IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE "A" BENCH, BANGALORE

Before Shri George George K., Vice President
and
Ms. Padmavathy S., Accountant Member

ITA Nos. 1196, 1226 & 1229/Bang/2024 (Assessment Years: 2016-17 to 2018-19)		
DCIT, Circle - 1(1)(1) Room No. 215, 2nd Floor BMTC Building, 6th Block Koramangala Bangalore 560095	vs.	Algonomy Software Pvt. Ltd. 40/4 Lavelle Road Bangalore Bazaar Bangalore 560001 PAN – AADCM7750M
(Appellant)		(Respondent)

Assessee by:	Shri Narendra Kumar Jain, Advocate
Revenue by:	Shri R.N. Siddappaji, CIT-DR

Date of hearing:	14.10.2024
Date of pronouncement:	15.10.2024

O R D E R

Per Bench

These appeals of the Revenue are directed against the separate orders of the Commissioner of Income Tax (Appeals)-12, Bangalore [CIT(A)] dated 30.04.2024 for Assessment Years (AY) 2016-17 to 2018-19. The common issues contended by the Revenue for all the AYs pertain to: -

i) Disallowance u/s. 14(a)(i) of the Income Tax Act, 1961 (the Act)

ii) ESOP expenses

Since the issues contended are common, these appeals were heard together and were disposed off by this common order.

ITA No. 1196/Bang/2024

2. The brief facts of the case are that the assessee is a domestic company engaged in the business of providing software support and development services and ITeS. The assessee filed return of income for AY 2016-17 on 28.11.2016 declaring total loss of Rs. 33,42,26,978/-. The return was selected for scrutiny and the statutory notices were duly served on the assessee. The Assessing Officer (AO) received information from DCIT (International Tax), Circle 1(2), Bangalore wherein it was reported that verification u/s. 133A(2A) of the Act done at the premises of the assessee revealed that an amount of Rs. 37,92,79,043/- was accounted as sales commission. Upon further enquiry the AO noticed that the said sales commission was paid to the assessee's US subsidiary Manthan Systems Inc and other subsidiaries (AEs) towards selling and marketing services and that no TDS was deducted on the same. The AO called on the assessee to furnish details pertaining to the payment of commission. The assessee submitted that the payments were made towards marketing and support services paid as sales commission and that it will not partake the nature of fees for technical services (FTS). The assessee further submitted that the AEs are remunerated for rendering marketing support services in the form of sales commission and that the AEs do not render any technical services The AO after perusing the details submitted by the assessee held that the payment made by the assessee is towards FTS since 85% of the revenue of the assessee is generated from exports. The AO further held that the label given in the agreement between the assessee and the AEs cannot be a decisive factor and that the nature of transactions required to be determined on the basis of obectives. Accordingly the AO made disallowance of the sales commission u/s. 40(a)(i) of the Act for the reason that the assessee has not deducted tax at source on the said amount u/s. 195 of the Act.

3. The AO further noticed that the assessee has debited a sum of Rs.1,86,40,000/- upon grant of options under ESOP scheme. The AO disallowed the entire ESOP expenses stating that the nature of expense is contingent in nature and in the absence of any specific provisions in the Act regarding allowance of any deduction towards grant of ESOP the same can't be allowable u/s. 37 of the Act. The AO also made a disallowance towards provision for doubtful debts to the tune of Rs. 48,95,064/-. No TP adjustments were made by the TPO towards international transaction entered into by the assessee with its AEs and hence TP adjustment was considered as Nil by the AO while passing the assessment order.

4. Aggrieved assessee filed further appeal before the CIT(A). The ld. CIT(A) relied on the decision of the Tribunal in assessee's own case for AYs 2012-13 to 2015-16 and deleted all the disallowance made by the AO. The Revenue is in appeal before the Tribunal against the order of the CIT(A) contending the deletion of disallowance made u/s.40(a)(i) of the Act and ESOP expenses.

5. The learned A.R. submitted that the issue is squarely covered by the decision of the coordinate bench in assessee's own case for AYs 2012-13 to 2015-16 (ITA Nos. 943 to 946/Bang/2023 dated 19.01.2024) and therefore the CIT(A) has rightly relied on the said decision while deleting the disallowances made by the AO. The learned A.R. drew our attention to the decision of the coordinate bench in the case of Manthan System Inc (IT(IT)A No. 723/Bang/2022 dated 23.09.2022) where it has been held that the amount received by Manthan Systems Inc towards rendering sales and marketing services would not fall within the ambit of FTS as defined u/s. 9(1)(vii) of the Act or under Article 12 of the DTAA between India and US. The learned A.R. accordingly submitted that the disallowance made by the AO u/s. 40(a)(i) for

non deduction of tax at source u/s. 195 of the Act is not tenable. The learned A.R further submitted that the coordinate bench in assessee's own case (supra) has considered the issue of ESOP expenses and Provision for doubtful debts and has allowed the issue in favour of the assessee.

6. The learned D.R., on the other hand, submitted that the department has preferred appeal against the order of the Tribunal in assessee's own case for AYs 2012-13 to 2015-16 (Supra) and accordingly prayed that the issues may be kept alive by setting aside the order of the CIT(A).

7. We have heard the rival contentions and perused the material on record. We notice that the coordinate bench in assessee's own case has considered the issue of disallowance u/s. 40(a)(ia) towards sales commission paid to Manthan Systems Inc and held that: -

> *"9. The crux of the case made by the assessee is this that since the services rendered to the appellant by the said Manthan Systems Inc. have been held not falling within the ambit of FTS or under Article 12 of the DTAA, the appellant is also not liable to deduct TDS on the payment made to the said company MSI as held by ITAT in the order under reference hereinabove. In this regard, we have carefully considered the order passed by the Ld.CIT(A) who has taken into consideration this particular aspect of the matter and deleted the addition with the following observation:*
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> > *"4.3.4 FINDING AND DECISION*
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> > *In the impugned order, the AO has made disallowance under Section 40(a)(i) of the payment made to Manthan Systems Inc. towards sales and marketing commission. The AO has extensively discussed why the commission paid by the appellant to Manthan Systems Inc was in the nature of Fees for Technical Services and was taxable both under the provisions of the Act and under the India-USA DTAA. The AO in Para 4.1 (Page 3 86 4) of the assessment order has listed the services provided by the Manthan Systems Inc. to the appellant and also stated that Manthan Systems Inc was providing sales and marketing services. These services are enumerated in the ARC Business Partner Agreement between the appellant and Manthan Systems Inc. dated 1 1 th February, 2009 as further amended and renewed by the agreement dated 1st April, 2013. The agreement was for marketing of the appellant's products and associated services, including the software called ARC developed by the appellant*

which were marketed in North and South America and the Caribbean by Manthan Systems Inc. Para 5 of the said agreement reproduced below further elaborates the nature of the contract between the appellant and Manthan Systems Inc.

5. MSSPL's Responsibilities

5.1 MSSPL, shall provide MSI all necessary and relevant information pertaining to its ARC Products and Associated Services, including all relevant literature, brochure, soft copies, CDs etc. related to the Products and Services, which the Business Partner shall use to adequately market the Products and Services.

5.2 MSSPL shall, upon the receipt of a purchase order from the Customer, intimate MSI as to the acceptance of the purchase order. MSSPL shall be at liberty to reject any purchase order which does not comply with the pricing agreed at the end of the Commercial Negotiations or is not accompanied with the advance amount as agreed therein.

5.3 MSSPL shall send along with the confirmation of the purchase order, an invoice to the Customer with a copy for information to MSI, which shall reflect the purchase order number, line item number, description of items, quantities, the price payable by the Customer for the units sold.

5.4 Notwithstanding the generality of the above, MSSPL shall also:

(a) Direct leads to MSI which it may receive directly from prospects

(b) Continue lead generation and marketing activities

(c) Until MSI achieves a Sales Revenue Level of USD 1 Million, Provide Sales training hours to the MSI team consisting of:

(i) Product training
(ii) Technical and deployment training
(iii) Sales training

Training beyond that Revenue level shall be priced to MSI on par with MSSPL's Training offered to other Channel Partners.

(d) Assist in ARC Product and Associated Services sales. business, technical and commercial discussions, product demonstrations and services portfolio presentations to the prospect.

(e) Deploy, maintain, customize and support the product and services with clients

(f) Carry Commercial and contractual ownership of the Customer Relationship

(g) Bear equal share of the cost on all event participation focused on the promotion of the Product and Services.

(h) Conduct Road shows.

Paras 3.3 to 3.7 of the agreement also delineate the responsibilities of both parties to the agreement.

3.3 MSI shall use all reasonable efforts to pursue aggressive sales policies and procedures to realize the maximum sales potential for the ARC Products and Associated Services.

3.4 During the term of this Agreement, MSI shall not, without MSSPL's prior written consent, represent, promote or otherwise try to sell any other types of software Products and/or Services which perform identical functions as the Products and/or Services provided by MSSPL.

3.5 MSI shall support such special programs as may be developed by MSSPL from time to time in relation to the ARC Products and/or Associated Services. Such support may be in the form of marketing or promotional services, provision of certification programs, integration of sales reporting tools developed by the Company, or such other services as the Company may specifically request. Any such special programs provided at a fee or charge shall be mutually agreed upon by the Parties hereto.

3.6 MSI agrees to provide the Company with sales and marketing data required by MSSPL in respect of the sales of the ARC Products. MSI will directly input this information into the MSSPL program in the manner stipulated by the MSSPL.

3.7 MSI shall be entitled to receive from MSSPI. such training as MSSPL may deem necessary in order for MSI to carry out its obligations under this Agreement.

From a reading of above clauses, it is evident that the services provided by Manthan Systems Inc. to the appellant were in the nature of marketing of the appellant's proprietary products. The AO has briefly discussed in Para 6 and Para 8.3 of her order, that the information provided by the Manthan Systems Inc was in the nature of commercial information and hence the payment for the same was in the nature of royalty. However, this view is not tenable in the light of the clauses of agreement discussed above.

Be that as it may be, the AO has gone into some detail and also extensively discussed with reference to various case laws that the payment for the services rendered by Manthan Systems Inc was also FTS and chargeable to tax as per the Act and DTAA. The AO has not specifically identified whether the payment for the services was royalty or FTS. This issue has been decided in the appellant's favour by the Bangalore ITAT 'C' Bench in the case of Manthan Systems Inc. vs DCIT, International Taxation, Circle-1(2), Bangalore IT (IT)A No. 723/Bang/2022 for the AY 2012-13 wherein the same transaction has been held to be not taxable as

FTS either under the Act or under Article 12 of the DTAA. The relevant portion of the order of the Tribunal is reproduced below.

"9. We have heard rival submissions and perused the material on record. The AO has referred to the services rendered by the assessee at para 6.1 of his order, The AO has contended that services rendered by the assessee are project management services and thereby fall within the ambit of FTS as per Explanation 2 to section 9(1)(vii) of the Act. The AO has concluded that services are in the nature of technical or consultancy services (Para 6.7 of the order). Finally at Para 10.2, it is concluded that services are technical in nature. The DRP has confirmed the finding of AO (Page 4 of the DRP order). The DRP has also observed that services of assessee assist MSSPL in making managerial/business decision. In the instant case, the assessee acted as intermediary and facilitates sale of software products/services outside India. On perusal of copy of sale and marketing agreement dated 11.02.2009 entered between the assessee and MSSPL, it is seen that the assessee rendered the following services.

- *Promoting the software product/services on behalf of the Appellant;*
- *Co-Ordination between the customers in North American, South American and Caribbean market and MSSPL;*
- *Following up with the customers in North American, South American and Caribbean market for collection of amount.*

10. In the instant case, the assessee is not providing any technical, managerial or consultancy services rather has been engaged to act as authorized business partner to market and promote the products or services of MSSPL outside India In fact, the AO/DRP have not even concluded as to what is the nature of services rendered by the assessee. The decision regarding what are the products/services that are to be developed or provided, the price to be charged to the customer etc. are solely taken by MSSPL. The assessee does not play any role in the decision-making process. Further, once the assessee procures the orders, it is at the discretion of MSSPL whether to sell the product or render services to identified customers. The Hon'ble Delhi High Court in case of Dui- (International Taxation) vs Panalfa Autoelectrik Ltd (2014) 49 taxmann.com 412 (Delhi) held that commission paid by the assessee to its foreign Agent for arranging export sales and recovery of payments could not be regarded as fee for technical services under section 9(1)(vii) of the I.T.Act. The High Court held that the skill, business acumen and knowledge acquired by the non-resident were for his own benefit and use.

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11. The Hon'ble Supreme Court in the case of CIT v Toshoku Ltd (1980) 125 ITR 525 (SC) held that the sales commission paid to the commission agents outside India was not taxable in India. The Apex Court observed

that the sales commission earned by the non-resident agents cannot be deemed to accrue or arise in India.

12. The Hon'ble Madras High Court in the case of CIT vs Faizan Shoes (P.) Ltd (2014) 48 taxmann.coni 48 (Madras) had held that Assessee was not liable to deduct tax at source when non-resident agent provides services outside India on payment of commission.

13. In the case of Exotic Fruits (P.) Ltd reported in (2013) 10 taxmann.com 348 (Bangalore- Trib.), the Bangalore Bench of the Tribunal held that payment made to the nonresident agents does not fall within the meaning of managerial services as mentioned under section 9(1)(vii) of the I.T.Act and not required to deduct TDS under section 195. Further, it has been held that in the absence of permanent establishment(s) of such agents in India, the export commission income of the agents was not liable to be taxed in India and thus, the assessee was not obliged to effect any deduction of tax on the commission payments made to the agents who were positioned overseas.

14. The ITAT in the case of iRunway India (P) Ltd vs DCIT (2022) 138 taxmann.com 188 (Bangalore-Trib.) had held that where assessee has obtained certain sales consulting services from USA and commission is based on fixed percentage of sales, then merely because the service provider is technically qualified, sales commission paid for enabling sale could not become payment for rendering technical services and therefore, TDS is not applicable.

15. Similarly, the Bangalore tribunal in the case of Deccan Creations (P.) Ltd vs DCIT (2022) 134 taxmann.com 144 (Bangalore-Trib.) had held that services of foreign agents in the form of providing the data related to market trends and requirements of customers does not constitute as managerial services, as these services are usually provided by any agent. Thus, sales commission paid to foreign agents on the value of sales affected through them cannot be treated as technical services and therefore, not taxable in India The following judicial pronouncements have also taken an identical view:-

- *PCIT vs Puma Sports India (P.) Ltd (2021) 127taxmann.com 169 (Karnataka} SLP dismissed by Supreme Court - (2022) 134 taxmann.com 60 (SC);*
- *Bengal Tea & Fabrics Ltd.. v DCIT (2018) 91 taxmann.com 38 (Kolkata - Trib.);*

- *DCIT v Divi's Laboratories Ltd (2011) 12 taxmann.com 103 (Hyd.);*
- *CIT vs. Model Exims, (2014) 42 taxmann.com 446 (ALL)*
- *Brakes India Ltd. v DCIT (2013) 33 taxmann.com 501 (Chennai - Trib.);*
- *Sri Subbaraman Subramanian v Asst CIT (2013) 30 taxmann.com 236 (Bangalore - Trib.);*
- *ACIT v India Shoes Exports (P.) Ltd (2015) 57 taxmann.com 303 (Cliennai-Trib.);*
- *ACIT v Evergreen International Ltd (2018) 91 taxmann.com 111(Delhi-Trib.);*
- *CIT v Orient Express (2015) 56 taxmann.com 331 (Madras);*
- *Divya Creation v ACIT (2017) 86 taxmann.com 276 (Delhi-Trib.); and*
- *Khimji Visram & Sons v ACIT (2014) 52 taxinann.com 485 (Mumbai-Trib,).*

16. In light of the above judicial pronouncements, the income received towards sales commission does not satisfy the definition of "FTS" under the Act as it is not in the nature of Managerial, Technical or Consultancy Services.

17. The AO has relied on the judgment of Hon'ble Supreme Court in case of GVK Industries Ltd vs ITO (2015) 54 taxmann.com 347 (SC) where in it was held that services provided by Switzerland based company for raising required finance from international organisations on most competitive terms, payment made to swiss company for rendering such consultancy services amounted to 'fee for technical service' liable to tax in India. The above judgment of Hon'ble Apex Court is not applicable to facts of the present case. In the above judgment Hon'ble Supreme Court observed that the non-resident entity provided various services like advising the assessee on various aspects like financial structure, and security package to be offered to the lender, study of various lending alternatives for the local and foreign borrowings, making assessment of expert credit agencies worldwide and obtaining commercial bank support on the most competitive terms, assisting the assessee-company in loan negotiations and documentations with the lenders, structuring, negotiating and closing financing for the project in a coordinated and expeditious manner. The above services are clearly in the nature of consultancy services as they assist in decision making. However, in the instant case, the assessee has rendered sales and marketing services to MSSPL. No consultancy services are rendered and in fact even the AO has concluded that assessee has

rendered technical services. Therefore, the above decision of Hon'ble Supreme Court in GVK Industries is not applicable to the facts of the present case. Further, the decision does not deal with the taxability under the treaty.

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19. Now, we shall deal with taxability as per DTAA:

The assessee is admittedly a tax resident of USA and hence it is eligible to claim benefits under India-USA DTAA. The payment received by the assessee will not qualify as "fees for Included services" under the India-USA DTAA. The definition "fees for Included services" under Article 12 to India-USA DTAA is as follows:

"fee for included services means payments of any kind to any person in 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."

20. The payments towards sales and marketing services provide by the assessee is not covered under sub clause (a) to Article 12(4) of India-USA DTAA as it is not ancillary to application or enjoyment of any right. Further, clause (b) to Article 12(4) of India-USA DTAA is only applicable if the services are in the nature of technical or consultancy services, which make available knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design. The sales and marketing services rendered by assessee is not in the nature of technical or consultancy services. The AO has submitted that services are in the nature of project management of services and the same has been confirmed by the DRP. The project management services does not constitute technical or consultancy services and therefore are outside the ambit of "FIS" as defined in India-USA DTAA. Even if it is assumed without admitting that marketing services is technical or consultancy in nature, it did not make available any technical knowledge, experience, know-how, process to MSSPL. The term "make available" under the treaty law postulates a concept wherein the recipient of the services is not only benefited by the services but there is also a transfer of the technology, processes, skill etc., to the recipient in a manner which will enable the latter to apply the technology, processes, skill etc., in future without

recourse to the service provider. The term "make available" encompasses some sort of durability and stability with reference to the transfer of technology, processes and skill etc., so that the same is not regarded as transient or ephemeral.

21. As per Memorandum of Understanding ("MOU") on Article 12 of the Treaty, entered into by the Government of India and the Government of USA on May 15, 1989, the technology is considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service. In this context, we rely on the judgment of the Hon'ble jurisdictional High Court in the case of CIT v De Beers India Minerals (P.) Ltd. 21 taxmann.com 214 (Kar.), wherein the Honourable High Court dealt with 'make available' clause. The High Court held that for attracting the liability to pay tax, not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The Hon'ble High Court, held that test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available.

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22. Reliance is also placed on the judgment of Delhi High Court in the case of DIT v. Guy Carpenter & Co. Ltd. [2012] 346 ITR 504 (Del.)

23. The Kolkata Tribunal decision in the case of On process Technology India (P.) Ltd v DCIT (2018) 96 taxmann.com 428 (Kolkata-Trib.) is squarely applicable to the facts of the present case. In the aforesaid case, the Tribunal rendered decision in the context of India-USA DTAA. The Tribunal held that the act of securing orders and soliciting business by the foreign marketing companies does not make available any technical knowledge or technical service and the same is not taxable either ups 9(I)(vii) or under India-USA DTAA. Reliance is also placed on the decision of Delhi Tribunal in the case Rajinder Kumar Aggarwal (HUF) vs DC1T [2021] 131 taxmann.com 252 (Delhi-Trib.)

24. The AO has stated that marketing services rendered by the assessee are technical in nature and which are used by MSSPL for development of

business, which results in enduring benefit. Accordingly, the A.O. has concluded that make available is satisfied as there is transfer of skill and knowledge which falls within the ambit of technical services. The DRP has also confirmed the view of the A.O. The AO and DRP has erred in not appreciating that what should be made available is technical knowledge, experience, skill etc. Making available service does not make available knowledge, experience, skill etc. MSSPL has to approach the assessee every time to get new customers and maintain relationship with existing customers. The test of make available as envisaged in the DTAA is therefore not satisfied in the instant case.

25. In light of the aforesaid reasoning, we hold that the sales and marketing services rendered by the assessee to MSSPL would not fall within the ambit of FTS as defined under section 9(1)(vii) or under Article 12 of DTAA. It is ordered accordingly."

As a corollary to the above order, since the services rendered to the appellant by Manthan Systems Inc. have been held to not fall within the ambit of FTS or under Article 12 of the treaty, there was no requirement on the part of the appellant to deduct TDS on the payment to MS1. Respectfully following the above order of the jurisdictional Tribunal, the disallowance made by the AO under Section 40(a)(i) r.w.s. 195 of the sales and marketing commission paid by the appellant for the year under appeal is deleted."

10. We further find that while dealing with the issue, the Coordinate Bench has been pleased to observe as follows while holding that the sales commission paid to the Manthan System Inc. does not fall within the ambit of FTS:

19. Now, we shall deal with taxability as per DTAA: The assessee is admittedly a tax resident of USA and hence it is eligible to claim benefits under India-USA DTAA. The payment received by the assessee will not qualify as "fees for Included services" under the India-USA DTAA. The definition "fees for Included services" under Article 12 to India-USA DTAA is as follows:

"fee for included services means payments of any kind to any person in 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."

20. The payments towards sales and marketing services provide by the assessee is not covered under sub clause (a) to Article 12(4) of India-USA DTAA as it is not ancillary to application or enjoyment of any right. Further, clause (b) to Article 12(4) of India-USA DTAA is only applicable if the services are in the nature of technical or consultancy services, which make available knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design. The sales and marketing services rendered by assessee is not in the nature of technical or consultancy services. The AO has submitted that services are in the nature of project management of services and the same has been confirmed by the DRP. The project management services does not constitute technical or consultancy services and therefore are outside the ambit of "FIS" as defined in India-USA DTAA. Even if it is assumed without admitting that marketing services is technical or consultancy in nature, it did not make available any technical knowledge, experience, know-how, process to MSSPL. The term "make available" under the treaty law postulates a concept wherein the recipient of the services is not only benefited by the services but there is also a transfer of the technology, processes, skill etc., to the recipient in a manner which will enable the latter to apply the technology, processes, skill etc., in future without recourse to the service provider. The term "make available" encompasses some sort of durability and stability with reference to the transfer of technology, processes and skill etc., so that the same is not regarded as transient or ephemeral.

21. As per Memorandum of Understanding ("MOU") on Article 12 of the Treaty, entered into by the Government of India and the Government of USA on May 15, 1989, the technology is considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service. In this context, we rely on the judgment of the Hon'ble jurisdictional High Court in the case of CIT v De Beers India Minerals (P.) Ltd. 21 taxmann.com 214 (Kar.), wherein the Honourable High Court dealt with 'make available' clause. The High Court held that for attracting the liability to pay tax, not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The Hon'ble High Court, held that test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available. The relevant finding of the Hon'ble High Cot reads as follows:-

"14. Therefore the Clause in Singapore agreement which explicitly makes it clear the meaning of the word 'make available', the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know how or processes. To attract the tax liability, that technical knowledge, experience, skill, know how or process which is used by service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know how or processes so as to render such technical Services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tar is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know how or process to the recipient of the technical service, in view of the Clauses in the DTAA. the liability, to tax is not attracted.

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22. What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill?, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the

receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other word, payment of consideration would be regarded as 'fee for technical / included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."

22. Reliance is also placed on the judgment of Delhi High Court in the case of DIT v. Guy Carpenter & Co. Ltd. [2012] 346 ITR 504 (Del.)

23. The Kolkata Tribunal decision in the case of On process Technology India (P.) Ltd v DCIT (2018) 96 taxmann.com 428 (Kolkata-Trib.) is squarely applicable to the facts of the present case. In the aforesaid case, the Tribunal rendered decision in the context of India-USA DTAA. The Tribunal held that the act of securing orders and soliciting business by the foreign marketing companies does not make available any technical knowledge or technical service and the same is not taxable either ups 9(I)(vii) or under India-USA DTAA. Reliance is also placed on the decision of Delhi Tribunal in the case Rajinder Kumar Aggarwal (HUF) vs DC1T [2021] 131 taxmann.com 252 (Delhi-Trib.)

24. The AO has stated that marketing services rendered by the assessee are technical in nature and which are used by MSSPL for development of business, which results in enduring benefit. Accordingly, the A.O. has concluded that make available is satisfied as there is transfer of skill and knowledge which falls within the ambit of technical services. The DRP has also confirmed the view of the A.O. The AO and DRP has erred in not appreciating that what should be made available is technical knowledge, experience, skill etc. Making available service does not make available knowledge, experience, skill etc. MSSPL has to approach the assessee every time to get new customers and maintain relationship with existing customers. The test of make available as envisaged in the DTAA is therefore not satisfied in the instant case.

25. In light of the aforesaid reasoning, we hold that the sales and marketing services rendered by the assessee to MSSPL would not fall within the ambit of FTS as defined under section 9(1)(vii) or under Article 12 of DTAA. It is ordered accordingly."

11. Taking into consideration the entire aspect of the matter, we find force in the submission made by the Ld.Counsel that since it has already been decided by the Coordinate Bench that the services rendered to the assessee by the said

Manthan Systems Inc. is not falling within the ambit of FTS or under Article 12 of the treaty, the assessee is not liable to deduct TDS on the payment made to the MSI."

8. The fact for the year under consideration being similar wherein the sales commission paid under the same agreement, we are of the view that the above decision of the coordinate bench is squarely applicable to the impugned issue for the year under consideration also. Therefore, respectfully following the above decision we hold that there is no infirmity in the order passed by the CIT(A) in holding that there is no liability to deduct tax towards sales commission paid by the assessee to Manthan System Inc and accordingly no disallowance is warranted u/s. 40(a)(i) of the Act.

9. We further notice that the coordinate bench in assessee's own case for AYs 2012-13 to 2015-16 (supra)

13. At the outset of the proceedings, the Ld.Counsel appearing for the assessee submitted before us that the issue is squarely covered by the judgment of Hon'ble Karnataka High Court in case of CIT, LTU vs. Biocon Ltd., reported in [2020] 121 taxmann.com 351 (Karnataka). In this regard, the Ld.Counsel appearing for the assessee submitted the written notes which is reproduced as follows:

"Ground 2 The Revenue has taken a Ground that services rendered by the US entity are in the nature of Consultancy as provided in Explanation 2 to Section 9(1)(vii) providing significant professional skills and the subsidiaries are not mere marketing or commission agents.

In this regard, the Respondent submits as follows:

a. The CIT(A) has held that sales commission is not taxable both under the Income Tax Act and DTAA. The Revenue has not taken ground that the CIT(A)'s decision of non-taxability under the DTAA needs to be reversed. Thus, entire contention of Revenue has no legs to stand on as once income is not taxable under the tax treaty, its taxability under the Act is of no relevance.

b. Without prejudice, the Appellant submits that MSI is not providing any technical, managerial or consultancy services rather has been engaged to act as authorized business partner to market and promote

the products or services of Respondent outside India. For the said activity, Respondent pays sales commission to MSI. Sales Commission is computed based on the percentage of billings made to customers for the orders secured by MSI.

c. The services provided by MSI are not in the nature of FIS even under India USA DTAA. Payment to MSI is not covered under sub clause (a) to Article 12(4) of India-USA DTAA as it is not ancillary to application or enjoyment of any right.

d. It is also not covered under clause (b) to Article 12(4) of India- USA DTAA as Sales Commission is not in the nature of technical or consultancy services. Further, the services of MSI do not 'make available' any technical knowledge, experience, know-how, process to the Respondent. Thus, the payment does not satisfy the make available test envisaged under Article 12 of India USA DTAA.

e. The Honourable Bangalore ITAT in the case of Manthan Systems Inc (Supra) has held that amount paid by the Respondent to MSI is not in the nature of FTS both under the Act and DTAA."

14. We also find from the order passed by the Ld.CIT(A) that while dealing with the matter, he has relied upon the judgment passed by the jurisdictional High Court in case of CIT, LTU vs. Biocon Ltd. (supra) which was held as follows:

"6. We have considered the submissions made by learned counsel for the parties and have perused the record. The singular issue, which arises for consideration in this appeal is whether the tribunal is correct in holding that discount on the issue of ESOPs i.e., difference between the grant price and the market price on the shares as on the date of grant of options is allowable as a deduction under Section 37 of the Act. Before proceeding further, it is apposite to take note of Section 37(1) of the Act, which reads as under:

Section 37(1) says that any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head, "Profits and Gains of Business or Profession".

7. Thus, from perusal of Section 37 (1) of the Act, it is evident that the aforesaid provision permits deduction for the expenditure laid out or expnded and does not contain a requirement that there has to be a pay out. If an expenditure has been incurred, provision of Section 37(1) of the Act would be attracted. It is also pertinent to note that Section 37 does not envisage incurrence of expenditure in cash.

8. Section 2(15A) of the Companies Act, 1956 defines 'employees stock option' to mean option given to the whole time directors, officers or the employees of the company, which gives such directors, officers or employees, the benefit or right to purchase or subscribe at a future rate the securities offered by a company at a free determined price. In an ESOP a company undertakes to issue shares to its employees at a future date at a price lower than the current market price. The employees are given stock options at discount and the same amount of discount represents the difference between market price of shares at the time of grant of option and the offer price. In order to be eligible for acquiring shares under the scheme, the employees are under an obligation to render their services to the company during the vesting period as provided in the scheme. On completion of the vesting period in the service of the company, the option vest with the employees.

9. In the instant case, the ESOPs vest in an employee over a period of four years i.e., at the rate of 25%, which means at the end of first year, the employee has a definite right to 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. It is well settled in law that if a business liability has arisen in the accounting year, the same is permissible as deduction, even though, liability may have to quantify and discharged at a future date. On exercise of option by an employee, the actual amount of benefit has to be determined is only a quantification of liability, which takes place at a future date. The tribunal has therefore, rightly placed reliance on decisions of the Supreme Court in Bharat Movers supra and Rotork Controls India P. Ltd., supra and has recorded a finding that discount on issue of ESOPs is not a contingent liability but is an ascertained liability.

10. From perusal of Section 37(1), which has been referred to supra, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of Section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraph 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under Section 37(1) of the Act subject to fulfillment of the condition.

11. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of accounts, which has been prepared in accordance with Securities And Exchange Board of

India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.

12. So far as reliance place by the revenue in the case of CIT VS. INFOSYS TECHNOLOGIES LTD. is concerned, it is noteworthy that in the aforesaid decision, the Supreme Court was dealing with a proceeding under Section 201 of the Act for non deduction of tax at source and it was held that there was no cash inflow to the employees. The aforesaid decision is of no assistance to decide the issue of allowability of expenses in the hands of the employer. It is also pertinent to mention here that in the decision rendered by the Supreme Court in the aforesaid case, the Assessment Year in question was 1997-98 to 1999- 2000 and at that time, the Act did not contain any specific provisions to tax the benefits on ESOPs. Section 17(2)(iiia) was inserted by Finance Act, 1999 with effect from 01.04.2000. Therefore, it is evident that law recognizes a real benefit in the hands of the employees. For the aforementioned reasons, the decision rendered in the case of Infosys Technologies is of no assistance to the revenue. The decisions relied upon by the revenue in Gajapathy Naidu, Morvi Industries and Keshav Mills Ltd. supra support the case of assessee as the assessee has incurred a definite legal liability and on following the mercantile system of accounting, the discount on ESOPs has rightly been debited as expenditure in the books of account."

The Ld.DR relied upon the order passed by the authorities below.

15. We also find that in the case of CIT, LTU vs. Biocon Ltd. (supra), the revenue relied upon the judgment in case of CIT vs. Infosys Technologies Ltd. reported in (2008) 166 Taxman 204/297 ITR 167 which has also been taken care by the Jurisdictional High Court and distinguished to this effect that the question raised therein i.e. the ESOP benefit was not in the provision of law at that material point of time rather the same was inserted by the Finance Act, 1999 w.e.f. 01.04.2000 and not applicable to the case of CIT, LTU vs. Biocon Ltd. (supra). Finally the Ld.CIT(A) relying upon the jurisdictional High Court order granted relief to the assessee by deleting addition made by the Ld.AO on account of ESOP expenses. Thus taking into consideration the entire aspect of the matter, we also do not find any reason to interfere with the same as the same is found to be just and proper. This ground of appeal preferred by the revenue, thus fails.

10. The issue of allowability of ESOP expenses is well settled and the coordinate bench has been consistently holding that the ESOP expenses are to be allowed as a deduction. Respectfully following the decision of the Hon'ble

Jurisdictional High Court and the decision of the coordinate bench we are not inclined to interfere with the decision of the CIT(A) in allowing the claim of the assessee towards ESOP expenses.

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11. On a perusal of records we notice that the facts of AY 2017-18 & 2018-19 pertaining to the issue of disallowance made towards section 40(a)(i) of the Act and disallowance of ESOP expenses are similar to the facts pertaining to AY 2016-17. Therefore, in our considered view our decision for the AY 2016-17 on these two issues is mutatis mutandis applicable to AYs 2017-18 & 2018-190 also.

12. In the result, the appeals filed by the Revenue for AY 2016-17 to 2018-19 are dismissed.

Order pronounced in the open Court on 15th October, 2024.

Sd/-	Sd/-
(George George K.)	**(Padmavathy S.)**
Vice President	**Accountant Member**

Bengaluru, Dated: 15th October, 2024
n.p.

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT, concerned*
4. *The DR, ITAT, Bangalore*
5. *Guard File*

By Order

//True Copy//

Assistant Registrar
ITAT, Bangalore