IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI (THROUGH VIDEO CONFERENCING]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 5544/DEL/2011 [A.Y 2008-09]
ITA No. 429 /DEL/2013 [A.Y 2009-10]
ITA No. 458/DEL/2014 [A.Y 2010-11]
ITA No. 1731/DEL/2015 [A.Y 2011-12]
ITA No. 1008/DEL/2016 [A.Y 2012-13]
ITA No. 634/DEL/2017 [A.Y 2013-14]
ITA No. 5815/DEL/2017 [A.Y 2014-15]

GE Energy Management Services Inc C/o 6th Floor, Building 7A DLF Cyber City, Phase -III Gurgaon	Vs.	The Asstt. D.I.T Circle -1(2) International Taxation New Delhi

PAN: AACCG 8701 H

(Applicant) (Respondent)

Assessee By : Shri Sachit Jolly, Adv
Ms. Disha Jham, Adv

Department By : Mrs. Anupama Anand, CIT-DR

Date of Hearing : 15.11.2021
Date of Pronouncement : 24.11.2021

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above captioned appeals by the assessee are preferred against the separate orders of the DRP/CIT(A) pertaining to assessment years 2008-09 to 2014-15. Since all these appeals pertain to same assessee and were heard together involving identical issues, these are being disposed of by this common order for the sake of convenience and brevity.

2. The representatives of both the sides agreed to be heard on the facts of Assessment Year 2010-11 in ITA No. 458/DEL/2014. On such concession, basis facts of Assessment Year 2010-11, the captioned appeals are considered and disposed off.

3. The first quarrel revolves around treatment of receipts from Power Grid Corporation of India Limited [PGCIL, for short] in relation to the offshore maintenance and support services provided to PGCIL under the Long Term Service Agreement [LTSA] as taxable in India.

4. The second quarrel relates to the receipts from North Delhi Power Limited [NDPL] for offshore supply of software licenses taxable as royalty in India.

5. Representatives of both the sides were heard at length. Case records carefully perused and with the assistance of the learned counsel, we have considered the relevant documentary evidences brought on record in form of paper book.

6. Briefly stated, the facts of the case are that the assessee entered into an agreement with PGCIL on 29.12.2006 to provide offshore maintenance and support services. The assessee's broad scope of work under agreement is to provide remote troubleshooting, support and supply of some incidental spare parts in respect of Energy Management System [EMS] and Supervisory Control and Data Acquisition System [SCADA] installed at specified locations in the southern region of India.

7. The entire services for software and hardware maintenance and support work performed by the assessee from outside India through remote system monitoring, remote launching of the system, telephonic

discussions and/or internet communications and no part of the services defined under the agreement were rendered by the assessee from India.

8. The Assessing Officer, in the draft assessment order, has held that services rendered by the assessee to PGCIL are taxable as Fees for Included Services [FIS] under section 9(1)(vii) of the Act and/or Article 12 of the Tax Treaty.

9. The first contention of the counsel is that pursuant to section 90 (2) of the Act, the assessee has opted to be governed by more beneficial provisions of the treaty and, accordingly, provisions of section 9(1)(vii) of the Act are not applicable.

10. We find force in this contention of the ld counsel. Since the provisions of the tax treaty are more beneficial to the assessee, provisions of Section 9(1)(vii) of the Act are done away with.

11. The entire quarrel is now considered within the relevant articles of the Tax Treaty.

12. The order of the DRP for Assessment Year 2010–11 is based upon the finding that the Assessing Officer in the assessment for Assessment Years 2004-05, 2005–06 and 2006-07 had taken up the taxability in the hands of the assessee in relation to two contracts and held that the consideration received for licensing of software and training for both the projects is in the nature of Royalty as per Domestic Law as well as Article 12 of the Treaty.

13. The DRP further observed that for Assessment Year 2004–05, 2005-06 and 2006–07, the assessee did not file appeals and accepted the departmental view on the taxability of the consideration received.

14. A perusal of the background of the assessee shows that the DRP has proceeded on erroneous facts. Firstly, the agreement referred to and considered is dated 19.01.1998, when the assessee was not even in existence. The said agreement was with GE Harris Energy Control Systems LLC for offshore supply of software and hardware and onshore supply of equipment as well as onshore services for southern and western region respectively.

15. Vide order dated 29.06.2006, the assessing officer has conclusively given a finding as under:

"Order u/s 154 of the I.T.Act, 1961 ('the Act')

A certificate u/s 195/197 of the I T. Act, 1961 was issued vide this office order No, ITO/TDS W-1/lntf. Tax./2005-07/29 dt. 17-04-2006 in which name of the payee was mentioned as "M/s GE Energy Management Services (formerly known as M/s GE Harris Energy Control Systems LEG) /GE Harris.

Now, the assessee has pointed out vide letter dt. 27-06-2006 that the name of payee has inadvertently surfaced as "M/s GE Energy Management Services (formerly known as M/s GE Harris Energy Control Systems LLC) (GE Harris)" both in the application filed earlier by the assessee on 04-04-2006 as well as in the subject order issued by this office on 17-04-2006. Whereas, the correct name of the payee for this certificate had all along been "M/s GE Harris Energy Control Systems LLC (GE Hanris.

The facts in this regard have been verified from records and it is clear that the contracts under reference for which payments are required to be made by M/s Power Grid Corporation of India Ltd. were infact executed by "M/s GE Harris Energy Control Systems LLC (GE Harris)". Due to this reason, earlier certificates issued u/s 195/197 of the I T. Act, 1961 by this office vide order dt. 16-06-2004, 03-12-

2004 & 17-06-2005 respectively carried the correct name of payee which happens to be M/s GE Hams Energy Control Systems LLC (GE Harris).

Keeping in view the above facts, order passed u/s 195/197 of the I.T. Act, 1961 on 17-04-2006 is hereby amended for limited purpose whereby the correct name of payee may be read as "M/s GE Harris Energy Control Systems LLC (GE Harris)" instead of "M/s GE Energy Management Services (formerly known as M/s GE Harris Energy Control Systems LLC) (GE Harris)". The other terms and conditions as mentioned earlier in the aforesaid order dt 17-04-2006 would remain the same for the purpose of deduction of tax at source by M/s Power Grid Corporation India Ltd. during the F.Y. 2006-07."

16. From the above order of the Assessing Officer, it is clear that GE Harris Energy Control System is not the same entity as the assessee. As mentioned elsewhere, the assessee was incorporated in the year 2001 and, therefore, could have never executed the agreement on 19.01.1998.

17. Observations of the DRP, as mentioned elsewhere, wherein it has referred to the assessment for Assessment Year 2004–5 to 2006–07 wherein the assessee accepted the departmental view is, in fact, reference to the confession made by GE Harris Energy Control System and

not the assessee. We find that GE Harris Energy Control Systems did not prefer any appeal for the smallness of the amount. In fact, the following letter dated 12.11.2008 addressed to the ADIT, International Taxation, would clear the dust:

"Dear Madam,

Re: GEEnergyControl Systems, LLC
(Formerly known as GE Harris Energy Control Systems LLC) Permanent Account Number: AACCG7043R Assessment Year: 2006-07

Sub: Assessment proceedings u/s 143(3) of the Income-tax Act, 1961

This is in respect of the ongoing assessment proceedings u/s 143(3) of the Income-tax Act, 1961-('Act') for the Assessment Year ('AY') 2006-07.

At the outset, we, on behalf of and under the instructions of our captioned client, submit that the assessee had entered into a turnkey project agreement with Power Grid Corporation of India Limited ('PGCIL') that involved offshore supply of hardware, offshore supply of software and onshore services. It is also submitted that the assessee did not have any presence in India, whatsoever, during the life of the project or thereafter.

We wish to bring to your kind attention that the assessee does not accept the view taken by your goodself in the assessment orders for prior years, *vis-a-vis* taxability of the offshore supply of software, offshore supply of hardware and portion of onshore services. We categorically reiterate our stand that the subject offshore supply of software, offshore supply of hardware and portion of onshore services are not taxable in India.

However, given that the assessee does not have any presence in India by way of office or employees in India, the assessee wishes to avoid further litigation, additional cost and buy peace with the Income-tax Department. The assessee, therefore, requests your goodself to conclude the captioned assessment proceedings for AY 2006-07 based on the assessment proceedings already completed for AY 2005-06, u/s 143(3) of the Act.

However, the assessee wishes to place on record that the conduct of the assessee of requesting your goodself to conclude the captioned assessment proceedings based on the assessment for AY 2005-06, should not be considered to be an acceptance by the assessee that offshore supply of software, offshore supply of hardware and portion of onshore services are chargeable to tax in India.

Furthermore, based on our earlier discussions with your goodself in this regard, we understand that penalty proceedings would not be initiated by your goodself for the subject assessment year.

To summarize, the aforesaid request of the assessee to conclude the assessment proceedings for the captioned year based on assessment of AY 2005-06 is being made in order to buy peace and to avoid further litigation with the tax department sincethere is no change in the facts and circumstances of the case. However, this submission may not be treated as any sort of admission by the assessee.

Further, this concession is being made with the prior understanding that the conclusions drawn in this assessment would have no bearing or impact in the assessments of other related entities which are being assessed as an outcome of other proceedings.

We request your goodself to kindly take the above on record."

18. The agreements in dispute before us is long-term software and hardware maintenance and support agreements, signed between the assessee and PGCIL for Southern and Western region.

19. In the agreement under the head definitions 'GE' means 'GE Energy Management Services INC, the entity which licensed software in original contract for SR ULDC Scheme and is providing support services hereunder, either itself or through its designee.

20. Under the head 'Support Services', only services governed by this agreement are those maintenance and support services described in the scope of work that are to be performed from outside of India, specifically software support to be provided from Melbourne, Florida USA any training to be done by GE Energy Management Services employees and any hardware supply and support that may be provided from outside of India. This agreement does not govern nor purport to obligate GE to provide any maintenance and support services from middle India. Any such services may be procured under a separate contract notwithstanding that such services maybe described in Attachment 1. Such description is for informational purposes only.

21. Attachment 1 to the agreement is as under:

AGENCY	CONTROL	LOCATION	CONTRACT co-
POWERGRJ	RS'CC	BANGALORE	SRI.DC, RSCC
AiTRANSC	SLDC	Mamidapalli	APTRANSCO, SLDC
AP1RANSC	SUB-fJ>C	YDAYAWADA	API ItANSCO, SLDC
APTRANSC	SUB-LDC	CUDDAPAH	APTRANSCO, SLDC
AFTRANSC	SUB-LDC	WARANGAL	AITRANSCO. SLDC
KPTCL	SLDC	BANGALORE	KPTCL, SLDC
KPTCL	sub-ldc	guttur	KPTCL. SLDC
KPTC1.	SUB LDC	LANGSUGUR	KPTCL, SLDC

K.SEB	SLDC	KALAMASEIR	KSEB, SU>C
K.SED	SUB-LDC	KANNUR	KSEB, SLDC
KSEB	sub-ldc	TRIVANDRUM	KSEB, SLDC
TNBB	-SLDC	CHENNAI	1NBB. sux:
1NGB	SUB-LDC.	ERODE	TNliB, SLDC
TNEB	suimjx:	MADURAI	TNEB, Sf.DC
UTP(P£D)	set:	PUDUCHERRY	see

Any support services described hereunder that describe services or work that is to occur inside of India shall not be included under this Agreement. Any such services may be procured in a separate contract. Such services are only set forth herein for purposes of describing such available service

22. The scope has been mentioned as under:

Scope

"The maintenance of the SCAOA-CMS System supplied by the GE shall be comprehensive, as set forth herein in nature and would broadly include but not be limited to diagnosis and rectification or the hardwore and software failures. The Scope also includes:

- repair/replacement of defective equipment including that of Application Processor, Work Stations, FGPs, Splitters, UCC cards, power supply units. Routers, flubs, LAN cabling, SCSI

cables, RAID Box, 1party products supplied by GP. (as set forth in the Agreement), internal/external hard disc, etc.,

- configuration of the replaced hardware /software, periodic routine checking as part of a preventive maintenance program (as described in further detail in this agreement) which would include checking of functionality of Hardware and software,

- services to bring op any or all SCADA-EMS systems upon its failure and to restore the functioning of SCADA-EMS system at all the Control Centres viz. RSCC/SLDCs/Sub-SLDC/SCC under SR ULDC Schemes,

- The Despatcher Training Simulator system at RSCC (DTS) (both hardware and software) would also be covered under this contract.

However, some of these equipment/components namely RTUs and its accessories VPD modems and Us power supplies, transducers, printers, loggers, NMS PCs are not included in the scope of this Agreement.

Routine works like data base building, addition of ICC!P, Analog and Status points and other such work which are classified as-day-to-day operational activity would primarily be the responsibility of POWERGRID and its constituents SCADA-EMS. Engineers of the respective utilities and in ease of encountering any difficulty in this

regard the same shall be referred to GE for support.

The scope, of work under this Agreement includes all Software modules including 3rd party products supplied by GE under the SCADA-EMS System (as set forth in the Agreement) as well as any additions/modifications etc done on the system till date by GE and the associated Hardware."

Technical Training [Optional item for which cost is to be quoted separately not included under this agreement unless ordered under separate purchase order.

23. Basis the above-mentioned relevant clauses of the Agreement the DRP observed that the essence of this agreement is to provide maintenance support for the designated hardware and software and to provide system enhancements to accommodate a growing system. There is rendering of managerial, technical and consultancy services including the provisions of services of technical and other personnel and a comprehensive training component in the Agreement. Whereas, it has been specifically mentioned under the head 'Technical Training' that it is an optional item for which cost is to be quoted separately.

24. Referring to the afore-stated relevant clauses of the agreement, the DRP formed a belief that service provided by the assessee are squarely covered under section 9(1)(vii)(b) of the Act read with Explanation below section 9(2) of the Act introduced by the Finance Act 2010 with w.r.e 01.06.1976. As mentioned elsewhere, the relevant clauses of the agreement have to be considered within the Article of Indo US Tax Treaty read with MOU/Protocol. The relevant article 12(4)(a) of the Indo USDTAA read as under:

RELEVANT PROVISIONS:

The relevant Article 12(4)(a) of the DTAA and the MOU/Protocol are reproduced herein below:

"12....

*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"

Relevant extracts of the MOU/Protocol are as under:

"Paragraph 4(a)

Paragraph 4(a) of Article 12 refers to technical or consultancy services that are ancillary and subsidiary to the application or enjoyment of any right, property, or information for which a payment described in paragraph **3(a)** or (b) is received. Thus, paragraph 4(a) includes a technical and consultancy services that are ancillary and subsidiary to the application or enjoyment of an intangible for which a royalty ***is*** received under a licence or sale as described in paragraph 3(a) as well as those ancillary and subsidiary to the application or enjoyment of industrial, commercial, or scientific equipment for which a royalty is received under a lease as described in paragraph 3(b).

It is understood that, 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. ***In*** addition, the clearly predominant purpose of the arrangement under which the payment of the service fee and such other payments are made must be the application or enjoyment of the right, property, or information described in paragraph 3. The question of whether the service is related to the application or enjoyment of right, property, or information described in paragraph 3 and whether the clearly

predominant purpose of the arrangement is such application or enjoyment must be determined by reference to the facts and circumstances of each case. Factors which may be relevant to such determination (although not necessarily controlling) include:

1. The extent to which the services in question facilitate the effective application or enjoyment of the right, property, or information described in paragraph 3;

2. The extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties described in paragraph **3 ;**

3. Whether the amount paid for the services (or which would be paid by parties operating at arm's length) is an insubstantial portion of the combined payments for the services and the right, property, or information described in paragraph 3;

4. 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)

; and

5. Whether the person performing the services is the same person as, or a related person to, the person receiving the royalties described in paragraph 3 [for this purpose, persons are considered related if their relationship is described in

Article 9 (Associated Enterprises) or if the person providing the service is doing so in connection with an overall arrangement which includes the payer and recipient of the royalties].

6. To the extent that services are not considered ancillary and subsidiary to the application or enjoyment of some right, property, or information for which a royalty payment under paragraph 3 is made, such services shall be considered "included services" only to the extent that they are described in paragraph 4(b).

Example 2

Facts :

An Indian manufacturing company produces a product that must be manufactured under sterile conditions using machinery that must be kept completely free of bacterial or other harmful deposits. A U.S. company has developed a special cleaning process for removing such deposits from that type of machinery. The U.S. company enters into a contract with the Indian company under which the former will clean the latter's machinery on a regular basis. As part of the arrangement, the U.S. company leases to the Indian company a piece of equipment which allows the Indian company to measure the level of bacterial deposits on its machinery in order for it to known when cleaning is required. Are the payments for the services fees for included services?

Analysis :

In this example, the provision of cleaning services by the U.S. company and the rental of the monitoring equipment are related to each other. *However, the clearly predominant purpose of the arrangement is the provision of cleaning services. Thus, although the cleaning services might be considered technical services, they are not "ancillary and subsidiary" to the rental of the monitoring equipment. Accordingly, the cleaning services are not "included services" within the meaning of paragraph 4(a).* [y]

25. If Article 12(4)(a) is read along with MOU, in our considered opinion, it is clear that for a service to qualify as FIS, two broad conditions must be fulfilled:

a) that the service is in connection with a right property or information which qualifies as royalty under article 12(3);

b) the predominant purpose of the arrangement under which the payment of the service fee is made is enjoyment of the right, property or information which qualifies as 'royalty'. Merely because the service is in connection with payment of royalty is not enough.

26. The above two conditions have been explained in five factors mentioned in the MOU hereinabove. This is clear from the following excerpts of MOU/Protocol wherein it is clarified that five factors are relevant for such determination:

> "The question of whether the service is related to the application or enjoyment of right, property, or information described in paragraph 3 and whether the clearly predominant purpose of the arrangement is such application or enjoyment must be determined by reference to the facts and circumstances of each case. Factors which may be relevant to such determination (although not necessarily controlling) include:"

27. From the above explanation provided in the MOU that forms an integral part of tax treaty that service only, if it makes available technical knowledge, experience, skill, know-how or processes to the service recipient. The receiver of this service can be said to acquire the relevant skills used by service provider only if he acquires those skills in such a way that he can himself use them independently without getting any assistance or being dependent on the service provider in future.

28. The facts of the present case clearly show that the offshore maintenance and support services provided by the assessee PGCIL are not geared towards making available any technical knowledge, experience, skills, know how or processes to PGCIL.

29. Our view is supported by the fact that the term of the agreement is five years and services provided by the assessee are repetitive and ongoing in nature. This means that PGCIL is not able to apply technical or skill use by the assessee for rendering such services. Given that repetitive nature of the services, it would be factually incorrect to allege that the services make available any technical knowledge, expertise, skill, know-how or processes to PGCIL.

30. The taxability of offshore software and hardware maintenance and support services has to be examined in terms of beneficial provisions of Article 12 of the tax treaty. The relevant article has been mentioned here in above. The term, make available, has been analyzed and explained in the following judicial precedents:

"DIT V. Guy Carpenter & Co Ltd (ITA No. 202/2012) (Delhi High Court)

In this case, the Delhi High Court concurred with the decision of Delhi 1TAT which relying on the case Raymond Limited V. DCIT (supra) held that "that once sec: 9(l)(vii) of the Income-tax Act stops with the "rendering" of technical services, the DTAA. between India & UK goes further and qualifies such rendering of services with words to the effect that the services should also make available technical knowledge, experience, skills, know-how or processes to the person utilizing the services. The Hon'ble Tribunal further observed that the word "which" occurring in the said Article after the word "services" and before the words "make available" not only describes or defines more dearly the antecedent noun ("services") but also give additional information about the same in the sense that it requires that the services should result in making available to the user technical knowledge, experience, skill, know-how or processes etc. Thus, the normal, plain and grammatical meaning of the language employed in the said Article 13(4)(c.) is that a mere rendering of services is not roped in unless the person utilizing the services is able to make use of the technical knowledge, experience, skills, know-how or processes by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill, knowhow or processes must remain with the person utilizing the services even after the rendering of the the services has come to an end. A transmission of the technical knowledge,

experience, skills, know-how or processes from the person rendering the services to the person utilizing the same is contemplated by the Article 13(-!)(c) of the lndo-UK Treaty. Some sort of durability or permanency of the result of the "rendering of services" is envisaged which will remain at the disposal of the person utilizing the services. The fruits of the services should remain available to the person utilizing the services in some concrete shape such as technical knowledge, experience, skills, know-how or processes. "(Para 29)

* CIT V. De Beers India Minerals Pvt. Ltd. (ITA No. 549 of 2007) (Karnataka High Court)

In this case, the HC observed that the services rendered by foreign company (Netherlands company) did not make available the technology to the service recipient in a manner that enabled it to apply the technology independently, as required under the India- Netherlands Double Taxation Avoidance Agreement (DTAA).

"What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc. so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to jit into the terminology "making available, the technical knowledge, skills, etc., must remain with the person receiving the services even after

the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted^ to and absorbed by the receiver so .*that* the receiver *can.* deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fad that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the. use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as 'fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same lime is satisfied. "(Para 22)

* Raymond Limited V. DCIT (86 1TD 791) (Mumbai ITAT)

"Thus, the normal, plain and grammatical meaning of the language employed, in our understanding, is that a mere rendering of services is not roped in unless the person utilizing the services is able to make use of the technical knowledge, etc. by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill, *etc,* must remain with the person utilizing the services even after the

rendering of the. services has come to an end. A transmission of the technical knowledge, experience,. skills, etc. from the person rendering the services to the person utilizing the same is contemplated by the article').

- CESC Ltd. V. DOT (80 TTJ 806) (Calcutta 11 AT)

"In our considered view, in order to be covered by the provisions of art. 13(4)(c) of the India UK DTAA, not only the services should be of technical in nature but such as to result in making the technology available to the person receiving the technical services, We also agree that merely because the provision of the. service may require technical input by the person providing the service, it cannot be said that technical knowledge, skills, *etc.* are made available to the person purchasing the service. As to what are the connotations of making the technology' available to the recipient of technical services, as is appropriately summed up in protocol, to Indo-US DTAA, "generally speaking, technology will he considered 'made available' when the person acquiring the service is enabled to apply the technology. " We are in considered agreement with the views expressed in the protocol to Inclo-USA DTAA which, as we have mentioned earlier, also represents *views* of the Government of India on this subject."

- McKinsey and Co. Inc. V. Assistant Director of Income Tax (99 TTJ 857) (Mumbai ITAT)

The Hon'ble Mumbai Tribunal found that the nature of assessee's activities is furnishing of geographical specific data and information inputs which are commercial and industrial information in nature, it further noted that there is no material to suggest that the payment is for any such services which enable the recipients of these, services to apply the technology. The Tribunal, relied upon the decision of Raymond Limited (supra) and ***CESC*** Limited (supra).

- Anapharm Inc. A.A.R. NO. 746 OF 2008 (2008-TIOL-14-ARA-IT)

It is, thus fairly dear that mere provision of technical services is not enough to attract Article J2(4)(b). It additionally requires that the service provider should also make his technical knowledge, experience, skill, know-how etc., known to the recipient of the service so as to equip him to independently perform the technical function himself in future, without, the help of the service provider, in other words, payment *of* consideration would be regarded as fee for technical / included services' only if the twin test of rendering services and making technical knowledge available at the same time is satisfied (Emphasis supplied).

- ISRO Satellite Centre (2008) (307 ITR 59) (AAR)

AAR reiterated the principle of "make available" and held that it implies that the technical knowledge, skill, etc. remains with the person utilizing the services even after the particular transaction is over. Merely enabling the use of services or products into which technical inputs have gone does not amount to "making available" technical knowledge, skills, etc. The recipient of service must be able to absorb and apply the technology on its own in its future activities

- Dell international services India (P) Ltd. (AAR) (218 CTR 209)

"The phrase "make available" occurring in art. 12(4) has been clarified in the MoU to the treaty itself to the situations where the person receiving the service is enabled to apply the technology. As there is no transfer of any technology in the sense that the recipient of the sendee is enabled to apply technology by itself the payment does not constitute a fee for included service"

- Cushman & Wakefield (S) Pte. Ltd. (AAR) (218 CI R 238)

"Assuming that managerial or consultancy services are involved in the present case, as Applicant has sought benefit of the. treaty we have to see whether such payments are FTS as per art. I2(1)(b) of the treaty, which lays down that services of such managerial, technical or consultancy nature can be FTS only if such services 'make available' technical know ledge, experience, skill, know-how or processes, which

enables the person obtaining the. services to apply the technology contained therein. In the instant case, no expertise, or know-how has been 'made available' to CW1 by reason of rendering service of the said description. We are of the view that transmission of the technical knowledge, experience, skills, etc. from the person rendering the services to the person utilizing the. same is contemplated by the article. Further, some sort of durability or permanency of the result of 'rendering of services' is also envisaged which wilt remain at the disposal of the person utilizing the services. Thus, in the instant case, the 'know-how' or the technical knowledge or commercial experiences etc. cannot be said to have been 'made available' to the Indian company ***(CWl)*** merely by reason of customer referral, Consequently, it emerges that the referral fee paid by the Indian company is not FTS as per the phraseology 'make available' used in art. 12(4)(b) of the treaty."

- Intertek Testing Services India (P) Ltd. (AAR) (307 ITR 418)

"Rendering technical or consultancy service is followed by *a* relative pronoun "which" and. it has the effect of qualifying the. services. That means, the technical or consultancy services rendered should be of such a nature that "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting the technical knowledge, etc. so that the payer of service could derive an enduring benefit and utilize the knowledge or know-how in future on his own without the aid of service provider. By making available the technical skills or know-how, the recipient of

service will get equipped with that knowledge or expertise and be *able to* make use of it in future, independent of the service provider. In other words, to fit into the terminology "make available", the technical knowledge, skills etc. must remain with the person receiving the services even after the particular contract comes to an end. The services offered may be the product of intense technological effort and lot of technical knowledge and experience of the service provider would have gone into if. But, that is not enough to fall within the description of services which make available the technical knowledge, etc. The technical knowledge or skills of the provider should *be* imparted to and absorbed by the receiver so that the *receiver* can deploy similar technology or techniques in future without depending on the provider. Taking some examples, the training given to *a* commercial aircraft Pilot or training the staff in particular skills such as software development would fall within the ambit of the said expression in clause (c).

Supposing, a prescription and advice is given by the doctor after examining the patient and going through the clinical reports. The service rendered by the doctor cannot he said to have made available to the patient, the knowledge and expertise possessed by the doctor. On the other hand, if the same doctor teaches or trains the students on the aspects of diagnosis or techniques of surgery, that will amount to making available the technical knowledge and experience of the doctor"

• DDT v Scientific Atlanta Inc, (ITA No. 9228 Mum 2004)

In this judgment delivered by the Hon'ble Mumbai Tribunal, the Bench has relied on the case of Intertek Testing Services Pvt. Ltd (supra) and held that the term 'make available' means providing something to one, which is capable of use by other. A passage from this judgment is reproduced below for ease of reference:

"...If the first party uses all the technical services at its own end abroad, albeit the benefit of that directly and solely flows to the payer of the service in India, that cannot be characterized as the

Invensys Systems Inc. vs D.I.T (AAR) (317 ITR 438)

In this case, the AAR relied on the case of Intertek Testing Services Pvt. Ltd (supra). The relevant Para of the ruling is reproduced below:

' Assuming that some of the services/functions can be brought within the definition of technical or consultancy services, yet the other ingredient in clause (b) of Art. 12.4. of DTAA viz. "make available" is not satisfied in the. instant case. The expression "make available" was construed in Intertek (supra) and Worley Parson (AAR/748/2007) (2009) 3J3 ITR 74. In understanding that expression, this Authority observed that the MOU appended to the India-USA DTAA succinctly explains the scope of the phrase "make available". It was explained in

the MOU."

Further, *reliance in this regard is placed on decision of Authority for Advance Ruling in case of Airport .Authority .of India (2004) 273. IT 437, "*

31. If the afore-stated decisions are applied on the facts of the case in hand, we find that in the case in hand, the customer would not be able to apply technology on its own and the customer would continue to depend on the assessee for provision of software and hardware maintenance and support services in future as well.

32. The ld. DR, in his written submissions, has reiterated the findings of the DRP which, as mentioned elsewhere, were based on incorrect facts. Further, judicial decisions relied upon by the ld DR are not applicable on the facts of the case In hand qua the agreement under dispute.

33. Considering the facts of the case in totality, in light of the judicial decisions discussed here in above, we are of the considered view that the receipts from PGCIL do not qualify as 'Royalty' under Article 12(4)(a) and 12(4)(b) of the India US DTAA. The same is directed to be deleted.

34. We will now address to the NDPL contract. This is relevant only for Assessment Years 2010–11, 2011–12 and 2012–13.

35. NDPL contract is divided into two purchase orders. The first purchase order is towards software licenses and second purchase order is for offshore services. For Assessment Year 2010–11, the assessee received consideration under both purchase orders but for Assessment Year 2011–12 only license fee under first purchase order was received and in 2012–13 only service fee was received under second purchase order.

36. Under the first purchase order, no copyright has been transferred to NDPL and there is only right to use the software, which is clear from the relevant contract. This issue has now been well settled by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt Ltd in Civil Appeal No. 8733 to 8734 of 2018 alongwith a bunch of 104 appeals. The relevant findings of the Hon'ble Apex Court read as under:

> "168. Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this judgment, it is clear that

there is no obligation on the persons mentioned in section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (section 9(1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.

169. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to nonresident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act. The answer to this

question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment.

170. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."

37. In light of the aforementioned decision of the Hon'ble Supreme Court, since the payment towards software license does not qualify as "Royalty" services even if connected with such software, do not qualify as FIS under Article 12(4)(a) of the India US DTAA read with MOU/Protocol. The DRP's findings in Assessment Year 2010–11 are premised on the basis that the software supplied by the assessee qualifies as "Royalty". This finding is incorrect in light of the decision of the Hon'ble Supreme Court [supra].

38. The other finding of the DRP that consideration for US dollar 1 lakh is towards software and hardware is also incorrect. The entire consideration of US dollar 1 lakh is towards software as is evident from the contract with NDPL. The relevant clause of the contract relating to scope of service makes it clear that services are in the nature of remote troubleshooting and do not make available any skill, knowledge, experience to NDPL.

39. Considering the facts of the case in light of the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt Ltd [supra] we are of the considered view that the consideration for services in connection with supply of software do not qualify as FIS under Article 12(4)(a) or 12(4)(b) of the India USDTAA. We, accordingly, direct for deletion of the addition.

40. The other issue relates to charging of interest under section 234B and 234C of the Act.

41. In so far as charging of interest under section 234B of the Act is concerned, this has been settled by the Hon'ble Supreme Court in the

case of Mitsubishi India Ltd in which the Supreme Court has held that prior to Assessment Year 2013–14, no interest is to be charged under section 234B of the Act. Charging of interest under section 234C is consequential. We, accordingly, direct the Assessing Officer to charge interest as per provisions of the law.

41. In the result, the appeals filed by the assessee in ITA No. 5544/DEL/2011, ITA No. 429 /DEL/2013, ITA No. 458/DEL/2014, ITA No. 1731/DEL/2015, ITA No. 1008/DEL/2016 ITA No. 634/DEL/2017 ITA No. 5815/DEL/2017 are allowed.

The order is pronounced in the open court on 24.11.2021.

Sd/-	**Sd/-**
[SUDHANSHU SRIVASTAVA]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 24th November, 2021

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

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	