IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, DELHI

BEFORE SHRIANIL CHATURVEDI, ACCOUNTANT MEMBER, AM
&
SHRI N. K. CHOUDHRY, JM

I.T.A. No. 1432/Del/2016
Assessment Year: 2011-12)

Serco India Pvt. Ltd. C/o Traveltime Car Rental Pvt. Ltd., Office No. 105, Astral Court, B Wing, Near Gaikwad Petrol Pump, Sanewadi, Aundh, Pune-411007. **PAN No.AAJCS6704P**	Vs.	**DCIT Circle-4(1),** 3rd Floor, Vanijya Nikunj, HSIIDC Building, Udyog Vihar, Phase-V, Near Shankar Chowk, NH-8, Gurgaon.
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Sh. Suraj Bhan Nain, Ld. Adv &Sh. Mahfuzur Rehman, Ld. CA
Respondent by	:	Sh. Rajesh Kumar, Ld. CIT (DR)
Date of Hearing	:	31-03-2023
Date of Pronouncement	:	27-06-2023

O R D E R

Per N. K. Choudhry, Judicial Member:

The Assessee/Appellant herein has preferred this appeal against the order dated 22-12-2015 impugned herein passed by Deputy Commissioner of Income Tax, Circle-4 (10), Gurgaon/ Ld. Assessing Officer {in short 'Ld. AO'} under sections 143(3) read with 144C(5) of the Income Tax Act 1961 (in short 'the Act') for AY 2011-12.

2. The Assessee being, a subsidiary of Serco Group PLC, UK incorporated in India on 27.02.2006 as a Captive Service Centre with an object to provide IT & IT Enabled Services (is short "ITES" to Serco Group. The Assessee was engaged in providing IT services to its group companies till the Financial Year (FY) 2009-10, but thereafter discontinued the said service and consequently, no service was provided qua IT Services during the FY 2010-11, relevant to AY 2011-12, as involved in this case.

3. The Assessee declared its total income of Rs. 3,02,59,990/- by e-filing its return of income on dated 30.11.2011, which was subsequently revised on dated 23.03.2013 by filing revised return of income, wherein the Assessee declared total income of Rs. 3,02,59,994/-.

4. Subsequently, the case of the Assessee was selected for scrutiny through CASS and therefore statutory notices were issued, against which the Assessee attended the hearings before the Ld. AO from time to time and filed its submissions and details in support of its case. On perusing the same, the ld. AO observed that the Assessee has entered into following international transactions with its Associated Enterprises (AE) during the year under consideration.

<table>
<tr><th rowspan="2">Sr. no.</th><th rowspan="2">Type of international transaction</th><th colspan="2">Transfer Pricing Method</th><th>Total value of transactions (Rs.)</th></tr>
<tr><th>MAM</th><th>PLI</th><th></th></tr>
<tr><td>1.</td><td>Provision of ITes services</td><td rowspan="3">Transactional Net Margin Method (TNMM)</td><td rowspan="3">OP/OC</td><td>9,06,08,346</td></tr>
<tr><td>2.</td><td>Provision of Management Services</td><td>7,95,81,010</td></tr>
<tr><td>3.</td><td>Reimbursement of expenses to PE</td><td>2,99,20,449</td></tr>
</table>

5. Considering the aforesaid international transactions, the AO made a reference to the Ld. Transfer Pricing Officer (in short ld. Ld. TPO) to determine the Arm's Length Price (in short "ALP").

6. The Ld. TPO in order to determine the ALP qua ITES segment, selected following 9 comparables:

S.No.	*Company Name*	*Adjusted OP/OC(%)*
i	*Accentia Technologies Ltd.*	*22.59%*
ii	*e4e Healthcare Business Services Pvt Ltd*	*7.21%*
iii	*Eclerx Services Ltd.*	*52.04%*
iv	*ICRA Techno Analytics Limited*	*19.49%*
v	*Infosys BPO Ltd.*	*15.03%*
vi	*Jindal Intellicom Ltd.*	*10.24%*
vii	*Microgenetic Systems Ltd.*	*-5.72%*
viii	*TCSE-Serve Ltd.*	*65.47%*
ix	*Acropetal Technologies Ltd(Seg)*	*7.48%*
	Average	***21.54%***

6.1 The Ld. TPO, Accordingly, computed the ALP of the international transaction qua IT Enabled Services, as under:

Particulars	***Amount***
Operating Cost (As per SCN)	*78789866*
Arm's Length Margin (%)	*21.54%*
Arm's Length Margin (Rs.)	*16971337*
Arm's Length Price	*95,761,203*
Price charged by the Assessee	*90608346*
International Transaction	*90608346*
5% of Price charged in international transaction	*4530417*
Difference between ALP and Price charged by Assessee	*5,152,857*
Percentage of services provided to AEs to total revenue Rs. 90608346/Rs. 90608346	*100.00%*
Proportionate Difference for which adjustment is required to be made	***5152857***

6.2 The Ld. TPO by considering the peculiar facts and circumstances of the case and the submissions of the Assessee, vide its order dated 16.01.2015 under section 92CA(3) of the Act, proposed an upward adjustment of Rs. 51,52,857/- in the international transactions qua segment of providing 'ITES' and accepted the ALP in the segment of "Management Services".

7. Consequently, on the basis of the Ld. TPO's order dated 16.01.2015, the Ld. AO passed a draft Assessment Order dated 18.02.2015 under section 143(3) of the Act.

8. The Assessee being aggrieved against the draft assessment order dated 18-02-2015, filed its objections before the Ld. Dispute Resolution Panel (in short "Ld. DRP").

9. The Ld. DRP vide its order dated 27.11.2015, **directed the AO to exclude one comparable/company namely "Accentia Technology Ltd." from the list of comparables and to take correct margin of E4e Healthcare @ 4.62%.**

9.1 The Ld. DRP during the proceedings before it, also observed that the Assessee had made payment qua reimbursement of salaries of employees seconded from Serco Group PLC, UK, which prima facie appears to require TDS under section 195 of the Act, in the light of the decision of Hon'ble Supreme Court in the case of Centrica India Offshore Pvt. Ltd. Vs. CIT 364 ITR 336 and therefore issued a notice dated 14.10.2015 for enhancement of income, by fixing the case on 19.11.2015, against which the Assessee vide its submissions dated 20.11.2015, elaborately distinguished the decision of Centrica India (supra)and claimed that TDS has been deducted from the salaries paid to the employees and therefore disallowance under section 40a(i) of the Act is not warranted.

9.2 The Ld. DRP found the aforesaid claim of the Assessee not acceptable and by observing mainly *“that this argument is not acceptable because the facts in the case of the Assessee shows great similarity to that of Centrica which has been discussed in details. Perusal of the broad principles laid down by the Hon’ble High Court and approved by the Hon’ble Supreme Court, will show that where employees seconded continued to retain their lien with their parent organization, on terms where they transferred and make available their technical knowledge, then the reimbursement of salaries of seconded are in the nature of FTS requiring TDS under section 195 of the Act”*, ultimately held that the reimbursements of expenses for seconded employees, is in the nature of FTS and are sums chargeable to tax both under section 9(1)(vii) and under Article 12(4) of the India USA DTAA and thus liable to TDS, which has not been made by the Assessee. **The Ld. AO is accordingly directed to disallow the aforesaid expenditure under section 40a(i) of the Act.**

9.3 Consequently, the ld. DRP directed the AO to complete the assessment as per the above directions and to incorporate the reasons given by the DRP iro various objections at the appropriate places in the body of the final order.

10. In compliance of the aforesaid directions of the Ld. DRP, the AO vide Assessment order dated 22.12.2015 u/s 143(3) of the Act, revised the computation of margins and the ALP of the International transactions pertaining to the provisions of ‘ITES’ as under:

Name of the company	TPO computed margin-Adjusted	Adjusted margin based on DRP Directions
Accentia Technologies Ltd.	22.59%	-
Acropetal Technologies Ltd	7.48%	7.48%

e4e Healthcare Business Services Pvt Ltd	7.21%	4.62%
Eclerx Services Ltd.	52.04%	52.04%
ICRA Techno Analytics Limited	19.49%	19.49%
Infosys BPO Ltd.	15.03%	15.03%
Jindal Intellicom Ltd.	10.24%	10.24%
Microgenetic Systems Ltd.	-5.72%	-5.72%
TCSE-Serve Ltd.	65.47%	65.47%%
Average	**21.54%**	**21.08%**

Accordingly, revised ALP and difference between ALP and price charged by the Assessee works out as under:

Particulars	Amount (in Rs.) Before DRP Directions	Amount (in Rs.) after DRPO Directions
Operating cost	7,87,89,866	7,87,89,866
Arm's Length Margin (in %, after considering DRP directions)	21.54%	21.54%
Arm's Length Margin (in Rs.)	1,69,71,337	1,66,08,904
Arm's Length Price	9,57,61,203	9,53,98,770
Price charged by the Assessee	9,06,08,343	9,06,08,343
International Transaction	9,06,08,343	9,06,08,343
5% of price charged in international transaction	45,30,417	45,30,417
Difference between ALP and price charged by the Assessee.	**51,52,857**	**47,90,424**

10.1 The AO ultimately, as per directions of the Ld. DRP, reduced **(i)** the adjustment of ALP to Rs. 47,90,424/- in place of Rs. 51,52,857/- which was made by the TPO vide its order dated 16.01.2015, and also **(ii)** made the addition of Rs. 2,99,20,449/- on account of disallowance under section 40a(i) of the Act, for non-deduction of TDS under section 195 of the Act.

11. The Assessee being aggrieved challenged the actions of the Ld. DRP and AO in determining the ALP by selecting the companies as comparable against the interest of the Assessee and making the additions of Rs. 47,90,424/- on account of disallowance qua TP Adjustments u/s 92CA of the Act and of Rs. 2,99,20,449/- on account of disallowance under section 40a(i) of the Act for non-deduction of TDS under section 195 of the Act.

11.1 The Assessee during the course of the argument of this appeal, with regard to selection of comparables for determination of Arm's Length Price, only agitated/pressed the grounds relating to inclusion of (i) TCS E-serve Ltd. (in short 'TCS') and (ii) eClerx Services Ltd. (in short 'eClerx') and for making the addition of Rs. 2,99,20,449/- under section 40a(i) of the Act.

11.2 In support of prayer/contention for exclusion of TCS and eClerx, the Assessee submitted the comparative chart of FAR of TCS and the Assessee, which is reproduced herein below:

M/s TCS E-Serve Limited

A comparative chart of FAR of TCS E-Serve Limited and Assessee Company as under:

S. No.	***Particulars***	***TCS E-Serve Limited***	***Serco India Private Ltd***
1	*Revenues (Turnover)*	*Rs. 1,442.42 Crores (Page 73 of Annual Report)* ***(PB-312)***	*Rs. 24.23 Crores (More than* ***59 times****)*
2	*Fixed Assets*	*Rs. 84.94 Crores (Page 72 of Annual Report)* ***(PB-311)***	*Rs. 1.63 Crores (More than* ***52 times****)*
3	*Brand*	*TATA*	*Nil*
3.1	*Brand Contribution*	*Tata Brand Equity contribution Rs. 2.61 Crores (Page 87 of Annual Report)* ***(PB-326)***	*Nil*

4	*Risk*	*The company operates full-fledged risk-taking enterprise.*	*Minimal risk as the services provided to AEs only.*
5	*Nature of Services*	*In addition to ITES services, TCS E-Serve Limited provided technical services involving software testing, verification, and validation of software at the time of implementation and data centre management activities. However, the segmental information on the bifurcation between ITES and technical services is not available in the Annual Report.*	*Captive ITes services.*
6	*Related Party Transactio n*	*It is not fulfilling the Related Party Transaction (RPT) filter of 25% as the services are predominantly provided to Citi Group were deemed to be international transactions entered into between two associated enterprises.*	

11.3 The Assessee by drawing our attention to the comparative chart and the Annual Report (**Heading**– opportunities and risk) of TCS, contended that it is evident that TCS has leveraged the expertise, synergies, operation efficiency, post advantage etc. of the Tata Group which has led to its enhanced profitability, hence, the TCS cannot be compared to the Assessee.

11.4 The Assessee further claimed that TCS has acquired CT Groups Captive BPO "Citi Group Global Services Ltd." for $ 505

Million from Citi Group Inc. TCS has also entered into an agreement with Citi Group to provide process outsourcing services worth $ 2.5 Billion to Citi Group over 9 years, hence, the transactions between TCS and Citi Group are deemed to be international transaction entered into two AE as per section 92B(2) of the Act and therefore, in this case TCS ought to be excluded from the list of comparable as it has turnover of Rs. 1,442.42 Crores as compared to the turnover of the Assessee of Rs. 24.23 Crores only and enjoying the benefits of high brand value of Tata.

11.5 The Assessee for exclusion of eClerx, submitted the comparative chart of FAR of eClerx and the Assessee company, which reads as under:

eClerx Services Ltd.

The comparative chart of FAR of eClerx Services Ltd and Assessee company can be summarized as under:

Sr. No.	***Particulars***	***eClerx Services Limited***	***Serco India Private Limited***
1	*Revenues (Turnover)*	*Rs. 341.91 Crores (Page 57 of Annual Report)* ***(PB-406)***	*Rs. 9.06 Crores of ITes (approx.* ***38 times****) (Total Rs. 24.23 Crores)*
2	*Fixed Assets*	*Rs. 29.54 Crores (Page 56 of Annual Report)* ***(PB-405)***	*Rs. 1.63 Crores (More than 18 times)*
3	*Risk*	*The company operates full-fledged risk-taking enterprise.*	*Minimal risk as 100% of the services are provided to AEs.*
4	*Nature of Services*	*The company is into KPO (Knowledge Process Outsourcing)*	*The Assessee was providing low end IT enabled services in the category of ITES/BPO.*

11.6 The Assessee further, by drawing our attention to the above chart, claimed that the Assessee has provided ITES in the nature of research operations to its AEs on cost plus basis which were low and in the category of ITES/BPOs. Whereas the eClerx is into knowledge process outsourcing (KPO) and as per Annual Report, providing services in two core areas i.e. (a) financial services and (b) sales and marketing services. Even there is no segment reporting, hence, on the aforesaid consideration, the same cannot be considered as comparable company.

11.7 The Assessee further claimed that the Assessee company being a captive service provider, is assuming minimum risk, whereas M/s eClerx operates as full-fledged risk taking enterprise, as it appears from Annual Report, wherein it is mentioned that eClerx derive around 80% of its revenue from top five clients, which include large multinational corporations and fortune 500 companies which translates into a high client concentration risk. In various judgments including by the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. Vs. CIT in ITA No. 102/2015 decided on 10.08.2015 (2015) 60 taxmann.com 355, it has been held that **BPO cannot be compared with the KPO service provider**. As the Assessee was engaged in IT Enabled Services in the nature of research operations to its AE and did not involve in any decision making and the Hon'ble Courts have clearly held that company providing KPO services, cannot be taken as comparable for determining ALP for such Assessee rendering BPO Services, therefore, eClerx is liable to excluded from the list of comparables.

11.8 The Assessee further claimed that the Hon'ble Bombay High Court in the case of CIT Vs. Pentair Water India Pvt. Ltd. (2016) 69 taxmann.com 180 (Bom.) has clearly held *" that the turnover is obviously the relevant factor to consider the comparability".*

11.9 The Assessee further by relying upon by various judgments including by the Hon'ble Bench of the Tribunal at Bangalore in the case of **Yokogawa IA Technologies India (Pvt.) Ltd. vs. DCIT(2019) 112 taxmann.com 341 (Bangalore-Tribunal)** submitted that in catena of decisions, various Benches of the Tribunal have held that where the Assessee company has total turnover of less than Rs. 200 Crores, the companies which have turnover in the range of Rs. 1 Crore to Rs. 200 Crore can be selected as comparables but not otherwise.

11.10 The Assessee further claimed that the Hon'ble Karnataka High Court in the case of Acusis Software India Pvt. Ltd. Vs. ITO-11(1), Bangalore (2018) 98 taxmann.com 183 (Karnataka) has affirmed the decision of the Tribunal in holding that if the turnover of the comparable company is less or more than 10 times of the turnover of the Assessee, then it cannot be considered as a comparable company.

11.11 Further the Hon'ble High Court of Delhi as well in various cases including in Agniky India Technologies Pvt. Ltd. (2013) 36 taxmann.com 289 (Del.) considered the identical issue and categorically held that a giant company having high turnover and high brand value, cannot be compared with smaller captive unit of the parent company.

12. On the contrary, the Ld. DR vehemently argued that huge turnover ipso facto does lead to exclusion of the company as comparable, in view of the judgment in the cases of Chryscapital Investment Advisors Pvt. Ltd. and Rampgreen Solutions Pvt. Ltd. (supra). High Turnover /Brand Value/High Fixed Assets are not the criteria for exclusion of the comparables. Even otherwise there

cannot be cherry picking. There is functional similarity between the Assessee and the aforesaid companies and therefore, the same cannot be excluded from the comparable.

13. In rejoinder, the Ld. AR claimed that after Chryscapital Investment case (supra), more water flown as in ***Avaya India (P.) Ltd. v. Assistant Commissioner of Income Tax [2019] 108 taxmann.com 222 (Delhi)*****(PB-554 to 563),** the Hon'ble Delhi High Court has considered the high turnover companies and brand value as well, for exclusion of comparables and therefore, the contention of Ld. DR is not tenable.

14. Heard the parties and perused the material available on record. First we will decide the issue challenges to the inclusion of "EClerx and TCS" as comparable. The Assessee before the Ld. DRP with regard to exclusion of eClerx Services Ltd. claimed that it is not functionally comparable with the Assessee, because of financial services, sales and marketing services and segmental note available. Margin of eClerx is abnormally high. Extraordinary circumstances exist during the year resulting abnormal margin. And there is unreliable Data.

14.1 The Ld. DRP though considered the aforesaid contention of the Assessee qua eClerx but not found acceptable and resultantly approved eClerx as comparable on the following reasons:

> *As per TP Study for provision of IT Enabled Services (-) during the year, Serco India acted as support service provider to Serco, UK. In respect of the margin and acquisition aspired by Serco, UK. These services formal part of the NSA. With regard to the Serco India assisted Serco, UK on the following:*
>
> ***Transaction Advisory***
> *On receiving instruction from Serco, UK for working on a specific target of company for merger/acquisition for any of the Serco*

Group company, Serco India would (passed on the specific work request from Serco, UK engaged in the following:

(a) Financial modeling of the transaction includes simultaneous be work with the necessary parties such as investments,
(b) Bankers, due delusion etc.
(c) Research of target companies and sharing information collated with Serco, UK
(d) Storing the information collated, etc.

14.2 With regard to the inclusion of TCS E-serve Ltd. the Assessee claimed that TCS is functionally dissimilar because it is involved/engaged in ITES and Software Development Services as well and providing services pre-dominantly to Citi Group. Segmental information between ITES and software development services of TCS is not available. There is presence of reputed brand, super normal profits and abnormal fluctuations in profits and abnormal profitability trend, significant high turnover and high base/size of the employee and therefore not comparable with the Assessee.

14.3 The ld. DRP, rejected the said contentions of the Assessee and somehow approved TCS as comparable on the following reasons;

"**Functionally comparable**:
The objection on turnover/ scale is effectively addressed by the jurisdictional High Court in Chrys Capital and Rampgreen supra. The Taxpayer has not shown how payment of Tata Brand equity and ownership of Intangibles is leading to high profit margin given that most of the revenues are derived from a long term contract from a single customer i.e. Citigroup. Undoubtedly TCS Global Network Delivery Model is being leveraged to service clients globally, however Actis Global as per its TP Study also leverages on all the valuable intellectual property rights and other commercial or marketing intangibles owned by the group company and provides a diverse range of services that would vary in complexity, depth of analysis and time involved. There is no fixed correlation between brand and margins. A case in point is Tata Elxl, carrying the same Tata brand name as TCSe-Serve the comparable, but Tata Elxl has much lower margins. On the volatility of profits, DRP has examined taxpayers Annual Report and 10% decline in Profit after tax is explained on account of expiry of tax holiday U/s 10A. One of the key Issues when analyzing transfer prices is to refine the comparability analysis after matching the functional profile carefully. However the marginal differences In

assets(Intangibles) owned or risk borne and their impact on margins earned as a result when Not performed are the same or similar has not been effectively demonstrated by the taxpayer The Taxpayer having failed to discharge onus to demonstrate or adduce evidence to show how the objection raised have impacted profit margins, and how it can arithmetically be determined cannot become the basis for adjustments DRP thus does not interfere in the inclusion of TCS E-serve as a valid comparable."

14.4 We have given thoughtful considerations to the determinations made by Ld. DRP and the Ld. AO and contentions raised by the parties qua comparables issue. No doubt in the case of Chryscapital Investment Advisory (India) (supra) as relied upon by the Ld. DR, the Hon'ble High Court of Delhi, though observed that mere fact that an entity makes high/extraordinary profits/losses does not, ipso facto, lead to its exclusion from the list of comparables for the purposes of determining of ALP, however in our considered view the Hon'ble High Court carved out the exception by holding that in such circumstances, enquiry under Rule 10B(3) ought to have been carried out, to determine as to whether the material difference between the Assessee and the said entity can be eliminated. Unless such differences cannot be eliminated, the entity should be included as a comparable.

14.4.1 The Hon'ble High Court also held that enquiry is to be carried out preceding the analysis under Rule 10B(3) as the comparables functionally similar with the Assessee and thereafter, the exercise of determining, if there are material difference on account of exceptionally high profits, which are capable of elimination, has to be carried out.

14.5 The Hon'ble High Court in the case of Rampgreen Solutions Pvt. Ltd. (supra) also held" *that in order for the benchmarking studies to be reliable for the purposes of determining the ALP, it would be essential that the entities selected as comparables are functionally similar and are subject to the similar business environment*

and risks as the tested party. Any factor, which has an influence on the PLI, would be material and it would be necessary to ensure that the comparables are also equally subjected to the influence of such factors as the tested party. This would, obviously, include business environment; the nature and functions performed by the tested party and the comparable entities; the value addition in respect of products and services provided by parties; the business model; and the assets and resources employed. It cannot be disputed that the functions performed by an entity would have a material bearing on the value and profitability of the entity. It is, therefore, obvious that the comparables selected and the tested party must be functionally similar for ascertaining a reliable ALP by TNMM. Rule 10B(2) of the Income Tax Rules, 1962 also clearly indicates that the comparability of controlled transactions would be judged with reference to the factors as indicated therein. Clause (a) and (b) of Rule 10B(2) expressly indicate that the specific characteristics of the services provided and the functions performed would be factors for considering the comparability of uncontrolled transactions with controlled transactions."

14.6 In view of the judgments referred to above, we have to consider, as to whether there is material difference between TCS and eClerx and the Assessee, qua business model & environment, the nature and functions performed by the Assessee and the comparable entities, the value addition in respect of products and services provided by parties, the assets and resources employed , profit & risk involved stc. .

14.7 Admittedly the total revenue turnovers of TCS and eClerx were 1,442.42 Crores and Rs. 341.91 Crores respectively, whereas the Assessee had turnover of Rs. 24.23 Crores only, which goes to shows that the revenue turnovers of TCS and eClerx were more than 59 and 14 times respectively, as compared to the turnover of the Assessee to the tune of Rs. 24.23 Crores only. In

addition to that TCS enjoyed/enjoying the brand value of Tata and also of Citi Group Inc. by acquiring its captive BPO (Citi Group Global Services Ltd.). Further, both the said companies are operating with full-fledged risk enterprises and TCS in addition to ITES Services also involved in providing technical services including software testing, verification and validation of software at the time of implementation and data centre managements activities. The eClerx is involved in "KPO" (Knowledge Process Outsourcing) whereas the Assessee is working as "BPO" and therefore in view of judgement in the case of Rampgreen Solutions Pvt. Ltd. (supra) where it has been held *"that BPO cannot be compared with the KPO service provider"*, and therefore the eClerx on this count alone is liable to be excluded.

14.8 In our considered view, the turnover is obviously the relevant factor to consider the comparability. It has also been clearly held by the Hon'ble Courts that where the Assessee company has total turnover of less than Rs. 200 Crores, the companies which have turnover in the range of Rs. 1 Crore to Rs. 200 Crore, can only be considered for comparison but not otherwise. Even the Hon'ble Karnataka High Court in the case of Acusis Software India Pvt. Ltd. Vs. ITO-11(1), Bangalore (2018) 98 taxmann.com 183 (Karnataka) as referred to by the Assessee, has approved decision of the Tribunal in holding *"that if the turnover of the comparable company is less or more than 10 times of the turnover of the Assessee, then it cannot be considered as a comparable company"*. The Hon'ble High Court of Delhi as well, in various cases including in Agniky India Technologies Pvt. Ltd. (2013) 36 taxmann.com 289 (Del.) considered the identical issue and categorically held that a giant company having high turnover and high brand value, cannot be compared with smaller captive unit of the parent company. Further in Avaya India (P.) Ltd. case (supra) the Hon'ble Delhi High

Court has also considered the high turnover of companies and brand value as well, for exclusion of comparables.

14.9 Considering the aforesaid facts and respectfully following the decisions of the Hon'ble Courts referred to above, we are of the considered view, that the TCS and eClerx are not comparable with the Assessee in any mode such as Revenue Turnover, Fixed Assets, Brand Value, Brand Contribution, Risk, Nature of Services, Related Party Transaction etc., hence for the just decision of case and for the ends of justice, we are inclined to direct the Ld. AO, to exclude 'TCS' and 'eClerx' from comparables companies and determine the ALP accordingly, hence directed accordingly.

15. Coming to the addition/disallowance u/s 40(a)(i) of the Act, the Assessee claimed that the Assessee being subsidiary of Serco, UK was incorporated on 27.02.2006 as a captive centre to provide IT & IT Enabled Services to Serco Group and therefore, desirous to recruit some of the employees of Serco UK, on full time basis to work exclusively for the Assessee/Serco India and requested the Serco UK to provide the employees, who acceded to the request of the Assessee and accordingly released three employees, who were appointed by the Assessee by giving appointment letters for the following posts/designations, as detailed below:

Sr. No.	Name of Employee	Designation
1	Mr. Robert Clayton McGuiness/ Bob McGuiness	Regional Chief Executive Officer
2	Mr. David Anthony Burke	Chief Finance Officer
3	Mr. Paul Alan Gasken	HR Officer

15.1 For administrative and employees' convenience and on the request of the Assessee, Serco UK agreed to pay part-salary in foreign currency to such employees on behalf of the Assessee. For this purpose the Assessee was supposed to inform Serco UK the amount of foreign currency payable as salary to such employees as determined by the Assessee, which was agreed to be reimbursed by the Assessee. Accordingly, "Salary Reimbursement Agreement" was entered into between the Assessee and Serco UK on 09.01.2010. According to the Appointment Letters and Salary Reimbursement Agreement, the Assessee was exclusively and solely liable to pay salaries, allowances and requisites to the aforesaid employees.

15.2 The Assessee therefore during the year under consideration has debited salary expenses to its Profit & Loss Account under the head "Salaries" and duly deducted taxes at source under section 192 of the Act on salaries paid to its employees, which duly reflects from Form-16. In total, amount of Rs. 299,20,449/- was paid as part salary in foreign currency on behalf of the Assessee by Serco UK on which TDS under section 192 was deducted at source and the same was paid to the Government of India by the Assessee. For ready reference the details are reproduced below:

Sr. No.	Name of Employee	Designation	Date of Joining (Period during the year)	Part salary in foreign currency reimbursed to Serco UK
1	Mr. Robert Clayton McGuiness/ Bob McGuiness	Regional Chief Executive Officer	07/01/2010 (12 months)	Rs. 2,24,79,687/-
2	Mr. David Anthony Burke	Chief Finance Officer	01/09/2010 (7 months)	Rs. 47,31,170/-
3	Mr. Paul Alan	HR Officer	03/01/2011	Rs. 27,09,592/-

	Gasken		(3 months)	
Total				**Rs.2,99,20,449 /-**

Infact the aforesaid employees, have also filed their returns of income in India, declaring inter-alia salary income received from the Assessee, as its reflect from their Income Tax Returns, produced before us by the Assessee.

15.3 The Assessee further claimed that though the Ld. AO has not proposed any disallowance under section 40(a)(i) of the Act in Draft Assessment Order, however the Ld. DRP while relying upon the decision of Hon'ble Delhi High Court in the case of Centrica (supra) show-caused the Assessee, as to why reimbursement of salaries may not be treated as Fees for technical services (FTS).

15.4 In response the Assessee claimed as under:

(i) The Assessee is legal and economical employer of these employees.
(ii) The case of *Centrica India* is factually distinguishable from that of the appellant.
(iii) The services provided by these employees cannot be treated as FTS.
(iv) The Assessee has already deducted TDS u/s 192 on the entire amount of salary. Even otherwise the Assessee has already deducted tax at source approximately @30% u/s 192 as against 15% applicable u/s 195.
(v) Therefore, disallowance of the said amount u/s 40(a)(i) is not warranted.

16. The Ld. DRP rejected the said explanation of the Assessee and directed the Assessing Officer to disallow reimbursement of salary amount of Rs. 2,99,20,449/- u/s 40(a)(i) of the Act, by holding as under:

> *Applying the principles laid down by the Hon'ble High Court to the case in hand, the "salary reimbursement agreement" Dated 27.01.,2010 between Serco Global Private Ltd. and Serco*

UK Ltd. was examined and the relevant clauses have been reproduced in the tabulated form vis-a-vis the relevant principles laid down by the Hon'ble Delhi High Court for easy reference, which reads as under:

S. No.	Centrica Reference	Salary Reimbursement Agreement dt. 07.01.2010 Reference
1	*Seconded employees duties and functions were dictated by the Instructions and directions of the CIOP.*	*Whereas, Serco UK has acceded to the specific request made by Serco India for releasing the employee to work exclusively for Serco India. Whereas, the Serco India employees shall be released from their work at Serco UK and shall be Integrated as employees of Serco India for the period of service with Serco India:*
2	*However crucially they retained their entitlement to participate in the overseas entitles retirement and social security plans and other benefits In terms of its applicable policies, and their salary was properly payable by the overseas entities, which claimed the money from CIOP. (page 40 para 34)*	*Whereas, at the time of recruitment of the Serco India Employee, Serco India will acknowledge that the Serco India Employees shall not act on behalf of or bind Serco UK with their duties in Serco India and further that the Serco India Employees shall not act or represent or bind Serco UK In any manner;*
3	*There was no purported relationship between CIOP and the secondees since secondees could not sue CIOP for default In payment of salary. and though i CIOP was given the right to terminate the secondment, but the original and subsisting relationship with overseas entity -whose regular employees they*	*Whereas, during the period of service of the Serco India Employees with Serco India, It is the understanding between the Parties to this agreement that the Serco India Employee would be entitled to remuneration In foreign currency paid to them outside or India ("Foreign Currency Salary");* *Whereas, the Parties to this*

	were, could not be terminated, (page 41 para 34)	*Agreement have agreed to adduce into writing the terms and conditions that is governing their mutual relations referred to in this Agreement and also the arrangement whereby Serco India shall bear and pay for the Foreign Currency Salary of the Serco India Employees.*
4	*While CIOP may have operational control over these persons in terms of the daily work, and may be responsible (in terms of the agreement) for their failures, these limited and sparse factors cannot displace the larges and established context of employment abroad. (page 42 para 36).*	*Para 3.2 For administrative convenience only and at the request of Serco India, Serco UK agrees to pay to the Serco India Employees the Foreign Currency Salary on behalf of Serco India. For this purpose, Serco India shall inform Serco UK, the amount of the Foreign Currency Salary that should be paid by Serco UK to the Serco India Employees on behalf of Serco India for their employment with Serco India.*
5	*Though CIOP was given the right to terminate the secondment, but the original and subsisting relationship with overseas entity -whose regular employees they were, could not be terminated*	*Para 4.7 During the period of service, Serco India shall have a right to undertake performance appraisal of the Serco India Employees in accordance with the politics of Serco India. Serco India may at its discretion make available findings of the appraisal to Serco UK.* *Para 4.8 Serco India shall have the right to terminate the employment of Serco India Employees with Serco India.* *Para 4.9 During the period of service with Serco India, Serco UK shall not have a right to recall any Serco India Employee without the approval of Serco India. Serco UK shall not be under any*

		obligation to replace any of the employee in the event where employment of any personnel is terminated with Serco India for any reason.
6	*The attachment of the secondees to the overseas organization is not fraudulent or even fleeting, but rather permanent, especially in comparison to CIOP, which is admittedly only their temporary home. (Page 42 para 35).*	*Para 4.11 In addition to the above, the employment of Serco India Employees with Serco India shall be subject to other specific terms and conditions as laid down In Employment Contract of each Serco India Employees with Serco India. The terms of Employment Contract shall specifically include details with regard to terms of employment with Serco India like period of service, nature of work, details of salary and other costs and such other terms as are customary.*
7	*Even the OECD commentary on Article 15 notes that the situation Is different if the employee works exclusively for the Enterprise in the state of employment and was released for the period in question by the Enterprise in his state of residence. This was clearly and critically not done this case.*	*Para 4.14 Serco UK hereby agrees to release and discharge the Serco India Employees for the period of service from all obligation and rights whatsoever, Including any lien on employment, if any, and from all actions, claims and demands towards Serco UK while they worked or will work as employees of Serco UK. Serco UK shall not enforce any kind of contractual obligation during the period of service of Serco India Employees as employees of Serco India.*

Source: *All extracts are from "Salary Reimbursement Agreement between Serco Global Services Private Limited and Serco Limited UK dated 7 January 2010"*

16.1 The Ld. DRP also observed as under :

"That aforesaid agreement is also supported by a detailed employment contract setting out the terms of employment. The employment contract and salary reimbursement agreement when read together to point out, some kinds of distinction vis-a-vis the Centrica particularly that employees have been released from their work at Serco UK and subsequently entered into a separate local employment agreement with Serco India. But a cleverly drafted agreement that attempts to adhere with a letter but the spirit of the Centrica decision, would be a case of form overriding substance. Serco India has the right to terminate the employment of employees with Serco India only. Serco, UK has the right to recall any Serco India employee, albeit with the approval of Serco India.

..

That the Hon'ble High Court has pointed out, the attachment of secondees is not flitting as borne out by the following extracts :

3.2 For administrative convenience only and at the request of SERCO India, SERCO UK agrees to pay to the SERCO India Employees the Foreign Currency Salary on behalf of SERCO India. For this purpose, SERCO India shall inform SERCO UK, the amount of the Foreign Currency Salary that should be paid by SERCO UK to the SERCO India Employees on behalf of SERCO India for their employment with SERCO India.

3.3 Pension contributions or accruals, social security contributions and similar payments (whether payable by the employer or employee) and related compliance shall be done by SERCO UK. SERCO India shall reimburse such contributions or accruals to SERCO UK.

3.4 SERCO Indio agrees to reimburse SERCO UK such foreign Currency Salary paid by SERCO UK on behalf of SERCO Indio subject to any requisite approval of the Government of India/Reserve Bank of India. The Foreign Currency Salary paid by SERCO UK to SERCO India Employees on behalf of SERCO India shall be reimbursed by SERCO India on a cost to cost basis.

3.5 SERCO UK shall periodically send to SERCO Indio Debit Notes for the reimbursement of the Foreign Currency Salary

paid by it to the SERCO India Employees on behalf of SERCO India.

3.6 The Foreign Currency Salary reimbursement by SERCO India to SERCO UK under this agreement shall be net of any withholding or other applicable taxes which shall be the sole responsibility of and by SERCO India.

16.2 The Ld. DRP also held that the Assessee has relied upon several judgments pronounced, which are not taken up, since the discussion now academic in view of the above decision of the Hon'ble Delhi High Court, which is approved by the Hon'ble Supreme Court.

17. The Assessee therefore submitted that Ld. DRP was not justified in directing the Assessing Officer to disallow the reimbursement of salary expenses u/s 40(a)(i) of the Act, on the following reasons:

(A) Reimbursement of salary cannot be disallowed u/s 40(a)(i) of the Act as the Assessee has already deducted TDS u/s 192 of the Act.
(B) The Assessee was legal and economical employer of these employees.
(C) The reimbursement of part salary expenses of expatriate employees to Serco UK did not fall under the purview of FTS.
(D) The ratio of the decision in the case of *Centrica India(supra)* is not applicable in this case.
(E) The disallowance u/s 40(a)(i) is against the 'rule of consistency'.

17.1 The Assessee further claimed that reimbursement of salary expenses cannot be disallowed under section 40(a)(i) of the Act as the Assessee has already deducted TDS under section 192 of the Act and therefore, the case of the Assessee does not fall under twin parameters set out in the provisions of section 40(a)(i) of the Act. In this regard, the Assessee relied upon various judgments

including by the Hon'ble Calcutta High Court in the case of CIT Vs. S.K. Tekriwal (2014) 46 taxmann.com 444 (Cal) PB 688 to 689.

17.2 The Assessee further claimed that Hon'ble Bangalore Bench of the Tribunal in the case of ACIT, Circle-1(1)(1), Bangalore Vs. AON Specialists Services Pvt. Ltd. (2020) 116 taxmann.com 368 (Bang. Trib.) (PB) 695 to 702, on the identical facts and circumstances held that where the Assessee has deducted tax at source under section 192 of the Act, for reimbursement of salaries paid to seconded employees, then no disallowance under section 40(a)(i) of the Act can be made.

17.3 The Assessee at last emphasized that Ld. DRP and Ld. AO erred in relying upon the decision of the Hon'ble Delhi High Court in the case of Centrica India Offshore Pvt. Ltd. Vs. CIT 364 ITR 336, as facts of the Assessee's case are altogether different that of the Centrica case (supra). In view of facts of the present case and ratio of above-mentioned decisions, it is clear that the Assessee was not liable for any disallowance u/s 40(a)(i) on account of reimbursement of part salaries paid in foreign currency to its employees, to Serco UK, as the Assessee has duly deducted TDS u/s 192 of the Act. It is, therefore, prayed that disallowance of Rs. 2,99,20,449/-made u/s 40(a)(i) of the Act, may be deleted.

18. On the contrary, the Ld. DR claimed that the amount of Rs. 2.99 lakhs have been paid to the holding company without deducting TDS under section 195 of the Act, therefore, the same was correctly disallowed by the authorities below. Even otherwise the issue raised by the Assessee, requires following determinations:

1. *Whether Seconded employees were of the Assessee or the holding company.*
2. *Nature of payment for FTC or salary*

3. *TDS was required to be deducted under section 192 or 195.*
4. *TDS in section 192 is at higher rate or lower.*
5. *Section 40(a)(i) of the Act is applicable or not.*
6. *Centrica case/judgment has been approved by the Hon'ble Supreme Court in Northern Operating case as well and therefore, is has to be considered, whether squarely applicable to the instant case or not.*

18.1 The Ld. DR further submitted that the Assessee by making colourable devices in the form of appointment letters and salary reimbursement agreement, tried to evade from the liability of TDS, as prescribed under section 195 of the Act. The Assessee has paid the reimbursement amount for Technical Services and therefore, liable for "FTS" in view of Centrica judgment (supra), which is squarely applicable to the facts of the Assessee's case. Further, even the Hon'ble Apex Court in the case of C.C, CE & ST Vs. Northern Operating Systems Pvt. Ltd. (2022) 101 GSTR 391 (SC) Civil Appeal No. 2289 to 2293 of 2021 also dealt with the seconded employees and according to the judgement in that case, the case of the Assessee is also covered to be "Fees for Technical Services" provided. The Ld. DR before us also demonstrated the facts of Centrica (supra) and the Assessee's case, in order to show the similarity.

19. In rejoinder, the Assessee claimed that in the aforesaid cases, the Hon'ble Apex Court has not dealt with the issue relating to Income Tax Proceedings and infact, the judgments delivered by the Hon'ble Apex Court are on facts but not on law points, hence cannot be made applicable to the instant case in view of decision of the Hon'ble Apex Court in the case of Muthoot Leasing and Finance Ltd. *v.* Commissioner of Income-tax [2023] 146 taxmann.com 53 (SC) wherein it has been held as under:

> *"18. Taxation depends upon the language of the charging section and what is brought to tax within the four corners of the charging section. Therefore, one should be careful and cautious when*

applying the ratio of judgments relating to one tax enactment as a precedent in a case relating to another tax enactment. This rule of caution is important and should not be overlooked, more so when the language of the enactment and the object and purpose of the enactment are different."

20. We have heard the parties on the issue under consideration and perused the material available on record. The Assessee has claimed that the Assessee was incorporated on 27.02.2006 being a subsidiary of Serco, UK and established a captive centre to provide IT and IT Enabled Services to Serco Group and during the year under consideration has provided the following services to AE i.e. IT Enabled Services in the nature of research operations, business process outsourcing and management consultancy support services. The Assessee for carrying out its objects, recruited the employees of Serco UK, on full time basis to work exclusively for the Assessee. The Serco UK released its employees by accepting the request of the Assessee and therefore, three employees entered into separate employees' contract, qua terms and conditions of employment including compensation and other expenses, with the Assessee. According to the contract, the Assessee was solely and exclusively employer of the employees and having complete control on the employees and during the period of employment with the Assessee, the said employees seized to be employees of Serco UK. For clarity and ready reference, main terms and conditions of employment contract with Mr. Bob McG Guinass Regional Chief Executive Officer (pg. 476 to 479), as a sample, are reproduced herein below:

a) ***Effective date :*** *The employment contract was made on 31.12.2009 w.e.f. 01-01-2010, whereby Mr. Bob has been appointed as Regional Chief Executive Officer – Arica, Middle East, Asia and Australia (AMEA) for a period of two years by the Assessee.*

b) ***Supervision and Control****: Mr. Bob is supposed to work under the control, direction and supervision of the Board of Directors of the Company and in accordance with the policies, rules and*

guidelines of the company. Further, has to perform the duties and exercise of powers, which the company may assign to Mr. Bob from time to time.

c) ***Compensation and allowances**: The salary allowance and benefits have been fixed as per para-3 of employment contract (pg. 476) (PB).*

d) ***Taxation**: The emoluments/benefits mentioned herein will be liable/subject to tax in accordance with the provisions of Indian Income Tax and the Rules made thereunder, as may be in force from time to time.*

e) ***Notice period:** Either party can terminate the employment by giving six months (employee/12 months (employer) notice, negotiable in both sides (i.e. either notice being served or salary payment in lieu of the notice period, paid).*

f) ***Responsibilities:** The employee will be in full time employment of the company and will be obliged to devote entire time, attention and effort to the furtherance of the business of the company and to continuously develop professional skills in the interest of the company and himself.*

The employee (Mr. Bob) shall not during his employment with the company, directly or indirectly engaged himself in or devote any time or attention to any employment or business or possession of monetary interest, other than that of the company, except with prior permission of the company.

***g) Confidentiality:** The Employee (Mr. Bob) shall not disclose or divulge any information or data without prior written consent of an authorized officer or the company and should keep and maintain stick confidentiality of such confidential information or data that may come to his possession or knowledge by virtue of this engagement.*

***h) Partial invalidity**: of the provisions of this agreement.*

***i) Final Provisions:** This offer is subject to your having a valid employment visa to work in India. You shall be bound by the laws of India and shall conduct yourself in full conformity with the applicable loss.*

20.1 The Assessee also entered into an agreement for reimbursement of salary dated 07.01.2010 with Serco UK,

according to which, the Assessee was supposed to inform Serco, UK to pay certain amounts in foreign currency, as part salary to the seconded employees and thereafter to submit the reimbursement claim which was supposed to be cleared by the Assessee. For better understanding and ready reference, let us peruse the Important terms and condition of 'Salary Reimbursement Agreement, which are produced hereunder:

> *"WHEREAS, SERCO India is desirous of* ***recruiting some of the employees of SERCO UK*** *(hereinafter referred to as the "SERCO India Employees") on a full-time basis to work exclusively for SERCO India;*
>
> *WHEREAS, SERCO UK has acceded to the specific request made by SERCO India for* ***releasing the employees*** *to work exclusively for SERCO India;*
>
> *WHEREAS, it is the specific understanding between the Parties to this Agreement that SERCO UK shall not be considered to be rendering any services to SERCO India by the release of its employees in favour of SERCO India and that SERCO UK shall not be responsible for any acts and/or omissions of the SERCO India Employees;*
>
> *WHEREAS, at the time of recruitment of the SERCO India Employees, SERCO India will acknowledge that the SERCO India Employees shall not act on behalf of or bind SERCO UK with their duties in SERCO India and further that the SERCO India Employees shall not act or represent or bind SERCO UK in any manner;*
>
> *WHEREAS, during the period of service of the SERCO India Employees with SERCO India, it is the understanding between the Parties to this agreement that the SERCO India Employees would be entitled to remuneration in foreign currency paid to them outside of India ("Foreign Currency Salary");*
>
> *WHEREAS, the Parties to this Agreement have agreed to adduce into writing the terms and conditions that is governing their mutual relations referred to in this Agreement and also the arrangement whereby SERCO India shall bear and pay for the Foreign Currency Salary of the SERCO India Employees.*
> *.................*
> *3.1 In consideration for the employment services to be provided by the SERCO India Employees,* ***SERCO India shall be solely responsible to pay salary and other costs*** *such as housing, transport etc. of SERCO India Employees.*

3.2 For administrative convenience only and at the request of SERCO India, SERCO UK agrees to pay to the SERCO India Employees the Foreign Currency Salary on behalf of SERCO India. For this purpose, ***SERCO India shall inform SERCO UK, the amount of the Foreign Currency Salary*** *that should be paid by SERCO UK to the SERCO India Employees on behalf of SERCO India for their employment with SERCO India.*

……………………

3.4 SERCO India agrees to reimburse SERCO UK such Foreign Currency Salary paid by SERCO UK on behalf of SERCO India subject to any requisite approval of the Government of India / Reserve Bank of India. The Foreign Currency Salary paid by SERCO UK to SERCO India Employees on behalf of SERCO India ***shall be reimbursed by SERCO India on a cost to cost basis.***

…………………..

4.1 It is expressly understood and agreed upon between the Parties to this Agreement that SERCO UK is not rendering any services whatsoever to SERCO India under this Agreement and that SERCO UK shall not be held responsible for any acts and / or omissions of the SERCO India Employees.

4.2 ……………. Further, SERCO UK is merely releasing its personnel for working with SERCO India and SERCO UK is not acting as provider of manpower supply to SERCO India.

…………………..

4.4 Both Parties to this Agreement acknowledge and agree that for all the purposes of this Agreement and otherwise, ***the SERCO India Employees shall have an employee employer relationship with and be under the exclusive direction and supervision of SERCO India*** *during the period for which the SERCO India Employees render services to SERCO India.*

…………………..

4.7 During the period of service, SERCO India shall have a right to ***undertake performance appraisal*** *of the SERCO India Employees in accordance with the policies of SERCO India……….*

4.8 SERCO India shall have the right to terminate the employment of SERCO India Employees with SERCO India.

4.9 During the period of service with SERCO India, SERCO UK shall ***not have a right to recall*** *any SERCO India Employee without the approval of SERCO India.* ***SERCO UK shall not be under any obligation to replace any of the employees in the event where employment of any personnel is terminated with SERCO India for any reason.***

4.10 During the period of service with SERCO India, SERCO India shall have the exclusive right to undertake any legal or disciplinary action against any misconduct, fraud, willful negligence or any other legal action of SERCO India Employees. SERCO India shall be solely obligated to address any conflicts with the SERCO India Employees in relation to employment with SERCO India. SERCO India Employees shall not have any legal recourse to SERCO UK for any conflicts arising in relation to their employment with SERCO India.

4.11 In addition to the above, the employment of SERCO India Employees with SERCO India shall be subject to other ***specific terms and conditions as laid down in Employment Contract of each SERCO India Employees with SERCO India.*** *The terms of Employment Contract shall specifically include details with regard to terms of employment with SERCO India like period of service, nature of work, details of salary and other costs and such other terms as are customary.*

4.12 SERCO UK shall not be responsible for the work of SERCO India Employees or assume any risk for the results produced from the work performed by the SERCO India Employees during the period of service with SERCO India. The SERCO India Employees shall not be regarded as employees of SERCO UK and shall also not in any way be subject to any kind of instructions or control of SERCO UK during the period of employment with SERCO India.

4.13 SERCO UK shall not have any obligation towards SERCO India with regard to the performance of SERCO India Employees. The obligation of SERCO UK would cease on entering of employment contract by the SERCO India Employees with SERCO India.

4.14 ………………….SERCO UK shall not enforce any kind of contractual obligations during the period of service of SERCO India Employees as employees of Serco India.

4.15 During the period of service with SERCO India, ***the SERCO India Employees shall not act for and on behalf of SERCO UK*** *nor make any representations or warranties on behalf of SERCO UK. Likewise, the SERCO India employees shall not assume any obligations in the name of SERCO UK nor has authority to create any obligations in favor or on third parties with regard to SERCO UK.*

4.16 SERCO India shall be responsible for complying with the requirements of withholding tax under the Indian tax laws on salary and costs paid to the SERCO India Employees.

………………………

> *6.1 This Agreement shall be governed and interpreted pursuant to the laws of India.*

20.2 We have given thoughtful consideration to the 'Employment Contracts' and 'Agreement for reimbursement of salary dated 07.01.2010 with Serco UK' and observe that the Assessee appointed three employees as Regional Chief Executive Officer (CEO), Chief Finance Officer (CFO) and HR Officer (HR) as per the terms and conditions of employment, including salary and perquisites as decided by the Assessee, for discharging administrative and supervisory functions assigned to the employees by the Assessee but not the Serco UK. Serco UK released these employees from their work at Serco UK. These employees were working under the exclusive control, direction, and supervision of the assessee. The Assessee had right to terminate the employment of these employees with Assessee and Serco UK had no obligation to replace any of the employees. These employees were on payroll of the Assessee Company. These employees had no legal recourse against Serco UK for any conflict arising in relation to their employment with Assessee. These employees did not have any lien on Serco UK. It is also important to note that Serco India was supposed to inform Serco UK, the amount of foreign currency salary that was to be paid by Serco UK to these employees on behalf of Serco India for their employment with Assessee. The obligation to pay salary and other emoluments was on the Assessee only and therefore the Assessee entrusted itself with the responsibility to pay the salary in 60:40 ratio in India and foreign respectively.

20.3 From the 'Salary Reimbursement Agreement' with Serco UK, it also clearly reflects that the persons appointed by the Assessee were the employees of Assessee only, as they were supposed to act as per directions of the Assessee but not the Serco UK. The

employees under consideration had employee-employer relationship with the Assessee only and therefore, these employees have no rights to act on behalf or bind Serco UK in connection with their duties in the Assessee. The Assessee was legal and economic employer of these employees. Accordingly, the payments made by the Assessee to the said employees as salary, partly by Assessee itself and remaining through Serco UK, which was subsequently reimbursed by the Assessee, was chargeable to tax as 'salaries' in the hands of aforesaid employees but not as "FTS" because even otherwise there is no agreement and/or any document to show that the Serco UK, has provided any 'Technical Service' and in consequence thereof the Assessee has paid FTS'. Thus in our considered view, the Assessee has not paid for any FTS provided but infact paid the total amount as 'salaries' and therefore correctly deducted tax at source (TDS) u/s 192 of the Act.

20.4 Let us also consider, as to whether the provisions of section 195 are applicable to the instant case or not. For completeness and better understanding, the provisions of section 195 of the Act are reproduced herein below:

> *"**195. Other sums.***
>
> *(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest not being interest referred to in section 194LB or section 194LC or section 194LD or any other sum chargeable under the provisions of this Act **(not being income chargeable under the head "Salaries")** shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :……."*

We observe that even as per the provisions of section 195(1) of the Act, income chargeable under the head 'salaries' is ousted from the purview of section 195 of the Act and therefore any person responsible for paying to any non-resident, any sum chargeable under the head 'Salaries', is not liable to deduct tax at source u/s 195 of the Act. In this case, even otherwise the Assessee has deducted TDS @ 30% of the total amount paid, whereas the TDS on FTS u/s 195 of the Act is liable to be deducted @15% of the total amount paid, and therefore also there is no loss of revenue.

21. Let us also consider, whether under the facts and circumstances of this case, disallowance u/s 40(a)(i) of the Act is justified or not. For ready reference conditions/parameters for making a disallowance under this provision, reads as under:

(i) **Tax is deductible at source under Chapter XVII-B**; and
(ii) **Such tax has not been deducted or, after deduction, has not been paid** onor before the due date specified in sub-section (1) of section 139.

From the provisions of this section, it is clear that disallowance u/s 40(a)(i) can be made only, when both the above conditions are satisfied. **Firstly,** the Tax is deductible at source under Chapter XVII-B which includes section **192** of the Act, **in which the Assessee has deducted the TDS**. **Secondly** such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139, **which is not the case here.** For clarity, we reiterate that the Assessee in this case has deducted the tax at source u/s 192 of the Act and deposited with the Government Account, within specified time as prescribed in the Act, hence not covered under the provisions of section 40(a)(i) of the Act.

21.1 The Hon'ble tribunal in *ACIT, Circle-1(1)(1), Bangaluru vs. AON Specialist Services (P.) Ltd. [2020] 116 taxmann.com 368 (Bangalore – Trib.)* (PB-695 to 702)[Para 22 of the order] also dealt with the identical issue and held as under:

> *In this case also the Assessee has reimbursed payment of salary of employees made by M/s AON Limited, UK and the Assessee had deducted tax at source on the salary expenses u/s 192 of the Act. According to the Assessing Officer, these payments were in the nature of Fees for Technical Service rendered and therefore, the Assessee ought to have deducted tax at source u/s 195 of the Act. Since, the Assessee did not deduct tax at source u/s 195, the AO disallowed the amount u/s 40(a)(i) of the Act. The DRP, however, deleted the addition made by the AO by following the decision of the Hon'ble ITAT in Assessee's own case in respect similar payments in ITO vs. AON Specialist Services (P.) Ltd. [2014] 43 taxmann.com 286 (Bangalore – Trib.) where it was held that the Assessee was real and economic employer of employees seconded from UK Company and reimbursement of salary cost etc. to UK company was without any profit element, it could not be regarded as income chargeable in hands of the UK company and therefore, reimbursement made by the Assessee to UK company was not liable for TDS u/s 195 of the Act.*
>
> *In the appeal filed by the Revenue, the Hon'ble ITAT, after referring to the decisions in the cases of CIT vs. S. K. Tekriwal [2014] 46 taxmann.com 444 (Calcutta) and CIT, Manglore vs. Kishore Rao & Others (HUF) [2017] 79 taxmann.com 357 (Karnataka), observed that no disallowance u/s 40(a)(i) of the Act can be made as the Assessee has deducted tax at source u/s 192 of the Act as it is not a case of non-deduction of tax. The Hon'ble ITAT concluded as under:*
>
> > *"22. We have given a careful consideration to rival submissions. It is not disputed by the revenue that in respect of the payments made to Aon Services Corporation, USA towards reimbursement of salary expenses the Assessee has duly deducted tax at source u/s 192 of the Act. In fact, in the letter dated 2-03- 2015 the Assessee has highlighted this aspect in para-2 at page-3 of the aforesaid letter. Though, the Assessee has not taken a specific plea that no disallowance u/s 40(a)(ia) of the Act can be made for short deduction of tax at source, yet the fact remains that the aforesaid plea is a legal plea which can be adjudicated on the basis of facts already available on record. As far as the merits of the plea raised by the Assessee is concerned, we are of the view, that decision of*

the Hon'ble Karnataka High Court in the case of Kishore Rao (supra) clearly supports the plea of the Assessee. The decision rendered in case of S. K. Tekriwal (supra) by the Hon'ble Karnataka High Court, taking a view that there can be no disallowance of expenses u/s 40a(ia) of the Act for short deduction of tax at source has been followed by the Hon'ble Karnataka High Court. In the given facts and circumstances of the case, we are of the view that the order of CIT(A) has to be upheld. Therefore, the question whether the payment in question has to be regarded as fees for technical services rendered or mere reimbursement of expenses does not call for any adjudication. Accordingly, ground no. 7 to 9 raised by the revenue are dismissed."

21.2 In Pr. CIT-2 v. M/s Boeing India Pvt. Ltd. [2023] 146 taxmann.com 131 (Delhi) [PB 912 to 920] [Para 11 of the judgment], the Hon'ble Court on the identical facts as involved in this case, has held as under:

"11. As far as disallowance under section 40(a)(ia) of the Act is concerned, this Court finds that there is no dispute that the Assessee has deducted tax at source under section 192 of the Act. This Court is in agreement with the opinion of the ITAT that Section 195 of the Act has no application, once the nature of payment is determined as salary and deduction has been made under section 192 of the Act."

21.3 The Hon'ble Courts in various cases including mentioned above, consciously held that even where tax has been deducted, under bona fide belief, under wrong provisions of TDS, the provisions of section 40(a)(i) cannot be invoked. Even if there is a difference of opinion as to the deductibility of TDS falling under different provisions, no disallowance can be made by invoking provisions of section 40(a)(i) of the Act. The Judgment passed by Calucutta High Court in the case of CIT vs. S. K. Tekriwal [2014] 46 taxmann.com 444 (Calcutta) (PB-688 to 689) is relevant on this issue, which has been subsequently followed by Hon'ble high Court of Delhi in the case of Pr. CIT vs. Future First Info. Services Private Limited [2022] 447 ITR 299 (Del.) [PB 815 to 819].

21.4 Coming to the arguments made by the Ld. DR by making emphasis on the decision of High Court of Kerala in the case of CIT-1, Kochi v. P V S Memorial Hospital Ltd. [2015] 60 taxmann.com 69 (Kerala)to the effects that deduction under a wrong provision of law will not save an Assessee from the rigors of section 40(a)(ia) of the Act, we observe that admittedly there are contrary judgments on this issue and it is also admitted fact after the decision of the Hon'ble Supreme Court in the case of CIT v. Vegetable Products Ltd. [1973] 88ITR 192 (SC)it is not res-intergra that when two views are possible in respect of an issue from different High Courts, then view which is in favour of the Assessee needs to be followed. Hence we are of the considered view that in this case on this count as well, no disallowance u/s 40(a)(i) is warranted.

22. Let us consider now, the applicability of Centrica judgement (supra) which was made a basis of making the addition by the Ld. DRP and Ld. AO. The Assessee before us claimed as under:

> *That the Centrica judgment is not applicable to the facts of the present case and is distinguishable. The Centrica India Offshore (P.) Ltd was a wholly owned subsidiary of Centrica PLC, UK. BSTL and BEML were also subsidiaries of Centrica Plc. These overseas concerns were in the business of supplying gas and electricity to consumers across UK and Canada. The overseas entities outsourced their back-office support functions like debt collection/consumers billings/ monthly jobs to third party vendors in India. Centrica India was established in India to act as a service provider to those overseas entities to ensure quality control and management of their vendors of outsourced activity. For this activity to be carried out, the Assessee required personnel with the necessary technical knowledge and expertise in the field, as the Assessee, newly formed company did not have necessary human resource. To seek support during initial years of its operation, Assessee sought some employees on secondment from the overseas entities. For this purpose, it entered into an agreement with the overseas entities. The seconded employees continued to remain on the payroll of the overseas entities who used to pay and disburse the salaries. The Assessee reimbursed such salary cost to the overseas employers. In this case, the seconded employees were not only providing services to the*

Assessee and rather ensuring that skills set of other employees was built and these services may be continued by them without assistance. On these facts, the Hon'ble High Court was satisfied that the seconded employees were 'making available' their experience and skill in managing and applying such processes and practices and therefore, the amount reimbursed by the Assessee to overseas companies towards salaries of seconded employees amounted to 'fee for technical services' liable to tax in India. Accordingly, the Assessee was required to deduct tax at source u/s 195 of the Act on this amount.

Whereas the Assessee is not a newly formed company and was in existence since 2006 and had large number of employees who were highly qualified personnel, having professional qualifications in the field of engineering and/or management, to render services to its AEs (as mentioned in page 22 of TPO order). It is also pertinent to note that Serco UK has relieved these seconded employees and Serco India has recruited them. The salaries, perquisites and other conditions of the employment were decided by the Assessee company with the employees. The Assessee company used to inform Serco UK the amount of foreign currency salary that should be paid by them to these employees on behalf of the Assessee. The seconded employees did not have a lien on their employment with Serco UK and hence, Serco UK did not retain any control over the terms of employment of these employees. These employees were on the payroll of Indian company and did not continue to be on the pay-roll of Serco UK. The Assessee was a real and economic employer of the expatriate employees as these employees were under the control and supervision of the Assessee company without any relation/connection with the associate enterprise. The obligation was on the Assessee company for salary payment to these employees whereas in the case of Centrica, payment of salary was the responsibility of the foreign company which was reimbursed by the Indian concern. Further, these employees were recruited as Chief Executive Officer (CEO), Chief Finance Officer (CFO) and HR Officer (HR) and were rendering administrative and supervisory services and were not rendering any technical services. In this case, the condition of 'make available' of technical knowledge or skill was also not fulfilled. Hence, it was not a case of 'fee for technical services' as envisaged in section 9(1)(vii) of the Income Tax Act as well as Article 13(4)(c) of India-UK DTAA. Therefore, the ratio of the decision in the case Centrica India is not applicable on the facts of the Assessee.

Thus, the Assessee claimed that the ratio of the decision in the case Centrica India is not applicable on the facts of the Assessee. In view of above submissions that the

Assessee has rightly deducted tax at source u/s 192 and was not liable for deduction of tax u/s 195 of the Act on reimbursement of part of salary expenses of its expatriate employees released by Serco UK. The Assessee also relies on the following judicial pronouncement:

> In Yamazen Machinery and Tools India (P.) Ltd. v. ACIT - [2023] 149 taxmann.com 96 (Delhi - Trib.)vide order dated 10.01.2023,the Hon'ble ITAT, New Delhi has decided this issue in favour of the Assessee. In this case, four employees of parent company were assigned to Assessee and holding position of Managing Director and Managers in the Assessee company. Part of their salary was payable in Japanese Yen in Japan by the parent company on behalf of the Assessee and reimbursed by the Assessee. The Assessee has duly deducted tax u/s 192 of the Act. But the Assessing Officer treated these payments as FTS and since, the Assessee has not deducted tax u/s 195 of the Act, the Assessing Officer disallowed Rs. 1,85,20,176/- of reimbursement of salary u/s 40(a)(i) of the Act. The Hon'ble ITAT held as under:
>
> > *"12. Thus, keeping in view the discussions made above, in final analysis, we hold that the payment of Rs.1,85,20,176/- made by the Assessee towards reimbursement of expenses is in the nature of salary cost of the assigned employees subject to TDS under section 192 of the Act, hence, cannot be treated as FTS under section 9(1)(vii) of the Act and Article 12 of the tax treaty. Accordingly, there was no obligation on the part of the Assessee to withhold tax at source under section 195 of the Act. Resultantly, we delete the addition made by the Assessing Officer. This ground is allowed."*

22.1 The Assessee at last claimed that in above cases, the Ld. Assessing Officers have treated reimbursement of salary expenses to foreign company as FTS relying on the decision of Hon'ble Delhi High Court in the case of **Centrica India Offshore (P.) Ltd (supra)**, but the Hon'ble ITAT and Hon'ble Courts have held that the reimbursement of such salary expenses were not FTS.

22.2 The Ld. DR by relying on the decisions in the cases of Centrica (supra) and C.C., C.E. & S. T. Bangalore v. Northern Operating Systems (P.) Ltd. [2022] 138 taxmann.com 359 (SC) argued that the ex-patriate employees were employees of Serco UK and not of the Assessee and hence, this was contract for service and part-salary reimbursement was FTS.

22.3 We have given thoughtful consideration the afore-stated contentions raised by the parties. For better understanding and clarity, some of the differences as pointed out by the Assessee in the Assessee's case and Centrica and Northern Operation cases (supra), are summarized as under:

Chart
Assessee ---Centrica

Parti-culars	**Centrica India Offshore (P.) Ltd**	**Appellant- Serco India Pvt. Ltd**
Initial year of operation	In Centrica's case, the Indian company was a newly formed entity and did not have the requisite technically trained human resources. In this case, the Hon'ble High Court had observed that the secondees were not only providing services to the Indian company in the initial period but also ensured that going forward, the skill set of the other employees of Indian company was built and these services could be continued by them without assistance from secondees.	In the instant case, the appellant-Assessee company has been in existence for a very long time. It was incorporated in India on 27.02.2006. Hence, it is not a case where the expatriate employees can be said to be deputed to India to assist the Indian entity in aiding in establishing the operations in the initial years of its establishment or to transfer any technical knowledge etc. to the local employees in the initial phase of its operation.
Knowledge of	Centrica India has asked the overseas entity to	The present case is not a case of initial support and

various process and practices	provide staff with knowledge of various processes and practices employed by overseas entity and experience in managing and employing such processes and practices. The Indian company had admitted that the reason for secondment was to provide support during the initial years till the necessary skillset was acquired by the resident employees. Therefore, it was held that the secondees had transferred their technical ability and had made available their technical know-how for future consumption. (Para 32 of judgment)	appellant company already had plenty of local employees who were well qualified and possess the requisite knowledge to carry out their duties in India. (*Reference: pages 21 & 22 of TPO order regarding 'Employees Profile of the Assessee'*). The expatriate employees were employed for carrying on the routine business activities as CEO, CFO and HR Officer under the **exclusive** control and supervision of the Appellant company. They were not rendering any technical services. The expatriate employees were recruited by the appellant company to carry on routine business activities as its employees.
Pay roll	In this case, the seconded employees were not specifically taken into employment by the Indian company. The employees continued to remain on the payroll of the overseas entities who used to pay and disburse the salaries. (Para 4 of judgment)	The expatriate employees were taken into employment and were on pay roll of the appellant company. The appellant was **solely responsible** to pay salary and other emoluments to these expatriate employees. (Para 3.1 of the Agreement)
Right to claim salary	The right of the seconded employees to seek their salaries and other emoluments was against the overseas entities. They cannot claim it as of right against the applicant. (Para 8 of judgment)	The right of the expatriate employees to seek their salary and other emoluments was against the appellant company. Serco India Employees shall not have any legal recourse to SERCO UK for any conflicts arising in relation to their

		employment with SERCO India. (Para 4.10 of the Agreement)
Release and recruitment	In this case, the seconded employees were not released by the foreign company during the period of secondment. [Para 36 of judgment-...*In fact, even the OECD Commentary on Article 15 of the Model Convention, on which learned counsel for CIOP has placed great reliance, interestingly notes that "the situation is different if the employee works exclusively for the enterprise in the state of employment and was* ***released*** *for the period in question by the enterprise in his state of residence". This was clearly, and critically, not done in this case.]*	In the instant case, the 'Salary Reimbursement Agreement' clearly states that the expatriate employees were **released** by the foreign company and **recruited** by the appellant company and would work **exclusively** for the appellate company. (Para 4.2 of the Agreement). Serco UK **does not have any lien** on employment of Serco India Employees. (Para 4.14 of the Agreement). The expatriate employees shall work under the **exclusive** direction and supervision of the appellant company during their employment in India. (Para 4.4 of Agreement)
Termination of employment	No such right with Centrica India.	The appellant has right to terminate the employment of expatriate employee with Serco India. (Para 4.8 of Agreement) and that Serco UK was not under any obligation to replace any such employees. (Para 4.9 of the Agreement)
Accrual of money	In Centrica's case, the Hon'ble High Court observed that the money paid by CIOP to the overseas entity accrues to the overseas entity, which may or may not employ it for payment to the	In the instant case, the appellant Indian company **inform** SERCO UK the amount of the part salary in foreign currency that should be paid to these expatriate employees on behalf of the appellant.

	secondees, based on its contractual relationship with them. (Para 40 of judgment)	Accordingly, SERCO UK paid part salary to these expatriate employees and thereafter the same would be reimbursed to Serco UK. Thus, SERCO UK was a conduit only to pay part of salary of appellant's employees and the money never accrued to SERCO UK. (Para 3.2 of Agreement)

Chart
Appellant - Northern Operating Systems

Particulars	**Appellant- Serco India Pvt. Ltd**	**Northern Operating Systems (P) Ltd 111`1**
Release & recruitment	In the instant case, the 'Salary Reimbursement Agreement' clearly states that the expatriate employees were **released** by the foreign company and **recruited** by the appellant company and would work **exclusively** for the appellate company. (Para 4.2 of the Agreement). Serco UK **does not have any lien** on employment of Serco India Employees. (Para 4.14 of the Agreement). The expatriate employees shall work under the **exclusive** direction and supervision of the appellant company during their	In this case, the seconded employees were not released by the foreign company during the period of secondment.

	employment in India. (Para 4.4 of Agreement)	
Employment Contract	The Assessee Serco India entered into Employment Contract with each employee and salary and other allowances were decided by the Assessee.	In this case the foreign company issued 'Letter of Undertaking' to seconded employees and salary and other allowances were decided by the foreign company. Even the foreign company made arrangement directly with the landlord/owner of the property in Bangalore for accommodation of such employees.
Pay-roll	The expatriate employees were taken into employment and were on pay roll of the appellant company. The appellant was **solely responsible** to pay salary and other emoluments to these expatriate employees. (Para 3.1 of the Agreement)	The employees continued to remain on the payroll of the overseas entities who used to pay and disburse the salaries. [ARTICLE 1 of SECONDMENT "*The employees seconded to NOS shall continue to be remunerated through the payroll of NTMS*".]
Right to claim salary	The right of the expatriate employees to seek their salary and other emoluments was against the appellant company. Serco India Employees shall not have any legal recourse to SERCO UK for any conflicts arising in relation to their employment with SERCO India. (Para 4.10 of the Agreement)	The right of the seconded employees to seek their salaries and other emoluments was against the foreign company.
Replacement of any	The appellant has right to terminate the employment of	In case Indian company rejects the employees selected for

employee	expatriate employee with Serco India. (Para 4.8 of Agreement) and that Serco UK was not under any obligation to replace any such employees. (Para 4.9 of the Agreement)	secondment, foreign company will give replacement of such employee. [ARTICLE II – Para (E)]

22.4 We also observe that the Ld. DRP, after examining the points of difference of this case, has accepted the distinction between the facts of the Assessee and *Centrica* case by observing as under:

> *" That aforesaid agreement is also supported by a detailed employment contract setting out the terms of employment. The Employment Contract and Salary Reimbursement Agreement when read together* ***do point out some points of distinction vis-a-vis the Centrica*** *particularly that employees have been released from their work at Serco UK and subsequently entered into a separate local employment agreement with Serco India."*

However, the Ld. DRP applied the case of Centrica India by observing as under:

> *"But a cleverly drafted Agreement that attempts to adhere with the letter but not the spirit of the Centrica decision would be a case of form overriding substance".*

22.5 We also observe that the Hon'ble Karnataka High Court in the case of M/s Flipkart Internet Private Limited V. DCIT (International Taxation), Bangalore [2022] 448 ITR 268 (Kar) has also considered the identical situation, wherein the Revenue has relied upon the judgment of the apex court in **Centrica India Offshore (P.) Ltd (supra)** and the Hon'ble High Court held as under:

> Distinguishing the Judgment in Centrica India Offshore (P.) Ltd. v. Commissioner of Income Tax-I, New Delhi13

(i) The petitioner had challenged the order of the 'Authority for Advance Ruling' dated 14.03.2012 by virtue of which the Authority had held that the income accruing to the Overseas Entities in view of the existence of a Service Permanent Establishment (Service PE) in India and that tax was liable to be deducted under Section 195.

(ii) The question referred for advance ruling was as to whether the reimbursements made by the petitioner to the Overseas Entities of the actual costs of expenses incurred under the Secondment Agreement is in the nature of income accruing to the Overseas Entities.

(iii) In the challenge before the High Court, the High Court had framed the issue for consideration as to whether the secondment of employees falls within provision of 'DTAA' which embodies the concept of 'Service PE' (see para-29). (2014) 227 Taxmann 368 (SC)

(iv) The Delhi High Court has recorded a finding which however is a finding on facts: (a) That the rendition of service constituted "included service" that made available skill behind that service to the other party. (b) That the control over the employment by the Overseas Entity was overriding and has approved broadly regarding the existence of Service PE in India. (c) That the reimbursement is a matter to be demonstrated and the nomenclature cannot be determinative and mere payment of costs where the Entities are related would not take such payment out of the consideration of necessity to deduct. (v) It must be noted that the conclusion in Centrica (supra) does not further the case of Revenue, as the decision was rendered in the context of facts and on the basis of the material available.

(vi) It must be noted that there was a reiteration of the necessity of demonstration of 'make available' apart from rendering of the requisite service for satisfaction of 'FIS'.

(vii) As regards reimbursement is concerned, the Court has merely reiterated that it is not the nomenclature that it is indeed an actual reimbursement that is required. Further, the Court, in light of the material has recorded a finding of the existence of Service PE by implication.

(viii) All such findings do not take away from the requirement of establishing that:

> *(a) The Domestic Entity was the real employer, that there was no Service PE in the local Country.*

(b) That there was indeed a reimbursement in the true sense and that cost payment among related Entities was to be ignored.
(c) That 'FTS' satisfied the 'make available' test.

Finally, the judgment in Centrica is on the facts and material on record.

22.6 The Hon'ble Karnataka High Court in M/s Flipkart Internet Private Limited (supra) also considered the applicability of decision in *C.C., C.E. & S.T. v. Northern Operating Systems Pvt. Ltd. [2022] 101 GSTR 391 (SC) ; Civil Appeal Nos. 2289 to 2293 of 2021,* and held that this judgment was rendered in the context of service tax and hence, not applicable for Income Tax Act to determine whether the payment made is for fees for included services, by holding 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 'FTS' in light of the further requirement of "make available."

22.7 We have given thoughtful consideration to the issue qua applicability of Centrica and Northern decisions (supra) to the instant case. It is well-settled that the interpretation of any expression used in the context of any statute is not automatically to be imported while interpreting the like expression of other statutes. The expression used in any statute has to be interpreted in the light of its own context and object. The meaning assigned to a particular word in a particular statute cannot be imported to a word used in a different statute. Taxation depends upon the language of the charging section and what is brought to tax within the four corners of the charging section. Therefore, one should be careful and cautious when applying the ratio of judgments relating to one tax enactment as a precedent in a case relating to another tax enactment. This rule of caution is important and should not be overlooked, more so when the language of the enactment and the object and purpose of the enactment are different. It is also well-settled that ratio decidendi of a case from one enactment, cannot be applied to an altogether different legislation.

22.8 From the facts and circumstances as demonstrated by the parties, the observations made by Ld. DRP and the points as summarized in the said charts and on examination by us independently, we are of the considered view that the facts and issues involved in the cases of Centrica and Northern Operating Systems(supra) were altogether different and distinct from the facts and issues involved in the Assessee’s case, as the Hon’ble Apex

Court, in those cases dealt with different facts, issues and Acts and therefore dictum laid down in those case, is not applicable to the instant case.

22.9 We also observe that the CBDT, vide its Circular No. 720 dated 30-08-1995(PB-703) has clarified that payment of any sum, shall be liable for deduction of tax, only under one section and therefore are in concurrence with the Assessee to the effects that as the Assessee deducted TDS u/s 192 on such expenses debited as salaries paid to the ex-patriate employees and therefore in view of the above Circular No. 720, not liable to deduct the TDS under any other section.

22.10 We also observe as claimed by the Assessee and not refuted by the ld. DR that the Assessee company has also reimbursed the part salary expenses of the employees expatriate to Serco UK in previous as well as in subsequent years. For clarity and ready reference details are reproduced below:

	AY 2010-11	*AY 2011-12*	*AY 2012-13*	*AY 2013-14*
Reimbursement of part salary expenses to Serco UK	*60,77,086*	*2,99,20,448*	*4,50,99,069*	*7,60,52,207*
Disallowance u/s 40(a)(i)	*No*	***Yes***	*No*	*No*

In fact, by not making any disallowance u/s 40(a)(i) of the Act in earlier and subsequent years (*except in A.Y. 2011-12 under consideration)*, the Revenue Department has accepted and strengthened the case of the Assessee qua salary expenses and consequently deduction of TDS u/s 192 of the Act. Though the provision of res judicata is not applicable to the income tax proceedings as every assessment year is distinct and independent, however considering the peculiar facts that there is no difference in

facts and circumstances in all the assessment years referred to above and therefore, in view of judgment of Hon'ble Apex Court in Radhasoami Satsang v. CIT [1992] 60 Taxman 248/193 ITR 321 (SC) wherein the Hon'ble Apex Court propounded the 'rule of consistency', no such disallowance as made in this year i.e. A.Y. 2011-12 is warranted.

22.11 At last, we reiterate, that the employees to whom the part salary were paid by Serco UK on behalf of the Assessee, have admittedly offered such salary amount as income by filling their Returns of Income in India and duly paid the income tax applicable and ITRs filled by said employees have also been accepted and therefore by treating the salary amount as "FTS" provided, shall jeopardize the rights of Assessee and its employees and Serco as well and also amount to double taxation.

23. Hence on the aforesaid analyazations and observations made and respectfully following the judgments of Hon'ble Courts on the issues involved in this case, we are inclined to hold that the Assessee has reimbursed the salaries amount paid to its employees seconded through Serco UK and not the Fees for any Technical Service (FTS) and therefore was not liable to deduct the TDS u/s 195 of the Act and thus in our considered view, correctly deducted the TDS u/s 192 of the Act and therefore no addition/disallowance is warranted.

24. We accordingly direct the Ld. AO, to exclude 'TCS' and 'eClerx' from comparables companies and determine the ALP accordingly and also to delete the addition of Rs. 2,99,20,449/- which was made on account of disallowance under section 40(a)(i) of the Act, for non- deduction of TDS u/s 195 of the Act.

25. In the result, appeal filed by the Assessee stands allowed.

Orders pronounced in the open court on 27th June, 2023.

Sd/-	*Sd/-*
(Anil Chaturvedi) Accountant Member	(N. K. Choudhry) Judicial Member

SK, Sr.PS.

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent
3. DR, ITAT, Delhi
4. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Delhi