned income to tax as business profits in India as per Article 7 of the DTAA. Therefore, on this count also we find no reason to interfere with the conclusion of the CIT(A) to the effect that assessee was not required to deduct tax on the impugned payments to the three recipient concerns. 16. In the result, the order of the CIT(A) is hereby affirmed and accordingly, Revenue fails in the captioned appeals."

32. We may also refer to the decision of Ahmedabad Bench of Tribunal in DCIT-(IT) Vs. Welspun Corporation Ltd. (supra), wherein also similar issue of payments to the residents of the tax jurisdictions with which Indian has tax treaties but these treaties have no specific article dealing with taxability of fees for technical services, arose. It was held by the Tribunal that in the absence of any specific provision for taxation of fees for technical services in India-Thailand Tax Treaty and India-UAE Tax Treaty and also where entities to whom the payment was made, did not have any PE in India, the income in the hands of recipient could neither be taxed as business income or under the head

'fees for technical services'. It also further held that there was no merit in the stand of Revenue that income embedded in the amount received by the assessee could anyway taxed as other income under the respective tax treaties. The Revenue therein had in turn, relied on the decision in the case of DCIT Vs. TVS Electronics Ltd. (supra) (which has also been relied upon by CIT(A) in the present case before us). The Tribunal held that *Only for a reason that DTAA is silent on a particular type of income, we cannot say that such income will automatically become business income of the recipient. In our opinion, when DTAA is silent on an aspect, the provisions of the Act has to be considered and applied.* In this regard reliance was placed on the decision of Hon'ble High Court of Madras in Bangkok Glass Industries Pvt. Ltd Vs ACIT (2013) 215 Taxman 116 (Mad), which was also dealing with India-Thailand Tax Treaty, which did not have FTS clause and rejected the claim of Revenue that even though the Thailand entity did not have any PE in India and for that reason this amount could not have taxed in India under Article 7, but could be taxed as other income under Article 12. The Hon'ble High Court had held that the said income does not fall as miscellaneous income and the same could not be brought under Article 12 of DTAA.

33. The Tribunal further vide para 25 held as under:-

> *"25. To understand the scope of these treaty provisions, which are broadly in pari materia with the provisions of article 21 of UN Model Convention, we find guidance from the OECD Model Convention Commentary which states that "The Article covers income of a class not expressly dealt with in the preceding articles (e.g. an alimony or a lottery income) as well as income from sources not expressly referred to therein (e.g. a rent paid by a resident of a Contracting State for the use of immovable property situated in a third State). The Article covers income arising in third States as well as income from a Contracting State". In other words, an income is of such a nature as, on satisfaction of conditions specified in the related provision, could be taxed under any of these specific treaty provisions, cannot be covered by this residuary clause. Take for example, income earned by a resident of a contracting state by carrying on business in the other contracting state. When, for example, article 5 provides that the income of resident of a contracting state, from carrying on business in the other contracting state, cannot be taxed in the source state unless such a resident has a permanent establishment in the other contracting state, i.e.*

> *source state, it cannot be open to the tax administration of source state to contend that even if it cannot be taxed as business income, it can be taxed as 'other income' nevertheless. It is important to bear in mind the import of expression 'not expressly dealt with in the foregoing articles'. Similarly, if independent personal services cannot be taxed in the source state as minimum threshold limit of fixed base is not satisfied, such a treaty concession cannot be nullified by invoking article 21. When a particular nature of income is dealt with in the treaty provisions, and its taxability fails because of the conditions precedent to such taxability and as specified in that provision are not satisfied, that is the end of the road for taxability in the source state."*

34. So far as first category of cases are concerned i.e. payments to residents of tax jurisdiction with which India has tax treaties, but there is no specific article dealing with taxability of Fees for Technical Services and where such residents did not have any Permanent Establishment in India, then income in the hands of such recipients can neither be taxed as Fees for Technical Services or under the head 'Business Income'. Thus, provisions of Article 7 of DTAA are not attracted. Further, such income can also be not taxed as 'Other Income' under the respective tax treaties i.e. Article 22 of DTAA cannot be applied. The Hon'ble High Court of Madras in Bangkok Glass Industries Pvt. Ltd Vs ACIT (supra), was deciding the issue of DTAA between India and Thailand. The said tax treaty does not have any FTS clause and the entity of Thailand had no PE in India. The Hon'ble High Court rejected the claim of Revenue that in the absence of PE in India, where the amount could not be taxed under Article 7, then such FTS could be taxed as other income under Article 22 of DTAA.

35. The Ahmedabad Bench of Tribunal in the case of DCIT-(IT) Vs. Welspun Corporation Ltd. (supra) applying said principle elaborated on the issue in para 25, which we have extracted above. We may look at the relevant Treaty provisions, which read as under:-

India Thailand tax treaty

ARTICLE 22- Other income

Items of income of a resident of a Contracting State, wherever arising, not expressly dealt with in the foregoing Articles may be taxed in that State. Such items of income may also be taxed in the Contracting State where the income arises.

India UAE tax treaty

ARTICLE 22- Other income

1. *Subject to the provisions of paragraph 2, items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing articles of this Agreement, shall be taxable only in that Contracting State.*

2. *The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply*

36. The Ahmedabad Bench of Tribunal while referring to the said Treaty provisions, had elaborated and held as under:-

"28. As we hold so, we are alive to the fact that there is no specific taxability provision, under India Thailand tax treaty or, for that purpose, under India UAE tax treaty, with respect to taxability of fees for technical services. Profits earned by rendering fees for technical services are only a species of business profits just as the profits any other economic activity. However, without the character of such receipts in the nature of business receipts being altered, the fee for technical services is dealt with separately in some treaties for the reason because, under those treaties the related contracting states proceed on the basis that even in the absence of the permanent establishment or fixed base requirements, the receipts of this nature can be taxed, on gross basis, at the agreed tax rate, and, to that extent, such receipts does not fall in line with the scheme of taxation of business profits under art. 7 and professional income under 14. It is interesting to note that the moment the threshold limits for permanent establishment or fixed base, as the case may be, is satisfied, the taxability shifts on net basis as business profits or professional (independent personal services) income. The business receipts or professional receipts thus cannot be seen in isolation with the fees for technical services. Its only the fact of, and mode of, taxation in the absence of PE or fixed base, which gets affected as a result of the fees for technical services. When there is an FTS clause, the FTS gets taxed even in the absence of the PE or the fixed base, but the character of FTS receipt is the same, i.e. business income or professional (independent personal) income, in the hands of the same. When there is no FTS clause, this sub categorization of income becomes irrelevant, because FTS or any other business receipt, the income embedded in such receipts gets taxed only if there is a permanent establishment or fixed base- as the case may be. The scope of business profit and independent personal service completely

covers the fees for technical services as well. With FTS article or without FTS article, the income by way of fees of technical services continues to be dealt with the provisions of articles relating to business profits, independent personal services, and additionally, in the event of existence of an FTS article, with the article relating to the fees for technical services.

29. In view of the above discussions, in our considered view, even if the receipts in question are in the nature of fees for technical services in the hands of Afras UAE and GMS Thailand, these receipts are not taxable in the hands of these entities, in terms of the respective tax treaties, in India. It is only elementary that under article 90(2) where the Government has entered into a tax treaty with any tax jurisdiction, in relation to the assessee to whom such treaty applies, "the provisions of this (Income Tax) Act shall apply to the extent they are more beneficial to that assessee". Quite clearly, when there is no taxability under the respective treaty provisions, there cannot be any taxability under the provisions of the Income Tax Act either."

37. What follows from the above is that since DTAA provisions are more beneficial to the entities based in such countries, with which India has tax treaty, but such tax treaty do not have FTS clause, then there is no question of taxability of such receipts under the Income Tax Act, either as business income or other income. In the facts of present case, the assessee has received the services from entities based in different countries and details are enlisted at page 32 of order of CIT(A). The countries falling in category one in the present case are Malaysia, Thailand, Indonesia, UAE and Saudi Arabia. The CIT(A) had relied on three decision while deciding this issue. The decision of Chennai Tribunal in DCIT Vs. TVS Electronics Ltd. (supra) has been overruled by the Hon'ble jurisdictional Madras High Court. The AAR decision relied upon by CIT(A) is to be applied to the facts of that case. Further, the reliance on decision of Hon'ble High Court of Calcutta in the case of CIT Vs. Davya Ashmore India Ltd. (supra) is misplaced.

38. The assessee while making payments to the entities based in countries falling in category one is thus, not required to deduct tax at source out of payments made to them, since the said amounts received by such entities were not taxable in their hands.

39. Now coming to the second category of cases i.e. payments to residents of tax jurisdiction with which India has tax treaties and where there is FTS clause, but without make available clause. Then receipts on account of FTS to entities based in such countries get taxed in their hands even in the absence of PE or the fixed base. The list of such countries i.e. category II include China, Denmark, Italy and Germany (i.e. the entities of such countries with whom assessee before us had dealings). Since such receipts are taxable in the hands of recipients, there was obligation on assessee to deduct tax or withhold tax out of such payments. The assessee having not deducted tax at source out of such payments or having not withheld the tax, thus had defaulted and is liable to the demand raised under section 201(1) of the Act and interest charged under section 201(1A) of the Act.

40. The third category of cases are in category III i.e. payments being made to entities resident of tax jurisdiction with whom India has tax treaties; further in such tax treaties, there is a clause of FTS, with condition of 'make available' of any technology. With regard to such entities in countries of category III, the condition of 'make available' is to be fulfilled in order to attract the provisions of clause of FTS. In other words, there has to be transfer of technology by such entities to the recipients of other Contracting States, while providing services to them. With regard to the countries of category III, the question which needs to be satisfied that while providing training, clause of make available of technology was satisfied or not. In the absence of any technology being transferred and where it is case of providing general training or attending seminar, then such receipts are not taxable in the hands of entities based in the source States. Various Courts have decided that the condition of 'make available' as provided in DTAA if does not get satisfied, then such payments to non-resident entities

are not liable for tax deduction at source. Such is the proposition laid down by Ahmedabad Bench of Tribunal in ITO Vs. Veeda Clinical Research (P.) Ltd. (supra).

41. Further, Pune Bench of Tribunal in John Deere India Pvt. Ltd. Vs DDIT (International Taxation) (2019) 70 ITR (Trib) 73 (Pune) have applied the said proposition and held as under:-

> *"103. The case of Revenue in all these grounds of appeal starting from grounds of appeal No.6 to 12 is that the payments made by assessee were fees for technical services and hence, it was the obligation of assessee to deduct tax at source. It may be pointed out herein itself that the fees for technical would arose in cases where the technical services are provided by provider to the recipient. In the absence of providing any technical services, it cannot be held to be case of fees for technical services and the assessee is not liable to deduct tax at source.*
>
> *104. Now, first coming to training fees paid by the assessee, wherein various modules were available on web and training could be obtained by the personnel of assessee on web itself. It was not case of interactive session and it was akin to reading an article or book and even if the person availing services had a query, there was no facility to answer the same on web. The question which arises in such circumstances, is whether there was any liability to deduct tax at source.*
>
> *105. In this regard, we find support from the ratio laid down by the Ahmedabad Bench of Tribunal in ITO Vs. Veeda Clinical Research (P) Ltd. (supra), wherein identical issue arose before the Tribunal and it was held as under:-*
>
> > *"5. The law is by now settled so far as the connotations of 'make available' clause in the definition of fees for technical services in the contemporary tax treaties are concerned. It is held to be a condition precedent for invoking this clause that the services should enable the person acquiring the services to apply technology contained therein. There are at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi High Court in the case of DIT Vs Guy Carpenter & Co Ltd (346 ITR 504) and Hon'ble Karnataka High Court in the case of CIT Vs De Beers India Pvt Ltd (346 ITR 467) in support of this proposition, and there is no contrary decision by Hon'ble jurisdictional High Court or by Hon'ble Supreme Court. We, therefore, hold that unless there is a transfer of technology involved in technical services extended by the UK based company, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under Article 13(4)(c) of India UK tax treaty. No doubt, as pointed out by the learned Assessing Officer, there can indeed be situations in which technical training is imparted resulting in transfer of technology, even consideration for rendering of training services will be covered by the definition of 'fees for technical services' but what is really the decisive factor is not the fact of training services per se but the training services being of such a nature that it results in transfer of technology. In the present case, the training services rendered by the service provider are*

> *general in nature as the training is described as 'in house training of IT staff and medical staff' and of 'market awareness and development training'. Clearly this training does not involve any transfer of technology. In any case, in order to successfully invoke the coverage of training fees by 'make available' clause in the definition of fees for technical services, the onus is on the revenue authorities to demonstrate that these services do involve transfer of technology. That onus in not at all discharged by the Assessing Officer, or even by the learned Departmental Representative. In the written submissions filed before us, main thrust of the arguments is that "the services provided were in the nature of 'fees for technical services' as defined in Explanation 2 to Section 9(1)(vii) of the Income Tax Act", that "the AO has finally held that the service provider has provided or made accessible the services of its technical knowledge and experience to the assessee company and, therefore, the payment was covered by the definition of 'fess for technical services' as per Article 13 of tax treaty between India and United Kingdom", and that, therefore, "the aforesaid payments were held taxable by virtue of both the provisions of the Income Tax Act and (the applicable) tax treaty……..". These submissions overlook the fundamental position that the provisions of the Income Tax Act apply in a treaty situation only to the extent they are more favourable, vis-à-vis the provisions of tax treaties, to the assessee. Accordingly, when case of the revenue authorities fails on the tests of the treaty provisions, there is no occasion at all for their leaning upon the provisions of the Income Tax Act. The case of the revenue authorities, as discussed above, does not succeed on the provisions of the tax treaty as there is nothing to establish, or even indicate, that there is any transfer of technology in the present case. In view of these discussions as also bearing in mind entirety of the case, in our considered view, the fees for training services of general nature, which does not seem to involve any transfer of technology, cannot be brought to tax under section 13(4)(c) of India UK tax treaty."*
>
> *106. In the facts before Ahmedabad Bench of Tribunal, where services rendered by service provider were general in nature and which did not involve any transfer of technology, it was held that where the onus was on Revenue authorities to demonstrate that these services too involve any transfer of technology and since that onus was not discharged, then the payment was not covered by the definition of 'Fees for Technical Services'. The facts of the said case are similar to the facts before us, wherein training availed by employees of assessee were web based services available on internet and no technical knowledge was being imparted by service provider and the Revenue has failed to demonstrate that the services did involve transfer of technology and in the absence of same, it cannot be said to be payments in the nature of Fees for Technical Services. Applying the said ratio, we hold that there was no liability upon the assessee to deduct tax at source on the aforesaid payments and hence, assessee cannot be held to be in default under section 201(1) and 201(1A) of the Act. The grounds of appeal No.6 to 8 are thus, allowed."*

42. Applying the said parity of reasoning, we hold that the authorities below in the present case have not come to any finding that training imparted by associated enterprises to the employees of assessee make available any technology and in the absence of the same, payments made to the entities

residents of countries of category III i.e. Singapore, USA, Switzerland and Sweden are not exigible to tax deduction at source. The assessee in such circumstances cannot be held to be in default for not deducting tax out of said payments. Accordingly, we hold so.

43. Our proposition in the paras above with regard to countries in category I to category III are to be applied in respect of payments which are covered both by grounds of appeal No.2.1 to 2.5 and also with regard to payments for design expenses raised vide ground of appeal No.3 by the assessee.

44. Now coming to the last issue which is raised vide ground of appeal No.4 by the assessee i.e. payment made on account of repairs and maintenance, the details of said payments are available at page 46 of the order of CIT(A). Out of total payments of ₹ 22,03,728/-, the CIT(A) has confirmed the order of Assessing Officer in respect of payments to two concerns. The assessee has fairly pointed out that payments made to Tetra Philippines Inc is not taxable as there is no Article in FTS in DTAA and hence, there is no requirement to deduct tax out of such payments. The said concern Tetra Philippines Inc falls in category No.I and hence, we hold that the payments made to such an entity is not exigible to tax deduction at source in line with our deliberations on the issue in paras above.

45. As far as payments to an entity in China is concerned which falls in category No.II, we hold that the said amount is exigible to tax at source in line with our decision in the paras above in respect of countries in category No.II.

46. Now coming to the appeal of Revenue which is in respect of relief given by CIT(A) in respect of TDS on design services to entities in Switzerland and Singapore. The findings of CIT(A) in para 2.6.14 of the appellate order are that the payments made for design services, do not satisfy make available clause, where no technical service had been made available to the assessee, there is no question of same being exigible to tax. The learned Departmental Representative for the Revenue has failed to controvert the findings of CIT(A). The recipients are residents of countries of category III and out of such payments, there is no requirement to deduct tax in the absence of satisfying 'make available' condition. Thus, grounds of appeal No.1 to 3 raised by Revenue are dismissed.

47. The issue raised vide grounds of appeal No.4 to 6 is against applicability of provisions of section 206AA of the Act. The limited issue which arises in the present case is against order of CIT(A) in holding that the provisions of section 206AA of the Act could not override the relevant DTAA provisions.

48. The Revenue is aggrieved by the aforesaid relief given by CIT(A). We find no merit in the grounds of appeal raised by Revenue in this regard as the beneficial provisions of DTAA would override the provisions of Income Tax Act and accordingly, there is no requirement to deduct tax at source as per provisions of section 206AA of the Act. The issue stands settled by decision of Pune Bench of Tribunal in DDIT Vs. Serum Institute of India Ltd. in ITA No.792/PUN/2013 and ITA Nos.1601 to 1604/PUN/2014, relating to assessment year 2011-12, order dated 30.03.2015. The Hon'ble Bombay High Court has dismissed the appeal filed by Revenue against the said decision of Tribunal in Income Tax Appeal No.548 of 2016 & Ors vide judgment dated

17.12.2018. The grounds of appeal No.4 to 6 raised by Revenue are thus, dismissed.

49. The last issue raised vide grounds of appeal No.7 to 9 is against grossing up of various payments. The Assessing Officer had grossed up various payments made in accordance with provisions of section 195A of the Act, while calculating the tax payable. The CIT(A) in turn, vide para 2.8.3 at page 53 had held that there was nothing on record, on the basis of which it could be concluded that the assessee had agreed to bear tax liability of the foreign companies, hence the provisions of section 195A of the Act should not have been applied. The learned Departmental Representative for the Revenue has failed to controvert the same and accordingly, we find no merit in grounds of appeal No.7 to 9 raised by Revenue.

50. Now, coming to the appeal of assessee in ITA No.1865/PUN/2014 relating to assessment year 2010-11.

51. The grounds of appeal No.1.1 to 1.5 raised by assessee in respect of training charges paid to various Tetra group companies totaling ₹ 1,30,61,142/-. The details of payments are available at page 33 of CIT(A)'s order. The Assessing Officer was of the view that the assessee has failed to deduct tax out of such payments and hence, the assessee was held to be liable and demand was raised under section 201(1) of the Act and interest was charged under section 201(1A) of the Act. The said issue is similar to the issue raised vide grounds of appeal No.2.1 to 2.5 in assessment year 2009-10 and our decision in the paras above would apply *mutatis mutandis*. The Assessing Officer is thus, directed to decide the same in line with our directions with regard to

entities based in country No.I to III, as discussed above. The said grounds of appeal are thus, partly allowed.

52. Now, coming to second issue raised vide ground of appeal No.2 i.e. relating to payment of service charges of ₹ 16,53,228/-, the learned Authorized Representative for the assessee fairly pointed out that the said issue has not been decided by the CIT(A). Accordingly, we remit this issue back to the file of CIT(A) to decide the same in accordance with law after allowing reasonable opportunity of hearing to the assessee.

53. Now, we take up the appeal of Revenue relating to assessment year 2010-11 in ITA No.1858/PUN/2014.

54. The first issue raised vide grounds of appeal No.1 to 3 is against relief given by CIT(A) vis-à-vis the payments made towards repairs and maintenance and other services and whether tax was deductible. The details of aforesaid payments are available at page 47 of CIT(A)'s order. The assessee claims to have made payment of ₹ 18,16,940/- to Core Link AB. The assessee claimed that the said payments included payments for material purchase or machinery part charges. The CIT(A) has directed the Assessing Officer to verify the claim of assessee and if the payments were made for material purchase or machinery part charges, then there was no requirement to deduct tax at source and for such non deduction of tax at source, no disallowance can be made. We find no merit in the grounds of appeal raised by Revenue in this regard as the CIT(A) has asked the Assessing Officer to make necessary verification and decide the issue. The grounds of appeal No.1 to 3 raised by Revenue are thus, dismissed.

55. Now, coming to the next issue vide grounds of appeal No.4 to 6, which is against applicability of provisions of section 206AA of the Act. The Revenue in assessment year 2009-10 had also raised similar issue vide grounds of appeal No.4 to 6 and our decision in the paras above would apply *mutatis mutandis.*

56. Similarly, grounds of appeal No.7 to 9 raised by Revenue are against issue of grossing up. We have also decided similar issue of grossing up in the appeal filed by Revenue in assessment year 2009-10 vide grounds of appeal No.7 to 9. Our decision would apply *mutatis mutandis* to this year and the grounds of appeal No.7 to 9 raised by Revenue are dismissed.

57. Now, coming to appeal of assessee in ITA No.1866/PUN/2014, relating to assessment year 2011-12.

58. The grounds of appeal No.1.1 to 1.5 are against disallowance of payments made to AB Tetra Pak, Sweden, which are in respect of purchase of copyrighted software. The Assessing Officer was of the view that the aforesaid payments were in the nature of royalty and for non deduction of tax at source, the assessee was held to be liable and demand was raised under section 201(1) of the Act and interest was charged under section 201(1A) of the Act. We have already decided this issue in assessment year 2009-10 with regard to grounds of appeal No.1.1 to 1.3 raised by assessee. Our decision in the said paras would apply *mutatis mutandis* and the grounds of appeal No.1.1 to 1.5 raised by assessee stands allowed.

59. Similarly, the issue raised vide ground of appeal No.2 is against payments made for software licenses purchased from other associated enterprise entities and the Assessing Officer and CIT(A) had held the assessee

in default for non deduction of tax at source on the ground that the said payments were in the realm of royalty and in the absence of deduction of tax at source, the assessee was in default. The said issue also is similar to the grounds of appeal No.1.1 to 1.5 raised by assessee for the instant assessment year and our decision would apply *mutatis mutandis*, in turn, we place reliance on earlier decision of Pune Bench of Tribunal in John Deere India Pvt. Ltd. Vs DDIT (International Taxation) (2019) 70 ITR (Trib) 73 (Pune), wherein it was held that no TDS is required to be deducted on purchases of copyrighted software licenses. Accordingly, there was no requirement to deduct any tax out of such payments. The ground of appeal No.2 raised by assessee is thus, allowed.

60. The issue raised vide grounds of appeal No.3 to 3.4 is against training charges paid by assessee to Tetra Pak group companies, wherein the Assessing Officer and CIT(A) were of the view that there was requirement to deduct tax at source, hence the demand was raised under section 201(1) of the Act and interest was charged under section 201(1A) of the Act. We have already deliberated upon this issue and have decided the same while deciding the grounds of appeal No.2.1 to 2.5 relating to assessment year 2009-10 and given directions in respect of entities based in different countries ranging from category I to III. The Assessing Officer is directed to apply the said decision and re-compute the demand, if any, under section 201(1) and 201(1A) of the Act. The grounds of appeal No.3 to 3.4 are thus, allowed.

61. The ground of appeal No.4 raised by assessee is not pressed, hence the same is dismissed as not pressed.

62. Now, coming to Revenue's appeal in ITA No.1859/PUN/2014 relating to assessment year 2011-12.

63. The ground of appeal No.1 raised by Revenue is against deleting the addition made on account of IT support services.

64. The learned Authorized Representative for the assessee pointed out that as per agreement entered into between assessee and AB Tetra Pak, Sweden, IT support services were provided by the said associated enterprise, copy of agreement is placed at pages 91 to 107 of Paper Book. The learned Authorized Representative for the assessee stated that the aforesaid support services provided by associated enterprise do not satisfy the condition of 'make available' in DTAA between India and Sweden and hence, there was no requirement to deduct tax at source.

65. The issue stands covered by the decision of Pune Bench of Tribunal in John Deere India Pvt. Ltd. Vs DDIT (International Taxation) (supra) and applying the said ratio to the present case, we uphold the order of CIT(A) in holding that there was no requirement to deduct tax at source as the said support services do not make available any technology to the assessee. The DTAA is between India and Sweden and we have in the paras above already referred to the provisions of DTAA between two countries and it falls in category No.III. In the absence of satisfying the condition of 'make available', there was no requirement to deduct tax at source. Accordingly, we dismiss the ground of appeal No.1 raised by Revenue.

66. The second issue raised by Revenue is against order of CIT(A) in allowing relief on account of training charges. The learned Authorized

Representative for the assessee pointed out that this ground of appeal is infructuous as no such relief has been given by the CIT(A). On perusal of records, we find merit in the plea of learned Authorized Representative for the assessee. Hence, the ground of appeal No.2 is also dismissed.

67. Now, coming to the issue raised vide ground of appeal No.3 i.e. in respect of other payments. The first issue is with regard to payment of ₹ 30,81,728/- on account of repairs and maintenance. The CIT(A) vide para 2.7.21 at page 52 of the appellate order has given directions to Assessing Officer to verify the claim of assessee and held that no TDS was required to be deducted out of separate payments for material purchase or machinery part charges. In view thereof, we find no merit in the ground of appeal No.3.1 raised by Revenue in this regard.

68. Now, coming to ground of appeal No.3.2 i.e. another payment i.e. for design charges, wherein in respect of some payments TDS was deducted and the CIT(A) vide para 2.7.24 has directed the Assessing Officer to verify the claim of assessee, in case TDS has already been deducted and paid, then the assessee cannot be held to be in default. Further, the CIT(A) has also held that in respect of balance payments, the same are not taxable as they do not satisfy the condition of 'make available'.

69. The learned Departmental Representative for the Revenue has failed to controvert the findings of CIT(A) and consequently, we find no merit in the ground of appeal No.3.2 raised by Revenue and the same is dismissed.

70. Now, coming to grounds of appeal No.4 to 6 which are against applicability of provisions of section 206AA of the Act. We have already

decided the said issue in the paras above in assessment year 2009-10 and applying the same *simile*, this ground of appeal raised by Revenue is dismissed.

71. The last issue raised vide grounds of appeal No.7 to 9 is against grossing up of various payments, which has also been decided by us in assessment years 2009-10 and 2010-11. Following the same *simile* of reasoning, we dismiss the grounds of appeal No.7 to 9 raised by Revenue.

72. In the result, all the appeals of assessee are partly allowed and all the appeals of Revenue are dismissed.

Order pronounced on this 9th day of September, 2019.

Sd/-	**Sd/-**
(D.KARUNAKARA RAO)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 9th September, 2019.

GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-IT/TP, Pune;
4. The DIT(TP/IT), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "सी" / DR 'C', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune