

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(IT)A Nos. 362 to 369 & 338 to 345/Bang/2020
Assessment Years : 2011-12 to 2014-15 & 2015-16 to 2018-19

M/s. Goldman Sachs Services Pvt. Ltd., Wing A, Wing B & Ground Floor to 6 th Floor of Wing C, Helios Business Park, 150 Outer Ring, Kadubeesanahalli, Bangalore – 560 103. PAN:AACCG2435N	Vs.	The Deputy Commissioner of Income Tax, International Taxation, Circle 1 (1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Sharath Rao, CA
Revenue by	:	Dr. Manjunath Karkihalli, CIT DR

Date of Hearing	:	09-03-2022
Date of Pronouncement	:	29-04-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeals are filed by the assessee against following orders, passed by the Ld. DCIT, International Taxation, Circle – 1(1), Bangalore independently, under section 201(1) and 201(1A) of the Act, for the assessment years under consideration as under:

Assessment Year	Order dated u/s. 201(1)	Order dated u/s. 201(1A)
2011-12	27.03.2018	27.03.2018
2012-13	22.02.2019	22.02.2019
2013-14	22.02.2019	22.02.2019
2014-15	22.02.2019	22.02.2019
2015-16	22.02.2019	22.02.2019
2016-17	30.05.2018	30.05.2018
2017-18	22.02.2019	22.02.2019
2018-19	22.02.2019	22.02.2019

2. The common issue that arises out of the above impugned orders are two fold:

1. Treating the assessee to be an, 'assessee in default' under section 201(1) of the Act for non-deduction of taxes at source under section 195 of the Act. And;
2. Levy of interest under section 201(1A).

As the above common issues in all these appeals were heard together, they are being disposed of by this common order for sake of convenience and brevity.

3. Brief facts of the case are as under:

3.1 The assessee is a subsidiary of Goldman Sachs (Mauritius) LLC, Mauritius. The assessee is engaged in providing back-end support services in the nature of information technology enabled services and software development services to the Goldman Sachs group entities.

3.2 The Ld.AO noticed that, the assessee employed expatriate employees, and part of their salary is paid by the assessee and

part of it by the overseas entity, which are then reimbursed at cost by the assessee. The reimbursements made by the assessee are recorded as salary and payroll costs in the books of the assessee.

3.3 The Ld.AO issued notice under section 201 of the Act to the assessee, to show cause, as to why, the assessee, should not be treated as an 'assessee in default' under section 201(1), of the Act for non-deduction of taxes at source under section 195 of the Act, on payments made to non-residents for salary costs, and why interest u/s. 201(1A) of the act should not be levied? The Ld.AO was of the opinion that the payments should be treated as "Fees for Technical Services/Fees for Included Services' (hereinafter referred to as FTS/FIS).

3.4 The assessee in response to the notice, submitted that, the expatriate employees were employed pursuant to a 'Contract of Employment' between the assessee and the respective employees and a performa of the said contract was duly submitted. Further, it was submitted before the Ld.AO that, the assessee duly deducted appropriate taxes on the entire salary (including the amounts paid by the overseas entity) of such expatriate employees under section 192(1) of the Act, and paid to the credit of the Central Government. The assessee has submitted that list of expatriate employees who were seconded to India during the assessment years under consideration at page 248 -249 containing details like PAN designation, division and brief description of the duties performed by such employees. It was also submitted that such expatriate employees held valid permanent account number in India and were assessed to tax in

India. The assessee also filed Form 16 issued by the assessee to the few expatriate employees are placed at Pages 173-182 and pages 228-243 of the PB-Vol I as sample.

3.5 The assessee submitted that, the reimbursement of salary cost was on 'cost-to-cost' basis, and did not include any element of profit or mark-up, and therefore, such payments were not chargeable to tax under the provisions of the act.

3.6 Without prejudice to the submission that the remittance was in the nature of reimbursement, the assessee also submitted that, the said reimbursements would not, 'make available' any technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design and therefore, would not constitute FTS/FIS under the provisions of the applicable Double Taxation Avoidance Agreement ("DTAA").

3.7 The Ld.AO, did not accept the submissions of the assessee, and passed the order under section 201(1) and section 201(1A) of the act, treating the assessee, as 'assessee in default'. The Ld.AO held that, that there was no employee-employer relationship between the expatriate employees and assessee, and that, the legal/real employer of such employees were the overseas entity, and not the assessee. Further, the Ld.AO held that, the overseas entity, have, through the employees, rendered technical, managerial and consultancy services to the assessee. Accordingly, the Ld.AO concluded that, the reimbursement of salary and other related costs made to the overseas entity, would be covered under the definition of FTS/FIS as per the provisions

of section 9(1)(vii) of the Act and also as per the provisions of the DTAA between India and the respective countries.

Aggrieved by the order of the Ld.AO passed u/s.201(1) and 201(1A) of the Act, assessee preferred appeal before the Ld.CIT(A).

4. Before the Ld.CIT(A), the assessee filed following additional evidences:

- List of all expatriate employees with details of their PAN, designation, division and a brief description of the functions performed;
- Note capturing the lifecycle of the expatriate employee to demonstrate that the assessee is the real, legal and economic employer of the expatriate employees;
- In order to demonstrate that the assessee is the real, legal and economic employer of the expatriate employees, sample copies of local employment contract entered by the assessee with the expatriate employees, Form 16 and relieving letters issued by the assessee were submitted.

5. The Ld.CIT(A) called for remand report from the Ld.AO. The Ld.AO objected to the admission of the additional evidences without commenting on the factual merits of the evidences.

The assessee also filed technical submission, and filed summary of the distinguish the facts between the assessee and the facts before *Hon'ble Delhi High Court in Centrica India Offshore (P) Ltd.*, reported in (2014) 44 *taxmann.com* 300. The distinguishing facts between the assessee and that in case of *Centrica India Offshore (P) Ltd.(supra)* before *Hon'ble Delhi High Court* are as under:.

Particulars	Centrica India	Assessee
Local employment agreement	No separate local employment Agreement	Independent local contract of employment between Appellant and expatriate employees
Employer — employee relationship	No relationship between Centrica India and employee	Relationship and legal obligations between Appellant and employee pursuant to local contract of employment
Employee right to claim salary from the host company	No right to claim salary from the host company in the absence of the independent agreement between them	Right to claim salary from the host company pursuant to the independent local contract of employment between Appellant and expatriate employees
Independent secondment agreement	Centrica India entered into independent secondment agreement pursuant to which the employees were seconded	There is no agreement for secondment of employees between Appellant and the AE in respect of such expatriate employees.
Termination of employment	No such right as there exists no independent contract between the company and secondees	The Appellant has the right to terminate the contract with the employee

The assessee filed its rejoinder to the said remand report and contended that the Ld.AO did not provide for sufficient opportunity to adduce the evidences, were produced before the Ld.CIT(A) as additional evidences.

6. The Ld.CIT(A) after considering the submission of assessee held that, the facts of the assessee were in *pari-materia* with the facts considered by this *Hon'ble Tribunal* in the case of *Intel Corporation* in *IT(IT)A No.135/Bang/2016*. The Ld.CIT(A), therefore concluded that the legal employer of the expatriate employees was the overseas entity and hence the payments re FTS/FIS under the Act and the respective DTAA. The Ld.CIT(A)

dismissed appeals of the assessee, and upheld the order of the Ld.AO, relying on the following decisions:

- *Decision of Hon'ble Delhi High Court in case of Centrica India Offshore (P) Limited (2014) 44 taxmann.com 300 (Delhi);*
- *Decision of coordinate bench of this Tribunal in case of Food World Supermarkets Limited (2015) 63 taxmann.com 43*
- *Decision of coordinate bench of this Tribunal in case of Intel Corporation IT(IT)A No 135/Bang/2016;*
- *Decision of coordinate bench of this Tribunal in case of Emulex Design & Manufacturing Corporation IT(IT)A No 358/Bang/2015.*

Aggrieved by the order of Ld.CIT(A), assessee filed appeals before this Tribunal.

7. Before considering the issue in hand, the Ld.AR took us through the the terms and conditions agreed between the assessee and the overseas entity towards secondment of employees. The assessee has placed copy of the 'India Recharge and Cost Allocation" Agreement', dated 03/03/2006, at page 141-154 of paper book. The relevant articles governing the agreement for employees on loan are as under:

"2. THE DIRECT COSTS AND COMMON COSTS

2.1 Each of the Group Companies will recharge Direct Costs and Common Costs to GSSPL which are attributable to its business and are incurred by the Group Companies on behalf of GSSPL.

2.2 The Parties agree that Direct Costs and Common Costs attributable to GSSPL may include, but not be limited to (i) salaries, bonuses, benefits and relocation expenses incurred on employees seconded to GSSPL by the Group Companies and who work under the direct control and supervision of GSSPL, (ii) technology recharges pertaining to utilization of a common pool of assets, and specifically used by GSSPL for its operations (such as voicemail, email, messaging systems. etc.), (iii) training charges incurred by Group Companies towards training GSSPL employees, secondees, etc.. (iv) travelling expenses (v) professional fees incurred by Group Companies for services procured from lawyers, Solicitors, tax advisors, mobility vendors, etc. in respect of GSSPL operations and (vi) postage and stationery utilised by or on behalf of GSSPL.

2.3 Group Companies shall be entitled to charge out any Common Costs incurred by them on behalf of GSSPL in connection with its business activities, at a reasonable cost and allocated in accordance with prevailing corporate policies and guidelines of The Goldman Sachs Group, Inc. and its Affiliates.

2.4 Group Companies shall be entitled to charge out to GSSPL, all Direct Costs Incurred by them on behalf of GSSPL, on an 'at actuals' basis.

3. PAYMENT

3.1 Payment of Direct Costs and Common Costs shall, subject to applicable Indian exchange control regulations, be made by GSSPL on a bi-monthly basis or at such other times as may be mutually agreed between the Parties.

3.2 The determination of the Direct Costs and Common Costs payable by GSSPL under Clause 2.3 and 2.4 above shall be on the basis of periodic statements, accompanied with such supporting documentation as may be reasonably requested for by GSSPL and/or required by regulatory authorities and the bankers to GSSPL, including, without limitation, vouchers, certifications, etc.

3.3 Payment of Direct Costs and Common Costs by GSSPL, shall be made subject to applicable Indian taxes and withholdings. Service tax, if applicable in relation to the Direct Costs and Common Costs, shall be borne by GSSPL. GSSPL shall issue appropriate certificates to the Group Companies with respect to the taxes so withheld.

4. MISCELLANEOUS

4.1 Any Affiliate of The Goldman Sachs Group, Inc. (i.e., in addition to the Group Companies) may, at any time with the consent of GSSPL, become a party hereto, subject to the Affiliate executing a 'Deed of Adherence' or such similar document as may be specified by GSSPL, agreeing to be bound by all terms and conditions of this Agreement. GSSPL shall provide written notice of such Affiliate's execution of the 'Deed of Adherence' or similar document, to all Group Companies.

4.2 The provisions of this Agreement shall apply in relation to any Direct Costs and Common Costs (1) outstanding as on the date of this Agreement, even if such costs were

incurred prior to the date of execution hereof and (ii) incurred on and from the date of execution hereof.

4.3 This Agreement constitutes the entire agreement between the Parties with respect to its subject matter, and supersedes all earlier conduct and prior agreements and understandings between the Parties in connection with its subject matter.

4.4 No modification or amendment to this Agreement and no waiver of any of the terms or conditions hereto shall be valid or binding unless made in writing and duly executed by all Parties.

4.5 This Agreement may be executed simultaneously in any number of counterparts, each of which shall be deemed an original. but all of which shall constitute one and the same instrument.

4.6 If any provision of this Agreement is held to be illegal, invalid, or unenforceable under any present or future law, (i) such provision shall be fully severable; (ii) this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part hereof; (iii) the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance here from; and (iv) in lieu of such illegal, invalid, or unenforceable provision, there shall be added automatically as a part of this Agreement a legal, valid, and enforceable provision as similar in terms and effect to such illegal, invalid, or unenforceable provision as may be possible. However, if there is no automatic addition as aforesaid the Parties hereto shall mutually agree to provide a legal valid and enforceable provision as similar in terms and effect to such illegal, invalid or unenforceable provision as may be possible.

4.7 Nothing in this Agreement shall be construed to require, or Impose any duty upon the Parties, to do anything that may be in violation of the laws or regulations of any jurisdiction.

4.8 The Parties shall attempt to resolve amicably any dispute, controversy or claim arising out of or relating to this Agreement, including any question regarding its existence, validity, interpretation, breach or termination,

4.9 Any of the Parties may terminate this Agreement by giving at least one (1) month's prior notice in writing, provided, however, that in the event of insolvency, bankruptcy, dissolution, involuntary transfer of ownership (in whole or in part) of a Party this Agreement shall be terminated automatically and immediately as to such Party. This Agreement shall remain effective as to non-terminating Parties as long as at least two Parties, and one of which shall be GSSPL (i.e. GSSPL and at least one Group Company), are not terminating Parties.

4.10 This Agreement shall be governed by and interpreted according to the laws of England and Wales.”

8. The Ld.AR submitted that, based on the above agreement, the assessee entered into independent contract with each of the seconded employees. It is submitted by the Ld.AR that the seconded employees worked under the control of the assessee. It is also mentioned that 100% of the salary payable by assessee to such employee is subject to TDS under the head salary and Form 16 is issued to the employees that are seconded. The assessee confirms the appointment of the seconded employee and an agreement is entered into between the assessee and the seconded employee. In support, he referred to letter of confirmation issued by the assessee to a seconded employee by the name Christopher Roberts, placed at page 244 of PB Vol I, and contract entered into by assessee with Christopher Roberts placed at page 216 -221 of paper book Vol I.

Scanned copy of the Letter of confirmation by assessee to Christopher Roberts, as an Associate is annexed hereunder:

✓ Goldman Sachs Services Private Limited
Crystal Downs | Embassy Golf Links Business Park | Off Intermediate Ring Road | Bangalore 560 071 | India
Tel: 91 80 4127 1600 | Fax: 91 80 4127 1601



Private and Confidential

October 31, 2011

Christopher Roberts
Villa 228, Phase 1, Adarsh Palm Meadows,
Ramagondanahalli, Whitfield,
Bangalore,
India,
560066

Employee ID: 00087831

Dear Christopher

I am writing to confirm your employment with Goldman Sachs Services Private Limited from August 21, 2006 to October 21, 2011. Your final position with us was Senior Technology Analyst within our Technology Division.

I can confirm that you have completed the necessary exit formalities and your employment ended on October 21, 2011.

It is the general practice of Goldman Sachs to provide only the title, position and dates of employment in response to inquiries about former employees. The provision of such information does not imply any comment, negative or positive, about the employee or the course of their employment with Goldman Sachs.

If you have questions, please call GS HR Direct at +91-80-41274801. Representatives are available Monday through Friday.

I wish you every success in your future.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ranjan Wadhwa'.

Ranjan Wadhwa
Human Capital Management

CERTIFIED TRUE COPY

Scanned copy of the agreement between assessee with Christopher Roberts is annexed hereunder:

Goldman Sachs Services Private Limited
 Crystal Downs | Embassy Golf Links Business Park | Off Intermediate Ring Road | Bangalore 560 071 | India
 Tel: 91 80 4127 1600 | Fax: 91 80 4127 1601

GOLDMAN SACHS SERVICES PRIVATE LIMITED

This Statement sets out the terms and conditions governing your employment in India with Goldman Sachs Services Private Limited ("GSSPL"). This statement, together with your offer letter, constitutes your contract of employment with GSSPL. In addition, you will be expected to comply with the GSSPL Workplace Policies and Procedures contained in the India Employee Handbook.

1. EMPLOYEE: CHRISTOPHER ROBERTS

2. EMPLOYER: GOLDMAN SACHS SERVICES PRIVATE LIMITED

2.1 You will be employed as an **Associate** by Goldman Sachs Services Private Limited (GSSPL or "the firm") or in any other commensurate capacity as the firm may decide. Although you will be employed by the firm, the firm shall be permitted to supply your services to other entities from time to time controlling, controlled by or under common control with GSSPL (GSSPL together with such entities, collectively defined as "Goldman Sachs"). During your employment by the firm, you shall (unless prevented by ill health or accident or by virtue of absence on leave/holiday or absence otherwise authorised by the firm) devote your time, attention and abilities to the business of GSSPL. You shall at all times act in the best interests of GSSPL.

2.2 During the term of your employment with the firm, you are required to work exclusively for the firm unless you obtain prior written consent from the firm in respect of your involvement in outside employment or business activities.

3. DATE OF EMPLOYMENT

3.1 Your employment with GSSPL will commence on **January 1, 2010** and shall continue for a fixed term of three years, subject to the notice provisions contained in paragraph 9 herein.

3.2 Notwithstanding the other provisions of this Statement, your employment will automatically terminate on your 58th birthday unless extended by the firm by written agreement.

3.3 For the purposes of calculating your entitlement to benefits, including vacation and other leave entitlements, the firm will take into account your previous years of service at Goldman Sachs so that, for these purposes, your tenure at the firm will be deemed to have commenced from January 1, 2010.

4. COMPENSATION

4.1 Your basic salary will be **USD 130,000** per annum, payable monthly, less tax or other withholdings and applicable deductions as required by law or in accordance with firm policy. Your salary will be paid 25% in Indian Rupees through the India payroll and 75% will be paid in US dollars through the New York payroll.

4.2 Provided you are an employee at fiscal year end, i.e. December 31, 2010, and have been in active employment at some time during the fiscal year you will also be eligible to be considered for a discretionary bonus.

4.3 Please note, in the future your total compensation may be quoted in Indian Rupees in the event of a promotion or a transfer to a different role.

4.4 At a minimum, your compensation will be reviewed annually. Each person's compensation is influenced by, among other things, his or her performance and the firm's results. You will not be eligible for any bonus should your employment with the firm terminate for any reason before fiscal year-end. Bonuses are discretionary and therefore are not a part of the guaranteed annual salary of the employee even if paid consistently over a period of years. Bonus payments will be payable in the January following the end of the respective fiscal year. All amounts paid to you will be subject to tax and other withholdings as required by law.

4.5 Consistent with other similarly compensated employees, the bonus that you may receive in 2010 or future years may be satisfied with cash and/or a non-cash award (which award may vest in the future), at the firm's sole discretion. In the event of a non-cash award, the firm will determine value, vesting conditions, and the like, and its decision in this regard will be final.

5. PLACE OF WORK AND DRESS CODE

5.1 The firm's primary office is in Bangalore although you may be required to work in any of the firm's other offices in India.

5.2 During your employment, you may be required to travel within India and around the world on business for the firm. You may also be required to work on a temporary basis for training purposes. In such circumstances the firm will provide you with appropriate assistance.

5.3 The firm has adopted a 'business casual' dress policy. In selecting your attire, you should remember that the office is a professional environment and that your appearance should reflect this.

6. HOURS OF WORK

6.1 Your minimum weekly hours of work are 40 per week between Monday and Friday inclusive but you will be required to work such additional hours as are necessary to meet the business demands of your job.

7. ANNUAL LEAVE AND HOLIDAYS

7.1 You will be entitled to 20 days' paid leave in a full holiday year, which runs from 1 January to 31 December. Subject to the provisions of applicable law, this will be pro-rated in your first and last years of service and details of the pro-rated entitlement will be set out in the India Employee Handbook.

7.2 In addition, you will be entitled to 12 paid public holidays details of which will be provided to you at the start of each holiday year and which may be subject to change on an annual basis.

7.3 On the termination of your employment you will be paid in respect of any accrued but untaken leave. If you have exceeded your accrued leave entitlement, you hereby consent to the excess being deducted from any sums due to you by the firm on termination.

7.4 You may be required by the firm to take any outstanding leave entitlement during your notice period.

7.5 Further details about leave entitlement, including how to book leave, are contained in the India Employee Handbook. Details of authorized leave other than leave entitlement are also found in the India Employee Handbook.

8. SICKNESS

8.1 If you are absent due to sickness and, provided that you comply with the firm's notification procedures as set out in the Employee Handbook, you will be paid your basic salary and usual benefits and allowances for up to 12 days in any period of 52 consecutive weeks. The firm's sick pay will include any entitlement that you may have to Statutory Sick Pay. Further details of sickness absence and sick pay are detailed in the Indus Employee Handbook. Your employment will cease to be active for the purposes of these terms and conditions during any continuing absence due to sickness after 12 consecutive days' sickness absence.

8.2 Entitlement to the firm's sick pay scheme is subject to the firm's right to terminate your employment at any time in accordance with the firm's notice provisions set out in paragraph 9 below.

8.3 In connection with your absence, the firm may require you to undergo a medical examination by its nominated doctor or consultant, for which the firm will bear the cost. The firm may also elect, with your consent, to consult your own doctor.

9. NOTICE ENTITLEMENT

9.1 In all cases other than gross misconduct, the minimum period of notice you or the firm are required to give to terminate your employment is one month.

9.2 Notwithstanding sub-paragraph 9.1, the firm reserves the right to terminate your contract without any notice if it has reasonable grounds to believe that you are guilty of gross misconduct (which shall, without limitation, include any breach of any of the provisions of this contract of employment), in which case no notice or pay in lieu of notice will be due.

9.3 The firm reserves the right to require you to remain at home and/or not to undertake all or any of your duties of employment during any period of notice of termination of your employment (whether given by you or the firm), provided that your basic salary is paid to you and contractual benefits are provided in the usual way.

10. BENEFITS AND ALLOWANCES

10.1 The firm offers a number of discretionary benefits to employees during employment. There is no contractual entitlement to these benefits and these may be withdrawn or varied at any time.

11. DISCIPLINE AND GRIEVANCE

11.1 The firm's disciplinary policy is contained in the Employee Handbook. Whilst the disciplinary process does not form part of your contract of employment, the disciplinary rules do. Disciplinary sanctions may include oral or written warnings and the firm reserves the right to transfer you to another position, to demote you or to impose a financial penalty, if appropriate. If the firm suspects that you have committed an act of serious or gross misconduct, it may suspend you from your duties, pending the outcome of the firm's investigation into the alleged misconduct.

11.2 If you are dissatisfied with a disciplinary decision taken against you, you should contact Human Capital Management, which will arrange for your concern to be raised with the appropriate person.

11.3 If you have a grievance, you may raise the matter with the person you report to either in writing or in person or you may use the firm's formal grievance procedure, details of which are set out in the Employee Handbook.

12. DEDUCTIONS

12.1 You agree as a term of your employment with the firm that the firm shall be entitled at any time during your employment, or in any event on termination, to deduct from your actual total compensation any monies due from you to the firm, including but not limited to:

- any debt or advance for the time being owed by you to the firm; and
- any deduction relating to leave or holiday taken in excess of entitlement as at the date of the termination of employment; and
- any deduction in respect of costs incurred by the firm or the cost of repairing damage to the firm's property caused by you (and of recovering the same); and
- any other money owed by you to the firm.

13. CONFIDENTIAL AND PROPRIETARY INFORMATION

13.1 In connection with your employment by the firm, you may have access to non-public information and materials, including but not limited to information and materials describing or relating to the business and financial affairs, personnel matters, operating procedures, organisational responsibilities, marketing matters, and policies or procedures of Goldman Sachs or its Managing Directors, employees, clients or other third parties, or the personal affairs of Managing Directors or employees ("Confidential and Proprietary Information and Materials"). With respect to such Confidential and Proprietary Information and Materials, you agree that:

- Confidential and Proprietary Information and Materials shall be used only as authorised and only for the purposes intended by Goldman Sachs; and
- you will hold all Confidential and Proprietary Information and Materials in strict confidence and, except for the above authorised uses, will not, nor will you permit any agent to give, disclose, copy, reproduce, sell, assign, license, market or transfer Confidential and Proprietary Information and Materials to any person, firm or corporation, including any Managing Director or employee of Goldman Sachs who does not have a need to know or see the Confidential and Proprietary Information and Materials. This provision applies to authorised writings of any kind containing such information or materials, including books and articles; and
- unless you have prior written authorisation from Goldman Sachs, you will not publicise, disclose or allow disclosure of any information about Goldman Sachs, its present or former Managing Directors, employees, agents or clients, its or their business and financial affairs, personnel matters, operating procedures, organization responsibilities, marketing matters and policies or procedures, or any aspects of your candidacy for employment or your tenure as an employee of the firm or of the termination of such employment, with any reporter, author, producer or similar person or entity, or take any other action seeking to publicise or disclose any such information in any way likely to result in such information being made available to the general public in any form, including books, articles or writings of any other kind, as well as film, videotape, audiotape or any other medium; and
- while employed by the firm, you will not disclose or use without authorisation any information concerning persons or entities other than Goldman Sachs that is confidential or proprietary to them, nor will you use information in any manner that would constitute a violation of any undertaking or agreement with a prior employer or third party; and
- upon the termination of your employment (or earlier if required by the firm), you will return to Goldman Sachs all originals and copies of documents and other materials relating to Goldman Sachs or containing or derived from Confidential and Proprietary Information and Materials that are in your possession or control, accompanied, if requested, by a certificate signed by you and satisfactory to Goldman Sachs to the effect that all such Confidential and Proprietary Information and Materials have been returned.

13.2 You hereby irrevocably assign to Goldman Sachs, its successors and assigns, and Goldman Sachs shall have exclusive ownership rights, including, without limitation, all patent, copyright and trade secret rights, with respect to any work, including, but not limited to, any invention, discoveries, concepts, ideas or information, conceived by you in the course of your employment with Goldman Sachs, and all documents, data and other information of any kind including, incorporating, based upon or derived from the foregoing, including reports and notes prepared by you. Such work will be the property of Goldman Sachs, shall be considered a work made for hire and may not be used for any purposes other than the benefit of Goldman Sachs. Any and all such property and material containing such property shall be delivered to Goldman Sachs on request and in any event at the termination of your employment by the firm, and no copies thereof shall be retained by you unless the prior written consent of Goldman Sachs is obtained with respect thereto. You will cooperate fully with Goldman Sachs to establish, protect or confirm Goldman Sachs' exclusive rights in such work or to enable it to transfer legal title together with any patents that may be issued. A certificate evidencing compliance with this provision shall, if requested, be provided to Goldman Sachs.

13.3 The obligations set out in this paragraph shall survive the termination of your employment. You hereby acknowledge that any violation, breach or other failure on your part to comply with these obligations could materially and irreparably injure Goldman Sachs and its business in a manner inadequately compensable in damages, and that Goldman Sachs may seek and obtain injunctive relief against the breach or threatened breach of these obligations in addition to any other legal remedies that may be available.

14. COMPLIANCE

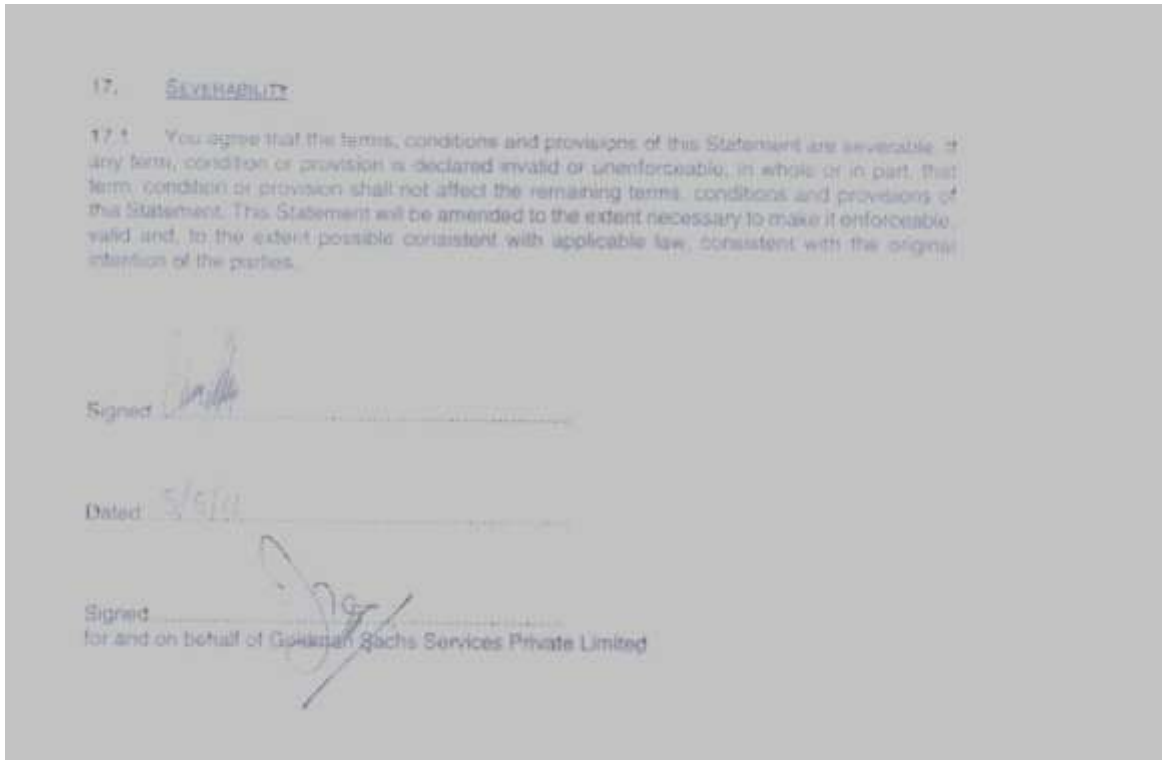
14.1 In addition to your compliance with the policies and procedures as outlined in the India Employee Handbook, you will be expected to comply with the applicable policies published on the intranet that broadly affect and govern our business and personal conduct. The firm has policies applicable to all employees of Goldman Sachs relating to personal securities accounts, related accounts and trading (the "Policy"). Among other things, the Policy requires that employees must maintain their securities account or related accounts at the firm. Maintaining a securities account or related account at any other broker, dealer, bank, or investment advisor without the prior written consent of the firm is prohibited.

15. REGULATORY AUTHORITIES

15.1 It is a condition of your employment to comply with the rules of any organization by which Goldman Sachs is regulated, or with whom Goldman Sachs may be registered.

16. MISCELLANEOUS

16.1 The terms and conditions of this contract of employment shall be governed and interpreted according to the laws of India. Any dispute, controversy or claim arising out of or in connection with this contract of employment shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce. The seat of arbitration shall be Bangalore. The language of arbitration shall be English.



9. It is submitted that, at the request of the seconded employee, the assessee, the overseas entity agrees to remit part of the salary to USA for the local use and family maintenance and the other part of the salary is paid in India.

10. The Ld.AR submitted that, the payment made by the assessee to the AE is towards reimbursement of the portion of salary paid by the AE to family of the seconded employee in USA, at the request of the employee. It is also submitted that 100% of the salary payable by assessee to the seconded employees are subjected to TDS under section 192 of the Act, and return of income is filed by such seconded employees in India, in respect of the total salary earned by the seconded employees in India.

11. He thus submitted that, the entire payment is subjected to tax under the head “salary” in India, and therefore the payment made to the AE was in the nature of reimbursement of expenses. The Ld.AR submitted that, the reimbursement to the AE do not

have any character of income in the hands of the AE, and therefore the taxing provisions under the Act, does not get triggered.

12. The Ld.AR placed reliance on following decision:

- *Decision of Hon'ble Bombay High Court in case of DIT(international Taxation) vs. Marks and Spencers reported in (2013) 138 taxmann.com190.*
- *Decision of Authority of Advance Ruling in case of Cholamandalam MS General insurance Co.Ltd reported in (2009) 309 ITR 356.*
- *Decision of coordinate bench of this Tribunal in case of IDS Software Solutions India Pvt.Ltd. vs. ITO reported in (2009) 122 TTJ 410.*
- *Decision of coordinate bench of this Tribunal in case of Abbey Business Service Pvt.Ltd vs.DCIT reported in (2012) 23 taxmann.com 346.*
- *Decision of Hon'ble Pune Tribunal in case of M/s. Faurecia Automative Holding vs.DCIT in ITA No,784/Pun/2015 by order dated 08/07/2019*
- *Decision of Hon'ble Mumbai Tribunal in case of DIT vs. HCL Infosystems Ltd reported in (2005) 144 taxman 492;*

13. The Ld.AR submitted that, payments to the assessee under the secondment agreement, cannot be treated as 'fees for technical services.' It was submitted that 'India Recharge and Cost Allocation" Agreement', dated 03/03/2006, entered by the assessee with overseas entity, for secondment of staff from overseas entity, to the assessee in India, and not an agreement for rendering of services by overseas entity to the assessee in India. The Ld.AR submitted that as per Article 2 of the Agreement with Mr. Christopher(supra) shows that, he works under the direct management, supervision and control, and as per instructions of the assessee in India during the period of secondment. It was submitted that the place of performance of the duty and the

manner in which the secondees had to work, were decided by the assessee, and it was the assessee and not overseas entity, who was responsible and accountable to ensure proper performance of duty by the secondees.

14. It was submitted by the Ld.AR that:

- (i) the nature of work to be performed by the secondee was specified by the assessee,
- (ii) the employees were required to act in accordance with the instructions and directions of the assessee;
- (iii) the salary costs of these employees were effectively borne by the assessee;
- (iv) the assessee was responsible and accountable for the work performed by the employees, the assessee was the real employer of the secondees for all practical purposes.

15. The Ld.AR thus submitted that, the right of superintendence, direction and control by an assessee over a person would result in an employer-employee relationship, and the remuneration paid to such person would be considered as 'salaries'. In support he referred to the decision of *Hon'ble Madras High Court* in case of *K.R. Kothandaramam v. CIT* reported in (1966) 62 ITR 345.

16. The Ld.AR submitted that, dual employment of a person is well known in law and section 192(2), which provides for TDS from salary, recognizes this. It was submitted that, under dual employment as in the instant case, where the legal employment remains with one employer and the other person exercises supervision over the employee, the latter person should be recognized as the real or economic employer. In support of this

argument, the Ld.AR relied on the following extract from the OECD commentary, which is as under :

"It should be noted that the term "employer" is not defined in the Convention but it is understood that the employer is the person having rights on the work produced and bearing the relative responsibility and risks. In cases of international hiring out of labour, these functions are to a large extent exercised by the user. In this context, substance should prevail over form, i.e. each case should be examined to see whether the functions of employer were exercised mainly by the intermediary or by the user. It is therefore up to the Contracting States to agree on the situations in which the intermediary does not fulfil the conditions required for him to be considered as the employer within the meaning of paragraph 2. In settling this question, the competent authorities may refer not only to the above mentioned indications but to a number of circumstances enabling them to establish that the real employer is the user of the labour (and not the foreign intermediary) :

- the hirer does not bear the responsibility or risk for the results produced by the employee's work ;*
- the authority to instruct the worker lies with the user,*
- the work is performed at a place which is under the control and responsibility of the user;*
- the remuneration to the hirer is calculated on the basis of the time utilized, or there is in other ways a connection between this remuneration and wages received by the employee;*
- tools and materials are essentially put at the employee's disposal by the user,*
- the number and qualifications of the employees are not solely determined by the hirer."*

17. The Ld.AR thus submitted that, when the assessee is considered as the real and economic employer of the secondees, the reimbursement of salary and other administrative costs to overseas entity, constitutes expenditure in the nature of 'salary' and consequently the reimbursements made to overseas entity, under the India Recharge & Cost Allocation Agreement dated 03/03/2006, cannot be considered as 'fees for technical services', either under the Act, or under the India US DTAA, and consequently, the said reimbursements are not liable for TDS u/s.195 of the Act.

18. The Ld.AR submitted that, the secondment of personnel under the agreement do not tantamount to rendering of technical, professional or consultancy services u/s.9(1)(vii) of the Act. It is submitted that, apart from deputing secondees, overseas entity did not render any other service to the assessee. It was submitted that, consequently in respect of the reimbursements made, the provisions of section 9(1)(vii) would not be attracted.

19. It was submitted that, as per section 9(1)(vii), the term 'fees for technical services' means any 'consideration' for rendering of managerial, consultancy or technical services. The Ld.AR submitted that, the remuneration and other administrative costs relating to seconded personnel was initially paid by overseas entity and these sums were reimbursed by the assessee. It was also submitted that, this arrangement was made out of social security and other reasons such as business exigencies and commercial expediency and did not contain any mark up resulting in any profit or income from it and therefore cannot be treated as 'consideration' as per the definition of the term 'fees for technical services u/s.9(1)(vii) of the Act.

The Ld.AR thus submitted that, overseas entity, did not render any services to the assessee. It only deputed secondees to the assessee as per the 'India Recharge and Cost Allocation' Agreement', dated 03/03/2006, and therefore, contended that, the expression "provision of services of technical or other personnel" as appearing in the definition of 'fees for technical services' was not satisfied. He submitted that, the revenue did not bring out any material on record in support of their

conclusion that, the payments to overseas entity, were in consideration for services rendered by overseas entity to the assessee.

20. The Ld.AR submitted that, the issue now stands covered by the decision of *Hon'ble Karnataka High Court* in case of *DIT vs. Abbey Business Services India (P.) Ltd* reported in (2020) 122 *taxmann.com*.

21. On the contrary, the Ld.CIT.DR place reliance on orders passed by authorities below.

22. The Ld.CIT.DR referred to the decision of *Hon'ble Delhi High Court* in case of *Centrica India Offshore Pvt.Ltd. vs. CIT* reported in (2014) 364 *ITR 336 (Delhi)*, wherein similar situation arose. *Hon'ble Court* held that, overseas entities, through seconded employees, provided 'technical' services to the assessee, and that, the expression, 'rendering technical services', expressly include, 'provision of services of personnel'.

23. He submitted that in the decisions of, *Verizon Data Services India P Ltd.In re* reported in 337 *ITR 192* the authority for advance ruling held that, the overseas entity is the real employer of the expatriate employees and it retains employer employee relationship with them. Thus, reimbursement of salaries was payment for rendering technical services hence taxable as FTS and liable to withholding of tax u/s.195. The *Hon'ble Madras High Court* in *Verizon Data Services India (P) Ltd. v. AAR & Ors.*, reported in 346 *ITR 489* upheld the ruling of AAR.

24. The Ld.DR also relied on the decision of coordinate bench of this *Tribunal* in case of *Food World Supermarkets Ltd vs. DDIT*

(International Taxation) reported in (2015) 63 taxman.com 43, wherein this Tribunal hailed as under:

13. *The SLP filed against the judgment of Hon'ble Delhi High Court has been dismissed by the Hon'ble Supreme Court in Centrica India Offshore (P.) Ltd.'s case (supra). Therefore the view taken by the Hon'ble High Court has attained finality. The concept of income includes positive as well as negative income or nil income. In the case of payment being FTS or royalty as per sec. 9(1) of the Act it is irrelevant whether any profit element in the income or not. It is not only a matter of computation of total income when the concept of profit element in payment is relevant. If the payment being FTS or royalty is made to non-resident, then the concept of total income becomes irrelevant and the provisions of sec. 44D recognize the gross payment chargeable to tax. Thus all the payment made by the assessee to non-resident on account of FTS or royalty are chargeable to tax irrespective of any profit element in the said payment or not. However, there is an exception to this Rule of charging the gross amount when the non-resident is having fixed place of business or PE in India and the amount is earned through the PE, then the expenditure incurred in the relation to the PE for earning said amount is allowable as per the provisions of sec. 44DA of the Act. Therefore, in view of the judgment of Hon'ble Delhi High Court in the case of Centrica (supra), the payment made to foreign company DFCL partakes the character of FTS as per the definition under explanation 2 to sec. 9(1)(vii) of the Act. The decisions relied upon by the assessee in the case of IDS Software Solutions India (P.) Ltd. (supra) and Abbey Business Services (India) (P.) Ltd.'s case (supra) would not help the case of the assessee when there is a direct judgment of Hon'ble Delhi High Court on this point.*

25. The CIT.DR, thus submitted that, the authorities below were right in disallowing the payment made by assessee to the overseas entity for non-deduction of tax as the same amounted to fee for technical services in the hands of the overseas entity.

26. We have perused the submissions advanced by both sides in light of records placed before us. In an identical facts this Tribunal analysed various aspects of secondment in case of *M/s. Toyota Boshoku Automotive India Pvt. Ltd. vs. ACIT* in IT(TP)A Nos. 1646/Bang/2017 & 2586/Bang/2019 for A.Ys. 2013-14 & 2015-16 by order dated 13.04.2022 as under:

“At the outset it would be useful to understand the concept of Assignment or secondment. Multi-national companies

with a view to utilize skill within the group companies has global mobility policy of assignment or secondment. Secondment is deputing or sending one employee in one entity of the multi-national company in one country to another entity of the same multi-national company in another country. For reasons like continued pensionary benefits and other similar reasons the employee would want to retain his contract of employment with the original employer rather than with the seconded employer. In such agreement there are usually three parties, the employer deputing or seconding his employee, the employee and the employer to whom the employee is seconded or deputed. Such arrangements are also referred to as "International hiring out of labor". Sec.9(1)(ii) of the Act lays down that Income in the form of salaries is deemed to accrue or arise in India and is deemed to have been earned in India if is received for services rendered in India. Under the Act, irrespective of the residential status of the employee, salary would be taxable in India, if it is for services rendered in India which is deemed to have been earned in India. In the case of seconded employee, if they are tax residents of a country with whom India has a Treaty for avoidance of double taxation, Indian tax authorities right to tax salary income would depend on the terms of such treat.

OECD Model Commentary, (which is adopted in many of the DTAA (treaties) provides for right of taxation in so far as salaries are concerned, between the source state and the residence state. Article 15 of the Model Commentary reads thus:

Article 15: INCOME FROM EMPLOYMENT

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived there from may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned, and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and
(c) the remuneration is not borne by a permanent establishment which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.”

Article 15(1) of OECD Model Convention lays down the rule of taxation of income earned by the seconded employee by giving the right to tax by the State where employment is exercised. The term “Employment is exercised” means, the place where the employee is physically present when performing the activities for which the employment income is paid. Article 15(2) of OECD Model Convention carves out exception to the rule in Article 15(1) by facilitating short term secondment without the burden of having to pay tax in the country where the employment is exercised subject to the following three conditions:

(a) If the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any 12 month period commencing or ending in the fiscal year concerned. and;

(b) if the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and,

(c) if the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

The Second Condition –the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State. The meaning of the term ‘employer’ is critical as there are occasions when seconded employees are on the rolls of a non-resident employer, but in essence, work as per the directions and under the supervision of an enterprise to whom he has been seconded and yet claims short stay exemption.

Since the right of the state of the temporary employment to tax employment income was limited by the provisions and conditions of Article 15, the tax administrations were not happy to notice that non-resident labor was easily entering their boundaries and easily avoiding source country taxation.

As a possible contribution to solving problems of abuse, recent OECD guidelines lay down guidelines to resolve interpretation issues concerning the concept of "employer"

for purposes of paragraph 2 of Article 15. In determining the employer, the guidelines attaches importance to the nature of the services rendered, in order to determine, whether the services rendered by the individual constitute an integral part of the business of the enterprise to which these services are provided. In cases where the nature of the services rendered point to an employment relationship different than the one of the formal employer, the guidelines suggests objective criteria to determine the employer, namely:-

- who has the authority to instruct the individual regarding the manner in which the work has to be performed;*
- who controls and has responsibility for the place at which the work is performed;*
- the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided;*
- who puts the tools and materials necessary for the work at the individual's disposal;*
- who determines the number and qualifications of the individuals performing the work.*

As a consequence, instead of being regarded as non-resident employee of a non-resident employer rendering services on a temporary basis, individuals may, if certain objective criteria are met, be deemed to be the employees of the service recipient in the other country (i.e. source country), and therefore, taxable in the source country where they are performing their services. Thus where the control is exercised by the entity to whom the services are rendered, such an entity shall be construed to be the employer for the purpose of Article 15(2)(b)."

26.1 In the above background let us analyse the 'India Recharge and Cost Allocation' Agreement', dated 03/03/2006, between the assessee before us and overseas entity, the independent employment contract between the assessee and the seconded employees and the correspondence between the employee and the assessee regarding bifurcation of salary payable to them. The assessee confirms the employment of Mr. Christopher pursuant to which an agreement is entered into between the assessee and Mr. Christopher. The said agreement is reproduced herein above.

26.2. From the recitals to the 'India Recharge and Cost Allocation' Agreement', dated 03/03/2006 between the assessee and overseas entity, it is clear that, the process of secondment of employees by overseas entity to the assessee in India is initiated, when the assessee in India, requires services of seconded employees of overseas entities, for its business projects by the assessee in India. The assessee in India then enters into an agreement for seconded with such employees. By way of illustration, we may take the case of one Laura May, who is a American national and who is on the rolls of overseas entity.

26.3. Article 3.3 of the 'India Recharge and Cost Allocation' Agreement', dated 03/03/2006 between the assessee and overseas entity imposes obligation of compliance with tax deduction at source as per the Act, on salaries paid to the seconded employees on the assessee in India.

26.4. A reading of Article 2, of the Agreement between the assessee and Laura May, shows that the control and supervision of the seconded employee is with the assessee in India.

26.5. As per Article 4 of the Agreement between the assessee and Laura May, 75% of the salary of expatriate employee will be paid by the overseas entity, that sends the employee on deputation, and that, overseas entity, continues to be the *de jure* employer. The assessee in India, to which the employee is sent on deputation is the *de facto* employer pays the balance 25%. The salary paid by the *de jure* employer is reimbursed by the assessee in India, to the overseas entity.

26.6. As per Article 13 f the Agreement between the assessee and Laura May shows that, the assessee in India as well as the

seconded employee shall not disclose confidential information of the other party.

26.7. Thus the Agreement between assessee in India with the seconded employee, contains following features:-

1. She is employee of overseas entity and during his assignment to assessee India, his employment responsibilities with overseas entity will remain suspended.
2. That, she will be under the control and supervision of the assessee in India.
3. That, she was appointed as an Associate, by the assessee in India and that during her employment in India she would be exclusively working for the assessee in India.
4. That, during the assignment period, part of the salary after deducting grossed up income tax, under the Act, on the total salary, will be paid in India and the balance salary payable in New York, by overseas entity on behalf of assessee which shall be reimbursed by assessee to overseas entity against a debit note.
5. That, during the period of assignment with the assessee in India, all other terms and conditions as per policies of the assessee company would be applicable.

26.8 The assessee is thus required to make following payments as salary package to the seconded employees:

Para No	Context	Description
2	Employer	GSSPL (Indian company) is the employer
2.2	Exclusivity	Employee works exclusively for GSSPL
4.1	Compensation	Compensation is decided and fixed by GSSPL

		in US\$, 25% of this is paid in India and 75% will be paid through the New York payroll. Overall 100% compensation responsibility is that of the Indian company and not the overseas company (as wrongly noted by CIT(A))
4.2	Bonus	Bonus amount is decided by GSSPL
4.4	Increment	Increments and bonus entitlements are decided by GSSPL, in its sole discretion
5.1	Place of Work	Place of work is in Bangalore (India)
7	Leave policy	Leave is decided as per GSSPL's local policy
9.1	Notice period	Either the employee or GSSPL can give notice (mutual) to end the employment with one month's notice
9.2	Termination	Firm has right to terminate the employment for a cause ("firm" is defined as GSSPL at para 2.1 and hence it is GSSPL which has the right to terminate the employment)
11	Discipline and Grievance	Employee is bound by the Employee Handbook of GSSPL (and not of overseas companies as noted by CIT(A) at para 23 of his order)
16	Miscellaneous	The contract is governed by the laws of India
17	Signatures	The contract of employment is signed both by the expatriate employee and GSSPL

26.9. Admittedly, the assessee deducted tax at source u/s.192 of the Act, on the 100% salary paid to the seconded employees, and paid the same to the credit of the Central Government. The assessee only reimbursed part of the salary cost of the seconded employee to overseas entity that has already subjected to TDS under section 192 of the Act. And therefore, at the time of making such reimbursement, to overseas entity, no taxes were deducted at source by the assessee in respect of reimbursements made as, according to the assessee, it was in the nature of cost-to-cost reimbursement, and, no element of income was involved.

26.10. The assessee in India does the TDS on 100% salaries u/s 192 and pay the same to the credit of the Central Government.

Form 16 at page 228- 230 issued to Christopher Roberts of PB Vol I, by the assessee in Indian, Certificate under section 203 of TDS having deducted at source and further indicates the following –

- Employee has a PAN number in India
- Total taxable salary is Rs 9,761,581 (this corresponds to the US\$ 130,000 as total compensation indicated in the local employment contract at para 4
- The Indian company does full TDS on 100% of the salaries, although 25% is paid in India and balance 75% outside India
- TDS done is Rs 2,834,300/-, which translates to 30.8% of Rs 9,761,58
- Employee also contributes to Indian provident fund Rs.2,57,885/-

26.11. From conjoint reading of Article 15 of the OECD Model Convention and the article referred to herein above, there is no doubt in our minds that the assessee in India is the economic and *de facto* employer of the seconded employees. It is an admitted fact that all the seconded employees are in India for more than 183 days in a 12 month period. Further all the seconded employees have PAN card as well as file their returns in India in respect of the 100 % salary, though the assessee pays only part of the salary in India.

26.12. The definition of FTS under the Act is given in *Explanation 2* to Sec.9(1)(vii) of the Act that reads as follows:-

“Income deemed to accrue or arise in India.

9. (1) The following incomes shall be deemed to accrue or arise in India :-
(i) to (vi)

(vii) income by way of fees for technical services payable by—

- (a) *the Government ; or*
- (b) *a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or*
- (c) *a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :*

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

26.13. The definition of FTS under the Act excludes "consideration which would be income of the recipient chargeable under the head salaries." If the seconded employee is regarded as employee of the assessee in India, then the reimbursement to overseas entity, by the assessee in India would not be in the nature of FTS, but would be in the nature of 'salary', and therefore, the reimbursements cannot be chargeable to tax in the hands of overseas entity, and therefore there would be no obligation to deduct tax at source at the time of making payment u/s.195 of the Act.

26.14. Article 12(4)-(5) of India USA, DTAA deals with "Fees for technical services', 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.

5. Notwithstanding paragraph 4, "fees for included services" does not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a);

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals making the payment; or

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).”

27. Rendering of managerial, technical and consultancy services is governed by Article 12 on ‘Fees for included services’ of the Double Tax Avoidance Agreement, between India and US. Payments made to ‘individual or firm of individuals for service rendered by them in independent professional capacity are specifically excluded since they are covered by Article 15 on Independent Personal Services. Likewise, Article 12 specifically excludes payments made towards services rendered by an ‘employee’ of the enterprise since services rendered under employment are covered by Article 16 on Dependent Personal Services.

28. The relevant portion of para 5(e) of Article 12 of the DTAA between India and US reads as follows: -

“Fees for included services does not include payments made - to an ‘employee’ of the person making the payment or - to any individual or firm of individuals (other than a company) for professional services as defined in article 15 (Independent Personal Services).

The payments made by the Indian entity to the overseas entity is towards reimbursement of salary paid by the overseas entity to the seconded personnel. As discussed in para 14.2 to 14.7 above, for the purpose of Article 15 of the OECD Model Commentary (corresponding to Article 16 of the DTAA between India and US), the seconded personnel are employees of the Indian entity, being the economic employer. It is to be noted that the understanding as to who is the ‘employee’ in order to be excluded from, “fees for technical services”, cannot be inconsistent with the understanding of employee for the purpose of Article 15 on income from employment, especially when Article 15 is an anti-abuse provision.

29. The Ld.DCIT placed reliance on the decision of the *Hon’ble Delhi High Court* in the case of *Centrica India Offshore Pvt.Ltd.* reported (2014) 44 taxmann.com 300 concluded that the reimbursement was FTS and that services provided make available technical skill or knowledge for use by the assessee.

29.1. In case of the decision of *Hon’ble Delhi High Court* in the case of *Centrica India Offshore Pvt.Ltd vs. CIT(supra)* dealt with identical case of reimbursement of salaries paid to expatriate employees. The *Hon’ble Court* held that, overseas entities had, through seconded employees, undoubtedly provided ‘technical’ services to *Centrica India* and that, the expression rendering technical services expressly includes provision of services of personnel. The *Hon’ble*

Court held that the Seconded employees, were provided by overseas entities and work conducted by them thus, i.e. assistance in conducting business of assessee of quality control and management was through overseas entities. The *Hon'ble Court* also held that, mere fact that secondment agreement, phrases payment made by *Centrica India* to overseas entity as 'reimbursement' could not be determinative. It was also held that, the fact that overseas entity did not charge mark-up over and above costs of maintaining secondees could not negate nature of transaction.

29.2 *Hon'ble Pune Tribunal* in case of *M/s.Faurecia Automotive Holding (supra)* has observed as under:

"4.10. We have gone through the facts of the case obtaining in Centrica India (supra). The assessee therein contended that payment to foreign party towards seconded employees was only reimbursement and hence, no income was chargeable to tax in its hands. The Authority for Advance Ruling (AAR) held that payment made by the petitioner to the overseas entity was in the nature of income in view of the existence of Service Permanent establishment (PE) in India and hence liable for tax withholding. Overturning the view of the AAR that Service PE was constituted, the Hon'ble High Court held that the payment to AE was in the nature of 'fees for technical services' and not reimbursement of expenses and further laid down that the nomenclature of reimbursement was not decisive. It noted that: 'Money paid by assessee to overseas entity accrues to overseas entity, which may or may not apply it for payment to secondees, based on its contractual relationship with them.' It is perceptible that in that case money paid by the Indian entity accrued to overseas entities only, which could or could not have been paid to the secondees depending upon the terms of contract. Per contra, we are confronted with a situation wherein the money never accrued to the assessee. It initially paid money to Mr. Franck in advance and then M/s.Faurecia Automotive Holding recovered the same from the Indian entity without any mark-up. There can be no question of the assessee receiving money in its own independent right. Rather, it is a case of discharge by the Indian entity of its own liability towards salary payable to Mr. Franck. It is thus manifest that this decision has no application to the facts of the instant case."

29.3 We also note that, reliance is placed on the decision of *Hon'ble Madras High Court* in case of *Verizon Data Services India (P) Ltd. v. AAR and Ors(supra)*, wherein it is held that, the reimbursement of salary of expatriates to foreign co by Indian company results in taxable income in the hands of the foreign company. *Hon'ble High Court* also upheld the observations of AAR, wherein it characterized the secondment of personnel as provision of managerial services. However, the *Hon'be Court* set aside the ruling of *Hon'ble AAR*, wherein it held that, the reimbursement of salary of expatriates constitutes fees for included services in terms of Article 12(4) of India USA DTAA. Therefore, reliance placed on this decision is of no assistance to revenue.

29.4 There is another decision of *Hon'ble Supreme Court* in case of *DIT v. Morgan Stanley* reported in (2007) 162 *Taxman* 165, wherein, it is held that, in case of deputation, the entity to whom the employees have been deputed cannot be regarded as employer of such employees as the employees continue to have lien on his employment with the entity which deposes him. Entity seconding the employee is the employer as it retained the right over seconded employee is also held by *Hon'ble AAR* in case of *AT & S India Pvt Ltd.*, reported in 287 *ITR* 421.

29.5 The observations of the *Hon'ble Supreme Court* in the case of *Morgan Stanley (supra)* were in the context of existence of service PE. This is clear from a reading of the relevant portion of the judgment of the *Hon'ble Supreme Court*, which is as follows:-

“As regards the question of deputation, an employee of MSCo when deputed to MSAS does not become an employee of MSAS. A deputationist has a lien on his employment with MSCo. As long as the

lien remains with the MSCo the said company retains control over the deputationist's terms and employment. The concept of a service PE finds place in the UN Convention. It is constituted if the multinational enterprise renders services through its employees in India provided the services are rendered for a specified period. In this case, it extends to two years on the request of MSAS. It is important to note that where the activities of the multinational enterprise entail it being responsible for the work of deputationists and the employees continue to be on the payroll of the multinational enterprise or they continue to have their lien on their jobs with the multinational enterprise, a service PE can emerge. Applying the above tests to the facts of this case, it is found that on request/requisition from MSAS the applicant deposes its staff. The request comes from MSAS depending upon its requirement. Generally, occasions do arise when MSAS needs the expertise of the staff of MSCo. In such circumstances, generally, MSAS makes a request to MSCo. A deputationist under such circumstances is expected to be experienced in banking and finance. On completion of his tenure he is repatriated to his parent job. He retains his lien when he comes to India. He lends his experience to MSAS in India as an employee of MSCo as he retains his lien and in that sense there is a service PE (MSAS) under art 5(2)(l). There is no infirmity in the ruling of the AAR on this aspect. In the above situation, MSCo is rendering services through its employees to MSAS. Therefore, the Department is right in its contention that under the above situation there exists a service PE in India (MSAS)."

29.6 *Per contra*, in the present facts of the case there is no finding, of their existing PE, in any form by the revenue and therefore is of no assistance to the revenue.

29.7 As far as the decision of *Hon'ble AAR* in the case of *AT & S (supra)* is concerned, the facts of the said case were that AT&S, a company incorporated in Austria, offered services of technical experts to applicant, a resident company, pursuant to a foreign collaboration agreement on the terms and conditions contained in secondment agreement. Under the secondment agreement the applicant is required to compensate AT&S for all costs directly or indirectly arising from the secondment of the personnel, and the compensation is not limited to salary, bonus, benefits, personal

travel, etc. but also includes other items. On the above facts, Hon'ble AAR ruled that the Contention that the payments are only in the nature of reimbursement of actual expenditure is not supported by any evidence and there is no material to show what actual expenditure was incurred by AT&S and what was claimed as reimbursement. A part of the salary of seconded personnel is paid by the applicant in Indian rupees and the remaining part is paid by the applicant to AT&S in Euro. While working with the applicant, the seconded personnel are required to comply with the regulations of the applicant, but they would go back to the AT&S on the expiry of assignment. Aforesaid terms and conditions show that the seconded personnel in effect continue to be employees of AT&S. Recipient of the compensation is AT&S and not the seconded employees. Further contention was that AT&S is not engaged in the business of providing technical services in the ordinary course of its business is also not tenable. Therefore, payments made to AT&S by the applicant are for rendering "services of technical or other personnel" and are in the nature of fees for technical services within the meaning of *Explanation 2 to sub clause (vii) of section 9(1)* and *Article 12(4) of the relevant DTAA* and are subject to deduction of tax at source under section 195.

30.1 The ruling of *Hon'ble AAR* is on the factual finding that payments were not only reimbursement of actual salary, bonus etc., but was also included other sums.

30.2 *Per contra* in the present facts of the case, it is not at all the contention of the revenue that, something over and above what was paid as salary, bonus etc.

30.3 Liability under section 195 to deduct tax at source when making payment to a non-resident arises, only if, sum paid is chargeable to tax in India. Payment of salaries is not covered under section 195. Thus, it is necessary to take into consideration following aspect to determine Payments to enterprise seconding employees, the Indian entity has an obligation to deduct tax source u/s 195:

- (i) *Payment of fees by an enterprise (Indian entity) to foreign entity for seconding employees;*
- (ii) *Reimbursement of salaries to the entity seconding the employees (foreign entity) from the entity to whom employees have been seconded (Indian entity).*

31. Payment for supplying skilled manpower cannot be regarded as payment towards managerial, technical and consultancy services as per dictionary meanings of these terms. *Hon'ble AAR in Cholamandalam MS General Insurance Co. Ltd., reported in 309 ITR 356, took the view that, merely supplying technical, managerial or personnel with managerial skills cannot be regarded as rendering technical services by the person supply such personnel. The following were the relevant observations of Hon'ble AAR:-*

"It is debatable whether the bracketted words - "including provision of services of technical or other personnel" is independent of preceding terminology - "managerial, technical or consultancy services" or whether the bracketted words are to be regarded as integral part of managerial, technical or consultancy services undertaken by the payee of fee. In other words, is the bracketted clause a stand alone provision or is it inextricably connected with the said services? HMFICL itself does not render any service of the nature of managerial, technical or consultancy to the applicant and it has not deputed its employee to carry out such services on its behalf. There is no agreement for rendering such services. In this factual situation, it is possible to contend that merely providing the service of a technical person for a specified period in mutual business interest

not as a part of technical or consultancy service package but independent of it, does not fall within the ambit of S.9(1)(vii).”

32. *Hon’ble Bombay High Court* in case of *Marks & Spencer Reliance India Pvt.Ltd. VS. DIT* reported in (2013) 38 *taxmann.cm* 190, upheld the view of *Hon’ble Mumbai Tribunal* which held that, payment towards reimbursement of salary expenditure without any element of profit, would not be taxable under the provisions of the Act. *Hon’ble Court* also held that, when the entire salary has been subjected to tax in India at the highest average tax rate, the assessee could not held to be in default for not without tax under the provisions of the Act.

33. *Hon’ble Delhi High Court* in the case of *DIT Vs. HCL Infosystems Ltd.* reported in (2005) 144 *Taxmann* 492 (Delhi) upheld the order of *Hon’ble Delhi Tribunal* which held that, when an Indian company had already deducted and remitted taxes under Sec.192 of the Act on salaries paid abroad to the technical personnel and when such salary is reimbursed on a cost to cost basis without any profit element, the provisions of Sec.195 of the Act cannot be applied to reimbursement of salaries made to foreign company, once again.

34. Coordinate bench of this *Tribunal* in case of *IDS Software Solutions v. ITO* reported in (2009) 32 *SOT* 25, *Abbey Business Services (P.) Ltd v. DCIT* reported in (2012) 23 *taxmann.com* 346, took the view that expats are deputed to work under the control and supervision of the Indian company and that the oversees entity is not responsible for the actions of the expatriate employees. Thus, oversees entity does not render any technical service to the Indian company, since such payment are towards

reimbursement of salary cost borne by overseas entity, and that, no income can be said to accrue to overseas entity in India. The decision of this *Tribunal* in case of *Abbey(supra)* has been upheld by *Hon'ble Karnataka High Court* in *DIT vs. Abbey Business Services India (P.)Ltd.*, reported in (2020) 122 *taxmann.com* 174.

35. *Hon'ble Ahmedabad Tribunal* in the case of *Burt Hill Designs (P) Ltd. vs. DDIT(IT)* (2017) 79 *taxmann.com* 459, on identical facts, as in the case of the present assessee before us, took the view that, there was no liability to deduct tax at source u/s.195 when payments were made by way of reimbursement.

Based on the above detailed analysis of various contrary decisions on the issue, we are of the view that the decisions relied by revenue are distinguishable with the present facts of the case.

Further, in the present facts we note that, the concept of make-available is not satisfied in the instant case. As per para 4(b) of Article 12 of the India-US DTAA on 'Royalties and fees for included services':

"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. 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."

Thus, even if, the rendering of service by the seconded personnel constitutes a contract for service, in the absence of making available any technical knowledge or skill to the Indian entity, the same shall not constitute fees for technical services.

In support we refer to the decision of *Hon'ble Karnataka High Court* in the case of *CIT vs. De Beers India Minerals Pvt. Ltd.*

reported in (2012) 21 taxmann.com 214, on the concept of 'make available', observed and held as under:

“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 fit 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 fact 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 time is satisfied.

36. The Ld.AR has placed before this *Tribunal* a decision rendered by *Hon'ble CESTAT, Bangalore*, wherein the *Hon'ble CESTAT* was deciding, whether the assessee in India, was required to pay service tax demand (on reverse charge basis) on the secondment reimbursements, on the basis that the same amounts to “manpower recruitment & supply agency services”, placed at page 66-86. The *Hon'ble CESTAT, Bangalore*, held that employer-employee relationship exist between the seconded employee and the assessee in India in para 14 of the order passed by *Hon'ble CESTAT, Bangalore*. The *Hon'ble CESTAT, Bangalore*, further held that, there is no manpower supply services since assessee in India is the real

employer by reason of the employment contract. Service tax demand was deleted.

The relevant extracts are below –

6. *Submitting on the demand of Service Tax under the category “Manpower Recruitment & Supply Agency Service”, the learned counsel states that the employer-employee relationship exists between the Appellant and Seconded Personnel who have been sent on secondment to the Appellant; the Appellant has entered into separate employment contract with the Seconded Personnel. The seconded Personnel, during the period of secondment, work under the control and supervision of the Appellant; In terms of the employment contract, the appellant is under obligation to pay salary (including other entitlements) to the Seconded Personnel during the period of secondment in foreign exchange in his home country; for administrative convenience, the Appellant remits the salary payable to the Seconded Personnel in his home country in Foreign Exchange through the Seconder Company; the Seconded Personnel, as required under the Income Tax Act, 1961, files their respective returns under Section 139 of Income Tax Act, 1961 and shows the entire salary paid by the Appellant (including part of the salary paid in Foreign Exchange) as his/her income as salaries and pays the income tax thereon.....*

14. *Coming to the third issue of payment of salary, allowances and expenses of the personnel drawn from different global entities to work with the appellant, we find that learned Counsel submits that the employer-employee relationship exists between the Appellant and Seconded Personnel who have been sent on secondment to the Appellant; the Appellant has entered into separate employment contract with the Seconded Personnel. The seconded Personnel, during the period of secondment, work under the control and supervision of the Appellant; In terms of the employment contract, the appellant is under obligation to pay salary (including other entitlements) to the Seconded Personnel during the period of secondment in foreign exchange in his home country; for administrative convenience, the Appellant remits the salary payable to the Seconded Personnel in his home country in Foreign Exchange through the Seconder Company; the Seconded Personnel, as required under the Income Tax Act, 1961. **We find that the issue is no longer res integra and is covered by decision of Volkswagen India Pvt. Ltd. Vs CCE, Pune-I, 2014 (34) STR 135 (Tri. Mumbai) [maintained by Apex Court in 2016 (42) S.T.R. J145 (S.C.)] wherein it was held that:***

5.1 *In view of the clauses of agreements noticed herein above and other facts, we hold that the global employees working under the appellant are working as their employees and having employee employer relationship. It is further held that there is no*

supply of manpower service rendered to the appellant by the foreign/holding company. The method of disbursement of salary cannot determine the nature of transaction.

15. *The learned Counsel for the appellants submits that the Department was fully aware of the facts when the SCN dated 27.10.2009 was issued and therefore no suppression of facts with an intent to evade payment of duty can be alleged in the subsequent SCN dated 15.04.2013. He relies upon Nizam Sugar Factory case (supra). **We find that the argument is acceptable and for this reason, the second SCN is liable to be set aside ab initio.....***

16. In view of the above, Appeal No. ST/25566/2013 & Appeal No. ST/21705/2016 are allowed.

Thus, the above decision of *Hon'ble CESTST Tribunal* further strengthens assessee's case. We therefore, hold that, the amount reimbursed by the assessee to the overseas entity cannot be subjected to tax in India as there does not involve any element of income embedded in it.

37. Respectfully following the above views expressed by *Hon'ble Karnataka High Court* in *DIT vs. Abbey Business Services India (P.)Ltd.(supra)*, *Hon'ble AAR* in *Cholamandalam MS General Insurance Co. Ltd. (supra)*, *Hon'ble Bombay High Court* in case of *Marks & Spencer Reliance India Pvt.Ltd. vs. DIT (supra)*, *Hon'ble Delhi High Court* in the case of *DIT Vs. HCL Infosystems Ltd. (supra)*, Coordinate bench of this *Tribunal* in case of *IDS Software Solutions vs. ITO (supra)*, *Hon'ble Pune Tribunal* in case of *M/s.Faurecia Automative Holding(supra)*, *Hon'ble Ahmedabad Tribunal* in the case of *Burt Hill Designs (P) Ltd. vs. DDIT(IT) (supra)*, we are of the view that the reimbursement made by the assessee in India to overseas entity, towards the seconded employees cannot be regarded as "Fee For technical Services"

Once there is no violation of provision of section 195, assessee cannot be held to be an assessee in default under section 201(1) of the Act for all the years under consideration. We therefore direct the

Ld.AO to delete the interest levied under section 201(1A) of the Act for all the years under consideration.

In the result, the appeal filed by the assessee for all the years under consideration stands allowed.

Order pronounced in the open court on 29th April, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 29th April, 2022.
/MS /

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|---------------|------------------------|
| 1. Appellant | 4. CIT(A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore