

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

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

<b>IT(IT)A Nos. 88 to 90/Bang/2023</b>
<b>Assessment Years : 2013-14, 2014-15 &amp; 2017-18</b>

M/s. Charles River Laboratories Inc., 251, Ballardvale Street, Wilmington, Massachusetts 01887, United States. <b>PAN: AAGCC2596Q</b>	<b>Vs.</b>	The Assistant Commissioner of Income Tax, International Taxation, Circle – 2(1), Bengaluru.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri Chavali Narayan, CA
Revenue by	:	Shri Sankar Ganesh K, Addl. CIT (DR)

Date of Hearing	:	16-05-2023
Date of Pronouncement	:	01-06-2023

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeals has been filed by non-resident assessee against separate final assessment orders all dated 20.12.2022 passed by Ld.ACIT (International Taxation), Circle – 2(1), Bangalore for A.Ys. 2013-14, 2014-15 and 2017-18.

2. For the sake of convenience, we reproduce the issues raised by assessee for A.Y. 2013-14 based on the submissions by the

Ld.AR that all the issues raised in all the assessment years under consideration are common and based on identical facts.

Grounds of appeal – Assessment Year 2013-14:

*“On the facts and circumstances of the case and in law. the learned Assistant Commissioner of Income Tax, International Taxation. - Circle 2(1). Bengaluru (\*the learned AO’). has erred in assessing the total income of the Appellant in the assessment order passed under section 143(3) read with section 147 read with section 144C of the Income Tax Act. 1961 (" the Act") for the captioned Assessment Year ("AY").*

*Each of the ground is referred to separately, which may be kindly considered independent of each other.*

1. Ground 1: Income earned by the Appellant erroneously characterized to be in the nature of Fees for Included Services/ Fees for Technical Services under the Act and the India — USA Tax Treaty ("Tax treaty") and is consequently subject to tax in India

*1.1 On the facts and in the circumstances of the case, and in law, the learned AO erred in holding that the income earned by CRL Inc from its various customers in India is in the nature of Fees for Included Services ("FIS") / Fees for Technical Services ("FTS") and consequently liable to tax in India, without having due regard to Article 12(4) of the Tax Treaty.*

*1.2 The Hon'ble DRP/learned AO has failed to appreciate that the testing services provided by CRL Inc does not make available its services to the recipient in accordance with Article 12(4) of the Tax Treaty.*

2. Ground 2: Consequential levy of interest under section 234A and section 234B of the Act

*On the facts and in the circumstances of the case and in law, the learned AO erred in levying consequential interest under section 234A and section 234B of the Act.*

3. Ground 3: Initiation of penalty proceedings under section 271(1)(c) and section 271F of the Act

*On the facts and in the circumstances of the case and in law. the learned AO erred in initiating penalty proceedings under section 271(1)(c) and section 271F of the Act.*

*All the above grounds are without prejudice to each other. The Appellant craves for leave to add, amend, vary, omit or substitute or withdraw any of the aforesaid grounds at any time before or at the time of hearing of the matter with the Income Tax Appellate Tribunal.*

*The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case.”*

### **3. Brief facts of the case are as under:**

The facts and circumstances in all the three assessment years under consideration are identical as submitted by the Ld.AR as well as the Ld.DR. It is also submitted that the issue alleged by the assessee in all the three appeals are on common grounds. For the sake of convenience, we refer to the facts for A.Y. 2013-14 and the decision shall be applied *mutatis mutandis* to the other two assessment years being 2014-15 & 2017-18.

We refer to the facts as narrated in A.Y. 2013-14.

3.1 The assessee is a non-resident incorporated under the laws of United States of America ("USA") on 25.07.1996. It is engaged in rendering pre-clinical laboratory services to enable the determination of a safe dose and assess the potential toxicity of new drugs prior to human clinical trials by way of conducting in vitro and in vivo tests and trials. It is submitted that, these services are largely catered towards Indian customers in the pharmaceutical, medical device and biotechnology industries. It was submitted by the assessee that the Indian customers provide samples prior to undertaking human clinical trials, which is tested by the assessee, by rendering such preclinical laboratory services. It is submitted that the assessee provides report to its customers containing a generic protocol of the test procedure and results to conclude the preclinical phase of testing. The assessee submitted that in rendering the above services, no technology / know-how / knowledge is transferred to the customers nor any right to access/ use of such property is granted.

3.2 For the year under consideration, the assessee received sum of Rs.9,77,31,642/- from its various Indian customers / clients including M/s. Syngene International Ltd. for the services rendered. The Ld.AO noted that the assessee had not offered the income in the return filed, and that, M/s. Syngene International Ltd. also failed to deduct TDS. Accordingly, notice u/s. 148 was issued to assessee on 31.03.2021.

3.3 In response to notice issued u/s. 148 of IT Act, the assessee filed its return of income for the A.Y. 2013-14 on 30.04.2021. Further, a notice u/s. 143(2) along with the reasons recorded for reopening was issued to the assessee on 25.06.2021 for furnishing details, documents, accounts, and other evidences in support of the return of income filed by the assessee. Thereafter notice 142(1) of the act was issued to the assessee on 09.02.2022 for furnishing details called for as prescribed manner, which was submitted by the assessee on 03.03.2022.

3.4 After issuance of notice u/s. 142(1), the assessee also filed objection against the 147 proceeding through communication letter dated 15.07.2021. The same were disposed of through a speaking order dated 09.03.2022.

3.5 The Ld.AO dealt with the objections raised by the assessee in paras 6 – 6.3 of the draft assessment order. While dealing with the objections, the Ld.AO observed as under:

*“6.3 Preclinical laboratory services are not liable to be taxed as FTS in India on account of the beneficial provisions of the Treaty, although such services could be characterized as FTS under the Act. The company submitted that it does not make available any technical knowledge, experience, skill, know-how or processes which enables the person acquiring the services to apply the technology therein. Thus, in absence of 'make*

*available' the services cannot be characterized as FTS under the treaty. The assessee has contended that pre-clinical laboratory services are not liable to tax as FTS in India on account of beneficial provisions of treaty. However, this contention of the assessee is not acceptable because Charles River Laboratory has provided laboratory services through test reports to various Indian entities, which was disposed of vide speaking order dated 09.03.2022”*

3.6 The Ld.AO thereafter noted that as M/s. Syngene International Ltd. did not deduct TDS along with other Indian entities who had made payments to assessee, proceedings u/s. 201 of the act were initiated in case of M/s. Syngene International Ltd. for non-deduction of tax at source on the payments made to assessee towards obtaining laboratory services through test report. The Ld.AO was of the opinion that the payment made to assessee was taxable under IT act and also taxable under DTAA as FTS/FIS in the hands of the assessee in India.

3.7 The assessee was issued show cause notice dated 11.03.2022 as to why the said amount received as laboratory service charges from the various Indian entities should not be brought to tax as fees from technical services for A.Y. 2013-14. During the course of the assessment proceedings, the assessee, has submitted the following –sample agreements, TRC and details of income received from various Indian customers. The Ld.AO has not considered the above documents nor appreciated the true import of the words “make available” used in Article 12(4)(b) while arriving at the conclusion.

3.8 The assessee filed various submissions in order to counter the observations of the Ld.AO during the assessment proceedings and also relied on various decisions of *Coordinate Bench of this*

*Tribunal* as well as the decision of *Hon'ble Karnataka High Court* in case of *CIT & Ors. vs. De Beers India Minerals (P.) Ltd.* reported in (2012) 21 *taxmann.com* 214. The Ld.AO however dealt with the issue by observing as under:

*“11.4 Judicial Precedents*

*11.4.1 Legal issues are susceptible to interpretations and judicial precedents serve as guiding principles. Therefore, the decisions related to the issues on hand are also examined in the subsequent paras:*

*11.4.2 Hyderabad Tribunal ruling, in Dr Reddy's Research [TS-683-ITAT-2014(HYD)], Preclinical research studies conducted by the foreign companies make available skill knowledge, expertise etc. to the Indian Company. Therefore, such services are taxable as Fee for Technical Services under the Tax Treaty*

*11.4.3 In the case of Stempeutics Research Pvt. Ltd., the Bangalore Income Tax Appellate Tribunal ruled that payments by the taxpayer to its Malaysian subsidiary (MS) for carrying out clinical trials and R&D pursuant to a product development agreement (PDA) with Cipla Ltd. would constitute fees for technical services (FTS) under Article 13 of the India-Malaysia DTAA.*

*11.4.4 The Hon'ble High Court of Karnataka has in the case of CIT & Ors V De Beers India Minerals Pvt Ltd in 346 ITR 467 held that the expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or know-how in future on his own. In the instant case the Indian entity derive an enduring benefit in the form of research.*

*11.4.5 In the case of M/s. XYZ Ltd. AAR, New Delhi A.A.R. No. 928 Of 2010, the applicant a tax resident of Hong Kong had provided inspection, verification, testing and certification (IVTC) services to Indian customers and payment received/receivable by applicant in relation to said services would be chargeable to tax in India as 'fees for technical services' under section 9(1)(vii)(b) and liable for deduction of TDS u/s 195. (XYZ Ltd. In re [2012] 348 ITR 20 (AAR-New Delhi) technical services utilized in India.*

*11.4.6 In view of the facts in above paras, it is clear that, payments received by the assessee for providing laboratory services through test reports are in the nature of fee for technical services as defined U/s 9 (1)(vii) of the*

*Income of the Income Tax Act as well Article 12 of Indo-USA DTAA which is taxable in India.*

*12. Finding:*

*12.1 The consideration received by the assessee is towards the testing charges which is technical in nature. It also ensures that the primary consideration for laboratory services is served by being an ancillary. Thus, the consideration received fulfils the conditions laid out in the DTAA of being ancillary as well as the make available of the skills, processes and knowledge to qualify it as fee for technical services*

*12.2 This apart the fact that the technical services rendered abroad are subsequently utilized by the Indian entity to test the products manufactured on the basis of the tested sample is a transfer of skill and knowledge which falls within the ambit of the term technical services are included services as the case may be.*

*12.3 The findings can be tabulated as under:*

<i>Whether income is received in India or on behalf of the assessee in India</i>	<i>Yes</i>
<i>Whether the service rendered in the form of testing is technical</i>	<i>Yes</i>
<i>Whether the technical service rendered is ancillary</i>	<i>Yes</i>
<i>Whether the technical service makes available the skill, process or know-how for further use</i>	<i>Yes</i>
<i>Whether the payment is by a resident</i>	<i>Yes</i>
<i>Whether it is in connection with its business in India</i>	<i>Yes</i>
<i>Whether such payment is in connection with the earning of income from any source in India</i>	<i>Yes</i>

*12.4 Assessee Company also provides research models and other similar products and these products and services are largely catered towards customers in the pharmaceutical, medical device and biotechnology industries. Charles River Laboratory has provided laboratory services through test reports to various Indian entities. The business of the Indian companies is based on the reports provided by the Clients/Vendors or the service providers. Therefore, in the context of Business*

*development of the Indian companies, the services rendered by Charles River which was made use by the Indian entities in business development is in the nature of technical services/consultancy services which facilitate the Indian entity towards achievement of the desired objects and business goals.*

*12.5 It is also to be mentioned that in the case of the clinical research fees and related expenses, the income also arises and accrues in India and falls within the ambit of section 5 of the IT Act as the services are utilized for earning income in India and the conduct of business activities in India. On this count also they are taxable in India and the classification of income is imported from the DTAA.”*

Aggrieved by the order of the Ld.AO, the assessee filed objections before the DRP.

4. Before the DRP, it was submitted that CRL Inc has not made available any services to its customers in India in view of the Memorandum of Understanding (“MoU”) of Treaty on Article 12.

During the DRP proceedings, the assessee, has submitted the sample agreements, invoice copies, TRC and details of income received from various Indian customers.

5. The DRP after considering the submissions of the assessee held as under:

*“2.2.1 Having considered the submissions, it is noticed from the Draft Asst. Order that the AO has observed that the revenue earned by the assessee falls under the Explanation 2 to section 9(1)(vii) of the Act, wherein FTS is defined as consideration for rendering of any managerial, technical or consultancy services. Further, the AO has given a finding at Para 12.1 of the Draft Order that the consideration received by the assessee is towards testing charges which is technical in nature, that the primary consideration for laboratory services is served by being an ancillary.*

*2.2.2 The assessee company has, however, submitted that:*

*(i) Preclinical laboratory services rendered does not qualify as Royalty under the provisions of the Treaty since the assessee does not provide its Indian customers any right to use, patent, secret formula or process and also does not*

*involve use of or the right to use any copyright of a literary, artistic or scientific work, any patent, trademark, design or model, plan or any industrial, commercial or scientific equipment;*

*(ii) Pre-clinical laboratory services rendered by would not qualify as FIS under the provisions of the Ingo-US Treaty given that the said services do not make available or transfer any technical knowledge, experience, etc. to its customers in India, which can be used by them independently in future;*

*(iii) It is eligible to opt for beneficial provisions of the Treaty, as per Sec.90 of the I.T. Act;*

*(iv) As the assessee does not have a business connection under Explanation 2 to Sec.9(1)(i) of the Act or a Permanent Establishment in India, the income arising to it is not taxable under Article 7 of the Treaty.*

*2.2.3 The AO did not accept the assessee's submissions and held that the consideration received by the assessee is Fee for Technical Services. He also held that the income arises and accrues in India and falls within the ambit of Sec.5 of the I.T. Act as the services are utilized for earning income in India and hence taxable in India.*

*2.2.4 After considering the submissions and materials on record, the Panel opines that the services rendered by the assessee become part and parcel of the technical know-how of the client which will be further enhanced by future research. Thus we are of the view that knowledge transfer has happened in this case and article 12(4)(b) of the Indo-US DTAA is applicable in the case of this transactions and the AO was right in holding that the consideration received in lieu of pre-clinical services is taxable in India.”*

On receipt of the DRP directions, the Ld.AO passed the final assessment order by making addition in the hands of the assessee at Rs.9,77,31,642/-.

Aggrieved by the order of the Ld.AO, the assessee is in appeal before this *Tribunal*.

6. The Ld.AR submitted that assessee earned income from vision of pre-clinical laboratory services to its Indian customers. On the completion of its service, the assessee generates a test report for the customers which contains the results of the test carried out on the sample provided by the customers. These test reports

contain a factual narration of the test procedure and the result of the test and thus. do not transfer any technology / know-how / knowledge to the customers nor do they grant any right to access/use of the underlying technology used to perform these services. Further, the designing of the test procedures and the equipment and technology used to carry out the test procedures are proprietary to CRL Inc. and are not accessible/ made available to its client. Accordingly. the pre-clinical laboratory services rendered by the Assessee to its customers in India would not be chargeable to tax in India, since the Assessee does not have a PE in India and further such services do not qualify as FIS as per Article 12(4)(b) and the MoU of the Treaty as submitted above. As mentioned above, CRL Inc is a resident of the USA and is eligible for Treaty benefit under section 90 of the Act. Therefore, in order for the preclinical laboratory services to qualify as FIS under the Treaty. it would need to satisfy the requirements outlined in the make available clause. The definition of FIS as per the Treaty is as follows —

*“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'*

7. The test reports generated by CRL Inc in the course of provision of its services, do not transfer any technology / know-how / knowledge to the customers nor do they grant any right to access / use of the underlying technology used to perform these services. Therefore. CRL Inc does not make available any knowledge to qualify as FIS under the Treaty, and accordingly such income would not be chargeable to tax in India by applying the beneficial provisions of the Treaty in accordance with section 90(2) of the Act. in the absence of a PE in India.

8. In support of this, the Assessee also relied on a host of other judgements including DCIT v Dr Reddy Laboratories Ltd (IT Appeal Nos. 867 and 868 of 2003) (Hyderabad ITAT. 2013) in the submissions made during the course of assessment proceedings which have held that such receipts are not taxable which was not considered by the learned AO.

The Ld.DR relied on the orders passed by the authorities below.

9. The Ld.DR reiterated the contentions as made out by the Ld.AO vide his detailed order and referred to S.9(1)(vii) and S.5 of the IT act besides Articles 12 and Article 7 of the DTAA, and reiterated that the payments made by the assessee company fall within the scope of 'fee for technical services' taxable under IT Act, and accordingly, the assessee should have deducted tax at source before making remittances.

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

10. We note that in the paper book at pages 274-297, master service agreement entered into by assessee with Dr.Reddy's Laboratories Ltd. is placed which has not been yet terminated.

At pages 298-299, the master service agreement dated 30.11.2007 stands extended until 30.11.2017. The assessee had relied on the decision of *Hon'ble Hyderabad Tribunal* in case of *DCIT vs. Dr. Reddy's Laboratories Ltd.* reported in (2013) 35 *taxmann.com* 339 for A.Ys. 2003-04 and 2004-05 and a subsequent decision reported in (2017) 78 *taxmann.com* 63 for A.Ys. 2007-08 and 2008-09 wherein the *Hon'ble Hyderabad Tribunal* has followed the view expressed by the authority of advanced ruling in case of *Anapharm Inc.* reported in (2008) 174 *Taxman* 124. Before the *Hon'ble Hyderabad Tribunal*, the payments made by Dr. Reddy's Laboratories to a similar contract research organisation who was referred to as CRO therein was under consideration. The issue that was considered was whether the payments made by Dr. Reddy's Laboratories to the CRO therein was business profits in the hands of the CRO or if for included services. *Hon'ble Hyderabad Tribunal* in great detail dealt with the issue by observing as under:

*"11. We have considered the issue. Keeping in mind the detailed order of the CIT(A), which is extracted above and the provisions of the [Income-tax Act](#) read with DTAA with USA and Canada, which are almost similar, we have no reason to differ from the order of the CIT(A). Even though the Assessing Officer considered that the payments were made by way of 'fee for technical services' as per [Article 12](#) of the DTAA, the same is taxable in the source country only if such services make available any technical knowledge, expertise, etc. or there is transfer of technical plan or design. In this case, as rightly considered by the learned CIT(A), the assessee was conducting clinical trials through the CROs in USA to Dr.Reddy's Laboratories Limited, Hyderabad comply with the regulations therein and the CROs who are experts in this field were only conducting studies and submitting the reports in relation thereto. They are neither transfer of technical plan or technical design nor making available of technical knowledge, experience or know-how by the CROs to the*

assessee company. In fact, the assessee company did not get any benefit out of the said services in USA and assessee was only getting a report in respect of field study on its behalf, which would help it in getting registered with the Regulatory Authority. Since there is no making available of technical skill, knowledge or expertise or plans or designs in the present case, the amounts paid by the assessee do not fall under [Article 12](#), but come within the purview of [Article 7](#) of the DTAA. Therefore, the amounts paid are to be considered as business receipts of the said CROs and since they do not have any PE in India on which aspect there is no dispute, there is no need to deduct tax at source. Similar issue was analysed and considered by the AAR in the case of Anapharm INC (supra), which is one of the recipients in the assessee's case also. The AAR in that case held as under-

"Mere provision of technical services is not enough to attract art.

12(4)(b). It additionally requires that the service provider should also make his technical knowledge, experience, skill, know-how etc., known to the recipient of the service so as to equip him to, independently perform the technical function himself in future, without the help of the service provider. In other words, payment of consideration would be regarded as 'fee for technical/included services' only if the twin test of rendering services and making technical knowledge available at the same time is satisfied. In the present case, the applicant renders bioanalytical services which, no doubt, are very sophisticated in nature, but the applicant does not reveal to its clients as to how it conducts those tests or the inputs that have gone into it, so as to enable them to carry out those tests themselves in future. A broad description or indication of the type of test carried out to reach this conclusion does not enable the applicant's client to derive requisite knowledge to conduct the tests or to develop the technique by itself. The mere fact that the tests in question are highly technical in nature will not make a difference. In its affidavit the applicant affirms that only final results, conclusion of data of bioequivalence tests are provided to the recipient. Clinical procedure, analytical methods, etc., which are proprietary items of the applicant, have neither been nor will they ever be transferred, assigned or handed over to 5 or any other Indian client. From the perusal of the relevant agreements, no provision is found which Dr.Reddy's Laboratories Limited, Hyderabad would entitle the clients to know the details of the analytical methods and procedures employed by the applicant in carrying out the

*bioequivalence tests. The only doubt cast by cl. 15 of the agreement with S is cleared by S's statement that the said clause which was part of standard format was never given effect to. It seems to be inapplicable also having regard to the actual modalities of the transaction as set out in the application. Then agreement with R says that R shall be the owner of the tested samples and test compounds. Further, the applicant will store tested samples and test compounds for three months and make these available to the client at the expiry of that period. Handing over tested samples and test compounds cannot be equated with making technology, know-how, etc., available to R. The agreement also states that R shall be the owner of all intellectual property rights resulting from the services. This would mean that, if on the basis of these results, the client is able to acquire patent or other intellectual property rights in respect of new generic drugs developed by it, then the applicant shall not claim any interest whatsoever in such right. It is altogether a different aspect. By agreeing to this provision, the applicant has not made its technical expertise, know-how, etc., available to R. It is only natural that R which has developed the generic drug should enjoy the intellectual property rights in relation thereto. The analytical test has not contributed to the development of new generic drug. The test has only shown whether that drug is as efficacious as the reference drug. Development of new drug and testing its efficacy are not one and the same thing. By merely acquiring knowledge of the testing methods one does not get any insight as to how a new drug could be developed. In the light of the above discussion interpreting the expression 'make available', it follows that cl. (b) of [art. 12\(4\)](#) relied upon by the Revenue does not come into play and the services in question cannot be considered to be "fees for included service" within the meaning of this provision. The second limb of cl. (b) refers to "development and transfer of a technical plan or technical design". Obviously, that has no application here.*

*The applicant uses its experience and skill itself in conducting the bioequivalence tests, and provides only the final report containing conclusions, to the client. The information concerning scientific or commercial experience of the applicant or relating to the method, procedure or protocol used in conducting bioequivalence tests is not being imparted to the pharmaceutical companies and the consideration is not paid for that purpose. On the basis of the final report, the pharmaceutical companies will not be able to find out what method, procedure or protocol was*

used in conducting the tests. Moreover, the test reports are drug specific. Hence the material furnished by the applicant will not in any way help the customers to facilitate further research and development of new drugs as contended by the Revenue. As such, the fees received by the applicant are to be treated as business income and not royalty income. Since the applicant is in the business of providing bio-analytical services to various pharmaceutical companies, the consideration received by it from them would be its business income. In view of [art. 7](#) r/w [art. 5](#), such income can be taxed in India only if the applicant has a PE in this country. The applicant has denied the existence of any PE here and there is nothing on record to indicate Dr.Reddy's Laboratories Limited, Hyderabad anything to the contrary. On the facts stated, the existence of PE in India cannot be inferred also. It is, therefore, ruled that the fee paid by S and R to the applicant in respect of bioequivalence tests conducted by it is in the nature of 'business profits' under [art. 7](#) and the same is not taxable in India as the applicant does not have a PE situated in this country.-[Raymond Ltd. vs. Dy. CIT \(2003\) 80 ITJ \(Mumbai\) 120](#) : (2003) 86 ITD 791 (Mumbai), [McKinsey & Co. Inc. \(Phillippines\) & Ors. vs. Asstt. Director of IT \(2006\) 99 ITJ \(Mumbai\) 857](#) concurred with; [Diamond Services International \(P\) Ltd. vs. Union of India \(2008\) 216 CTR \(Bom\) 120](#) : (2008) 169 Taxman 201 (Bom) relied on.

Conclusion:

Applicant, tax resident of Canada, only providing final results to its Indian clients by using highly sophisticated bio-analytical know-how, without providing any access whatsoever to the clients to such know-how, fee received by it is business income and not fee for technical/included services or royalty and applicant having no PE in India, such income would not be taxable in India by virtue of relevant provisions of DTAA between India and Canada.

12. We agree with the above opinion expressed by the AAR and accordingly, we uphold that the amounts paid by the assessee company to the CROs are not taxable in India. That being so, there is no need for the assessee to deduct tax at source. Consequently, the impugned order of the CIT(A) is confirmed and the grounds raised by the Revenue in these appeals are rejected.”

11. Before us the assessee is a similar type of contract research organisation that carries out clinical trial and provides test reports to its Indian customers for which a fee is charged. The

non-resident assessee before us has claimed it to be not taxable in India, in its return of income, as the services provided by it is not in the nature of “fee for included services in accordance with Article 12 of India-US DTAA” and that, the services are not “made available” in the form of technical knowhow of whatsoever nature to its Indian customers. It is also the case of the assessee that it does not have a permanent establishment (PE) in India and hence the receipts from Indian customers are to be considered as business receipts in USA and not taxable in India as there is no PE as per Article 7 of India-US DTAA.

12. We have perused the various master service agreements placed in the paper book wherein we refer to clause 13 that defines ownership as under:

*“13. Ownership. Any inventions and/or techniques for carrying out the Services hereunder which relate to the conduct of Laboratory’s business are and shall remain Laboratory’s exclusive property, including but not limited to; present and future documentation, scientific and technical data, test procedures and other information that is owned or licensed by Laboratory and that is not developed hereunder. Laboratory shall have the right to use concurrent control data as part of its general historical database. Any data, discoveries or inventions developed or generated pursuant to this Agreement which directly relate to any information or materials provided by Sponsor hereunder, including without limitation new data, uses, processes or compositions directly relating to the information or materials provided hereunder shall be the exclusive property of Sponsor. Laboratory agrees to assist Sponsor in securing for Sponsor any patents, copyrights or other proprietary rights in such data, discoveries or inventions, and to perform all acts that may be reasonably required to vest in Sponsor all right, title and interest in such data, discoveries or inventions, and Laboratory shall be compensated at its standard rates for such assistance. All costs and expenses associated with establishing Sponsor’s rights therein shall be Sponsor’s responsibility.”*

13. Further, we note that assessee has complete knowledge and knowhow and expertise to carry out the research and to issue reports based on the study conducted as per the agreement between assessee and its client. From clause 13 reproduced hereinabove, we note that all inventions or techniques for rendering of necessary services by assessee to its client shall remain the exclusive property of the assessee alone. The reason for such agreements between the assessee and its Indian clients for carrying out research and to issue reports is merely providing information for enabling the Indian client to use such data to perform its business. The fact that assessee has been called upon for such research time and again establishes the fact that there is no “make available” of such technical knowledge that is held by assessee through its employees to any of its Indian clients.

14. The various sample agreements placed in the paper book reveals that assessee has provided test reports based on the research carried out by its employees at the cost of the Indian clients but has not made available the technical expertise, skill, knowledge in respect of such research process which the Indian clients could independently apply without the assistance and undertake similar type of research independently without the assistance of the assessee. The authorities below have distinguished the decision of *Hon'ble Karnataka High Court* in case of *CIT vs. De Beers India Minerals (P.) Ltd. (supra)* and the decisions of *Hon'ble Hyderabad Tribunal* in case of *DCIT vs. Dr. Reddy's Laboratories Ltd. (supra)*.

On perusal of these decisions and the observations relied by the revenue authorities, we note as under:-

15. *M/s. XYZ Ltd., AAR, New Delhi AAR No. 928 of 2010*

15.1 In the ruling in AAR No. 928/2010, we note that there was a batch of applicants who had approached the authority in different set of facts. The authority for advanced ruling while considering the facts in 928 of 2010 observed that the payments received / receivable by the applicant in connection with the services rendered by such applicants were in the nature of technical services and taxable as FTS u/s. 9(1)(vii) of the act. The AAR also held that the applicant again availed the benefit of exemption provided in section 9(1)(vii)(b) based on the particular set of facts therein. It was held that the applicants had tax presence in India and therefore its Indian customers / clients were required to withhold tax u/s. 195 of the act. Such ruling was given in case of an applicant, a resident of a country with whom India did not have a tax treaty and hence the applicant was not entitled to the benefits u/s. 90(2) of the act.

15.2 In the present facts of the case, the assessee before us is a US entity and there is a DTAA between India and USA. This particular point has been totally missed out by the authorities below while referring to this decision in order to deny the benefit available to the assessee before us. We therefore are of the view that this particular decision of AAR relied by the revenue is distinguishable on facts.

16. Another decision relied by the revenue was in the case of *Stempeutics Research Pvt. Ltd.* reported in (2016) 75 taxmann.com 240.

16.1 It is a case where the assessee was a Malaysian company who had its research driven company in India with a mandate of R&D and manufacturing of therapeutic products based on stem cells. The assessee before the *Tribunal* was a Malaysian subsidiary and there is a categorical finding that the outcome product and the R&D as well as the clinical trial will not belong to the assessee being the Malaysian subsidiary or its parent company and the Indian client being Cipla had all the right to acquire the outcome in the shape of technical information, technology documentation, knowhow and process involved in the clinical trial and R&D undertaken by such Malaysian company. In the present facts of the case, as we have observed hereinabove, clause 13 of all the agreements reproduced hereinabove very clearly states that all inventions / techniques for rendering of services by assessee would be the exclusive property of the assessee including documentation, scientific and technical data, test procedures etc as mentioned therein. We therefore are of the view that the view taken by *Coordinate Bench of this Tribunal* in case of *Stempeutics Research Pvt. Ltd. (supra)* cannot be applied to the present facts of the case.

17. Now coming to the decision of *Hon'ble Hyderabad Tribunal* in case of *DCIT vs. Dr. Reddy's Laboratories Ltd. (supra)*, we have already reproduced in great detail hereinabove wherein the "make available" clause have been invoked and held the payments paid by the assessee therein to the non-resident to be not taxable in India.

18. We shall refer to the decision of *Hon'ble Delhi High Court* in the case of *Guy Carpenter* reported in (2012) 20 *taxmann.com*

807. *Hon'ble Court* in similar circumstances held as under:

*"9. A plain reading of Article 13(4)(c) of the DTAA indicates that 'fees for technical services' would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which, inter alia, "makes available" technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. According to the Tribunal this "make available" condition has not been satisfied inasmuch as no technical knowledge, experience, skill, know-how, processes, have been made available by the assessee to the insurance companies operating in India. It also does not consist of the development and transfer of any technical plan or technical design.*

*10. The Tribunal examined the evidence available on record in order to return a finding on the issue as to whether the payments received by the assessee from the insurance companies operating in India would fall within the expression 'fees for technical services' as appearing in article 13(4)(c) of the DTAA read with section 9(1)(vii) of the said Act.*

*11. The Tribunal also noted the process by which the transaction takes place. It has been pointed out that the originating insurer in India would contact J.B. Boda M.B. Boda for placing identified risks/class of risks with international reinsurers. J.B. Boda, in turn, would contact one or more international firm(s) of reinsurance broker(s) like the assessee for competitive proposals from the international reinsurer. Then, the international reinsurance brokers like the assessee would contact other primary brokers and various syndicates in the Lloyds market for competitive proposals. Based on the various offers or proposals given by the international reinsurance brokers, like the assessee, to J.B. Boda, the latter would present various options to the originating insurer in India, which would take a final decision in the matter. Based on the decision of the originating insurer in India, the policy terms would then be agreed upon and the risk would be placed with the international reinsurer. It was also pointed out that as per the normal industry practice, the reinsurance premium net of brokerage of 10% as per the policy contract is remitted to the assessee, i.e., reinsurance brokers, for onward transmission to international reinsurers. The intermediation fee which is another word for brokerage is paid separately by the originating insurance in India to J.B. Boda, the international reinsurance brokers like the assessee and other intermediaries, based on a*

*mutually agreed ratio which accounts for their relative contribution in the reinsurance process.*

*12. Based on this manner of transacting, the Tribunal came to a conclusion that the payment received by the assessee could not be regarded as 'fees for technical services'. Further, more, the Tribunal also held that such receipts would not amount to fees for technical services as the "make available" clause contained in article 13(4)(c) had not been satisfied in the facts and circumstances of the present case.*

*13. In our view, the Tribunal has arrived at these conclusions purely on assessing the factual matrix of the case at hand. The findings are in the nature of factual findings and, therefore, according to us, no substantial question of law arises for our consideration, particularly, because the learned counsel for the Revenue was unable to point out any perversity in the recording of such findings."*

**19. Hon'ble Karnataka High Court in the case of De Beers India Minerals (P.) Ltd. (supra) has, inter alia, held as under;**

*13. Under the Act if the consideration paid for rendering technical services constitutes income by way of fees for technical services, it is taxable. However, Article 12 of the aforesaid India-Netherlands Treaty defines fees for technical services for the purpose of Article 12 which deals with royalties and fees for technical services. The fees for technical services means the payment of any amount to any person in consideration for rendering of any technical services only, if such services make available technical knowledge, expertise, skill, know-how or processes. If the technical knowledge expertise, skill, know how or process is not made available by the service provider, who has rendered technical service for the purpose of Article 12 of DTAA it would not constitute fees for technical services. To that extent the definition of fee for technical services found in the agreement is inconsistent with the definition of fees for technical services provided in Explanation 2 to Clause (vii) of sub Section (1) of Section 9. In view of Section 90 the definition of fees for technical services contained in the agreement overrides the statutory provisions contained in the Act. In fact, the latest agreement between India and Singapore further clarifies this position, where they have explained the meaning of the word 'make available'. According to the aforesaid definition fees for technical service means payments of any kind to any person in consideration for services of technical nature if such services make available technical knowledge, experience,*

*skill, know how or processes, which enables the person acquiring the service to apply technology contained therein. Though this provision is not contained in India Netherlands Treaty, by virtue of Protocol in the agreement, Clause (iv) (2) reads as under:- "If after the signature of this convention under any Convention or Agreement between India and third State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."*

*14. Therefore the Clause in Singapore agreement which explicitly makes it clear the meaning of the word 'make available', the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know how or processes. To attract the tax liability, that technical knowledge, experience, skill, know how or process which is used by service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know how or processes so as to render such technical Services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the*

*technology which the service provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know how or process to the recipient of the technical service, in view of the Clauses in the DTAA. the liability, to tax is not attracted.*

*15. The learned Additional Solicitor General relied on 3 Judgments to point out that was the earlier view. Now there is a departure supporting the department. The first Judgment on which reliance is placed is, the Judgment of the Advance Ruling Authority in the case of Perfetti Van Melle Holding B.V., In re [2012] 204 Taxman 166/[2011] 16 taxmann.com 207 (AAR-New Delhi) where it was held as under:- "The expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or know-how in future on his own. "By making available the technical skills or know how, the recipient of the same will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. So when the expertise in running the industry run by the group is provided to the Indian entity in the group to be applied in running the business, the employees of the Indian entity get equipped, to carry on that business model or service model on their own without reference to the service provider, when the service agreement comes to an end. It is not as if for making available, the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the service agreement on its expiry."*

*16. In the aforesaid case, the applicant holding Company was to provide to its subsidiary Company in India the licence to manufacture and sell products, the licence to use technology, technical marketing and commercial know-how in the manufacture, sales and advertisement and promotion of the products, offer technicians, marketers, salesman, in-house legal counsel and the experienced employees to assist in the activities mentioned above. Under the Service Agreement, specifically the Service recipient require the use of proprietary knowledge and processes belonging to Perfetti Group. Specified services*

*such as Accounting budgeting, sales, marketing, forex management, loans, HR, legal support etc. and specified services are to be provided on continuous basis. Therefore, it was held in the aforesaid case, that the case falls within the purview of Article 12.5(a) of the DTAC on such service which are ancillary and subsidiary to the applicant or enjoyment of right property or information for which the payment prescribed in paragraph 4 of the Article is to be made. Therefore, it is a case of royalty and not fee for technical service. Even otherwise it is clear under the terms of the agreement the technical know-how in the manufacturing, sales, advertisement and promotion of the products is made available. Therefore, the aforesaid finding recorded is legal and cannot be found fault with.*

*17. Yet another Judgment relied on is in the case of Shell India Markets (P.) Ltd., In re [2012] 205 Taxman 288 / 18 taxmann.com 46 (AAR-New Delhi) where also the Authority For advance Ruling held relying on findings recorded in Perfetti Marketing case where it was held that "the expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or know-how in future on his own." Here, the industrial specific expertise is provided to the Indian entity which is applied in running its business. The employees of the Indian Company get equipped to carry on their business, market or service market on their own without reference to the service provider when the service . Agreement comes to an end. It is a case of making available the technical knowledge. The recipient of the service was conveyed specifically the right to continue the practice put into effect and adopt it under the agreement on its expiry.*

*18. From the aforesaid discussion it is clear that test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available.*

*20. In the aforesaid case the business of the applicant being that of executing the projects for transmission and distribution of power on turnkey basis, it is the French Company and other Group Companies which continuously upgrade designs, model and other engineering plans and formulae which are used by the applicant for the purpose*

*of its business. The main objective of setting up of an exclusive platform is not for providing information technology but for enabling the applicant to use data in the form of designs, plan, model and engineering formulae etc., in 2D & 3D form. The character of the payment is clearly royalty as defined in Article 13(3) of DTAA as well as to Explanation 2 to Section 9(1)(vi) of the Act. The agreement clearly establishes that the applicant as to prepare for the installation at the fixed gateway sites for proper installation of equipment by France telecom. It is to act as bailee of the equipment which is under its control and use for its business. The use of equipment is with the usual condition of warranty and the network could be managed by the applicant. The equipment installed is to be integrated into Areva Net Global Network which is managed and controlled by the French Company for equipment installation at gateway sites in Noida and Chennai constitute PE in India as the equipment has been used by the French Company in the course of its business in providing technical data to the group companies.*

*21. Therefore from the aforesaid Judgments it is not possible to hold that there is a departure by the advance Ruling Authority in respect of its earlier views. It is in this background one has to look at the facts of this case, in order to find out whether the service provider has made available the technical knowledge to the assessee so as to foist the liability of payment of tax.*

*22. 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. 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 edge, 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."*

20. Under the India US DTAA, a service would not be FTS unless technical knowledge, experience, skill, know-how or processes is made available to the person making the payment, even where other ingredients are satisfied. Now it has to be seen whether the 'technical services' are made available to Indian customers/clients.

21. In the instant case, the Indian customers/clients have to repeatedly seek the assessee's services in respect of testing/research followed by a report on the outcome of such testing/research undertaken by the assessee. The assessee is not involved in supporting a system which is put in place or is already in place by the Indian customers/clients. The assessee is not getting its Indian customers/clients equipped to carry on the testing/research independently of the assessee. The utility of the services available in the form of a report, though highly technical in nature, comes to an end, little thereafter, if not immediately, after its rendition. The Support that the Indian entity seeks after the report is delivered is to understand the report from the assessee. The elements necessary for "*make available*" is absent in the services rendered by the assessee to its Indian customers/

clients, inasmuch as even for the said reports, the customers have to continuously refer to the assessee and the same is not freely made available to the Indian customers. Thus, technical services rendered by the affiliates do not "*make available*" technical knowledge, experience, skill, know-how or process while preparing these reports for their, Indian customers/ clients. In light of the aforementioned judicial decisions, we are of the considered view that the service recipient of the assessee is unable to make use of the said technology only by itself in its business or for its own benefit without recourse to the assessee year after year.

**Accordingly, ground no. 1 raised by the assessee in all the three appeals stands allowed.**

22. **Ground nos. 2 & 3** are consequential in nature and therefore do not require any adjudication in all three assessment years.

**Accordingly, the appeals filed by the assessee stands allowed.**

**In the result, all the three appeals filed by the assessee stands allowed.**

Order pronounced in open court on 01<sup>st</sup> June, 2023.

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 01<sup>st</sup> June, 2023.  
/MS /

**Copy to:**

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

By order

Assistant Registrar,  
ITAT, Bangalore