ITAT: Allows FTC to AZB on tax withheld in Japan & Nepal on professional legal fees; Follows Amarchand ruling

Nov 09, 2024

AZB and Partners [TS-819-ITAT-2024(Mum)]

Conclusion

Mumbai ITAT holds that the Assessee (AZB and Partners) is entitled to get Foreign Tax Credit (FTC) in respect of tax withheld in Japan of Rs. 78.26 Lac and in other jurisdictions i.e., Singapore and Nepal of Rs. 1.52 Lac; Relies on coordinate bench ruling in Amarchand Mangaldas & Suresh A Shroff & Co. wherein claim of foreign tax credit under Section 90 on legal services rendered in Japan was allowed on the premise that Article 12 of India-Japan DTAA provides for taxability of income from professional services would be taxable in contracting state i.e., India, however, Article 12(4) provides that such payments would not constitute 'fee for technical services' only if such payments is made to any individual for carrying out independent professional services referred to in Article 14; Thus following the coordinate bench ruling, ITAT dismisses Revenue's appeal; Assessee filed return of income for AY 2017-18 declaring total income of Rs. 144 Cr and claiming foreign tax credit amounting to Rs. 80.45 Lac under Section 90 for the income received from services rendered in Japan, Singapore, Nepal and Mauritius; During assessment, Revenue disallowed the claim of foreign tax credit on the premise that the receipts were not taxable in the said countries in view of Article 14 of the said DTAAs and thus, taxable in contracting state i.e., India; CIT(A) allowed Assessee's appeal; ITAT refers to Delhi ITAT ruling in Dynamic Drilling & Services wherein reliance was placed on coordinate bench ruling in Amarchand Mangaldas to held that DTAA provisions don't require state of residence to eliminate the double taxation in all cases where state of source has imposed tax by applying a provision of convention on an income that is different from view of state of residence; Thus, dismisses Revenue's appeal.:ITAT Mum

Decision Summary

The ruling was delivered by the Division Bench of Mumbai ITAT comprising Shri Amarjit Singh, Accountant Member and Shri Sandeep Singh Karhail, Judicial Member.

Mr. Sunil M. Lala appeared for the Assessee while Revenue was represented by Mr. Ram Krishna Kedia, Sr. DR.

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

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
AND SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITAs No.3381 & 3382/Mum/2024
Assessment Years: 2020-21 & 2017-18

ACIT-16(2), Mumbai.	Vs.	AZB and Partners, AZB House, Peninsula Corp. Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai – 400 013, Maharashtra. PAN: AAKFA0281H
(Appellant)		(Respondent)

Assessee by : Shri Sunil M. Lala
Revenue by : Shri Ram Krishna Kedia, Sr. DR

Date of Hearing : 19.09.2024
Date of Pronouncement : 21.10.2024

O R D E R

PER AMARJIT SINGH, ACCOUNTANT MEMBER:

These appeals of the Revenue for the assessment years 2020-21 and 2017-18 are directed against the order u/s 250 of the Income-tax Act, 1961 dated 06.05.2024 passed by the ld. Commissioner of Income-tax (Appeal), National Faceless Appeal Centre, Delhi.

2. Both these appeals filed by the Revenue are based on similar issues on identical facts, therefore, for the sake of convenience, both these appeals are adjudicated together by taking the ITA No.3382/Mum/2024 as the lead case and its findings will be applied to the other appeal *mutatis mutandis* wherever applicable.

ITA No.3382/Mum/2024

3. Grounds of appeal are as under:-

> *"1. On the facts and in the circumstances of the case and in law the ld.CIT(A) erred in allowing tax relief in regard to income earned in Japan, Nepal and Singapore. The ld.CIT(A) has not considered the provisions of Article 14 of DTAA with Japan, Nepal & Singapore dealing with Independent Professional Services. As per the provisions of Article 14 the income itself is not taxable the tax credit in respect thereof is not allowable.*
>
> *2. The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.*
>
> *3. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

4. The facts in brief are that the return of income declaring the total income of Rs.144,48,15,300/- was filed. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 21.08.2018. During the course of assessment, the AO noticed that the assessee had claimed relief u/s 90/91 of the Income-tax Act, 1961 at Rs.80,45,229/- for the income received from services rendered in Japan, Singapore, Nepal and Mauritius. The AO observed that the assessee had provided professional

services to clients in Japan, Nepal and Singapore, but, it did not have a fixed base or persons for more than 183 days in Japan and Nepal and 90 days in the case of Singapore. However, TDS had been deducted by the entities of these countries and the assessee had claimed credit of Rs.79,78,570/- in the income-tax return filed in India. The AO was of the view that credit of such withholding tax was not allowable to the assessee in India as these receipts were not taxable in those countries. The AO also noticed that as per Article 14 of DTAA with Japan, Nepal and Singapore, the income derived by a resident of a contracting State in respect of the professional services or other activities of an independent character shall be taxable only in that contracting State if the assessee has a fixed base regularly available to him or his presence in other contracting State exceeds 183 days in Japan, Nepal and 90 days in the case of Singapore during the relevant year. The AO stated that since the income of the assessee was not subject to tax in Japan, Nepal and Singapore, therefore, credit for withholding tax of Rs.78,26,428/- from Japan, Rs.67,335/- from Singapore and Rs.84,807/- from Nepal were not allowed to the assessee.

5. The aggrieved assessee filed appeal before the Ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee after following the decision of the ITAT, Mumbai on the similar issues identical to the case of the assessee. The relevant extract of the decision of the CIT(A) is reproduced as under:-

"6.1.3 I have perused submissions of the appellant and the decisions cited therein. It is noted that the facts of the case of the appellant are identical to the case of M/s.Cyril Amarchand Mangaldas ITA no.1046/Mum./2023 (AY 2017-18) & ITA no.104 7/Mum./2023 (AY 2018-19), common order dated 28/06/2023 wherein relying upon the decision, dated 18/12/2020, of coordinate bench of Hon'ble ITAT, Mumbai in case of Amarchand and Mangaldas and Suresh A Shroff & Co. v/s ACIT, in ITA No. 2613/Mum./2019 (AY 2014-15), it was noted that the Japanese authorities had interpreted Article 14 of the India-Japan DTAA differently holding that the provisions of Article 14 shall be applicable only in case of professionals working in the individual capacity, i.e. independent lawyers, and not to entities engaged in rendering professional services like corporate law firms, such as the assessee and therefore, its clients in Japan 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 the payments to the assessee. The AO therein had held that the credit of such withholding tax was not allowable to the assessee in India as the receipt was not taxable in Japan and thus, the tax was not required to be withheld, as it was in the nature of independent personal services and accordingly, the AO had denied the foreign tax credit claimed by the assessee under section 90 of the Act. Further, the AO had also rejected the alternative claim of the assessee of reducing the turnover to the extent of the foreign tax credit, as the assessee had received the net amount in India. In that case, Hon'ble Tribunal had discussed the provisions of the relevant DTAAs & then pondered over the core issue as below:

"Essentially, therefore, it is open to the Assessing Officer to take a call on whether the taxes withheld in the treaty partner jurisdiction could be reasonably said to be in harmony with or in conformity with the provisions of the related tax treaty, and in a case in which he comes to the conclusion that the taxes so withheld in the treaty partner jurisdiction could indeed be reasonably said to be not in harmony with the scheme of taxation in that tax treaty, he can decline the foreign tax credit under article 23(2)(a). The question, therefore, that we really need to adjudicate upon is whether the assessee could reasonably be said to be taxable in Japan under article 12, in respect of the professional income earned in Japan, of the Indo Japanese tax treaty. It is when the answer to this question is

in the affirmative that the granting of the tax credit in respect of taxes so paid abroad could be considered, of course on merits, in the hands of the assessee.

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…….

Suffice to say, on the facts of this case, the conclusions arrived at by the Japanese tax authorities, directing tax withholdings from the payments made to the assessee by its Japanese clients, cannot be said to unreasonable or incorrect. In the light of these discussions, as also bearing in mind entirety of the case, we hold that the assessee was wrongly declined tax credit of Rs.80,55,856 on the facts of this case. We, therefore, direct the Assessing Officer to grant the said tax credit to the assessee. As we have upheld the plea of the assessee with respect to the admissibility of the foreign tax credit, we see no need to deal with the alternate plea of the assessee seeking deduction of the taxes so withheld abroad in the computation of its income."

Facts of the case of present appellant are identical as in the cases cited above. It is not the case of the AO that in India, the appellant has not offered the income received from Japan on which tax was withheld there. The similar provisions for India-Singapore applied by the AO in the present case are also cited below:

ARTICLE 14: INDEPENDENT PERSONAL SERVICES -

1. Income derived by an individual who is a resident of a Contracting State

from the performance of professional services or other independent activities

of a similar character shall be taxable only in that State except in the following circumstances when such income may also be taxed in the other Contracting State : (a) if he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State ; or (b) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 90 days in the relevant fiscal year, in that case, only

so much of the income, as is derived from his activities, performed in that other State may be taxed in that other State.

2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities, as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.

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ARTICLE 25: AVOIDANCE OF DOUBLE TAXATION - 1. The laws in force in either of the Contracting States shall continue to govern the taxation of income in the respective Contracting States except where express provision to the contrary is made in this Agreement.

3. Where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in Singapore, India shall allow as a deduction from the tax on the income of that resident an amount equal to the Singapore tax paid, whether directly or by deduction. Where the income is a dividend paid by a company which is a resident of Singapore to a company which is a resident of India and which owns directly or indirectly not less than 25 per cent of the share capital of the company paying the dividend, the deduction shall take into account the Singapore tax paid in respect of the profits out of which the dividend is paid. Such deduction in either case shall not, however, exceed that part of the tax (as computed before the deduction is given) which is attributable to the income which may be taxed in Singapore.

4. For the purposes of paragraph 2 of this Article, "Singapore tax paid" shall be deemed to include any amount of tax which would have been payable but for the reduction or exemption of Singapore tax granted under : (a) the provisions of the Economic Expansion Incentives (Relief from Income-tax) Act and the provisions of sections 13(1)(t), 13(1)(u), 13(1)(v), 13(2), 13A, 13B, 13F, 14B, 14E, 43A, 43C, 43D, 43E, 43F, 43G, 43H, 43-I, 43J and 43K of the Income-tax Act, insofar as they were in force and have not been modified since the date of signature of this Agreement, or have been modified in minor respects so as not to affect their general character. (b) any other provision which may subsequently be enacted granting an exemption or

reduction of tax which is agreed by the competent authorities of the Contracting States to be of a substantially similar character to any provision referred to in sub-paragraph (a) of this paragraph, if such provision has not been modified thereafter or has been modified only in minor respects so as not to affect its general character.

5. Subject to the provisions of the laws of Singapore regarding the allowance as a credit against Singapore tax of tax paid in any country other than Singapore, Indian tax paid, whether directly or by deduction, in respect of income from sources within India shall be allowed as a credit against Singapore tax payable in respect of that income. Where such income is a dividend paid by a company which is a resident of India to a resident of Singapore which owns not less than 25 per cent of the share capital of the company paying the dividends, the credit shall take into account Indian tax paid in respect of its profits by the company paying the dividends.

6. For the purposes of paragraph 4 of this Article the term "Indian tax paid" shall be deemed to include any amount of tax which would have been payable in India but for a deduction allowed in computing the taxable income or an exemption or reduction of tax granted for that year in question : (a) Sections 10(4), 10(4B), 10(5B), 10(15)(iv), 10A, 10B, 33AB, 80-I and 80-IA, insofar as these provisions were in force and have not been modified since the date of signature of this Agreement, or have been modified only in minor respects so as not to affect their general character, (b) any other provision which may subsequently be enacted granting an exemption or reduction of tax which is agreed by the competent authorities of the Contracting States to be of a substantially similar character to a provision referred to in sub-paragraph (a) of this paragraph, if such provision has not been modified thereafter or has been modified only in minor respects so as not to affect its general character.

6. Income which, in accordance with the provisions of this Agreement, is not to be subjected to tax in a Contracting State, may be taken into account for calculating the rate of tax to be imposed in that Contracting State. India-Nepal DTAA provisions are also reproduced below:

Article 14 INDEPENDENT PERSONAL SERVICES

1. Income derived by an individual who is a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State except in the following circumstances when such income may also be taxed in the other Contracting State: (a) if he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only

so much of the income as is attributable to that fixed base may be taxed in that other State; or (b) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any period of 12 – months; in that case only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, surgeons, dentists and accountants.

……

……

Article 23 METHODS FOR ELIMINATION OF DOUBLE TAXATION

1. The laws in force in either of the Contracting States shall continue to govern the taxation of income in the respective Contracting States except where provisions to the contrary are made in this Agreement. Where income is subject to tax in both Contracting States, relief from double taxation shall be given in accordance with the following paragraphs of this Article.

2. Double Taxation shall be eliminated as follows: (i) in Nepal: 19 (a) Where a resident of Nepal derives income which, in accordance with the provisions of this Agreement, may be taxed in India, Nepal shall allow as a deduction from the tax on the income of that resident, an amount equal to the tax paid in India. Such deduction shall not, however, exceed that portion of the tax as computed before the deduction is given, which is attributable, as the case may be, to the income which may be

taxed in India. (b) Where in accordance with any provision of the Agreement, income derived by a resident of Nepal is exempt from tax in Nepal, Nepal may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income. (ii) In India: (a) Where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in Nepal, India shall allow as a deduction from the tax on the income of that resident, an amount equal to the tax paid in Nepal. Such deduction shall not, however, exceed that portion of the tax as computed before the deduction is given, which is attributable, as the case may be, to the income which may be taxed in Nepal. (b) Where in accordance with any provision of the Agreement, income derived by a resident of India is exempt from tax in India, India may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income.

A reading of the above provisions is to be compared with article 14 of Indo-Japan DTAA which is as below:

ARTICLE 14-INDEPENDENT PERSONAL SERVICES

1. Income derived by a resident of a Contracting State in respect of

professional services or other activities of an independent character shall be taxable only in that Contracting State unless he has a fixed base regularly available to him in the Contracting State for the purpose of performing his activities or he is present in that other Contracting State for a period or periods exceeding in the aggregate 183 days during any taxable year or 'previous year' as the case may be. If he has such a fixed base or remains in that other Contracting State for the aforesaid period or periods, the income may be taxed in that Contracting State but only so much of it as is attributable to that fixed base or is derived in that other Contracting State during the aforesaid period or periods.

2. The term 'professional services' includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.

It is also noted that decision of Ershisanye Construction Group India Pvt. Ltd. (supra) cited by the AO is not applicable in present case as in that case involving DTAA of India-China and the issue was whether payment made by an Indian resident to a resident law firm of China would constitute FTS within the meaning of India China DTAA.

In fact, a perusal of above-cited provisions of the three DTAAs with reference to facts of the case of present appellant show that in this case, the decision of Hon'ble ITAT in case of Amarchand and Mangaldas and Suresh A Shroff & Co. (Supra) applies for DTAAs with Singapore and Nepal too.

Considering the above discussion, it is hereby held that the credit for taxes of Rs.78,26,428/- paid by the appellant in Japan, Rs. 84,807/- paid in Nepal & Rs. 67,335/- paid in Singapore is allowable in India u/s 90 of the Act."

6. Heard both the sides and perused the material on record. During the appellate proceedings before us, the ld. Counsel, without reiterating the facts as discussed above, at the outset, submitted that issue on hand being squarely covered by the following judicial pronouncements of the ITAT, Mumbai:-

i. Amarchand & Mangaldas & Suresh A. Shroff & Co. v. Assistant Commissioner of Income Tax Circle 16(2), Mumbai [2020] 122 taxmann.com 248 (Mumbai - Trib.)

ii. Deputy Commissioner of Income-tax v. Cyril Amarchand Mangaldas [2023] 154 taxmann.com 99 (Mumbai - Trib.)

iii. Amarchand & Mangaldas & Suresh A. Shroff & Co. v. Commissioner of Income Tax (Appeals) National Faceless Appeal Centre Delhi [ITA No. 982/Mum/2023 AY 2017-18]

7. With the assistance of the ld. Representatives, we have perused the decision of the ITAT in the case of Amarchand & Mangaldas & Suresh A. Shroff & Co. v. Commissioner of Income Tax (Appeals) in ITA No. 982/Mum/2023 pertaining to AY 2017-18 wherein the provisions of Article 12 and Article 14 of the India-Japan Double Taxation Avoidance Agreement are discussed and it is held that Article 12 of the DTAA provides that income from professional services or other activities of independent characters would be taxable in the resident country, i.e., India. However, clause 4 of the Article 12 provides that such payments would not constitute 'fee for technical services' only if such payment is made to an individual for carrying out independent professional services referred to in Article 14. The relevant extract of the decision of the ITAT read as under:-

> *"5. Heard both the sides and perused the material on record. During the course of assessment the AO has disallowed the claim of credit of foreign tax withholding made by the Japanese clients of the assesse. The assesse firm has provided legal services to certain clients based in Japan for which the clients paid legal fees after withholding tax @ 10% under Article 12 of the India Japan Double Taxation Avoidance Agreement (DTAA). Article 12 of the DTAA provides that income from professional services or other activities of independent character would be taxable in the resident country i.e India. However, clause 4 of Article 12 provides that such payments would not be constitute as fees for technical services only if such payment is made to an individual for carrying out independent personal services referred to in Article 14. Since, assessee is a partnership firm*

and exception for payment referred in Article 14 would be applicable only for individual, therefore, the fees received by the assessee would not be covered under the such exception and accordingly would be subject to withholding tax in Japan. In this regard we have perused the decision of coordinate bench of ITAT in the case of the assessee for AY. 2014-15. The relevant operating part of the decision is reproduced as under:

"9. In view of these discussions, there is a valid school of thought that in the scheme of the Indo Japanese to creaty, article 14 for independent personal services holds the field for the individuals only particularly in the light of the exclusion clause under article 12(4) being restricted to payment of fees for professional services to individuals balone There is no dispute that the provisions of article 14 and article 12 are overlapping inasmuch as what is termed as professional service could also be covered by the fees for technical service particularly as the definition of the fees for technical services is on classical model of much wider scope and not on the 'make available model now in vogue in many tax treaties. The only reason for which exclusion from article 12 was canvassed by the Assessing Officer was that rather specific provisions of article 14 have to make way for rather general provisions of article 12, but then when we hold that, in the context of Indo Japan tax treaty, article 14 comes into play only for individuals, this proposition ceases to hold good in the present context. As a corollary to this legal position, and the exclusion clause under article 12(4) not being triggered on the facts of this case as such, it is indeed reasonably possible to hold that the payments in question were rightly subjected to tax withholding in Japan. The judicial precedents cited by the authorities below are in the context of the tax treaties other than Indo Japan tax treaty, and the provisions of the Indo Japan tax treaty are not in pari materia with the provisions of those tax treaties. These judicial precedents deal with the tax treaties that India has entered into with China, U.K. and the USA, but then all the three treaties are, in the material respects, differently worded vis-à-vis the Indo-Japanese tax treaty that we are presently dealing with. It is, therefore, not even necessary, even if we have our reservations on correctness of these decisions, to refer the matter to the larger bench for reconsideration of the principle laid down therein.

> *Suffice to say, on the facts of this case, the conclusions arrived at by the Japanese tax authorities, directing tax withholdings from the payments made to the assessee by its Japanese clients, cannot be said to unreasonable or incorrect. In the light of these discussions, as also bearing in mind entirety of the case, we hold that the assessee was wrongly declined tax credit of Rs.80,55,856 on the facts of this case. We, therefore, direct the Assessing Officer to grant the said tax credit to the assessee. As we have upheld the plea of the assessee with respect to the admissibility of the foreign tax credit, we see no need to deal with the alternate plea of the assessee seeking deduction of the taxes so withheld abroad in the computation of its income."*
>
> *6. Following the decision of coordinate bench of ITAT as referred supra we direct the Assessing Officer to allow the claim of foreign tax credit as directed by the ITAT in the above referred decision. Therefore, the ground of appeal of the assesse is allowed.*

8. Similarly, the decision of the ITAT in the case of Amarchand & Mangaldas & Suresh A. Shroff & Co. v. Commissioner of Income Tax (Appeals) National Faceless Appeal Centre Delhi [ITA No. 982/Mum/2023 AY 2017-18 discussed as supra also applies to DTAAs with Singapore and Nepal too as discussed in the findings of the ld.CIT(A).

9. We have perused the decision of ITAT, Mumbai in the case of Dynamic Drilling & Services (P) Ltd. vs ACIT (2022) 140 taxmann.com 102 (Delhi-Trib.) as referred by the ld. Counsel wherein it is held in para 19 of the order after referring the decision of ITAT, Mumbai in the case of Amarchand & Mangaldas Suresh A. Shroff & Co. v. Asstt. CIT [2020] 122 taxmann.com 248/12021] 187 ITD 750 as under:-

> *"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 248/12021] 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."*

10. There is nothing before us on hand differs from the issues raised in the cases cited (supra) so as to take a different view on this issue. Therefore, since the issue on hand being squrely covered, therefore, following the principle of consistency, we find merit in the submission of the assessee and allow the claim of deduction. Following the decisions of the ITAT Mumbai as referred to above, we do not find any infirmity in the decision of the ld.CIT(A), therefore, the grounds of appeal filed by the Revenue are dismissed.

11. In the result, the appeal of the Revenue is dismissed.

ITA No.3381/Mum/2024

12. We have adjudicated similar issue with identical facts, vide ITA No.3382/Mum/2024 as discussed supra in this order,

therefore, applying the findings in that appeal, the grounds of appeal of the Revenue in the instant appeal are also dismissed.

13. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open court on 21.10.2024.

Sd/-	**Sd/-**
(SANDEEP SINGH KARHAIL)	**(AMARJIT SINGH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 21.10.2024

dk

Copy to:

1. The Appellant:
2. The Respondent:
3. The CIT,
4. The DR

//True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai