**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH: 'C' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER**
**AND**
**MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 6252/DEL/2012 ( A.Y 2009-10)**

| H. J. Heinz Company, USA<br>7th Floor, D-Shivsagar Estate,<br>Dr. Annie Besant Road, Worli<br>Mumabi<br>AACCH2144P<br>**(APPELLANT)** | Vs | ADIT<br>Circle-1(2)<br>International Taxation<br>New Delhi<br>**(RESPONDENT)** |
|---|---|---|

**ITA No. 1991/DEL/2015 ( A.Y 2011-12)**

| H. J. Heinz Company, USA<br>7th Floor, D-Shivsagar Estate,<br>Dr. Annie Besant Road, Worli<br>Mumabi<br>AACCH2144P<br>**(APPELLANT)** | Vs | ACIT<br>Circle-2(1)(1),<br>International Taxation,<br>Room NO. 410, 4th Floor, E-Z Block, Pratyaksh Kar Bhawan<br>New Delhi<br>**(RESPONDENT)** |
|---|---|---|

| **Appellant by** | **Sh. Salil Kapoor, Adv, Ms. Soumya Singh, Adv, Ms. Ananya Kapoor, Adv** |
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| **Respondent by** | **Sh. G. K. Dhall, CIT(A) DR** |

| **Date of Hearing** | **27.05.2019** |
|---|---|
| **Date of Pronouncement** | **23.08.2019** |

## ORDER

**PER SUCHITRA KAMBLE, JM**

These appeals are filed by the assessee against the order dated 15/10/2012 passed by Assessing Officer for A.Y. 2009-10 and order dated 21.01.2015 passed by the Assessing Officer for A.Y. 2011-12.

2. The grounds of appeal are as under:-

**ITA NO. 6252/DEL/2012 A.Y. 2009-10**

*" On the facts and in the circumstances of the case and in law, M/s H. J. Heinz Company (hereinafter referred to as the 'Appellant') craves leave to prefer an appeal against the order passed by the Assistant Director of Income-tax, (International tax), Circle 1(2), New Delhi (hereinafter referred to as the 'learned AO') under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter referred to as the 'Act') on the following grounds, each of which are without prejudice to one another:*

***Ground 1: General***

1. *On the facts and in the circumstances of the case and in law, the Learned AO/ Dispute Resolution Panel - I New Delhi (hereinafter referred to as the 'DRP') erred in assessing the total income at Rs 2,21,02,821 as against income of Rs 32,48,463 computed and returned by the Appellant;*

***Ground 2: Taxing of reimbursements of Rs 1,88,54,358 as Fees for Technical /included service ('FTS/FIS) and Royalty under the Act and Double Taxation Avoidance Agreement between India and USA ('DTAA')***

2. *On the facts and in the circumstances of the case and in law, the Learned AO/ DRP erred in holding that the cost reimbursements of Rs 1,88,54,358 received by the Appellant towards providing support services to its group affiliates are taxable as FTS both under section 9(1)(vii) of the Act as well as Article 12(4) of the DTAA;*

3. *On the facts and in the circumstances of the case and in law, the Learned AO erred in holding that the Appellant has made available technical knowledge, skill, experience, etc. to the recipient of services;*

4. *On the facts and in the circumstances of the case and in law, the Learned AO/DRP further erred in holding that the cost reimbursements are also taxable as 'Royalty' both under section*

*9(1)(vi) of the Act as well as Article 12 of the DTAA;*

5. *On the facts and circumstances of the case, the Learned AO/ DRP failed to appreciate that the amounts represented pure reimbursement of costs and hence does not result into any taxable income accruing in India;*

6. *Without prejudice to the above, the Learned AO/ DRP failed to appreciate that the income, cannot be both 'royalty' as well as 'FTS' and hence the order passed on account of non application of mind, needs to be quashed;*

***Ground 3: Not granting credit of taxes deducted at source (TDS') of Rs 44,43,786***

7. *On the facts and in the circumstances of the case and in law, the Learned AO erred in not granting credit for TDS of Rs 44,43,786 claimed by the Appellant in the return of income;*

***Ground 4: Levy of interest under section 234B of the Act***

8. *On the facts and in the circumstances of the case and in law, the Learned AO erred in levying interest under section 234B of the Act, without appreciating that its income, if any, is subject to tax withholding and hence it being a non-resident, no interest is leviable;*

9. *Without prejudice to the above, the Learned AO failed to consider that after granting credit of TDS amounting to Rs 44,43,786, no tax is payable by the Appellant, and accordingly no interest is leviable;*

***Ground 4: Initiation of penalty proceedings under section 271(1)(c) of the Act***

10. *On the facts and in the circumstances of the case and in law, the Learned AO erred in initiating penalty proceedings under section 271 (1 )(c) of the Act for concealment of income and furnishing of inaccurate particulars of income, without appreciating the facts and circumstances of the case."*

**ITA No. 1991/DEL/2015**

*On the facts and in the circumstances of the case and in law, M/s H. J. Heinz Company (hereinafter referred to as the 'Appellant') craves leave to prefer an appeal against the order passed by the Assistant Director of Income-tax, (International tax), Circle 2(1)(1), New Delhi (hereinafter referred to as the 'learned AO') under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter referred to as the 'Act') on the following grounds, each of which are without prejudice to one another:*

***Ground 1: General***

*1. On the facts and in the circumstances of the case and in law, the Learned AO/ Dispute Resolution Panel - I, New Delhi (hereinafter referred to as the 'DRP') erred in assessing the total income at Rs 10,17,16,750 as against an income of INR 5,18,235 computed and returned by the Appellant;*

***Ground 2: Taxing of reimbursements of Rs 9,82,61,852 as Fees for Technical** I **included service ('FTS/FIS) and Royalty under the Act and Double Taxation Avoidance Agreement between India and USA ('DTAA')***

2. *On the facts and in the circumstances of the case and in law, the Learned AO/ DRP erred in holding that the cost reimbursements of Rs 9,82,61,852 received by the Appellant towards providing support services to its group affiliates are taxable as FTS both under section 9(1 )(vii) of the Act as well as Article 12(4) of the DTAA;*

3. *On the facts and in the circumstances of the case and in law, the Learned AO erred in holding that the Appellant has made available technical knowledge, skill, experience, etc. to the recipient of services;*

4. *On the facts and in the circumstances of the case and in law, the Learned AO/ DRP further erred in holding that the cost reimbursements are also taxable as 'Royalty' both under section 9(1 )(vi) of the Act as well as Article 12 of the DTAA;*

5. *On the facts and circumstances of the case, the Learned AO/ DRP*

*failed to appreciate that the amounts represented pure reimbursement of costs and hence does not result into any taxable income accruing in India;*

6. *Without prejudice to the above, the Learned AO/ DRP failed to appreciate that the income, cannot be both 'royalty' as well as 'FTS' and hence the order passed on account of non application of mind, needs to be quashed;*

***Ground 3: Not granting credit of taxes deducted at source ('TDS') of Rs 1,19,35,314***

7. *On the facts and in the circumstances of the case and in law the Learned A.O erred in not granting credit for TDS of Rs.1,19,35,314/- claimed by the Appellant in the return of income'*

***Ground 4: Levy of interest under section 234B of the Act,***

8. *On the facts and in the circumstances of the case and in law, the Learned AO erred in levying interest under section 234B of the Act, without appreciating that its income, if any, is subject to tax withholding and hence it being a non-resident, no interest is leviable;*

9. *Without prejudice to the above, the Learned AO failed to consider that after granting credit of TDS amounting to Rs 1,19,35,314, there is no tax is payable by the Appellant, and accordingly no interest is leviable;*

***Ground 4: Initiation of penalty proceedings under section 271 (1 )(c) of the Act***

10. *On the facts and in the circumstances of the case and in law, the Learned AO erred in initiating penalty proceedings under section 271 (1)(c) of the Act for concealment of income and furnishing of inaccurate particulars of income, without appreciating the facts and circumstances of the case."*

3. H. J. Heinz Company is a Company is a tax-resident of the United States of America (USA). It is a leading manufacturer of foods products with a portfolio of global brands. It is stated to be headquartered in Pittsburgh, USA listed on the New York Stock Exchange, with operations in over 10 locations

world-wide. Together all these entities are from the Heinz Group. The assessee company stated to have entered into a global agreement dated 3rd May 2007 with its group entities including Heinz India Pvt. Ltd. As per the agreement, the entire costs incurred by the assessee for undertaking the support activities for affiliates are allocated/shared between the affiliates based on an allocation key. No mark up is charged by the assessee on the cost allocated of its affiliates. Heinz India, a private limited company, incorporated under the Indian Companies Act, 1956 is an indirect and independent subsidiary of the assessee. Pursuant to the Agreement entered into with Heinz India, the assessee allocated cost of $ 367,603 equivalent to Rs. 18,854,358/- without any mark up to Heinz India and received a reimbursement towards the same during the subject year. Based on the facts and circumstances of the case, the Assessing Officer taxed receipts of Rs.18,854,358/- received by the Assessee under the aforesaid agreement as FTS. The assessee Company, resident of USA filed its return of income on 30/09/2009 declaring a total income at NIL. The case was selected for scrutiny and notice u/s 143(2) was issued. In response to the notice Authorized Representative of the assessee Company appeared on various dates and filed details before the Assessing Officer. During the course of the proceedings, the assessee Company vide order sheet entry dated 25/11/2011 was given a show cause and was asked why the amount received in lieu of support activities given by the assessee should not be added back to the income of the assessee. The assessee vide letter dated 2/12/2011 submitted its reply. The Assessing Officer had taken cognizance of the reply of the assessee and draft assessment order was passed on 13/12/2011. Subsequently, the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide its direction dated 24/9/2012, directed the Assessing Officer to tax the amount of Rs. 18,854,358/- at the rate of 10%. The taxable income of the assessee was computed by the Assessing Officer vide order dated 15/10/2012 as under:-

| Particulars | Amount (Rs.) |
|---|---|
| Gross amount received by the assessee company as Royalty (Tax Payable @ 15%) | 32,48,463 |
| Gross amount received by the assessee company as FTS/Royalty (Tax Payable @10%) | 1,88,54,358 |
| **Total Income** | **2,2,1,02,821** |

Thus, the Assessing Officer assessed an income of the assessee at Rs. 2,21,02,821/-.

4. Being aggrieved by the assessment order, the assessee filed appeal before us.

5. The Ld. AR submitted that the receipt of Rs. 1,88,54,358/- from Heinz India constitute reimbursement of expenses and the same is not taxable in India as Fees For Technical Services under the Income Tax Act, 1961. The Ld. AR submitted that the activities carried out by the assessee under the agreement is broadly in the area of Human Resources, Strategic Planning and Marketing, Finance and Information Systems. Cost incurred by the assessee in terms of time and effort of its employees for carrying out the activities are shared amongst the various affiliates on a uniform and consistent basis using appropriate allocation factor in the manners specified in the Agreement. Clause 5.2 Agreement specifically deals with allocation of cost and provides for the mechanism for the same. The Ld. AR submitted that an accounting method consistent with US Generally Accepted Accounting Principles and Assessee's accounting policies would be used to identify all direct and indirect cost associated with activities carried out by the assessee for each affiliate. For each cost centre an appropriate allocation factor is identified. The above costs are allocated by the assessee to its Affiliates without charging any mark

up/profit element. The cost contribution/payments made by Heinz India as a participant to the Agreement merely represents a reimbursement of the costs incurred by the assessee towards the above activities. In substance and in form the payment cannot be considered as income earn by the assessee. The same can be seen from the agreement itself that there is a zero percent mark up. Expenses incurred by the assessee and reimbursement by Heinz India are mere recoupment of expenses and would not constitute income of the assessee. The assessee merely allocates the costs and does not charge any mark up. In view of the above, the Ld. AR submitted that reimbursement of expenses received from Heinz India is not taxable in the hands of the assessee in India under the provisions of the Act. The Ld. AR further submitted that the addition is liable to be deleted on this ground alone as there are various judgments on this issue where it is held that when there is only recoupment of expenses, there is no element of income and held the same cannot be held to be taxable in India. The decisions on reimbursements are as under:-

- Dunlop Rubber 142 ITR 493 Kolkata High Court
- DECTA 237 ITR 190-AAR
- Siemens Aktiongesellschaft 189 Taxman 422-AAR Bombay High Court
- ABB Ltd 189 Taxman 422-AAR
- Ernst & Young Pvt. Ltd. 49 Taxmann.com 386 Kolkata ITAT

6. The Ld. AR further submitted that the assessee does not “Make Available” technical services of Heinz India and hence should not be taxable as Fees for Included Services (FIS) under the provisions of the DTAA. The Ld. AR submitted that in the present case factually no technical knowledge etc. was ever made available by the assessee to Heinz India. The fact that the assessee performs such activities on a year on year basis also supports the contention that no technical knowledge etc. was ‘made available’. Heinz India has not acquired any knowledge which can be used by Heinz India in its operations in India. The Ld. AR submitted that the assessee does not ‘make available’ any

technical knowledge, skill, etc to Heinz India, nor does it develop and transfer any technical plan, design, etc. Therefore, the reimbursements received by the assessee cannot be said to be covered within the meaning of FIS under the DTAA. Hence, such reimbursement should not be taxable in India under the DTAA. The Ld. AR submitted that in light of the definition and judicial pronouncements of various courts for any payment to qualify as FIS under the DTAA the following criteria are essential:

(i) The services need to be a technical or consultancy nature and

(ii) The services need to make available technical knowledge, experience skill, know-how or processed, are concerned of the development and transfer of a technical plant or technical design.

7. The Ld. AR further submitted that a technical or consultancy services is taxable only if the services make available the technical knowledge, experience, skill, know-how or process or consist of development and transfer of a technical plan or technical design, the technology is considered to be made available when the person acquiring the service is unable to apply the technology. The fact that the provision of the service made require technical input by the person providing the service does not per say mean that technology knowledge, skills, etc are made available to the person charging services. Similarly the use of product which embedded technology is not part to be considered to make the technology available further, even if the services are considered to be managerial in nature, the same would not be taxable in India US Tax Treaty because under the US Tax Treaty, the Treatment Managerial Services is not included under the definition of Fees of Included Services. In view of the above, by a draft Fee for Technical Knowledge etc is made available to a purchaser any fees generated would not be FIS under Article 12(4) of the DTAA. Services rendered may not make available any technical knowledge skill knowhow or service processed if the service provider is able to show that;

(i) such services do not enable the service recipient to apply the technology if any contained therein under independent manner in future.

(ii) Such services also do not contemplate development or transfer of a technical plant or technical design.

(iii) The payment to the service provider is for service simplicter and not for making available any technology knowledge, experience etc.

Accordingly, the service recipients should be able to make use of such technical knowledge, skill etc by means in his business or for his own benefit without recourse to the service provider in the future. The aforesaid principle has also been upheld in the following decisions wherein the concept of 'making available' has been discussed in detail and the issue is ruled in favour of the tax payers.

i) US Technology Resources (P) Ltd. 407 ITR 327
ii) Guy Carpenter & Co. 346 ITR 504 (Del HC)
iii) De Beers India Minerals (P) Ltd. 346 ITR 467
iv) Raymond Ltd. 86 ITD 791
v) Koninklijke Philips Electronics Pvt. N. V. (2018) 99 taxmann.com 23
vi) Exxon Mobil Company India (P) Ltd. (2018) 92 taxmann.com 5
vii) Bombardier Transportation India (P) Ltd. 162 ITD 586
viii) Timken Company (2017) 88 taxmann.com 21
ix) Outotec Oyj (2017) 162 ITD 541
x) Steria (India) Ltd. 386 ITR 390
xi) Cummins Ltd. 381 ITR 44
xii) Sandvik AB (2015) 61 taxmann.com 31
xiii) Measurement Technology Ltd. 376 ITR 340 – AAR
xiv) Sandvik Australia Pty. Ltd. (2013) 31 taxmann.com 256
xv) Endemol India Private Limited 361 ITR 340
xvi) Invensys Systems Inc (2009) 183 Taxman 81 – AAR
xvii) KPMG Ltd. (2013) 142 ITD 323
xviii) Renaissance Services BV (2018) 94 taxmann.com 465
xix) Veeda Clinic Research (P) Ltd. (2013) 144 ITD 297
xx) Reliance General Insurance Co. Ltd. (2018) 97 taxmann.com 350

Further, the case laws mentioned hereunder are specifically on the proposition

that managerial services are not covered under FIS article in India-USA DTAA:

i) Raymond Ltd. 86 ITD 791

ii) Koninklijke Philips Electronics Pvt. N. V. (2018) 99 taxmann.com 23.

iii) Steria (India) Ltd. 386 ITR 390

iv) Cummins Ltd. 381 ITR 44

v) Measurement Technology Ltd. 376 ITR 340 – AAR

vi) Invensys Systems Inc (2009) 183 Taxman 81 – AAR

Further, the case laws mentioned hereunder are specifically on the proposition that since support services are rendered year-on-year, they do not satisfy make available test and hence is not taxable as FIS:

i) Exxon Mobil Company India (P) Ltd. (2018) 92 taxmann.com 5

ii) Bombardier Transportation India (P) Ltd. 162 ITD 586

iii) Outotec Oyj (2017) 162 ITD 541

In light of the above submissions and the relevant case laws in favour of the assessee, the Ld. AR submitted that the said services cannot be held to be FIS and hence are not taxable in India.

8. The Ld. AR submitted that the receipts of Rs. 1,88,54,358/- from Heinz India do not fall within the ambit of ancillary and subsidiary clause. The amount received is not ancillary and subsidiary to the payment of royalty under TTLA. At the outset itself, the Ld. AR submitted that the parties of both the agreements, TTLA and SA are entirely different. While one aims to provide license on which royalty is being earned, the aim of the assessee is to ensure uniformity, consistency and international standards across all group companies, for the purpose of which these services and activities have been identified and support services are accordingly being provide which are of the nature of General Management, Human Resources, Finance, Data Processed, Quality Control, Purchase, Business Development, Law and other related areas. Moreover, the service charges under the SA are not paid only for sales

covered under TTLA. License is only for specified products and Royalty under TTLA is paid only for Licensed Products. Services under the SA are not products specified and causes are alleged on several diverse criteria. The Ld. AR pointed out the sales break up chart which demonstrate that the sale of licensed products is only 1-2% of the total sales. If service charges are payable for total sales within the services charges cannot be said to be ancillary and subsidiary.

9. The Ld. AR relied on decision of International Tire Engineering Resources (LLC) 185 Taxman 209 and Spencer Stuart International Vs. ACIT 94 Taxman.com 380. There is no overlap between TTLA and SA Agreement and, therefore, SA in no manner assists in the TTLA. The Ld. AR submitted that the assistance under TTLA are specifically provided for technology assistance as provided under Clause 3.4 and 3.5 at the exclusive cost of Heinz India and services under SA which does not cover any product specific Technology Assistance or product specific Quality Control. The very fact that SA is for the business as a whole and not restricted to the Licensed Products establishes that SA is in the ordinary course of business. The total sales of Heinz India are Rs. 748.20 crores out of which sales from tomato ketchup is only Rs. 13.43 crores. Accordingly, the sales from tomato ketchup constitute only 1-2% of total sales made by Heinze India. The service charges paid are approximately 6 times the amount of royalty paid as the services charges paid Rs. 1.88 crores and the royalty received is Rs. 32.48 lakhs. Moreover, they are altogether separate agreement. In India- US DTAA, there is a Memorandum of Understanding (MOU) which states 5 parameters to determine the application of “Ancillary and Subsidiary” Clause. In order for a service fee to be considered “ancillary and subsidiary” to the application or enjoyment of some right, property, or information for which a payment described in paragraph 3(a) or (b) is received, the service must be related to the application or enjoyment of the right, property, or information.

10. The Ld. AR further submitted that the receipts of Rs. 1,88,54,358/- from Heinz India do not fall within the ambit of royalty and hence is not taxable. Royalty has been defined under the India-US DTAA as payments consideration received of any kind for the use of or right to use any intellectual property. A perusal of the services covered under the Service Agreement shows that they are in the nature of General Management, Human Resources, Finance, Data Processing, Quality Control, purchasing, business development, law and other related areas which nowhere fall within the ambit of royalty has been defined under Article 12. The Ld. AR relied upon the decision of Marck Bio Sciences Ltd. (2017) 164 ITD 205 Ahmedabad Tribunal and Vanoord Dredging & Marine Contractors BV ITA 7589/Mum/2012, Mumbai ITAT. The Ld. AR submitted that the decisions relied upon by the Assessing Officer are not applicable in the present case as the same are distinguishing in the factual aspect with the present assessee's case.

11. The Ld. DR submitted that the arguments of the Ld. AR are focused entirely on coverage of the fees paid under Paragraph 4(b) of Article 12 which is narrower than the category described in Paragraph 4 (A) because which excludes any service that does not make technology available to the present acquiring the service. The question is whether the assessee is covered under Paragraph 4(A) of Article 12. The Ld. DR submitted that the DRP held that the services provided are clearly, ancillary and subsidiary to the application or enjoyment of the right, property or information for which royalty is paid and hence covered under Paragraph 4 (a) of Article 12. There is no dispute that the nature of activities are covered under the exclusions under Paragraph 5 of Article 12. Thus, only issue to be decided whether the service fee is to be considered "Ancillary & Subsidiary". As has been stated in the Memorandum of understanding concerning Fees for Included Services under Article 12, the memorandum also identified several factors which may be relevant to such determination specially using the words facilitate, customarily provided, the amount paid is in substantial, single contract or set of related contracts person

performing the services is the same person and the person receiving the royalties. The Ld. DR submitted that as regards the relation test the DRP has given a finding that services provider under SA dated 3/5/2007 flow from the terms of TTLA dated 21/2/2005 and there is a clear relation between the two. The DR's observation established that not only the services provider under SA are related to the application and enjoyment of rights granting under TTLA but the predominant purpose for the payment of service fees under SA is for the application and enjoyment of rights granted under TTLA. As per the TTLA the assessee licensed certain know-how, technology and ongoing technical assistance in connection with the manufacture, distribution, marketing and sale of products manufactured by the manufacturer. It can be seen that the restrictions/liability of the licensee and the control exercise by the assessee is in respect of 3 areas i.e. use of trade mark Clause 2, use of technology Clause 3 and quality control, Clause 4 towards this end, the licensee that to manufacture in accordance with the standards, specifications, and instructions supplied by or approved by the assessee as per Clause 2.1. It has to ensure the secrecy and confidentiality of the formulation and actual ingredients of the suffice tax as per Clause 3.3.B and for this purpose there is a provision of training of the employees of the licensee by the assessee as per Clause 3.4 and that of making available of technology specialized by the assessee for development of employee training and managerial skills and in the operation of factory and manufacture of license products Clause 3.5. Quality control is recognized as one of the important aspects of the TTLA. Its importance can be gauged from the fact that it is the most elaborate and exhaustive of the above three control systems. The entire agreement provides for quality claim control measures and includes inspection of facilities, equipment and materials used for preparing, processing, packaging, advertising, selling and distributing the products manufactured. The other clauses of the agreement identify the areas where the license need to be confirmed with the quality control programmes of the assessee. These are

(i) Personnel management

(ii) Resources Management including internal quality audit

(iii) Documentation data control and quality system management

(iv) Purchase Management

(v) Production process control

(vi) Handling, storage, packaging, preservation and delivery

(vii) Maintenance of quality control records

(viii) Training and

(viii) Auditing.

The Ld. DR further submitted that as against above support services as defined under Article 1.8 of SA include (but not limited to)

(1) General Management

(2) Human Resources

(3) Finance

(4) Data Processing

(5) Quality Control

(6) Purchasing

(7) Business development

(8) Law and Order

Moreover, while analyzing the relationship between the services provided with the earning of royalty, the Ld. DR pointed out that the quantum of value of royalty receipts is directly dependent upon the Net Sales Value of licensed products. Thus, any services resulting in enhanced sales, maximization of profits, increase in the efficiency and benefits of economies of scale of the licensee facilities the effective application or enjoyment of the rights granted under TTLA as well as mechanism of royalty receipts in the hands of the assessee. The Ld. DR further submitted that Quality Control is central to the TTLA. The licensee has been entrusted with the obligation of maintaining quality and any shortcomings in these areas will seriously and adversely affect the TTLA. All the above observations established that the services received by

the licensee are not only related to the application or enjoyment of the rights granted to it under TTLA but the predominate purpose of the arrangement under which the payment of the service fee and such other payments are made to facilitate the effective application or enjoyment of such rights. Thus, the facilitation test is satisfied. The second test as per the memorandum is whether such services are customarily provided in the ordinary course of business arrangements involving royalties described in Paragraph 3 of the agreement. The answer to this in the present case is in negative since a separate agreement was necessitated for the provision of these services. The third test revolves around the quantum paid for such services and whether the amount paid for the services is an insubstantial portion of the combined payments for the services and the right, property or information described in Paragraph 3 of the agreement. The Ld. DR pointed out that the quantum paid is not insignificant and is more than the amount of royalty paid. Hence, the answer to this question is in negative. The fourth test as per the memorandum is whether the payment made for the services and the royalty described in Paragraph 3 of the agreement are made under a single contract (or a set of related contracts). The Ld. DR submitted that as held by the DRP, both the S.A and the TTLA are related contracts. The last test as per the memorandum is whether the person performing services is the same person as the person receiving the royalties described in Paragraph 3 of the agreement and the answer is yes according to the Ld. DR. Thus, the Ld. DR submitted that all the test stated under the memorandum are specified and the service fee can be considered ancillary and subsidiary to the application or enjoyment of rights for which royalty was paid and hence covered under Paragraph 4(a) of Article 12. The Ld. DR further submitted that the assessment order and the DRP directions/order of the CIT(A) are emphatically relied upon by the Revenue Authorities. The Ld. DR submitted that the undisputed facts before us are that:

(i) Characterization of the services as technical services and it is not at all disputed.

(ii) Services are ancillary and subsidiary to the application or enjoyment of the right, property or information for which royalty is paid. The Ld. DR further submitted that the assessee conveniently ignored and overlooked the applicability of the provisions of Article 12(4) (a) to it. In its letter dated 2/12/2011 to the Assessing Officer in Para 16, the assessee itself had quoted the said provision.

(iii) The services provided by the assessee are not covered under any of the exclusionary provisions of Article 12(5) of the DTAA. The nature of services provided under various agreements and the interplay and interlinkage of such agreements have been elaborately discussed by the DRP. After examining the provisions of TTLA and S.A (GA), the DRP recorded a finding that TTLA is critical to its (i.e. assessee) earning of royalty & (GA) dated 3rd May 2007 only formalizes that arrangement for provision of support services in the areas listed on a commercial basis. The areas listed in GAR identical that and flow from the terms of the TTLA dated 21st February 2005 and are clearly ancillary and subsidiary to the application or enjoyment of the right, property or information for which royalty is paid. It would be out of contest, therefore, to highly the similarities and the interconnectedness of the obligations of the licensee under TTLA and services received by it under SA. The Services provided by the assessee by virtue of SA merely him to ensure that obligations exceeded upon the licensee by TTLA are fulfilled. The memorandum of understanding consisting Fees For Included Services in Article 12 ends further credence to the above findings of the DRP. The memorandum also identified several factors which may relevant to such determination although not ancillary controlling. These include three positive tests and two negative test:

(i) The extent to which the services in question facilitate the effective application or enjoyment of the right, property or information.

(ii) The extent to which such services are customarily provided in the

ordinary course of business arrangements involving royalties described in paragrapah3.

(iii) Whether the amount paid for the services ( or which would be paid by parties operating at Arm's Length) is in substantial portion of the combined payments for the services and the right, property, or information described in Paragraph 3.

(vi) Whether the payment made for the services and the royalty described in Paragraph 3 are made under a single contract or a set of related contracts)

(v) Whether the person performing the services is the same person as related person to the person receiving the royalties described in Paragraph 3 ( for this purpose, persons re considered related if the relationship is described in Article 9 (An associated enterprises or if person providing the service is doing so in connection with and over all arrangements which includes the payer and recipients of the royalties.

12. The Ld. DR further submitted that the Facilitation Test as envisaged in the Memorandum, when applied to the obligations and services as enumerated in the above table leaves no uncertainty. Quality Control is central to the TTLA. Its importance can be seen from the fact that it is the most elaborate and exhaustive of the above three control systems. In-fact Exhibit-E is the most elaborate exhibit of the entire agreement providing for a variety of quality control measures including "inspection of facilities, equipment and materials used for preparing, processing, packaging, advertising, selling and distributing the products manufactured(Cl-4.2) Exhibit-E identifies the areas where the licensee needs to confirm with the quality control parameters of the appellant. The licensee has been entrusted with the obligation of maintaining quality and any shortcomings in these areas will seriously and adversely affect the effective application

or enjoyment of the rights granted to it under TTLA. The assessee is in absolute control over the entire production, quality control and marketing, sale & distribution process through the use of Technology (Cl-3) and Quality Control (Cl-4) clauses of the TTLA. The licensee has to manufacture "in accordance with the standards, specifications and instructions supplied by or approved by" the assessee (Cl-2.1) in a "factory approved by the assessee" [Cl.4.2] and as per the Quality Standards' provided in the agreement [Exhibit- E] or as approved by the assessee. [Cl.4.2] This provides the assessee to have a right of access to the factory to inspect the facilities, equipment and materials used in preparing, processing, packaging and records involving advertising, sale and distribution and operations and Quality Control.[Cl.4.2] The assessee is also obligated under TTLA to provide services of "technical specialists" [C1.3.5]and training [Cl.3.4 & 3.5]to the personnel of the licensee. It shall provide "Ongoing Technical Assistance" to the Licensee[C1.3.2] as well as 'instruction and training' to the employees of the licensee at its own factory in the areas involving manufacture/production and marketing of the products. [Cl.3.4] Assessee shall make available qualified technical specialists to work with and assist the licensee in the development of employee training and managerial skills and in the operation of the factory and the manufacture of licensed products. [Cl.3.5] All the above observations establish that the service received by the licensee under SA are not only related to the application or enjoyment of the rights granted to it under TTLA but the predominant purpose of the arrangement under which the payment of the service fee and such other payments are made are to facilitate the effective application or enjoyment of such rights as granted by the licensee under TTLA. Moreover, while analysing the relationship between the services provided with the earning of royalty, it should be remembered that the quantum and value of royalty receipts is directly dependent upon the Net Sales value of licensed products. Thus, any services resulting in enhanced sales, maximization of profits, increase

in the efficiency and benefits of economies of scale of the licensee facilitates the effective application or enjoyment of the rights granted under TTLA as well as maximization of Royalty receipts in the hands of the appellant. Thus, the facilitation test is satisfied. The second test as per the Memorandum is whether such services are customarily provided in the ordinary course of business arrangements involving royalties described in paragraph 3. It can't be said that services as envisaged in SA are customarily provided in the ordinary course of business arrangements involving royalties. Thus, the answer to this in the present case is in negative since a separate agreement was necessitated for the provision of these services.

13. The Ld. DR further submitted that the assessee has put a lot of emphasize on the zero mark up on the services rendered and argued that these being pure reimbursement does not have any element of profit in it and hence cannot be brought under taxation. The Ld. DR submitted that the contentions of the Ld. AR cannot be accepted as no evidence in support of the claim was placed by the assessee before the Revenue Authorities. There is no embedded profit element furnished before the Revenue by the assessee. As per the provisions in the TTLA, there is a provision and for independent reimbursement also. The zero marker as provided in Article 5.2 (D) of the SA has to be appreciated with reference to the provisions under US Transfer Pricing Rules and cannot be taken as absolute. The zero mark up as provided in Article 5.2 (D) of the SA must viewed against and contrasted with the Article 1.8 of the SA which defines support services as the services described in Article 3 & provided to the recipients on a commercial basis. The DRP on the basis of the assessee's submissions concluded that this arrangement is merely a basis for the recovery of the fees, charged on a commercial basis. Re-imbursements to the non recipient enterprises have been held as taxable by courts under various other provisions of the Act i.e. u/s 44 BB. The Ld. DR further submitted that although purely academic in view of the application of

the provisions of Article 12 (4) (a) of the DTAA, nevertheless and without prejudice; the assessee's claim that it does make available any knowhow or technology through it services also cannot be accepted. The Ld. DR further submitted that the SA is nothing but an extension and enable instrument of TTLA. Clause 3.1 of the TTLA provides for the licensee of proprietor information provided by the assessee mostly in writing. Moreover, the assessee through its technical specialized and trainee at its own factories enables the licensees employees develop and acquire managerial scales and scales in the operation of the factory and manufacture of licensee products in fact as per Clause 3.7 of the TTLA. The assessee will be entitled to the exclusive benefit without any consideration being payable. If any new, improved or changed method of marking or manufacturing the licensee products which are discovered by the licensee or any of its employees. Viewed from this prospective, there is no doubt that the requirements make available Clause also stand satisfied. The Ld. DR relied upon the decision of the Hon'ble Delhi High Court in case of Centrica India Off Shore Vs. CIT(A) (2014) 364 ITR 336. The Ld. DR also relied the decision of the AAR in the case of Intertek Testing Services India Pvt. Ltd. (2008) 307 ITR 418. The Ld. DR further submitted that the cases/decisions relied upon by the assessee are distinguishable on facts and are delivered in the contest of make available provision and hence have not reliefs to the present case, since it is covered under the provisions of Article 12(4) (A) of the DTAA. Accordingly, it is prayed that the order of the DRP be sustained and the assessee's appeal be dismissed.

14. In rejoinder, the Ld. AR submitted that that the services rendered under the Service Agreement (SA) dated 3 May 2007 entered between Heinz US and its various other associated companies including Heinz India is ancillary and subsidiary to the Technology Transfer and License Agreement (TTLA) entered between Heinz US and Heinz India is misplaced in view of the following reasons:

(i) Heinz US is the ultimate parent of Heinz India whereas Heinz Italia is the holding company of Heinz India. The SA cannot be ancillary and subsidiary to the TTLA entered with Heinz US as the sales of the licensed products manufactured by Heinz India under the TTLA with Heinz US is only approximately 1 to 3% of the total sales of all the products manufactured/ traded by Heinz India.

(ii) The services rendered under the SA are for the benefit of all the products (not only restricted to TTLA) manufactured by Heinz India.

(iii) During the course of hearing on 10 December 2018. As could be perused from the submission of DR filed on 16 January 2019, the above fact as stated in point 2 above is undisputed. Amount of royalty and support service received from Heinz India as compared to sales of tomato ketchup by Heinz India. The support services cannot be considered to be ancillary and subsidiary to the TTLA entered between Heinz US and Heinz India under the TTLA, between Heinz US and Heinz India, Heinz US has granted license to Heinz India to manufacture, distribute, market and sell only the Licensed products.

15. The Ld. AR submitted that Heinz US has entered into SA dated 3 May 2007 with its various associated companies including Heinz India for providing services in areas of general management, human resources, finance, data processing, quality control, purchasing, business development, law and other related areas and in turn to ensure uniformity, consistency and international standards across all group companies. The Ld. AR submitted that the purpose of both the Agreements TTLA & SA are entirely different. While one aims to provide license on which royalty is being earned, the aim of the SA is to ensure uniformity, consistency and international standards across all group companies, for the purpose of which these services and activities have been identified and support services are accordingly being provided which are of the nature of general management, human resources, finance, data processing, quality control, purchasing, business development, law and other related

areas. The Ld. AR submitted that the Ld. DR was in correctly stating that the TTLA pertains to products manufactured by the licensee i.e. Heinz India. The TTLA agreement clearly states that it is pertaining to granting of license in connection with the distribution, marketing and sale of licensed products. 'Licensed products' as mentioned in Exhibit A of the TTLA agreement states the list of licensed products i.e. tomato ketchup, condiments and sauces, beans, convenience meals, baby foods and pasta/ noodles only. On the basis terms of TTLA, Heinz India has paid royalty to Heinz US on the sales of tomato ketchup, which constitute only 1 to 3% of total sales of Heinz India against which a royalty of Rs 32.48 lakhs and Rs 34.54 lakhs during the AY 2009-10 and AY 2011-12 respectively was paid by Heinz India to Heinz US. Further a technical assistant services, if required under the TTLA would at best be rendered for the license products and not for all the products manufactured by Heinz India. There is no overlap between the TTLA and SA Agreement and, therefore, SA in India manner assist in the enjoyment of the TTLA. Services under SA do not cover any product specific technology assistance or products specific quality control. The very fact that SA is for the business as a whole and not restricted to the license products established that SA is in the ordinary course of business. The total sale of Heinz India during Assessment Year 2009-10 is Rs. 748.20 crores out of which sales from tomato ketch up is only Rs. 13.43 crores. Accordingly, the sales from tomato ketch up constitutes only 1-3% of total sales made by Heinz India. The service charges paid are approximately six times the amount of royalty paid as the services charges received are Rs.1.88 crores and the royalty received is Rs. 32.48 lakhs.

16. The Ld. AR further submitted that 5 factors (though not conclusive) are outlined in the Memorandum of Understanding in the India-US treaty to determine whether service fee is ancillary and subsidiary to application or enjoyment of right, property or information for which royalty payment is received. The services under SA are not linked to TTLA since, the TTLA related solely to use of the product marks in the manufacturing process while the SA

related to centrally managed operation and administrative support functions that are similar for all affiliates that can be consolidated into one global function for efficiency purposes. The affiliates benefitted by obtaining greater operational and administrative coverage that previously didn't exist. Further, from Heinz India's perspective, several services under SA like legal, finance, ethics corporate communications, etc cannot be linked to only royalty paid to Heinz US under TTLA since the sales of tomato ketchup is only 1-3% (approx) of overall sales made by Heinz India during the year under consideration. The services under SA for the purpose of greater efficiency and optimum utilization of resources through centralized management and reduced costs, irrespective of whether any payment of royalty is received by parent company. The Assessee renders support services for central operations and administrative support functions.

17. Further, the Ld. AR in submitted that a separate support service agreement has already been entered by Heinz India under which the support services are rendered to various group entities of Heinz US Worldwide. In the instant case, amount paid for the services under SA is approximately six time amount paid under TTLA and, therefore, the payment could be constitute to be ancillary or subsidiary to royalty payment made to Heinz US. The Ld. AR submitted that the Ld. DR agrees in his synopsis that the quantum paid is significant and is more than royalty paid. Therefore, the Ld. AR submitted that the Support Service Agreement cannot be ancillary said to be ancillary or subsidiary to the TTLA as the benefits arising out of the support services are for all he products manufactured by Heinz India i.e. Complan, Glucon D, Nycil, Tomato ketchup and also for the corporate office of Heinz India for e.g. finance, legal, human resource, general management, information system, etc. Further, it is humbly stated that 'Heinz' trade name is not used on products such as Complan, Glucon D, Nycil, etc which constitute 90% and more of total sales of Heinz India.

18. The Ld. AR submitted that in the present case, the activities carried out by the assessee under the agreement are particularly in the area of general management, human resources, strategic planning and marketing, finance and information systems. Costs incurred by the Assessee in terms of time and effort of its employees for carrying out the activities are shared amongst the various affiliates on a uniform and consistent basis using appropriate allocation factor in the manner specified in SA. Clause 5.2 of SA specifically deals with allocation of costs and provides for the mechanism for the same an accounting method consistent with US Generally Accepted Accounting Principles and Assessee's accounting policies would be used to identify all direct and indirect costs associated with the activities carried out by the Assessee for each affiliate for each cost centre an appropriate allocation factor is identified. The above costs are allocated by the Assessee to its Affiliates without charging any mark up/ profit element. The cost contribution/ payments made by Heinz India as a participant to SA merely represents a reimbursement of the costs incurred by the Assessee towards the above activities. In substance and in form the payment cannot be considered as income earned by the Assessee. As can be seen from the agreement itself, there is 0% markup. The definition of Support Services in the SA means the activities performed by the assessee in the areas of area of general management, human resources, finance, data processing, etc are to be provided to Heinz India on a commercial basis i.e. the services to be provided should be such that are provided between two unrelated parties. The expenses incurred by the assessee and reimbursed by Heinz India are mere recoupment of expenses and would not constitute income of Assessee. The Assessee merely allocates the costs and does not charge any mark-up. In view of the above, the Assessee wishes to submit that the reimbursement of expenses received from Heinz India is not taxable in the hands of the Assessee in India under the provisions of the Act. The Ld. AR further submitted that the addition is liable to be deleted on this ground alone as there are various judgments on these issues which have held when there is only recoupment of expenses, there is no element of income and held the same cannot be held to

be taxable in India. The decisions are as follows:-

- Dunlop Rubber 142 ITR 493 Kolkata High Court
- DECTA 237 ITR 190-AAR
- Siemens Aktiongesellschaft 189 Taxman 422-AAR Bombay High Court
- ABB Ltd 189 Taxman 422-AAR
- Ernst & Young Pvt. Ltd. 49 Taxmann.com 386 Kolkata ITAT

19. In respect of issue relating to make available technical services to Heinz India. The Ld. AR submitted that the assessee does not 'Make Available' Technical Services to Heinz India and hence should not be taxable as FIS under the provisions of the DTAA. In the present case, the Ld. AR submitted that factually no technical knowledge, etc was 'Made Available' by the assessee to Heinz India. The fact that the assessee performs such activity on year on year basis also supports the contention that no technical knowledge etc. was 'made available'. The Ld. AR submitted that the assessee does not "make available" any technical knowledge, skill, etc. to Heinz India, nor does it develop and transfer any technical plan, design, etc. Therefore, the amount received by the Assessee cannot be said to be covered within the meaning of FIS under the DTAA. Hence, such reimbursements should not be taxable in India under the DTAA. Article 12(4) of the DTAA defines the term 'FIS'. In light of the above definition and judicial pronouncements of various courts it is now a well settled law that for any payment to qualify as FIS under the DTAA, the following criteria are essential. The services need to be of technical or consultancy nature; and the services need to make available technical knowledge, experience, skill, knowhow or processes, or consist of the development and transfer of a technical plan or technical design. These are essentials a 'technical or consultancy service' is taxable only if the services 'make available' technical knowledge, experience, skill, know-how, or processes, or consist of development and transfer of a technical plan or

technical design. The technology is considered to be '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. Similarly, the use of a product, which embodies technology, is not per se considered to make the technology available. Further, even if the services are considered to be managerial in nature the same would not be taxable under India US tax treaty because under the India US tax treaty the term 'managerial' services is not included under the definition of fees for included services. In view of the above, by contrast, if no technical knowledge, etc is 'made available' to a purchaser, any fees generated would not be FIS under Article 12(4) of the DTAA. Typically, services rendered may not make available any technical knowledge, skill, know-how or processes if the service provider is able to show that such services do not enable the service recipient to apply the technology (if any) contained therein, in an independent manner, in future such services also do not contemplate development or transfer of a technical plan or technical design; and the payment to the service provider is for service simpliciter and not for making available any technical knowledge, experience, etc.

20. Accordingly, the service recipient should be able to make use of such technical knowledge, skill, etc by himself in his business or for his own benefit without recourse to the service provider in the future. The aforesaid principle has also been upheld in the following judicial precedents wherein the concept of "make available" has been discussed in detail and the issue has been ruled in favour of the taxpayers even in the cases of the support services rendered under a global agreement. The following decisions were relied by the Ld. AR

- US Technology Resources (P) Ltd. (2018) 407 ITR 327 (Kerala) H.C

- Guy Carpenter & Co. Ltd. [2012] 346 ITR 504-Delhi H.C
- De Beers India Minerals (P) Ltd. [2012] 346 ITR 467 (Karnataka)-H.C
- Koninklijke Philips Electronics N. V. [2018] 99 Taxmann.com 23-Kolkata ITAT
- ExxonMobil Company India (P.) Ltd [2018] 92 taxmann.com 5 - Mumbai ITAT
- Bombardier Transportation India (P.) Ltd. [2017] 162 ITD 586 (Ahmedabad - Trib)
- Timpken Company [2017] 88 taxmann.com 21 - Kolkatta ITAT
- Outotec Oyj [2017] 162 ITD 541 - Kolkatta ITAT
- Steria (India) Ltd. [2016] 386 ITR 390- Delhi- HC
- Cummins Ltd. [2016] 381 ITR 44-AAR
- Sandvik AB [2015] 61 taxmann.com 31 - Pune ITAT
- Measurement Technology Ltd. [2015] 376 ITR 461 - AAR
- Sandvik Australia Pvt. Ltd. [2013] 31 taxmann.com 256 - Pune ITAT
- Endemol India Pvt. Ltd. [2014] 361 ITR 340-AAR
- Invensys Systems Inc [2009] 183 Taxman 81 - AAR
- KPMG Ltd. [2013] 142 ITD 323 (Mumbai- Trib
- Renaissance Services BV. [2018] 94 taxmann.com 465 - Mumbai ITAT
- Veeda Clinic Research (P) Ltd. [2013] 144 ITD 297 (Ahmedabad - Trib

- ❖ Reliance General Insurance Co. Ltd. [2018] 97 taxmann.com 350-Mumbai ITAT

Further, the case laws specific on the proposition that managerial services are not covered under FIS article in India-US treaty are as follows:-

- ❖ Raymond Ltd. [2003] 86 ITD 791-Mumbai ITAT
- ❖ Koninklijke Philips Electronics N.V- [2018] 99 taxmann.com 23 - Kolkatta ITAT
- ❖ Steria (India ) Ltd. [2016] 386 ITR 390 - Delhi- HC
- ❖ Cummins Ltd. [2016] 381 ITR 44-AAR HC
- ❖ Measurement Technology Ltd. [2015] 376 ITR 461 - AAR
- ❖ Invensys Systems Inc [2009] 183 Taxman 81 - AAR

Further, the case laws specific on the proposition that since support services are rendered year-on-year, they do not satisfy make available test and hence is not taxable as FIS:

- ❖ ExxonMobil Company India (P) Ltd. (2018) 92 Taxmann.com 5- Mumbai ITAT
- ❖ Bombardier Transportation India (P.) Ltd. [2017] 162 ITD 586 (Ahmedabad - Trib)
- ❖ Outotec Oyi- [2017] 162 ITD 541 - Kolkatta ITAT

The Ld. AR submitted that the reliance of Centrica India Offshore Pvt. Ltd (2014) 364 ITR 336 cannot be applied in the facts of Heinz US as in the Centrica ruling the case of whether the salary payment made to overseas entity is taxable or not. Further, the payment made under the case of Centrica was not for year-to year basis as in the case of Heinz US. Thus, the Ld. AR submitted that the said service cannot be held to be FIS and hence are not taxable in India.

21. We have heard both the parties and perused all the relevant materials available on record. It is pertinent to note that taxability of the payment made by Heinz India towards the cost allocated by Heinz USA in respect of the activities carried out will depend upon the characterization of such payment. Such payment could be governed by Article 12 – 'Royalties and fees for included services' or Article 7 – 'Business Profits'. The term "fees for included services" (FIS) has been explained in Article 12(4) of the DTAA which reads as under:

*"4. For purposes of this Article, "fees 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.*

The assessee has filed the present appeal challenging the assessment order on the ground that the cost reimbursement of Rs. 1,88,54,358/- received by the assessee towards providing support services to its group affiliates are taxable as FTS both u/s 9(1)(vii) of the Act as well as Article 12(4) of the DTAA taxing the same by the assessing officer as royalty is also not just and proper. From the perusal of the records it can be seen that the assessee has entered into a global agreement effective from 3rd May, 2007 with its group entities (affiliates), including Heinze India Pvt. Ltd. (Heinze India) for the provision of support activities. The underlying objective of the agreement is to achieve consistency of

approach and economies of scale for the group entities. The activities carried out by the Heinz, USA under the agreement are broadly in the area of supply chain Human Resources, Strategic Planning and marketing, Finance and information systems from the DTAA as well as the agreements entered into by the assessee company as well as Heinz, India Novel Define but services are coming while claiming the reimbursement. The approach of the assessee is that the services should not be considered as taxable contending that they are merely reimbursements and reimbursement cannot be taxed. But to come under the category of reimbursement of certain receipts of service, the same has to fulfill certain criteria for which the services have to be provided by the assessee to its affiliated companies. The assessing officer has observed that the services provided by the assessee are in the area of supply chain, human resources, strategic planning and marketing, finance and information systems under the agreement which is an admitted fact. Thus, services have been utilized by the Indian Company as well. The concept of make available requires that the fruits of the services should remain available to the service recipients in some concrete shape such as technical knowledge, experience, skills etc. which is met in the instant case as can be reflected from the nature and duration of the contract. The service recipient has to make use of such technical knowledge, skills etc. by himself in his business and for his own benefit. Thus, the short durability or permanent usage of the service envisages by the concept of make available services remains at the disposal of their service recipients. Thus, the consideration qualifies as fees for technical services (FTS) both under the Income Tax Act and under the tax treaty as well. The Ld. AR relied upon the various decisions in respect of meaning of make available under DTAA and certain support services which do not satisfy make available clause under DTAA. The first case law of the Hon'ble Jurisdictional High Court is Guy Carpenter and Company Ltd. 346 ITR 504. After going through the decision in this particular case, the issue was whether the nature of reinsurance brokerage, commission which was paid by insurance companies operating in India to the assessee was assessable as fees for technical services

within the meaning of Section 9(1)(vii) of the said Act read with Article 13 of the India United Kingdom Double Tax Avoidance Agreement or not. The Hon'ble Delhi High Court observed that a plain reading of Article 13(4)(c) of the DTAA indicates that fees for technical services would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which inter alia makes available technical knowledge, experience, skill, know-how or processing or consist of the development and transfer of a technical plan or technical design. In the said case, the assessee did not maintain any office in India and has a referral relationship with J. B. Boda which is not affiliated company of the assessee. Thus, the factual aspect differs with the present assessee and therefore the ratio laid down by the Jurisdictional High Court decision is not applicable to the facts of the present case. In fact the assessee during the hearing has given almost 20 decisions which are quoted hereinabove as the submissions of the Ld. AR which are not be applicable in the present case as the factual aspect differs and has unique features which will not be applicable in the present case. As regards the decision that certain support services cannot be taxable as royalty on the DTAA, the decision of the Tribunal cited by the Ld. AR will not be applicable in the present case. Decisions on ancillary and subsidiary clauses in DTAA will also be not applicable. As regards, the decision on reimbursement the Hon'ble Bombay High Court in case of Siemens (supra) has held that the amounts received by the assessee therein under the agreement would be royalty under the DTAA but would fall within the expression, industrial or commercial profits within the meaning of Article 3 of the DTAA. Thus, the ratio will not be applicable in the present case. Thus, Ground No. 2 is dismissed.

22. As regards the ground no. 3 not granting credit of taxes deducted at source the issue is remanded back to the file of the assessing officer for granting due credit of TDS after proper verification. Needless to say the assessee be given opportunity of hearing by following principle of natural justice, therefore, ground no. 3 is allowed.

23. As regards ground no. 4 regarding levy of interest u/s 234B, the same is consequential hence is not adjudicated here.

24. As regards ground no. 5 (wrongly mentioned in Appeal memo as Ground No. 4) relating to initiation of penalty proceedings u/s 271(1)(c) of the Act, is consequential and Ground No. 1 is general in nature, hence, does not require adjudication.

25. As regards to ITA No. 1991/Del/2015, the same is having identical issues, hence the same is also partly allowed for statistical purpose.

26. In result, both the appeals of the assessee are partly allowed for statistical purposes.

**Order pronounced in the Open Court on 23rd August, 2019**.

| **Sd/-**<br>**(R. K. PANDA)**<br>**ACCOUNTANT MEMBER** | **Sd/-**<br>**(SUCHITRA KAMBLE)**<br>**JUDICIAL MEMBER** |
|---|---|

Dated: 23/08/2019
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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| Date of dictation | |
| Date on which the typed draft is placed before the dictating Member | |
| Date on which the typed draft is placed before the Other Member | |
| Date on which the approved draft comes to the Sr. PS/PS | |
| Date on which the fair order is placed before the Dictating Member for pronouncement | |
| Date on which the fair order comes back to the Sr. PS/PS | |
| Date on which the final order is uploaded on the website of ITAT | |
| Date on which the file goes to the Bench Clerk | |
| Date on which the file goes to the Head Clerk | |
| The date on which the file goes to the Assistant Registrar for signature on the order | |
| Date of dispatch of the Order | |