

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI C.N. PRASAD, JUDICIAL MEMBER**

ITA No. 2469/Del/2015
Asstt. year 2010-11

ITA No. 6137/Del/2015
Asstt. year 2011-12

AND

ITA No. 2355/Del/2017
Asstt. Year: 2012-13

Everest Global Inc. C/o A-1/B-27, Janak Puri New Delhi – 110 058 PAN AACCE3597R	Vs.	DDIT, Circle-1(2) International Taxation, New Delhi-110 058
(Appellant)		(Respondent)

Assessee by:	Ms. Vandana Bhandari, Adv.
Department by :	Shri Vijay Kumar Choudhary, Sr. DR
Date of Hearing	30/12/2021
Date of pronouncement	30/03/2022

ORDER

PER C.N. Prasad, JM

These three appeals are filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-42, New Delhi ("**CIT(A)**") dated 17.02.2015; 21.09.2015; and 31.01.2017 pertaining to assessment years ("**AY**") 2010-11, AY 2011-12 and AY 2012-13 respectively.

2. Since the underlying facts in issues are common in all the three appeals they were heard together and are disposed of by way of this common order for the sake of convenience and brevity.

3. In all the three appeals, ground no. 2, 3 and 5 are common grounds. In AY 2010-11, Ground no. 10 relates to charging of interest under section 234A and 234B of the Income Tax Act, 1961 ("**Act**") which has not been raised in other two appeals. Other grounds in all the three appeals are general in nature and hence do not require adjudication.

4. The main common issues in all the three appeals relate to addition made by the Assessing Officer ("**AO**") under section 143(3) of the Act on account of management fee and IC Labour charges received by the assessee from its subsidiary in India and on account of miscellaneous services rendered to certain third parties in India.

5. The assessee operates as a global services advisory and research company. Assessee assists corporations in developing and implementing leading edge sourcing strategies including captive outsourced and shared services approaches. The assessee is a LLC registered in United States of America (**USA**) and hence entitled to be governed by the provision of the Double Taxation Avoidance Agreement between entered into between India and USA ("**India-USA DTAA**").

6. Since the underlying facts in issues are identical in all the three appeals we have considered the facts of the AY 2010-11 in ITA No. 2469/Del/2015. For AY 2010-11, the assessee filed its return of income declaring total income of Rs. 91,04,468/- in nature of royalty subject to tax on gross basis under India-USA DTAA. However, the AO completed the assessment at Rs. 5,25,13,014/- by making an addition on account of management fee and IC Labour Charges received by the assessee in respect of services offered to its wholly owned subsidiary in India, Everest Business

Advisory India Pvt. Ltd. ("**Everest India**") under Master Support Service Agreement and Master Consultant Sharing Agreement respectively. The AO also made addition on account of receipts from third party clients in India in respect of certain services rendered by the assessee to these clients in India such as web promotion, banner ads, development of whitepapers which are available for download by registrants for free etc. The AO treated management fee and IC Labour Charges as fee for technical services/fee for included services ("**FTS**"/"**FIS**") under the Act as well as under the India-USA DTAA. As regards receipts from third parties, the AO held these receipts to be taxable as royalty/ FTS/ FIS in the alternative under the Act as well as India-USA DTAA.

7. The Ld. CIT(A) confirmed the addition on account of management fee and IC Labour Charges. The finding of the Ld. CIT(A) is reproduced below:

"7.2 I have perused the relevant clauses of 'Master Consultant Sharing Agreement'. Clause 2 (i) defines 'shortage of capacity' which means a lack on part of a group member of a specific type of expertise or an adequate number of consulting employees needed to satisfy the requirements of all its clients. Clause 20 defines 'excess capacity' which means possession of a group member of a specific type of expertise or an adequate number of consulting employees needed to satisfy the requirements of all its clients without fully utilizing all its consulting employees. Clause 3 provides scope and delivery of services and it says that during term of this sharing agreement, any member of the group with shortage of capacity may request the services of any member of group with excess capacity. The member with excess capacity will then be referred to as lender and member of group with shortage of capacity will then be referred to as borrower. These clauses indicate that any member of group can borrow consultants from other member of group having excess number of consultants to meet with its requirement. Obviously, the lender member is providing consultants to the borrowing member and consideration received for 'provision of services of technical or other personnel' is fee for technical services ('FTS') as per Explanation 2 to section 9(l)(vii) of the Act and also Article 12 of Indo-USA DTAA. Therefore argument of the appellant that agreement is just about sharing of resources and does not amount to FTS is legally fallacious. Further, Article 12(4)(b) of Indo-USA DTAA requires that 'make available' should be satisfied. MOU of Indo-USA DTAA and various judicial decisions provide definition of 'make available' as a

situation when recipient of services is enabled to apply the services on its own in future without recourse to the service provider. In present case, borrower member is simply deficient in number of consultants and can borrow consultants from other member if having surplus number. That means that borrower member or recipient of services is already in a position to apply those services and borrowing of more consultants simply results in enhancement of its capacity. In other words, the recipient is in a position to apply those services in future on its own even without borrowing more consultants from service providers. Therefore 'make available' clause as contained in Article 12(4)(b) of Indo-USA DTAA is satisfied. In view of discussion above, I hold that consideration received by the appellant as IC labour charges are in nature of FIS/FTS under both domestic act and relevant DTAA subject to taxation on gross basis. The action of the AO on this count is upheld.

7.3 I have carefully perused 'Master Support Services Agreement'. Clause 2(c) defines services as service activities and duties performed by Everest Global for each affiliated entity as contemplated by this Master Support Agreement and more fully described in Attachment C. Clause 3 describes scope and delivery of services and it says that during the term of this Master Support Agreement, Everest Global shall perform all or part of services set out in the attachments on an independent and non-exclusive basis and in accordance with terms and conditions contained in the Master Support Agreement. Everest Global agrees to render services as follows:

- (i) By making available its skilled employees to each affiliated entity on an as needed basis for performance of services*
- (ii) By providing each affiliated entity, upon request, with verbal or written advice pertaining to services*
- (iii) By providing each affiliated entity, upon request, with factual information, examples models, samples, referrals, studies, data or recommendation relating to services so as to enable each affiliated entity to promote and improve its business.*

Further, Attachment C describes various heads of services which include Management oversight, Marketing, Finance and accounting, Human resources development, Information technology, Training and legal.

7.3.1 Perusal of above mentioned clauses clearly indicates that scope of services to be provided under the agreement is to give advice so as to enable the recipient of the services to promote and improve its business and also to provide various trainings. By giving advice, the service provider is enhancing the capability of service recipient who later on can apply that acquired knowledge on its own. Further, service provider is contractually responsible for imparting training to

service recipient which satisfies 'make available' requirement In view of above discussion, I hold that consideration received by the appellant as management fee is in nature of FIS/FTS under both domestic act and relevant DTAA subject to taxation on gross basis. The action of the AO on this count is upheld."

7.1 In respect of receipt from third parties, the Ld. CIT(A) partly allowed the claim of the assessee by deleting addition made in respect of consideration for web promotion, banner ads, branding on website, online listing services etc. and confirmed the addition in respect of consideration for subscription service to data base and custom research holding them to be in the nature of royalty. The finding of the Ld. CIT(A) is reproduced below:

"7.4.1 Regarding consideration received for subscription service to data base and custom research, it is seen that the appellant has comprehensive data bases for BPO/ ITO etc., which contains research themes gathered from different sources. These reports help in projecting future scenarios. The database subscription service provides access to research reports, articles, white papers and other data which is made available to subscribers via an interactive website. The subscriber is granted a non-exclusive, non-transferable right and licence to use, modify, copy, distribute and display all or any portion of subscription material for business purpose only by and among employees of subscriber. Ownership and copyright to subscription material shall remain with appellant. From these facts, it can be seen that the subscribers have been granted right by the appellant to use its data base for their business purpose. Subscription amount under similar set of facts has been held to be in nature of royalty in case of CIT v Wipro Ltd. [2011 -TII-45- HC-KAR-INTL] where applicable tax treaty was Indo-USA DTAA and also in case of ONGC VIDESH LTD [2012-TII-218-ITAT-DEL-INTL] under Indo-UK DTAA which is similarly worded as Indo-USA DTAA. In view of above discussion, I hold that consideration received by the appellant as subscription fee for data base/custom research is in nature of royalty under both domestic act and relevant DTAA subject to taxation on gross basis. The action of the AO on this count is upheld.

7.4.2 Regarding payments received by EGI on account of branding on website, feature in website content, online listing, sponsorship to editorial section etc., I find force in contention of the appellant that 'make available' clause as contained in Article 12(4)(b) of Indo-USA DTAA is not satisfied. Further, it is undisputed that the service provider does not have any permanent establishment ('PE') in India.

Therefore, the consideration received for such services is not taxable in India under beneficial provisions of DTAA. The appellant has not furnished bifurcation of consideration relevant to such services. The AO is directed to work out portion of consideration relevant to such services after getting necessary information from the appellant and grant relief accordingly. To sum up, the appellant shall get relief in respect of consideration relevant to Web promotion, Banner ads, allowing posting of white papers, webinars, branding on website, online listing, promote client through OC emails, web content, and blog articles. All other receipts are taxable as royalty / FTS as discussed supra.”

7.2 The Ld. CIT(A) also confirmed the levy of interest u/s 234A and 234B on tax payable on assessed income for AY 2010-11. The relevant para of the Ld. CIT(A)'s order is reproduced below.

“8.0 Ground no. 4 is regarding levy of interest u/s 234A/B/C.

The appellant has not submitted any argument in respect of the issues involved in this ground of appeal. It is settled principle of law that interest u/s 234A/B/C are mandatory and consequential in nature. The AO is directed to recompute these interests after giving effect to this order. The ground of appeal is disposed off accordingly.”

8. Aggrieved the assessee is in appeal before us.

9. The first common issue (Ground 2) in three appeals relates to the taxability of management fee received by the assessee on account of management support services rendered to Everest India under the provisions of the Act and/or under India-USA DTAA as FTS / FIS.

9.1 The Ld. DR strongly relied on the order of the Ld. CIT(A) / AO and submitted that the management services rendered by the assessee to Everest India fall within the scope of the definition of FIS under the India-USA DTAA as these services satisfy the make available requirement enabling Everest India to make use of these services on its own in future.

9.2 The Ld. AR made a detailed submission on scope and applicability of FIS in context of the nature of services provided by the assessee under the Master Support Services Agreement. At the outset, the Ld. AR submitted that the assessee does not have a permanent establishment (“**PE**”) in India

and managerial services rendered by the assessee to Everest India are not covered within the meaning of FIS under Article 12(4) of the India-USA DTAA. The services rendered by the assessee are only in the nature of support services in various areas such as human resource, accounting, legal etc. and that the management support services performed by the assessee for Everest India do not result in making available any technical knowledge, experience, skill, know-how or processes nor does it enable Everest India to make use of these services independently on its own without recourse to the assessee. Further, provision of these services has not resulted in any enduring benefit to Everest India by way of any know-how or knowledge which it could apply on its own in future without the aid of the assessee. In its support, the Ld. AR relied upon the judgement of the jurisdictional Delhi High Court in Steria (India) Ltd. vs. CIT [2016] 72 taxmann.com 1; US Technology Resources (P) Ltd. Vs. CIT [2018] 97 taxmann.com 642 (Kerala HC); and Wockhardt Ltd. vs. ACIT [2011] 10 taxmann.com 208 (Mumbai – Trib.).

9.3 We have carefully considered the rival submissions and perused the facts on record. Article 12(4)(b) of the India-USA DTAA provides the meaning of the term FIS 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 :

.....

(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.”

9.4 Now coming to the facts of the present appeal, the assessee has rendered management support services of the description listed at Annexure C of Master Support Services Agreement to Everest India on independent and non-exclusive basis. These services are centralized services which are being provided to all group entities in order to maintain uniformity and

rationalize and standardize the practices across global location. No element of profit is earned by the assessee in course of rendering these services.

These services include-

1. Management Oversight

- a. Strategic direction
- b. Contract review
- c. Financial and legal guidance
- d. Client Relationship Management
- e. Insurance
- f. Peer Review

2. Marketing

- a. Brand Awareness
- b. Marketplace analysis
- c. Competitive analysis
- d. Webinars
- e. Leadership forum
- f. Speaking engagements

3. Finance and Accounting

- a. Payroll
- b. General ledger
- c. Employee time and expense
- d. Revenue and expense accruals
- e. Payables
- f. Accounts Receivables
- g. Cash Management
- h. Financial Reporting
- i. Budgeting
- j. Line of credit access management

4. Human Resource management

- a. Recruiting
- b. Compensation
- c. Benefits administration
- d. Legal

5. Information Technology

- a. Laptop Maintenance
- b. Help desk support
- c. Desk side support
- d. User Id and password
- e. Remote access
- f. System/antivirus
- g. Intranet
- h. Inter site communication links, email, voice mail etc
- i. Standard computer platform
- j. New hardware and software
- k. Training on IT resources

- l. Licenses and compliance
- m. Computer and phone networks
- 6. Training
 - a. Global training conferences
 - b. Monthly training sessions
 - c. Ad hoc training as required
- 7. Legal
 - a. Contract review
 - b. Litigation management
 - c. Other legal services as required

9.5 We agree with the contention of the assessee that managerial services are outside the scope of the meaning of FIS under Article 12(4) of the India-USA DTAA. Wherever the intention of the legislature is to include managerial services within the scope of FTS/ FIS, the same has been expressly mentioned therein. This contention of the assessee finds support by the jurisdictional Delhi Court judgment in the case of Steria (supra). The relevant para of the judgment is reproduced below.

19. The next question that arises is concerning to extent to which the benefit under the India-UK DTAA can be made available to the Petitioner. As already noticed, the definition of "fee for technical services" occurring in Article 13(4) of the Indo-UK DTAA clearly excludes managerial services. What is being provided by Steria France to the Petitioner in terms of the Management Services Agreement is managerial services. It is plain that once the expression 'managerial services' is outside the ambit of 'fee for technical services', then the question of the Petitioner having to deduct tax at source from payment for the managerial services, would not arise. It is, therefore, not necessary for the Court to further examine the second part of the definition, viz., whether any of the services envisaged under Article 13(4) of the Indo-UK DTAA are "made available" to the Petitioner by the DTAA with France."

9.6 The assessee's case also finds support from the MOU annexed to the India-USA DTAA explaining the FIS wherein it is clarified that clause 4(b) of Article 12 excludes any service that does not make technology available to the person acquiring the service.

"Memorandum of Understanding (MOU) annexed to the India-USA DTAA dated 15.05.1989 concerning FIS states as under:

Article 12 includes only certain technical and consultancy services. But technical services, we mean in this context services requiring expertise in a technology. By consultancy services, we mean in this context advisory services. The categories of technical and consultancy services are to some extent overlapping because a consultancy service could also be a technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in a technology is required to perform it.

*Under paragraph 4, technical and consultancy services are considered included services only to the following extent: (1) as described in paragraph 4(a), if they are ancillary and subsidiary to the application or enjoyment of a right, property or information for which are royalty payment is made; **or (2) as described in paragraph 4(b), if they make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design. Thus, under paragraph 4(b), consultancy services which are not of a technical nature cannot be included services. {emphasis supplied}***

Paragraph 4(b)

*Paragraph 4(b) of Article 12 refers to technical or consultancy services that make available to the person acquiring the services, technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plant or technical design to such person. (For this purpose, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person). **This category is narrower than the category described in paragraph 4(a) because it excludes any service that does not make technology available to the person acquiring the service. Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service 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, 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. {emphasis supplied}***

Typical categories of services that generally involve either the development and transfer of technical plans or technical designs, or making technology available as described in paragraph 4(b), include :

- 1. Engineering services (including the sub-categories of bio-engineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical, metallurgical, and industrial engineering) ;*
- 2. Architectural services ; and*

3. Computer software development.

Under paragraph 4(b), technical and consultancy services could make technology available in a variety of settings, activities and industries. Such services may, for examples, relate to any of the following areas :

- 1. Bio-technical services ;*
- 2. Food processing ;*
- 3. Environmental and ecological services ;*
- 4. Communication through satellite or otherwise ;*
- 5. Energy conservation ;*
- 6. Exploration or exploitation of mineral oil or natural gas ;*
- 7. Geological surveys ;*
- 8. Scientific services ; and*
- 9. Technical training.”*

From the above, it is evident that none of the services provided by the assessee are in the nature of FIS.

9.7 Further, considering the services provided by the assessee (listed above), in our view, these are not technical services nor do they require any technological knowledge, skill or experience. There is no transfer of technology involved. Everest India is not enabled to apply any technology on its own without recourse to the service provider i.e. the assessee. These services have not resulted in any enduring benefit to Everest India by way of any knowledge which could be applied by it on its own in future without depending on the assessee. These are general managerial services which are received by the assessee on recurring basis. Therefore, the test laid down under Article 12(4)(b), in our considered view, are not satisfied in the present factual scenario.

9.8 Thus, management fee received by the assessee from Everest India is not taxable as FIS under the provisions of India-USA DTAA. Accordingly, this ground is allowed in favour of the assessee.

10. The second common issue (Ground 3) in three appeals relates to the taxability of IC Labour Charges received by the assessee on account of supply of manpower to Everest India under the provisions of the Act and/or under India-USA DTAA as FTS/FIS.

10.1 The Ld. DR relied upon the order of the CIT(A) in support. The Ld. AR submitted that the services rendered by the assessee are purely in the nature of manpower supply services and do not satisfy the two fold test provided in Article 12(4)(b) of the India-USA DTAA. The substance of the Inter-Company Consultant Sharing agreement is not to deliver or achieve a particular output but to provide the manpower in case it is available and required by group entities. The consideration is received only for supply of manpower for certain for certain hours/days and nothing more. The arrangement exists between group entities only to optimize the group manpower cost. The manpower lent by the assessee works does not work under the supervision of assessee nor is the assessee responsible for outcome of any project of Everest India for which the manpower has been lent. During the subject AYs, they have not even visited India but operated from USA. There is no element of technical service or transfer of technology from assessee to Everest India. Everest India is not being enabled to apply any technical experience, skill, know-how on its own after the manpower resource is withdrawn by the assessee and hence the make available requirement is not satisfied. The AR relied upon several judicial rulings in support.

10.2 We have carefully considered the findings of the CIT(A) and the submissions forwarded by the Ld. AR. Admittedly, the manpower is supplied by the assessee under an Inter-Company Sharing Agreement. Under this agreement, if any group entity is in shortage of a manpower resource, any other group entity which has excess manpower resource lends the same and in consideration charges 60% of standard fee rate of employee lent to compensate itself for the salary cost of the employee lent.

10.3 Keeping in mind the facts involved, in our considered view, the assessee does not satisfy the make available requirement as per the provisions of Article 12(4) of the India-USA DTAA so as to make it taxable in India as FIS. This is for the reason that there is no rendition of technical or consultancy services by the assessee through the supply of manpower which

has enabled Everest India to apply any technical knowledge, experience, skill, know-how on its own without the recourse to the manpower supplied by the assessee. The agreement is continuous in nature and the lending entity is free to withdraw the manpower resource if it requires the resource for its own business. The objective of agreement is not to make Everest India self equipped/self sufficient for future. In support, reliance is placed on the decision of the Hyderabad ITAT in ACIT vs. IIC Systems (P.) Ltd. [2010] 127 TTJ 435 (Hyd.) wherein the ITAT held under:

“7. We have considered the rival submissions arid perused the material available on record. There is no dispute with regard to the facts of the case and the only dispute involved in these matters relate to the nature of the payments made, so as to determine whether, the TDS provisions are attracted or not. Thus, the primary question that arises is whether the payments in question made by the assessee to the ACSC, were by way of fee for technical services or merely by way of payment for supply of personnel. The next question is whether the payments in question can be considered as fee for 'included service' or not. The ultimate question that arises is whether the payments in question are taxable as business profit in the hands of the recipient as per art. 7 of the DTAA between India and USA. Before we go into the main issue, we may note that the CIT(A) clearly held that the liability to deduct tax at source under section 195 of the Act is dependent upon the taxability of the income in the hands of the recipient. When the payment made by the, assessee company is not chargeable to tax as per the provisions of IT Act in the hands of the recipient, or as per the provisions of DTAA between India and USA, the question of liability to deduct tax does not arise. We are impliedly fortified in this behalf by the ratio of the decision of the apex Court in the case of Hindustan Coca Cola Beverage (P) Ltd. v. CIT [2007] 293 ITR 226 (SC), wherein it was held, that when the recipient has already paid the taxes, the provisions of section 201(1) of the Act are not attracted. That being so, as per the ratio of the said decision, when no tax is liable to be paid by the recipient, the, provisions of section 195 are not attracted and the assessee has no obligation to deduct tax at source: Explanation to section 9(1), which defines the scope of the term 'technical services' has provided for two exceptions. The first exception relates to the fees for technical services payable for services utilised in a business carried on by the payer outside India and the second exception relates to fees for technical services

payable for earning any income from any source outside India. It is true, as observed by the CIT(A) that in the case under consideration the payer is a resident in India and the payment is being made in connection with earning of income by the assessee company from a source inside India and to this extent; the exceptions provided in section 9(1) do not apply to the case of the assessee., Since the payments are made by a person, who is a resident for the purposes of making or earning income from a source inside India, the remittances can come within the ambit of fee for technical services. However, in terms of DTAA between India and USA, it needs to be examined whether the said remittances are payments made by the assessee company to the ACSC falling within the definition of 'fee for included services' as per art. 12(4) of the DTAA, since the provisions of DTAA, as held by the apex Court in the case of Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC), shall prevail over the provisions of the IT Act, to the extent the same are beneficial to the assessee. The CIT(A) after elaborate discussion with regard to the various aspects of the matter, in the light of the contentions of the assessee, came to the conclusion that so far as DTAA between India and USA is concerned, consultancy services which are not technical in nature, cannot be treated as 'fee for included services'. We also notice that the fact that in the instant case the agreement of the assessee with ACSC is only for manpower supply or supply of technical personnel and it is well accepted even by the AO in para 2 of the impugned orders passed under section 201(1) r/w section 195 of the Act. The DTAA between India and USA also clarifies that the provision of services may require technical input by a person providing the person (sic—service), which does not per se mean that technical knowledge or skill are made available to the person purchasing the service. Similarly, use of the product which embodies technology shall not per se be considered to make the technology available and rendering of the service must enable the payer to apply such technology. Moreover, even if there is a transfer of developed work, software etc., it is not the ACSC but the assessee who transfers the right. It appears that neither the assessee company nor the ACSC are engaged in computer programming activity, which is evident from paras 1 and 2 of the orders of the AO and even the developed work never belonged to the assessee company or the ACSC as referred by the AO in his orders. In the circumstances, as correctly held by the CIT(A), the question of treating the payments as 'fees for included service' would not arise at all. The orders of the AO fastening the liability to TDS on the assessee are based on the agreement between the assessee and the IBM in order to determine the nature of the services

rendered by the ACSC to the assessee. We agree with the CIT(A) that what was required to be looked into is whether there is an element of technical services in the agreement between the assessee and the ACSC, which gives rise to income that can be brought to tax in India. It is because the payments remitted by the assessee to ACSC flows from the agreement between the assessee and ACSC and not from the agreement between the assessee and IBM. In our considered view, the primary services rendered by the ACSC to the assessee is akin to recruitment and placement service rather than making available any technology, plan, design, etc. One important aspect we noticed is that the final product or result on account of deployment of technical personnel by the assessee through the ACSC is not predetermined by the ACSC or the assessee. The Department has not brought anything on record to show that any product was developed by the assessee company and transferred to IBM. No specific project or product is defined before hand, for which services of personnel have been provided by the assessee through ACSC. The CIT(A) has also gone through a number of copies of the purchase order, work order, invoice etc, before, coming to the conclusion that what is ordered through the purchase order is certain amount of manpower at a specified unit price per hour. No detail as to what work is to be done is mentioned even in the work order issued by the assessee. Thus, neither the agreement nor the invoice refer to any technical services rendered or any product or software developed for IBM. All the agreements, invoices and related documents produced before us lead to the fact that the payments have been made only for supply of manpower for certain amount of hours and nothing more. Since there is no technology, skill, experience, technical plan, design, etc . had been made available either by the assessee. or the ACSC, as held by the CIT(A), invoking the provisions of art. 12(4)(b) of the DTAA for treating the payments as chargeable to tax in India, is not justified. In our view, the CIT(A) was justified in holding that the services rendered by the ACSC for which remittances in question have been made by the assessee are akin to those of a recruitment or placement agency, and would not come within the purview of 'fee for inducted services' within the meaning of art. 12(4)(b) of the DTAA between India and USA. Even if the payments would constitute fees for technical services under section 9(l)(vii) of the IT Act, in view of section 90(2) of the Act, the Indian company has option to be governed by the provisions of the tax treaty, if the same are more beneficial to it. Accordingly, the payments so made by the assessee company to ACSC will not be chargeable to tax in India, in view of the provisions of the DTAA between India and USA. We are also

Supported in this behalf by the view taken by the Department, vide order of the CIT(A)-XXXI, Mumbai dt. 27th Dec, 2007, a copy of which is filed by the assessee at pp. 116 to 141 of the paper book with regard to the taxability of similar receipts in the case of the recipient involved in these very matters, viz. ACSC for the asst. yr. 2004-05. In the absence of any appeal preferred by the Department, that view taken by the CIT(A) in that order appears to have become final. Even though the learned Departmental Representative tried to bring forth certain points of distinctions between the payments made by the assessee in the present case and the receipts considered for the assessment year 2004-05 in the above case of ACSC by referring to the relevant agreements, we find no merit in the arguments of the learned Departmental Representative based on the same. Further, we are in agreement with the elaborate reasoning given by the CIT(A) in the impugned order, and consequently we find no justification to interfere with the same. As for the case law relied on by the learned Departmental Representative, we find that the same, is clearly distinguishable in as much as in the present case the remittances made are purely for supply of manpower since the services rendered by the ACSC are akin to those of a recruitment or placement agency, and there is no involvement of any technical services. For this very reason, we find that the other arguments advanced by the learned Departmental Representative, like a common person, Baburao Mandava, being the President for ACSC and the chairman of the assessee, and reliance on the write-up from the internet website and ruling of the AAR, are devoid of any merit. In this view of the matter, we uphold the impugned order of the CIT(A) and reject the grounds of the Revenue in both the appeals.”

10.4 Accordingly, in our view, the IC Labour Charges received by the assessee from Everest India are not taxable as FIS under the provisions of Article 12(4)(b) of the India-USA DTAA. Hence, this ground is allowed in favour of the assessee.

11. The next common ground (Ground 5) relates to addition made by AO on account of miscellaneous services rendered to third party clients. These services comprises of two components i.e. access to published research reports by subscribing to the same and customized research advisory.

11.1 The Ld. DR relied upon the findings of the Ld. CIT(A). The Ld. AR submitted that the assessee sold published research reports and provided custom research services to clients in India as per work orders / invoices which are on record. The published reports are general in nature and factual information is compiled from various secondary sources. Anyone in the public can subscribe to the database and on payment of requisite fee access these general purpose reports. The database and server of assessee is in USA. The database subscription is granted through a website, which allows download of published reports, annual market updates, white papers, data cuts. The published reports and database is copyright protected. The subscriber gets a non-exclusive, non-transferable right and license to use the published report. The subscription material can be used by subscriber for business purpose only by and among subscriber's employees. The ownership of and the copyright to subscription material as well as the database remains vested in assessee, the subscriber cannot copy, reproduce, distribute, republish, display, post, or transmit in any form or by any means any of the subscription material or alter, modify, or change, the subscription material without the prior written permission of the assessee. Subscriber is permitted to use subscription material without alteration of factual content and properly attribute the name of assessee as the source of such information. Further, subscriber is legally bound to give copyright notice and bound not to remove and reproduce and include all copyright notices or confidential or proprietary legends in and all copies of subscription materials. Subscription to online database is same as purchasing online industry specific newsletters, journals, books, magazines. In substance, the transaction is that of purchase and sale of published report. The client gets access to view a particular published report subscribed by it and not to the full database owned and maintained by assessee. The Ld. AR relied upon jurisdictional Delhi HC judgment in DIT vs. Infrasoftware Ltd. [2013] 39 taxmann.com 88 (Delhi) and several other cases of Delhi ITAT wherein a clear distinction has been carved out between right

to use the copyright and right to use a copyrighted article so as to determine the taxability of the transaction as royalty under the relevant DTAA.

11.2 In respect of customized research advisory, the Ld. AR submitted that the custom research is advisory service rendered by assessee in relation to Outsourcing Industry. Assessee does not allow right to use any data base which is happened only in case of published reports. The advisory is on topics provided by client in advance that is why it is called customized. The output of custom research advisory is not provided through subscription mode/database access mode. The advisory under this head is given to client through emails or presentations. So the CIT(A) clearly erred on facts in taxing this under the head "Royalty". The AO and CIT(A) failed to consider the facts properly and, they mixed up the taxability of Published reports and Custom Research under the head "Royalty". Admittedly, clause (a) of Article 12(4) is not applicable to custom research services nor it is a case of Revenue. It is also not revenue's case that the impugned service has anything to do with Article 12(3). Further, the receipts under this head are not even taxable as FIS/FTS under Article 12(4)(b) of the India-US treaty.

11.3 We find force in the above submission of the assessee. By allowing access to database what assessee grants to customers is only a right to use a copyrighted material (i.e. published report). The assessee does not grant the right to use the copyright. Hence, consideration (subscription fee) received by the assessee is not taxable as royalty under the provisions of Article 12(3) of the India-USA DTAA. Similarly in customized research advisory services the assessee is providing only advisory services through emails or presentations. The output of custom research advisory is not provided through subscription mode or data base access mode and, therefore, the question of access to data base does not arise at all. Further there is no transfer of any copy right to the customers. Thus, the considerations received by the assessee towards customized research

advisory services are not taxable under the head Royalty. This ground of appeal is allowed.

12. The last ground of appeal relates to levy of interest (in AY 2010-11) under section 234B and 234C of the Act. The Ld. AR submitted that since the assessee is a non-resident, entire tax was to be deducted at source on payments made by Everest India / third party clients to the assessee and that there was no question of payment of advance tax by assessee. Therefore, interest under section 234B and 234C is not applicable on the assessee. In support, the Ld. AR placed reliance on CIT-International Taxation vs. ZTE Corporation [2021] 130 taxmann.com 129 (SC); DIT vs. Jacobs Civil Incorporated [2011] 330 ITR 578 (Delhi); and DIT (International Taxation) vs. NGC Network Asia LLC [2009] 313 ITR 187 (Bom).

12.1 We have considered the above submission. It is worth noting that the Ld. CIT(A) has himself not levied interest under section 234B/C for AY 2011-12 and AY 2012-13. Respectfully following the judgment of the Hon'ble Supreme Court in ZTE Corporation (supra), this ground of appeal is allowed.

13. In the result, the appeal of the assessee is allowed as indicated above.

Order pronounced in the Open Court on 30th March, 2022.

Sd/-
(G.S. PANNU)
PRESIDENT

Dated: 30/03/2022

***Veena**

***Kavita Arora**

Sd/-
(C.N. PRASAD)
JUDICIAL MEMEBR

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi