

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE**

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

ITA No.1658/Bang/2017
Assessment Year: 2014-15

M/s. Kennametal Inc., USA C/o Kennametal India Ltd. 8/9 th Mile Tumkur Road Nagasandra Bangalore 560 073. PAN NO : AACCK6397B	Vs.	Deputy Commissioner of Income-tax (International Taxation) Circle-1(2) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Vasudevan & Shri Ankur Pai, A.R.s
Respondent by	:	Shri Dilip, Standing Counsel for Dept.

Date of Hearing	:	13.07.2022
Date of Pronouncement	:	13.07.2022

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against assessment order passed u/s 143(3) r.w.s. 144C of the Act dated 13.6.2017.

2. Ground Nos.1 to 9 of the appeal of the assessee are as follows:-

1. *"The learned Assessing Officer ("learned AO") and the learned DRP have erred in law and facts of the case by treating the salary cost of the seconded employees as "Fees for Technical Services"*
2. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in holding that the seconded employees remained employees of the assessee, totally dis-regarding-the employment*

agreement which clearly stated that the seconded persons were in the employment of the group company during the period of secondment.

3. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in relying on selected case laws on a selective basis, totally ignoring the other decisions cited by the appellant on the same issue.*
 4. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in placing reliance on the decision of the Hon'ble Delhi High Court in the case of Centrica (India) Ltd., and the decision of the Hon'ble Bangalore Tribunal in the case of M/s.Intel Corporation without appreciating that the said decisions were specifically on the facts of the case and that the facts of the Appellant case are different.*
 5. *The learned Assessing Officer- ("learned AO") and the learned DRP have erred in dis-regarding several decisions of the jurisdictional Higher authorities which have held that such salary costs of the seconded employees does not constitute "Fees for Technical Services"*
 6. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in selectively citing certain clauses of the Agreement without considering the agreements. in toto and in spirit.*
 7. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in not appreciating that there is no income element in the reimbursement of Salary cost and therefore it is not taxable as "Fees⁴for Technical Services".*
 8. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in not adjudicating on the contention raised by the Appellant that if the secondment arrangement constitutes service PE, then the reimbursement of Salary cost needs to be examined under Article 7 of the DTAA related to "Business Profits" and not under Article 12 related to "Royalty and Fees for included Services".*
 9. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in not taking into consideration the decision of the Hon'ble Mumbai Tribunal in the case of Morgan Stanley in this regard, even-though it was brought to the notice of Hon'ble DRP."*
2. The issues in this appeal are that the taxability of the amounts received as reimbursement of costs
- i) Costs of seconded employees - Rs 1,26,83,810
 - ii) Costs for providing IT support services - Rs 16,23,11,570

Facts in brief:

2.1 The appellant is a Non-resident company incorporated in USA and is a tax resident of USA. For the year under consideration, it had filed Return of Income in India showing income of Rs 2,01,39,680 which was towards Royalty received and taxable in India. (Para 1 of AO's order)

Reimbursement towards secondment of employees

2.2 During the year under consideration, the appellant had receipts of Rs 1,26,83,810 towards reimbursement of costs of seconded employees. The facts related to the reimbursement of costs under this head is as under :

- i) During the year under consideration, the appellant had seconded an employee to its Group company in India, i.e., Kennametal Shared Services Pvt. Ltd. (KSSPL)
- ii) This secondment was supported by a Service Agreement between the appellant and KSSPL and also by a separate employment agreement with the employee (attached herewith)
- iii) The employment agreement with the employee states clearly that his employment is with KSSPL, the Indian entity. Hence there is a clear employer-employee relationship with KSSPL
- iv) The employee rendered services under direct supervision and control of KSSPL and KSSPL was responsible for the services rendered.
- v) The employee was paid salary through KSSPL and the necessary TDS on salary was made and paid to the exchequer.

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- vi) A portion of the remuneration was paid by the appellant for the purpose of social security, retirement and health benefits. This amount was reimbursed to the appellant by KSSPL, on cost basis.
- vii) As this reimbursement of cost does not involve any income element, no TDS was withheld from these payments.

Decision of the AO/DRP

2.3 The Learned Assessing Officer (AO) has held these cost reimbursement to be "Fees for Technical Services (FTS)" by relying on the decision of the Hon'ble Delhi High court in the case of Centrica India Offshore Pvt Ltd. The DRP confirmed the stand of the AO.

2.4 Ld. A.R. submitted as follows:-

- i) The secondment is supported by an employee agreement, which specifically states that the employment is for KSSPL and KSSPL is responsible for the services rendered, which has been totally ignored by the AO
- ii) On similar set of facts, the coordinate benches of the Hon'ble Tribunal have held that reimbursement of costs incurred towards seconded employees is not FTS.
- iii) The reliance placed by the A.O blindly on the decision rendered in the case of Centrica is misplaced, as the facts of that case are different and the decision was rendered in the context of a service PE.
- iv) The decision of Centrica has been distinguished by the Hon'ble Karnataka High Court in the case of M/s Abbey Business Services India Ltd, ITA No. 214 of 2014 wherein the Hon'ble Jurisdictional High Court has held that

reimbursement of costs towards secondment of employees is not FTS.

- v) There are many decisions of the Hon'ble Tribunals where the decision in case of Centrica has been distinguished on facts and on similar set of facts as that of appellant, it has been decided that reimbursement of costs towards secondment of employees is not FTS. Reliance is placed on the following decisions:

(a) Boeing India Pvt Ltd, ITA 9765/Del/2019

(b) Faurecia Automotive Holding, ITA/785/Pun/2015
Nr\i-

(c) Yum Restaurants(Asia) Pte Ltd, ITA No. 6018/Del/12

- vi) In the light of the decision of the Jurisdictional High court and the consistent decisions of various benches of the Tribunal, the reimbursement of cost of seconded employees is not FTS.

3. After hearing both the parties, similar issues came for consideration in the case of Toyota Boshoku Automotive India Pvt. Ltd. In ITA No.1646/Bang/2017 dated 13.4.2012 in which it was decided as under:-

14. We have perused the submissions advanced by both sides in light of records placed before us.

*14.1. 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 Double Taxation Avoidance Agreement (DTAA), Indian tax authorities right to tax salary income would depend on the terms of such treaty.

14.2. In OECD Model Commentary, Article 15 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.”

14.3. 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.*

14.4.1 The first condition – is not relevant as the seconded employees have been employed in India for more than 183 days.

14.4.2 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 nonresident 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.

14.5. 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.

14.6. 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.*

14.7. As a consequence, instead of being regarded as nonresident 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.

14.8. In the above background let us analyse the 'Agreement of employees on loan', dated 01/08/2008, between the assessee and Toyota Corporation Japan, 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. As a sample we have reproduced the contract of assessee with Mr.Minoru Asahi herein above.

14.9. A reading of Article 2, of the 'Agreement of employees on loan', dated 01/08/2008, between the assessee and Toyota Corporation, Japan, the request for employees on loan shall be made by a assessee in Part A of Form-1, wherein number of employees with details of the profile would be mentioned. We know that the said form one is annexed at page 507 as an annexure to the agreement of employees on loan dated 01/08/2008.

14.10. A reading of Article 6, of the 'Agreement of employees on loan', dated 01/08/2008, between the assessee and Toyota Corporation, Japan, shows that the control and supervision of the seconded employee is with the assessee in India. As per Article 7 of the 'Agreement of employees on loan', dated 01/08/2008 between the assessee and Toyota Corporation Japan, the salary of expatriate employee will be paid by the Toyota Corporation, Japan, that sends the employee on deputation, and that, Toyota Corporation Japan, continues to be the de jure employer. The assessee in India, to which the employee is sent on deputation is the de facto employer. The salary paid by the de jure employer is reimbursed by the assessee in India, to the Toyota Corporation, Japan.

14.11. Article 7 of the 'Agreement of employees on loan', dated 01/08/2008 between the assessee and Toyota Corporation Japan 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.

14.12. As per Article 8 of the 'Agreement of employees on loan', dated 01/08/2008, between the assessee and Toyota Corporation Japan, the assessee in India as well as the seconded employee shall not disclose confidential information of the other party.

14.13. From the recitals to the the 'Agreement of employees on loan', dated 01/08/2008 between the assessee and Toyota Corporation Japan,

it is clear that, the process of secondment of employees by Toyota Corporation, Japan to the assessee in India is initiated, when the assessee in India, makes a request requiring the services of seconded employees of the Toyota Corporation, Japan, for its business projects by the assessee in India. The assessee in India gives offer letter to the seconded employee. By way of illustration, we may take the case of one Mr.Minoru Asahi who is a Japanese national and who is on the rolls of Toyota Corporation, Japan.

14.14. The offer letter dated 11.06.2014 of the assessee in India addressed to Mr. Minoru Asahi contains the following features:-

- 1. He is employee of Toyota Corporation Japan and during his assignment to assessee India, his employment responsibilities with Toyota Corporation Japan will remain suspended.*
- 2. That, he will be under the control and supervision of the assessee in India.*
- 3. That, his specialized knowledge in PED, Quality & New Projects was vital for the assignment with the assessee in India. From the letter dated 11/06/2014, upon completion of the assignment, it is clear that, Mr.Minoru Asahi was called upon to continue at the post of specialist PED Quality & New Projects with 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 Japan, by Toyota Corporation, Japan on behalf of assessee, which shall be reimbursed by the assessee to Toyota Corporation, Japan 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.*

Similar is the situation with all the seconded employees.

14.15. Admittedly, the assessee deducted tax at source u/s.192 of the Act, on the 100% salary paid to all 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 Toyota Corporation, Japan that was already subjected to TDS under section 192 of the Act. And therefore, at the time of making such reimbursement, to Toyota Corporation Japan, 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.

14.16. From a 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. We are therefore of the view that there exists an employer-employee relation between the assessee and the seconded employees.

14.17. Article 12(4) of India Japan DTA, A that deals with “Fees for technical services”, as under:

“4. The term "fees for technical services" as used in this Article means payments of any amount to any person other than payments to an employee of a person making payments and to any individual for independent personal services referred to in Article 14, in consideration for the services of a managerial, technical or consultancy nature, including the provisions of services of technical or other personnel.”

Reading Article 12(4) of India Japan DTAA, it is clear that payments made to individuals or firm of individuals for services rendered by them in independent capacity are specifically excluded as they are covered by Article 14 being “ Independent Personal Services. Article 12(4) also excludes payments made towards services rendered by an ‘employee’ of an enterprise. 14.18. 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".

14.19. 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 Toyota Corporation, Japan, 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 Toyota Corporation, Japan, and therefore there would be no obligation to deduct tax at source at the time of making payment u/s.195 of the Act.

14.20. 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.

14.20.1. 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 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 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.

14.20.2. 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.”

14.21. 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.

14.22. 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 deputes 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.

14.22.1. 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).”

14.22.2. 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.

14.23. 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.

14.23.1. 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.

14.23.2. 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.

14.24. 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).*

14.25. 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)."

14.26. Hon'ble Bombay High Court in case of Marks & Spencer Reliance India Pvt.Ltd. VS. DIT reported in (2013) 38 taxmann.com 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.

14.27. 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.

14.28. 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 oversees entity, and that, no income can be said to accrue to oversees 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.

14.29. 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.

15. 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 Toyota Corporation, Japan, towards the seconded employees cannot be regarded as "Fee For technical Services" and therefore not taxable u/s. 195 of the Act. We therefore direct the Ld.AO to delete the disallowance made u/s. 40(a)(i) of the Act.

Accordingly, Ground nos. 11-14 raised by assessee for the assessment year 2013-14 stands allowed."

3.1 Further, coordinate bench of the Tribunal in the case of M/s. Scania CV AB Vs. Deputy Commissioner of Income-tax in ITA No.3432/Bang/2018 dated 6.7.2022 held as under:-

"2.3 It is submitted that identical issue has been considered at length and in detail in the above decisions. The Ld.AR referred to the recent decision of Hon'ble Karnataka High Court in case of M/s. Flipkart Internet Pvt. Ltd. vs. DCIT (IT) (supra) wherein Hon'ble Court observed as under:

"(viii) The Revenue has relied upon the judgment of the Apex Court in C.C., C.E. & S.T.-Bangalore (Adjudication) etc. v. M/s.Northern Operating Systems Pvt. Ltd.¹² where the Apex Court has interpreted the concept of a secondment agreement taking note of the contemporary business practice and has indicated that the traditional control test to indicate who the employer is may not be the sole test to be applied. The Apex Court

while construing a contract whereby employees were seconded to the assessee by foreign group of Companies, had upheld the demand for service tax holding that in a secondment arrangement, a secondee would continue to be employed by the original employer.

(ix) The Apex Court in the particular facts of the case had held that the Overseas Co., had a pool of highly skilled employees and having regard to their expertise were seconded to the assessee and upon cessation of the term of secondment would return to their overseas employees, while returning Civil Appeal Nos.2289-2293/2021 such finding on facts, the assessee was held liable to pay service tax for the period as mentioned in the show cause notice.

(x) It needs to be noted that the judgment rendered was in the context of service tax and the only question for determination was as to whether supply of man power was covered under the taxable service and was to be treated as a service provided by a Foreign Company to an Indian Company. But in the present case, the legal requirement requires a finding to be recorded to treat a service as 'FIS' which is "make available" to the Indian Company.

(xi) Accordingly, any conclusion on an interpretation of secondment as contained in the M.S.A. to determine who the employer is and determining the nature of payment by itself would have no conclusive bearing on whether the payment made is for 'FIS' in light of the further requirement of "make available.""

3. On the contrary, the Ld.DR placed reliance on orders passed by authorities below.

4. We have perused the submissions advanced by both sides in the light of records placed before us.

4.1 We note that the evidences filed by assessee has not been considered by the revenue authorities.

4.2 We therefore remand this issue to the Ld.AO to consider the claim in accordance with the decision of Hon'ble Karnataka High Court in case of M/s. Flipkart Internet Pvt. Ltd. vs. DCIT (IT) (supra) and Coordinate Bench of this Tribunal in the above referred cases M/s. Toyota Boshoku Automotive India Pvt. Ltd. vs. DCIT (supra) Goldman Sachs Services Pvt. Ltd. vs. DCIT(supra) having regard to the evidences filed by the assessee. Needless to say that proper opportunity of being heard must be granted to assessee in accordance with law.

Accordingly this ground raised by assessee stands allowed for statistical purposes."

3.2 In view of the above order of the Tribunal, taking consistent view we remit the issue to the file of AO to decide it afresh in the light of above order of the Tribunal cited (supra).

4. Next ground Nos.10 to 17 are regarding reimbursement towards support services, which are reproduced as under:-

10. *"The learned Assessing Officer ("learned AO") and the learned DRP erred in holding the IT charges received from group companies as taxable under "Fees for included Services" as per Article 12 (4)(b) of the India-US DTAA.*
11. *The learned Assessing Officer ("learned AO") and the learned DRP erred in holding that. the payment towards IT charges are for the use of SAP software and is in the nature of Royalty.*
12. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in not appreciating that the payments are neither in the nature of Royalty nor are covered under "Fees for included Services"*
13. *The' learned Assessing Officer ("learned AO") and the learned DRP have erred, in not appreciating that the IT charges are only reimbursement of expenses and have no element of Income*
14. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in not appreciating that the receipts are for use of SAP software by way of sub-licensing the same to the group entity and therefore not taxable.*
15. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in not appreciating that the payment is towards usage charges of copyrighted software and not a right on the copyright of the software and hence not taxable.*
16. *The learned Assessing Officer ("learned AO") and the learned DRP have erred in not appreciating that the Appellant being nonresident, the provisions of the DTAA would apply as against the provisions of the Indian Income Tax Act.*
17. *The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal."*

5. Ld. A.R. in his written submissions has submitted as follows:-

Reimbursement towards IT support services

5.1 The assessee has received reimbursement of costs towards IT support services like computer usage, storage of

data, application system support, network communication, SAP services etc. These payments included the payment towards SAP license fees. These charges are basically towards the use of the SAP software and the data centre maintained by the assessee in USA. These payments were issues in appeal in earlier assessment years also.

5.2 Facts in brief

- i) The appellant is a Non-resident company incorporated in USA. The appellant has provided Information Technology Services to its Indian subsidiary, Kennametal India Ltd (KTL), for which it received payment from KTL
- ii) These services are provided from the data centre of the appellant at USA and charged on the basis of number of SAP users in each location, based on a certain key
- iii) The charges are reimbursed based on actual cost incurred without any markup and hence there is no income element
- iv) The IT support services are services in relation to computer usage and storage of data, support in relation to application system, Network communication, Disaster recovery etc.

5.3 Contention of the AO

- i) The receipts from KIL are mainly in the nature of cross charges. The appellant acquired license for the software SAP from SAP AG, Germany and this included onetime cost as well as recurring cost. The appellant has a centralized data centre in USA which houses the server that caters to SAP access and also provides the various services. The same was allotted to the individual entities based on the number of SAP users in each entity.

- ii) Even if the assessee were not the licensee, the payment received by it from the group entities would not have escaped the definition of Royalty under the DTAA, as the payment is for use of copyright in SAP software

- iii) It is therefore concluded that the **payments made by KIL to the appellant are basically in the nature of Royalty**

5.4 DRP Directions

The Ld. DRP upheld the stand of the AO.

5.5 Hon'ble Tribunal's order for earlier years (AY 2009-10 to 13-14)

This issue was before the Hon'ble Tribunal for A.Y 2009-10 to AY 2013-14 in ITA No.s 802 to 806/B/19. Vide order dated 09.12.2021, the Hon'ble Tribunal remanded the issue to the AO.

5.6 Ld. A.R. submitted that:-

- i) The AO had contended that the payments are towards software licenses and for services auxiliary to the use of software. Hence, the AO has held the payments to be "Royalty" and "Fees for Included Services". The DRP upheld the same.

- ii) This issue has been decided by the Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence Pvt. Ltd v CIT, & Anr, { (2021) 125 TAXMANN.COM 42 }**. In the said decision, the Hon'ble Supreme Court has held that payment for use of software is NOT Royalty. Hence, the issue in these appeals is squarely covered by the above decision of Hon'ble SC.

- iii) As regards the issue whether these payments constitute "Fees for Included Services", the Hon'ble Karnataka High Court, in the case of De Beers India Minerals Pvt Ltd., { (2012) 21 TAXMANN.COM 214 } has explained the meaning of "Make available" to qualify as "Fees for Included Services". It has been held that there should be a transfer of technology and that technology should be made available to the transferee/service recipient in order for the services to be considered to have been 'made available'.
- iv) Even as per the AO, the services are supplementary to the use of SAP software and there is no claim of transfer of technology. As such, the payments will not come within the purview of "Fees for Included Services" under India-USA DTAA.
6. The Ld. D.R. relied on the orders of lower authorities.
7. We have heard the rival submissions and perused the materials available on record. After hearing both the parties, we are of the opinion that similar issue came for consideration in ITA Nos.802 to 806/Bang/2019 in the case of Kennametal Inc., Bangalore dated 9.12.2021 in which it was decided as under:-

7. We have heard the rival submissions. Similar issue came for consideration before this Tribunal rendered in the case of M/s. World Courier (India) Pvt. Ltd. vs. ACIT in ITA Nos. 1727, 1577/Bang/2017 dated 11.08.2021, wherein held that

“11. We have carefully considered the rival submissions, perused the order of the AO and Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the issue to be decided in the grounds raised by the assessee is in relation to taxability of payment in question in India in the hands of the recipient. The decision of Hon'ble Karnataka High Court in the case of CIT vs. Samsung Electronics Ltd. 345 ITR 494 on the basis of which the revenue authorities concluded that the payment in question is in the nature of royalty, now stand overruled by the decision of the

Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. (2021) 125 [Taxmann.com](#) 42 (SC). The Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. (2021) 125 [Taxmann.com](#) 42 (SC) held that A copyright is an exclusive right that restricts others from doing certain acts. A copyright is an intangible right, in the nature of a privilege, entirely independent of any material substance. Owning copyright in a work is different from owning the physical material in which the copyrighted work may be embodied. Computer programs are categorised as literary work under the Copyright Act. Section 14 of the Copyright Act states that a copyright is an exclusive right to do or authorise the doing of certain acts in respect of a work, including literary work. The Hon'ble Court took the view that a transfer of copyright would occur only when the owner of the copyright parts with the right to do any of the acts mentioned in section 14 of the Copyright Act, 1957(Copyright Act). In the case of a computer program, section 14(b) of the Copyright Act, speaks explicitly of two sets of acts:

- 1. The seven acts enumerated in sub-clause (a); and*
- 2. The eighth act of selling or giving of commercial rental or offering for sale or commercial rental any copy of the computer program.*

The seven acts as enumerated in section 14(a) of the Copyright Act, in respect of literary works are:

- 1. To reproduce the work in any material form, including the storing of it in any medium electronically;*
- 2. To issue copies of the work to the public, provided they are not copies already in circulation;*
- 3. To perform the work in public, or communicate it to the public;*
- 4. To make any cinematographic film or sound recording in respect of the work;*
- 5. To make any translation of the work;*
- 6. To make any adaptation of the work; and*
- 7. To do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (1) to (6).*

The court held that a licence from a copyright owner, conferring no proprietary interest on the licensee, does not involve parting with any copyright. It said this is different from a licence issued under section 30 of the Copyright Act, which grants the licensee an interest in the rights mentioned in section 14(a) and 14(b) of the Copyright Act. What is 'licensed' by the foreign, non-resident supplier to the distributor and resold to the resident end-user, or

directly supplied to the resident end-user, is the sale of a physical object which contains an embedded computer program. Therefore, it was a case of sale of goods. The payments made by end-users and distributors are akin to a payment for the sale of goods and not for a copyright license under the Copyright Act. The decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Samsung Electronics Co. Ltd. (2011) 16 taxmann.com 141 (Karn.), on which the revenue authorities placed reliance in making the impugned addition stood overruled by the Hon'ble Supreme Court.

12. On the question whether the provisions of the Act can override the provisions of the DTAA, the Hon'ble Court held that Explanation 4 was inserted in section 9(1)(vi) of the ITA in 2012 to clarify that the "transfer of all or any rights" in respect of any right, property, or information included and had always included the "transfer of all or any right for use or right to use a computer software". The court ruled that Explanation 4 to section 9(1)(vi) expanded the scope of royalty under Explanation 2 to section 9(1)(vi). Prior to the aforesaid amendment, a payment could only be treated as royalty if it involved a transfer of all or any rights in copyright by way of license or other similar arrangements under the Copyright Act. The court held that once a DTAA applies, the provisions of the Act can only apply to the extent they are more beneficial to the taxpayer and therefore the definition of 'royalties' will have the meaning assigned to it by the DTAA which was more beneficial. It was held that the term 'copyright' has to be understood in the context of the Copyright Act. The court said that by virtue of Article 12(3) of the DTAA, royalties are payments of any kind received as a consideration for "the use of, or the right to use, any copyright "of a literary work includes a computer program or software. It was held that regarding the expression "use of or the right to use", the position would be the same under explanation 2(v) of section 9(1)(vi) because there must be, under the licence granted or sales made, a transfer of any rights contained in sections 14(a) or 14(b) of the Copyright Act. Since the end-user only gets the right to use computer software under a nonexclusive licence, ensuring the owner continues to retain ownership under section 14(b) of the Copyright Act read with sub-section 14(a) (i)-(vii), payments for computer software sold/licenced on a CD/other physical media cannot be classed as a royalty.

13. As contended by the learned DR, neither the AO nor the CIT(A) had the benefit of the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd.(supra) and therefore in all fairness, the issue should be remanded to the AO to examine the terms of the agreement

under which right were granted to the Assessee in the light of the provisions of the DTAA as to whether the same would amount to royalty. We accordingly remand the issue to the AO. The AO will afford opportunity of being heard to the Assessee in the set aside proceedings. The appeal of the Assessee is accordingly treated as allowed for statistical purpose.

14. ITA No.1727/Bang/2017 : In this appeal, the issue to be decided is as to whether the AO is justified in disallowing a sum of Rs.1,15,68,449/-being software charges on the ground of non-deduction of tax at source. The facts and circumstances under which this addition is made by the AO under section 40a(ia) of the Act are identical to the facts and circumstances as it prevailed in Assessment Year 2014-15. We have already remanded the issue to the AO for fresh consideration with certain directions. The said directions and decisions will equally apply to the present Assessment Year also. We hold and direct accordingly. The other issues raised in the grounds of appeal were not pressed by the learned Counsel for the assessee. The appeal of the Assessee is accordingly treated as partly allowed for statistical purpose.

15. In the result, the appeal for AY 2014-15 is treated as allowed for statistical purpose while the appeal for AY 2012-13 is treated as partly allowed for statistical purposes.”

8. In view of the above order of Tribunal, the issues raised by assessee are remitted to the file of AO to examine the terms of the agreement dated 01.07.2005 under which rights are granted to the subsidiary and in the light of the DTAA as to whether the same would amount to Royalty. The AO will afford opportunity of being heard to the assessee in proceedings.”

8. In view of the above, we remit the issue to the file of AO to decide it afresh in the light of above order cited (supra).

9. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 13th Jul, 2022

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 13th Jul, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,
ITAT, Bangalore.**