**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**MUMBAI BENCH "I", MUMBAI**
**BEFORE SMT BEENA PILLAI, JUDICIAL MEMBER**
**AND**
**SHRI RATNESH NANDAN SAHAY, ACCOUNTANT MEMBER**

**ITA No.852/M/2024**
**Assessment Year: 2015-16**

| **Amarchand Mangaldas & Suresh A Shroff & Co.**<br>5th Floor,<br>Ganpatrao Kadam Marg,<br>Peninsula Chambers,<br>Lower Parel,<br>Mumbai- 400013.<br>**PAN: AAAFA6542P** | **Vs.** | **Assistant Commissioner of Income Tax, Circle 16(2)**<br>Room No. 440,<br>Aayakar Bhawan,<br>M. K. Road,<br>Mumbai- 400020. |
|---|---|---|
| **(Appellant)** | | **(Respondent)** |

**Present for :**
**Assessee by** : Shri Sunil M. Lala, A.R.
**Revenue by** : Shri Soumendu Kumar Dash (SR. D.R.)

**Date of Hearing** : 17 . 09 . 2024
**Date of Pronouncement** : 30 . 09 . 2024

**O R D E R**
**Per: Ratnesh Nandan Sahay, Accountant Member:**

1. This appeal has been filed by the appellant against the Order of the Ld. CIT (Appeals) passed u/s. 250 of the Income Tax Act [the 'Act' in short] vide DIN & Order No. ITBA/NFAC/S/250/2023-

24/1059130291(1) Dated 28/12/2023 for the Assessment Year 2015-16.

2. Following grounds of appeal have been raised by the appellant:

1. *“The order passed by the Learned Commissioner of Income tax (Appeals) ("Ld. CIT(A)") under section 250 of the Income tax Act, 1961 ("Act") in denying the foreign tax credit of INR 1,10,93, 772 and making a further enhancement of INR 21,37,846 being taxes withheld by the clients of the assessee located in countries other than Japan, was erroneous and bad in law.*
2. *The Ld. CIT(A), after having accepted that the decision of learned Assessing Officer ("Ld. AO") was erroneous, ought not to have adopted a different ground for denying the foreign tax credit to the appellant.*
    - 2.1. *The Ld. CIT(A) ought to have appreciated that the case of the appellant was squarely covered by Appellant's own case pertaining to an earlier period (i.e. AY 2013-14) passed by the Hon'ble Income Tax Appellate Tribunal ("Hon'ble ITAT") reported in (2020) 122 taxmann.com 248 (Mumbai), wherein it was categorically held that the Appellant was eligible to get foreign tax credits for the taxes withheld by its clients in Japan.*
    - 2.2. *The Ld. CIT(A) ought to have appreciated that the CIT(A)'s scope under section 250 of the Act was restricted to examine the correctness of the decision made by the Ld. AO. Having held that the Ld. AO had erred in holding that the payments are in the nature of 'Independent Personal Services' and that they are in the nature of 'fees for technical services', the Ld. CIT(A) ought not have denied the foreign tax credit on a completely different ground which was not the subject matter of assessment or the subject matter of appeal.*
    - 2.3. *The decisions relied on by the Hon'ble CIT(A) to hold that it has powers to enhance the assessment are not applicable to the facts of the present case.*

*2.4. The Ld. CIT(A) erred in relying on factually distinguishable precedents viz. the Hon'ble Delhi High Court in the case of Gurinder Mohan Singh Nindrajog v. CIT [2012] 18 taxmann.com 176 (Delhi) had merely held that the CIT(A) had the powers to enhance the income if the addition/disallowance forming part of the subject matter of appeal. In the instant case, the 'subject matter of appeal was not dealing with the aspect of whether the taxpayer was required to file return of income in the foreign jurisdiction to claim foreign tax credits in India and, therefore, the Ld. CIT(A) ought not to have adopted the said ground to deny the foreign tax credits to the Appellant.*

*3. The Ld. CIT(A) ought to have followed the decision of Hon'ble ITAT in the Appellant's own case pertaining to AY 2014-15 and AY 2017-18 (in (2020) 122 taxmann.com 248 (Mumbai))), thereby disregarding the principle of judicial hierarchy.*

*3.1. The Ld. CIT(A) being a lower body ought to have followed the decision of Hon'ble ITAT in the earlier year and the subsequent year.*

*3.2. The Ld. CIT(A) ought to have appreciated that the issue of providing foreign tax credits to the Appellant had already been considered by the Hon'ble ITAT two other appeals pertaining to AY 2017-18 and 2018- 19 in case of an affiliate of the Appellant, M/s Cyril AmarchandMangaldas which were reported in DCIT v. Cyril AmarchandMangaldas (2023) 154 taxmann.com 99 (Mumbai - Trib.), wherein the issues were decided in favour of the Appellant.*

*3.3. The Ld. CIT(A) erred in law by disregarding the principle of judicial hierarchy while overruling the decision of Hon'ble ITAT in Appellant's own case, thereby ignoring the principles laid down by Hon'ble Supreme Court in CIT v. Gopal Purohit (2011) 334 ITR (St.) 308) wherein the Hon'ble SC had held that the tax authorities are bound to follow the rule of consistency, the hierarchy and*

*different views should not be taken for different years in tax matters.*

4. *The Ld. CIT(A) had erred in denying the foreign tax credits to the Appellant pertaining to the taxes withheld by its clients in overseas jurisdiction Japan, China, Brazil and Nepal on the ground that the Appellant had not filed its return of income in the relevant jurisdictions.*
   - 4.1. *The Ld. CIT(A) grossly erred in holding that taxes withheld in the foreign jurisdiction would not amount 'subjected to tax' in the foreign jurisdiction unless income tax return is filed by the assessee in such jurisdictions.*
   - 4.2. *The Ld. CIT(A) had acted on the basis of his personal surmises and conjectures by holding that it will not be possible to determine the income chargeable to tax in the foreign jurisdiction unless a return of income is filed the said foreign jurisdiction.*
   - 4.3. *The Ld. CIT(A) had also erred in law and on the facts of the case by holding that gross amount of legal fees received by the assessee in a foreign jurisdiction cannot be equated with the tax payment on the net income. He has also erred in assuming that the income portion of the professional fees has not been considered by the Hon'ble ITAT.*
   - 4.4. *The Ld. CIT(A) had also erred in law and on the facts of the case by holding that the Ld. ITAT had not analyzed the quantum of Japanese tax paid in Japan even though the entire amount of income earned by the assessee as well as the taxes withheld in Japan were dulysubmitted.*
   - 4.5. *The Ld. CIT(A) misinterpreted the decision of Bank of India v. ACIT (2021) 125 taxmann.com 155 to state that withholding of taxes in the foreign jurisdiction would not be considered as 'subjected to tax' in that foreign jurisdiction, but the said decision did not hold anything of that sort. It merely distinguished between 'subjected to tax' and 'liable to tax' in respect of foreign branch offices of Indian bank, which were required to pay taxes on*

*net basis in the foreign respective foreign jurisdictions.*

4.6. *The Ld. CIT(A) erred in holding that tax deducted at source on gross basis did not amount to taxes paid on the income portion of such gross sum in that jurisdiction, ignoring the fact that the payments in the nature of 'fees for technical services' had to be offered for taxation on gross basis and not on net basis as per Article 12 of the DTAA, which is a settled position of law and also had been confirmed in the Appellant's own case by this Hon'ble ITAT.*

4.7. *The Ld. CIT(A) erred in disregarding the provisions of Article 23 of the India-Japan DTAA and other relevant DTAAs, which categorically states that India "shall" provide foreign tax credit to its resident taxpayers so long as the taxes are paid in other direction either directly or by "deduction".*

4.8. *The Ld. CIT(A) ought to have appreciated that Indian tax authorities cannot mandate its taxpayers to file return of income in the foreign jurisdictions, especially when neither the relevant DTAAs nor the Act imposes any such conditions.*

4.9. *The Ld. CIT(A) ought to have appreciated that as per Article 31(1) of Vienna Convention on the Law of Treaties ("VCLT") states that "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the Treaty in their context and in the light of its object and purpose".*

5. *The Ld. CIT(A) also erred in law and on the facts of the case by disallowing credit for the taxes withheld by the clients of the assessee in Brazil, China and Nepal and enhancing the amount by Rs. 204,823 by following the same erroneous lines of argument.*
6. *The Ld. CIT(A) ought to have at least allowed the taxes withheld in foreign jurisdictions as tax deductible expenses under section 37 of the Act as held by the jurisdictional High Court in the cases of Reliance Infrastructure Ltd. v. CIT (2016) 390 ITR 271 (Bom.) and the jurisdictional Hon'ble*

*Mumbai Bench of ITAT in the case of Bank of India v. ACIT (2021) 125 taxmann.com 155, etc.*

*6.1. The Ld. CIT(A) erred in holding that withholding tax would not amount to final payment of taxes and that the final tax would be paid by filing return of income on the net income and only then such taxes could be allowed as tax deductible expenditure, whereby completely ignoring the fact that taxes of 'fees for technical services' shall have to be withheld on the gross income as per the relevant DTAA.*

*6.2. The Ld. CIT(A) ought not to have held that 'withholding of tax' would not be considered as 'subjected to tax', ignoring the decision of this Hon'ble ITAT in the case of Bank of India v. ACIT (supra), wherein it was categorically held that withholding of taxes on the dividend income had resulted in "subjected to tax" in the foreign country.*

*6.3. The Ld. CIT(A)'s attempt to distinguish the case of Reliance of Infrastructure Ltd v. CIT (2016) 390 ITR 271 was not appropriate. In the said case, even the excess taxes paid by the taxpayer in Saudi Arabia (i.e. the assessee therein had paid more taxes than what was required) was allowed as tax deductible expenditure in India.*

*7. The Appellant craves permission of this Hon'ble ITAT to reserve its right to add/delete/amend the grounds of appeal at any time before the final hearing."*

3. The AO, on perusal of the return of the income, noticed that the assessee has claimed relief u/s 90 of the Act for the income received for services rendered in Japan. Since, the receipt was in the nature of independent personal services, it is not taxable in Japan, the tax was not required to be withheld there. Thus, the credit of such withholding tax is not allowable to the assessee in India. The AO, therefore, asked the assessee to justify why

tax was withheld in Japan? In response to that the assessee, vide its letter dated 15.12.2018 submitted as under: -

1. *"As mentioned in the preliminary submission, the legal services provided by the assessee would squarely fall within the ambit of 'consultancy services in view of the decision of the Hon'ble Supreme Court in the case of GVK Industries Lid. vs. ITO (2015) 371 ITR 453 as provision of legal services requires skill, acumen and knowledge in the specialized field. Therefore, in accordance to Article 12 of the India- Japan Double Taxation Avoidance Agreement ("DTAA"), the legal services rendered by the assessee to the Japanese residents would be taxable in Japan at the rate of 10%. Since the taxes have already been paid in Japan, the same should be allowed as admissible tax credits.*
2. *It is pertinent to highlight that the provisions of Article 14 of the DTAA states that income of a professional services or other activities of an independent character would be taxable in the resident country only ie. India, in the instant case, and it has also been provided that the term 'professional services' would include independent activities of lawyers. We have been informed by our Japanese clients that Japanese tax authorities have interpreted differently and have held that the provisions of Article 14 of the*

*DTAA shall be applicable only in case of professionals working in their individual capacity i.e. independent lawyers and not to entitles engaged in rendering professional services like corporate law firms such h as the assessee. Accordingly, our Japanese clients were directed by Japanese tax authorities to deduct tax under Article 12 of the India- Japan DTAA and deposit the taxes to its credit while making payments to the assessee.*

3. *We admit that certain decisions rendered by the Indian judiciary (i.e. jurisdictional ITAT in the case of Maharashtra State Electricity Board 90 ITD 793 and DCIT Vs Chandbourne & Parke LLP (2005) 2 SOT 434), have held that legal services provided by a partnership firm would fall within the ambit of 'Independent Personal Services".*
4. *However, it is important to note that these decisions have been rendered by the Indian judiciary in respect of payments made by Indian residents to non-residents towards legal services rendered by a non-resident partnership firms and not in the context of an Indian partnership firm receiving income from a non-resident client. In any case, decisions of the Indian judiciary do not have any binding effect on the Japanese tax authorities or Japanese judiciary. Hence, the analysis of whether tax needs to be withheld*

*or not on the payments to be made by a Japanese client would depend on the position taken by the Japanese tax authorities and Japanese Courts.*

5. *Without prejudice to our other contentions, it must be noted that in cases where the taxes have already been withheld in Japan, they cannot be reversed, However, credit should be granted to the assessee in respect of the taxes withheld in Japan as per the provisions of Article 23 of the DTAA which reads as under:*

> *"...India shall allow deduction from the tax on the income of that resident an amount equal to the Japanese tax paid in Japan, whether directly or by deduction".*

6. *Thus, so long as the entitlement of the assessee to claim credit of taxes paid in Japan is not disputed as per Article 23 of the DTAA, the credit cannot be denied to the assessee. As your goodself has acknowledged that taxes have been withheld and deposited in Japan, credit should be made available to the assessee under Article 23 of the DTAA.*

7. *Without prejudice, we would also like to submit here that it is a settled legal position that the provisions of the DTAA cannot be used to the detriment of the assessee. The CBDT Circular No. 621 dated December 19, 1991provides as under:*

*"Since the tax treaties are intended to grant relief and not put residents of a Contracting State at a disadvantage vis-a-vis other taxpayers, section 90 of the Income-tax Act had been amended to clarify any beneficial provisions in the lave will not be denied to a resident of a contracting country merely because corresponding provisions in a tax treaty is less beneficial."*

8. *In this regard, it must be noted that as per the provisions of section 90 of the IT Act, credit to the income taxes paid in the other countries should be provided on the income in respect of which the assessee is liable to pay tax in India, Section 901)(a)(i) of the IT Act specifically stipulates that the Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India for granting relief in respect of income on which taxes have been paid both under the provisions of the IT Act and income-tax in that country. In view of the same, it is submitted that credit for the taxes paid abroad have to be provided under section 90 of the IT Act and it cannot be denied based on interpretation of Article 14 of the DTAA as the same would tantamount to the violation of the provisions of the CBDT Circular.*

*9. We would also like to place our reliance on the decision of the jurisdictional ITAT in the case of Tata Sons Ltd. Vs DCIT (2011) 10 taxmann.com 87, wherein it was held that the taxes paid abroad should be taken into account for the purpose of computing admissible tax credits under the provisions of the IT Act, if not under the DTAA. The relevant extract is as follows:*

*"It was incorrect to proceed on the assumption that State Income-tax paid in USA, or in Canada, cannot be taken into account for the purposes of computing admissible tax credits. It was so for the elementary reason that the provisions of a tax treaty, based on which tax credits are said to be inadmissible, cannot be pressed into service to decline a benefit to the assessee which is otherwise available to him, even in the absence of such a tax treaty, under the provisions of the Income-tax Act."*

*"........Accordingly, even though the assessee was covered by the scope of India US and India Canada tax treaties, so far as tax credits in respect of taxes paid in those countries were concerned, the provisions of section 91, being beneficial to the assessee, held the field........"*

*10. In view of the said decision, it is humbly submitted that credit for the taxes withheld and deposited in Japan may kindly be allowed and thus, render justice.*

*11. Without prejudice to the other arguments, it is also respectfully submitted that credits for taxes paid in Japan of Rs.1,10,93,772/- should at least be available as a tax deductible expense under section 37 of the IT Act since gross revenue has been shown as revenue by the assessee. As the withholding of taxes took place in Japan which was without the control of the assessee and the assessee had offered the entire revenue for taxation in India in anticipation of getting credit of the taxes withheld in Japan. In case credit for the taxes withheld in Japan is not allowed, then the taxes withheld in Japan should, at least, be allowed as a tax deductible expense. It is pertinent to note that the amounts withheld in Japan towards taxes had neither accrued nor deemed to be accrued to the assessee under the provisions of the IT Act.*

*12. It is pertinent to note that provisions of section 40(a)(ii) of the IT Act, which lays down a bar for claiming the payment of taxes is deduction, could not be pressed into service in the instant case in view the said restriction is applicable only in respect of the taxes paid under the provisions of the fact that the said re the IT Act or*

*Act in respect of the sums of taxes which are eligible for relief of tax under section 90 of the IT Act.”*

4. The submissions made as above were considered by the AO but the tax credit was not allowed to the assessee on the ground that the assessee has provided professional services to clients in Japan and do not have a fixed base or presence for more than 183 days in Japan. However, TDS has been deducted by Japanese entities and credit of Rs.1,10,93,772/- was claimed in Income Tax return filed in India by the assessee. The credit of such withholding tax is not allowable to assessee in India as a receipt is not taxable in Japan and thus, the tax was not required to be withheld, as it was in the nature of independent personal services. Reliance is placed on para 18 and 19 of the judgement of ITAT in Ershisanye Construction Group India P Limited vs. DCIT Circle 11(1) Kolkata in ITA No. 756/Kol/2015 and further on ITAT Mumbai order in case of Maharashtra State Electricity Board, 90ITD 793(mum) and DCIT vs. Chandbourne & Parke LLP (2005) 2 SOT 434 (mum) as referred in ITA No. 756/Kol/2015. Similar ratio may also be applied in the matter of claim of withholding of taxes on receipts from other countries/foreign clients.
5. Aggrieved by the order of the Ld. AO, the appellant filed appeal before the Ld. CIT(A) who vide impugned order decided the appeal as under: -

1. *"The CIT (Appeals) has the power of enhancement of assessment in the facts of the present case, as the subject matter of the assessment was claim of foreign tax credit u/s 90 of the Act, which has been considered expressly or by clear implication by the AO from the point of view of taxability of the assessee (paras 6.3 to 6.5).*
2. *The assessment for the impugned AY 2016-17 is enhanced by rejecting all the foreign tax credit claims, in respect of the taxes withheld abroad in treaty partner jurisdictions. Therefore, the Assessing Officer is directed to disallow the foreign tax credit claim of Rs.1,32,31,618/- relating to taxes withheld in Japan, and Malaysia (para 42).*
3. *The taxes withheld on gross receipts in Japan and other foreign jurisdictions are not eligible for deduction from the total income offered in India. No further deduction should be allowed in this regard (paras 49 & 50.*
4. *The assessing officer is directed to examine the reconciliation of 27 transactions reflecting in AIR submitted by the appellant during the appellate proceedings and pass appropriate orders if the reconciliation is found to be correct (para 52).*
5. *The AO is directed to pass necessary orders accordingly, In the result, the appeal is partly allowed for statistical purposes."*

6. Aggrieved by the order of the Ld. CIT(A), this appeal has been filed before us. During the appellate proceedings before us, the appellant has submitted as under:

   1. *"Amarchand & Mangaldas & Suresh A. Shroff & Co. ("Appellant") is a partnership firm established under the provisions of the Indian Partnership Act and is engaged in the business of providing legal services. The Appellant receives professional legal fees from its clients situated in India as well as outside India. Certain overseas clients had withheld taxes in accordance with the relevant Double Taxation Avoidance Agreements ("DTAA") before making payments to the Appellant. For the relevant years, the Appellant had received professional fees from clients situated in Japan, Malaysia, Brazil, China and Nepal and taxes were withheld by them in the range of 6% to 15%. It must be noted that the Appellant was liable to tax in India at the rates of 33.99% and 34.608% for the AYs 2015-16. The details of the taxes withheld by overseas clients for the relevant years are as follows:*

| ***Assessment Year - 2015-16*** | |
|---|---|
| ***Country*** | ***Taxes withheld*** |
| *Japan* | *Rs. 1,10,93,772* |
| *Brazil* | *Rs. 2,09,074* |
| *China* | *Rs. 46,404* |
| *Nepal* | *Rs. 18,82,368* |

*The Appellant claimed Foreign Tax Credit ("FTC") with respect to the above income in accordance with the provisions of the DTAA (ie., under Article 23 of India-Japan, India-Brazil, India-China and India-Nepal DTAAs and under Article 24 of India-Malaysia DTAA respectively.)*

2. *The Ld. Assessing Officer ("AO") denied the FTC for Japan for both the years. As per the AO, the provisions of Article 14 of the India-Japan DTAA dealing with Independent Personal Services would be applicable to the case of the Appellant; and since the Appellant did not have a fixed base in Japan for more than 183 days (which is a prerequisite for taxability under Article 14), no tax was liable to be deducted in Japan and consequently, FTC cannot be granted to the Appellant in India for the taxes wrongly withheld in Japan. For this purpose, the AO had relied on the decisions of (i) Ershisanye Construction Group India P Limited v. DCIT (ITA No. 756/Kol/2015); (ii) Maharashtra State Electricity Board v. CIT 90 ITD 793; and (iii) DCIT v. Chandbourne & Parke LLP (2005) 2 SOT 434.*
3. *During the pendency of appeal before the Ld. Commissioner of Income tax (Appeals) ("Ld. CIT(A)"), the Hon'ble Mumbai Income Tax Appellate Tribunal ("Hon'ble ITAT") had decided the identical issue*

*in favour of the Appellant in one of the earlier years (i.e. AY 2014-15) reported in (2020) 122 taxmann.com 248 (Mumbai). The Hon'ble ITAT has held that Article 14 of the India-Japan DTAA was applicable only to individuals and thus not applicable to the Appellant, which is a partnership firm. It further held that the fees earned by the Appellant firm in Japan was taxable as fees for technical services under Article 12 and that the FTC ought to have been granted to the Appellant firm for the taxes withheld in Japan. Further, it held that when the source jurisdiction has taken a reasonable and bonafide view, which is not manifestly erroneous, that taxes should be withheld at source, FTC should be provided by the resident jurisdiction even though the legal position in the residence jurisdiction may not be the same. Accordingly, the Hon'ble ITAT held that India should provide FTC for the taxes withheld in Japan. As regards the decisions relied on by the AO (see para 2 above), it held that same were distinguishable and not applicable to the facts of the Appellant. The decision of AY 2014-15 was again followed by the Hon'ble ITAT in AY 2017-18 (ITA No 982/Mum/2023 dated 30.06.2023) and in the case of Assessee's affiliate Cyril Amarchand Mangaldas for AY 2017-18 and AY 2018-19 reported in (2023) 154 taxmann.com 99. Compilation of the aforesaid*

*orders passed by Hon'ble ITAT were submitted during the course of hearing.*

4. *Before the Ld. CIT(A), the Appellant relied on the aforementioned compilation of orders. However, the Ld. CIT(A) refused to grant/allow FTC for the taxes withheld in Japan. Instead, he issued an enhancement notice stating as to why FTC should not be denied in India since the Appellant had not filed "return" of income in Japan and therefore, it could not be said to have been "subjected to tax" in Japan. This rationale was adopted by the Ld. CIT(A) in both its orders dated 28.12.2023 concerning AY 2015-16. Further, in Paras 11, 13 and 18 (page 13 and 17 of AY 2015-16 order), the Ld. CIT(A) held that he is not bound by the order of Hon'ble ITAT since the above aspects had not been looked into by the Hon'ble ITAT. Further, in para 25 (page 19 of AY 2015-16 order), Ld. CIT(A) has referred to and quoted extract of the decision of Bank of India (2021) 125 taxmann.com 155 despite conceding that the facts of it were different (as Bank of India had incurred losses and wanted to claim refund in India of the taxes paid abroad which is evident from the Page 20 & 22 of the CIT(A) order, which is not so in the instant case. Further, nowhere it is stated in the said judgement that an Indian assessee needs to file his return of income abroad to claim FTC in India).*

*Similarly, despite holding in para 34 (page 26 of AY 2015-16 order) that Rule 128 of the Income tax Rules, 1962 ("IT Rules") and Form 67 is applicable from AY 2017-18 onwards, the Ld. CIT(A) proceeded to deny FTC in AYs 2015-16 and 2016-17 because according to him, the Appellant's income had not been "subjected to tax" in Japan since the Appellant had not filed any "return" of income in Japan. Further, the Ld. CIT(A), for the same reasons as above, made the enhancement by disallowing the FTC granted by the AO in respect of the tax deducted at source in the other countries viz. Brazil, China, Nepal (AY 2015-16) and Malaysia (AY 2016-17).*

5. *It is respectfully submitted that the aforesaid reasoning of the Ld. CIT(A) is not in accordance with the law to say the least. As self-evident from the perusal of Article 23 of India-Japan DTAA (reproduced by the Ld. CIT(A)'s AY 2015-16 order at Para 14 (page 13), there is no requirement whatsoever to file any return of income in source jurisdiction to claim FTC in India. What is relevant for grant of FTC in India is that taxes should have been paid/deducted at source/withheld abroad. Since it is undisputed that that the taxes have been deducted abroad in the case of Appellant, it is submitted that the FTC ought to have been allowed. In support of the above, reliance is placed on the decision of the Hon'ble ITAT in the case of ITTIAM*

*Systems P. Ltd. v. ITO (2021) 86 ITR(T) 611 which had considered the India-Japan, DTAA and allowed FTC in respect of taxes withheld abroad and after relying on the decision of Hon'ble Karnataka High Court in the case of Wipro Ltd. (2015) 382 ITR 179, held as under:*

> *"24.......for eliminating double taxation of doubly taxable income in the hands of assessee, it would be necessary to establish the taxes paid by assessee in USA, Japan and Germany. The condition stipulated is very clear that FTC is available on taxes paid in these countries.*
>
> *42. Based on above discussion, we are of the view that assessee is eligible for FTC in full, amounting to taxes paid in USA, Japan and Germany."*
>
> *(Further, for the sake of completeness it may be pointed out that the phrase 'subjected to tax' which according to the Ld. CIT(A) can happen only on filing of return of income abroad has not even been used in any of the five DTAAs relevant to the instant case).*

*In light of the above, it is submitted that the Ld. CIT(A) ought to have followed the order of the Hon'ble ITAT in the case of the Appellant (and its affiliate) referred to in para 3 above.*

6. *With respect to the submissions made by the Learned Departmental Representative ("Ld. DR") that the Appellant would not be entitled*

*FTC without filing of return of income as taxes withheld cannot be construed as taxes paid in the foreign jurisdiction, reference may be drawn to the commentary on OECD Model Convention on Article 2 (dealing with Taxes Covered), which is extracted hereunder:*

> *"3. This paragraph states that the Convention applies to taxes on income.... irrespective of the method by which the taxes are levied (e.g. by direct assessment or by deduction at the source, in the form of surtaxes or surcharges or as additional taxes)."*

*Reliance is placed on the judgement of the Hon'ble Supreme Court in the case of Engineering Analysis Centre for Excellence (P.) Ltd. v. CIT (2021) 432 ITR 471 wherein the Apex Court placed heavy reliance on the commentary of OECD Model Convention (while deciding the issue before it) and held that said commentary on OECD Model Convention is "significant" in interpreting the treaty provisions (please refer Para 150, 151, 158 and 159 of the order). Further reliance is also placed on the judgement of the Hon'ble Delhi High Court in the case of BDR Finvest (P.) Ltd. v. DCIT (2024) 161 taxmann.com 583 wherein it was held that "taxes withheld shall have to be treated as taxes paid on behalf of the assessee" (please refer para 21.2 and 21.4 of the said judgement). Further, it would be pertinent to point out that even in the case of*

*ITTIAM Systems P. Ltd. (Supra), FTC was granted with respect to taxes withheld in the source jurisdictions (please refer para 6 of the order read with paras 20 and 24). Copies of the aforementioned decisions have been already handed over to the Hon'ble Bench during the course of hearing.*

7. *As regards FTC with respect to the other countries (namely Nepal, Brazil, China and Malaysia), the Ld. CIT(A) has used the same reasoning as mentioned above in Para 4 above. The Ld. DR has also relied on the same arguments that he made with respect to India-Japan DTAA for denying the FTC for taxes withheld in the aforesaid countries. Thus, the same submissions made by the Appellant in Para 5 and Para 6 above are being humbly reiterated for the FTC with respect to the taxes deducted in Nepal, Brazil, China and Malaysia as well.*

8. *Further, for the sake of completeness and as submitted during the course of hearing, it is respectfully submitted that by and large the judicial views have been consistent that FTC should be granted to the assessee for the taxes paid/deducted abroad under section 90/91 of the Act. Reference may be made to the decision of (i) Tata Sons Ltd. v. DCIT (2011) 10 taxmann.com 87 (Mumbai); (ii) Dr. Rajiv I. Modi v. DCIT (2017) 86 taxmann.com 253 (Ahmedabad);*

*and (iii) Aditya Khanna v. ITO (2019) 105 taxmann.com 323 (Delhi). Further, reliance is also placed on the decision of Hon'ble ITAT in the case of Dynamic Drilling & Services (P.) Ltd. v. ACIT (2022) 140 taxmann.com 102 (Delhi) wherein FTC was granted in respect of taxes withheld at source. The relevant extract is as follows:*

*"19. While arriving to our aforesaid conclusion we also draw our guidance in support from the decision of Hon'ble Mumbai ITAT in the case of Amarchand & Mangaldas Suresh A. Shroff & Co. v. Asstt. CIT [2020]122 taxmann.com 248/[2021] 187 ITD 750 where in para 10 at page 8 therein, the Hon'ble Bench held that DTAA provisions don't require that state of residence eliminate the double taxation in all cases where state of source has imposed its tax by applying to an item of income, a provision of convention that is different from state of residence considers to be applicable. Therefore, in all cases in which interpretation of residence country about applicability of a treaty provision is not the same as that of source jurisdiction about the provision and yet the source country levied taxes whether directly or by way of tax withholding, tax credit cannot be declined."*

9. *In light of the aforesaid facts and submissions, it is humbly prayed before this Hon'ble Bench to allow the appeals of the Appellant by directing the Ld. AO to provide FTC in full for the taxes withheld in Japan, Nepal, Brazil, China and Malaysia and oblige.*

   *It is respectfully submitted before your Honours that the above submissions may kindly be taken on record and appropriate relief may kindly be granted to the Appellant."*

7. The Ld. CIT (DR) on the other hand relied on the orders of the Ld. CIT (A) and submitted that the Appellant would not be entitled for FTC without filing of return of income as taxes withheld cannot be construed as taxes paid in the foreign jurisdiction. We have considered the facts of the case, rival submissions and the judicial position on this issue. It is found that the Hon'ble ITAT, Mumbai has already decided the identical issue in favour of the Appellant in AY 2014-15 reported in (2020) 122 taxmann.com 248 (Mumbai). The Hon'ble ITAT has held that Article 14 of the India-Japan DTAA was applicable only to individuals and thus not applicable to the Appellant, which is a partnership firm. It further held that the fees earned by the Appellant firm in Japan was taxable as fees for technical services under Article 12 and that the FTC ought to have been granted to the Appellant firm for the taxes withheld in Japan. Further, it held that when the source jurisdiction has taken a reasonable and

bonafide view, which is not manifestly erroneous, that taxes should be withheld at source, FTC should be provided by the resident jurisdiction even though the legal position in the residence jurisdiction may not be the same. Accordingly, the Hon'ble ITAT held that India should provide FTC for the taxes withheld in Japan. As regards the decisions relied on by the AO, it held that same were distinguishable and not applicable to the facts of the Appellant. The decision of AY 2014-15 was again followed by the Hon'ble ITAT in AY 2017-18 (ITA No 982/Mum/2023 dated 30.06.2023) in the case of Assessee's affiliate Cyril Amarchand Mangaldas for AY 2017-18 and AY 2018-19 reported in (2023) 154 taxmann.com 99. Further, Hon'ble ITAT in the case of ITTIAM Systems P. Ltd. v. ITO (2021) 86 ITR(T) 611 allowed FTC in respect of taxes withheld abroad on the basis of India-Japan, DTAA by placing reliance on the decision of Hon'ble Karnataka High Court in the case of Wipro Ltd. (2015) 382 ITR 179, held as under:

> "*24.......for eliminating double taxation of doubly taxable income in the hands of assessee, it would be necessary to establish the taxes paid by assessee in USA, Japan and Germany. The condition stipulated is very clear that FTC is available on taxes paid in these countries.*

*42. Based on above discussion, we are of the view that assessee is eligible for FTC in full, amounting to taxes paid in USA, Japan and Germany."*

8. Thus, respectfully following the decision of the coordinate benches in the case of the appellant and its affiliate, we hold that the appellant is entitled to get Foreign Tax Credit (FTC) in respect of tax withheld in Japan.

9. As regards FTC with respect to the other countries (namely Nepal, Brazil, China and Malaysia), again Hon'ble Mumbai ITAT in the case of the appellant itself (supra.) has held that DTAA provisions don't require that state of residence and eliminate the double taxation in all cases where state of source has imposed its tax by applying to an item of income, a provision of convention that is different from state of residence considers to be applicable. Therefore, in all cases in which interpretation of residence country about applicability of a treaty provision is not the same as that of source jurisdiction about the provision and yet the source country levied taxes whether directly or by way of tax withholding, tax credit cannot be declined.

10. Thus, respectfully following the decision of the coordinate bench, we also hold that the appellant is entitled to FTC on the taxes withheld in these jurisdictions also.

11.In the result, appeal is allowed.

**Order pronounced in the open court on 30.09.2024.**

| **Sd/-**<br>**BEENA PILLAI**<br>**JUDICIAL MEMBER** | **Sd/-**<br>**RATNESH NANDAN SAHAY**<br>**ACCOUNTANT MEMBER** |
|---|---|

Mumbai, Dated: 30.09.2024.
*Snehal C. Ayare, Stenographer*

Copy to:The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.