IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER &
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

I.T.A. Nos. 2788 & 2789/Ahd/2017
(Assessment Years: 2009-10 & 2014-15)

Shell International B.V., C/o. B.S.R. Associates & LLP, 903, Commerce House V, Nr. Vodafone House, Prahaladnagar, Corporate Road, Ahmedabad-380051	Vs.	Deputy Commissioner of Income Tax, International Taxation-I, Ahmedabad-380014
[PAN No.AAHCS9360D]		
(**Appellant**)	..	(**Respondent**)

I.T.A. Nos. 2388 & 2389/Ahd/2018
(Assessment Years: 2010-11 & 2011-12)

Shell International B.V., C/o. B.S.R. Associates & LLP, 903, Commerce House V, Nr. Vodafone House, Prahladnagar, Corporate Road, Ahmedabad-380051	Vs.	Assistant Commissioner of Income Tax, International Taxation-I, Ahmedabad-380014
[PAN No.AAHCS9360D]		
(**Appellant**)	..	(**Respondent**)

I.T.A. Nos. 175 & 176/Ahd/2017
(Assessment Years: 2012-13 & 2013-14)

Shell International B.V., C/o. B.S.R. Associates & LLP, 903, Commerce House V, Nr. Vodafone House, Prahaladnagar, Corporate Road, Ahmedabad-380051	Vs.	Deputy Commissioner of Income Tax, International Taxation-I, Ahmedabad-380014
[PAN No.AAHCS9360D]		
(**Appellant**)	..	(**Respondent**)

I.T.A. Nos. 1657&1658/Ahd/2019
(Assessment Years: 2015-16 & 2016-17)

Shell International B.V., C/o. B.S.R. Associates & LLP, 903, Commerce House V, Nr. Vodafone House, Prahladnagar, Corporate Road, Ahmedabad-380051	Vs.	Assistant Commissioner of Income Tax, International Taxation-2, Ahmedabad-380014
[PAN No.AAHCS9360D]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 563/Ahd/2020
(Assessment Year: 2017-18)

Shell International B.V., C/o. B.S.R. Associates & LLP, 903, Commerce House V, Nr. Vodafone House, Prahladnagar, Corporate Road, Ahmedabad-380051	Vs.	Assistant Commissioner of Income Tax, International Taxation-2, Ahmedabad-380014
[PAN No.AAHCS9360D]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 110/Ahd/2022
(Assessment Year: 2018-19)

Shell International B.V., C/o. Shell India Markets Pvt. Ltd., Trent House, 1st Floor, G-Block, Plot No. C-60, Bandra Kurla Complex, Bandra East, Mumbai-400051	Vs.	Assistant Commissioner of Income Tax, International Taxation-1, Ahmedabad-380014
[PAN No.AAHCS9360D]		
(**Appellant**)	..	(**Respondent**)

Appellant by :	Shri S. N. Soparkar, Sr. Advocate, Shri Parin Shah, Shri Ankit Gandhi & Ms. Dhruvi Salot, A.Rs.
Respondent by:	Dr. Darsi Suman Ratnam, CIT D.R.

Date of Hearing	23.02.2024 & 06.03.2024
Date of Pronouncement	20.03.2024

O R D E R

PER SIDDHARTHA NAUTIYAL, JM:

These appeals have been filed by the Assessee against the orders passed by the Deputy Commissioner of Income Tax (International Taxation-I), Ahmedabad and Assistant Commissioner of Income Tax (International Taxation-1), Ahmedabad, Assistant Commissioner of Income Tax (International Taxation-2), Ahmedabad vide orders dated 05.10.2017, 03.10.2018, 17.11.2016, 05.10.2017, 19.09.2019, 11.09.2019, 29.09.2020 &

24.02.2022 passed for the Assessment Years 2009-10 to 2018-19. There are various Assessment Years before us for our consideration, however, since there are common facts and issues for consideration for all the impugned Assessment Years, all the appeals filed by the assessee are being taken up together.

2. We shall first take up Assessment Year 2011-12, and discuss the grounds of appeal raised by the assessee. This year shall serve as the lead Assessment Year, and thereafter as we take up the subsequent Assessment Years and our observations for this Assessment Year would apply to the years as well, wherever applicable. For additional services rendered by the assessee for the subsequent years / additional grounds taken, we shall deal with them separately for each of the Assessment Years.

Assessment Year 2011-12

3. The brief facts of the case are that the assessee is a company based out of the Netherlands. For the impugned years under consideration, the assessee provided various services to its group companies based in India. For Assessment Year 2011-12, the assessee provided certain services which were offered to tax as fee for technical services/royalty. However, revenues received from rendering certain services were claimed by the assessee as non-taxable in India. The Assessing Officer analysed the nature of services for various years under consideration, and held that the services were taxable as royalty/fee for technical services under the income tax act, read with the India-Netherlands tax treaty. The issue for consideration before us primarily revolves around the taxability of aforesaid services, which have been held by the Department to be taxable as royalty/fee for technical services for various years under

consideration. The primary contention of the assessee is that these services do not qualify as royalty/fee for technical services and in view of the recent developments and judicial precedents on the subject in favour of the assessee, no taxability arises in India in respect of the aforesaid services. The stand of the Department, however continues to be that the services are taxable as royalty/fee for technical services, looking into the nature of services and taking into consideration the surrounding facts and circumstances of the instant case.

4. The assessee has raised the following grounds of appeal for Assessment Year 2011-12:

> *"1. The learned AO based on the directions of the DRP has erred on the facts and in law in assuming jurisdiction under Section 147 / 148 of the Act, even when the conditions precedent for initiation of reassessment proceedings and various applicable timelines and requirements have not been complied with. Therefore, initiation of reassessment proceedings is bad in law, void ab initio and liable to be quashed.*
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> *2. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the aggregate cost recovery of Rs. 7,15,01,526 received from Hazira LNG Private Limited ('HLPL'), Hazira Port Private Limited ('HPPL'), Shell India Markets Private Limited ('SIMPL'), and Shell Technology India Private Limited (merged with SIMPL) ('STIPL') for HR Shell People Support as royalty under Section 9(1)(vi) of the Act and Article 12 of India – Netherlands tax treaty ("Tax Treaty").*
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> *3. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 1,83,16,548 received from STIPL for CHR recruitment fee as fees for technical services under Section 9(1)(vii) of the Act and Article 12 of the Tax Treaty.*
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> *4. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 30,50,296 received from SIMPL for IT migration support as fees for technical services under Section 9(1)(vii) of the Act and Article 12 of Tax Treaty.*
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> *5. Without prejudice to the above mentioned grounds, the learned AO based on the directions of the DRP has erred on the facts and in law in disregarding the fact that the amount received for the above mentioned cost recoveries is a mere allocation of cost incurred by SIBV without markup and hence the same is not chargeable to tax in India.*

6. The learned AO has erred in levy of interest under Section 234A and 234B of the Act.

7. The learned AO based on the directions of the DRP has erred in initiating penalty proceedings under Section 274 r.w.s. 271(1)(c) of the Act against the Appellant.

The Appellant reserves the right to add, amend, alter or vary all or any of the above grounds of appeal as they or their representative may think fit."

Ground number 1: taxability of HR Shall People Support as royalty:

5. During the impugned year under consideration, the assessee had provided HR Shell People Support Services to its related group companies in India. The Assessing Officer observed that on perusal of the local services agreement (LSA), it did not mention any date and therefore, it is not clear whether this agreement is applicable for the impugned year under consideration. The AO observed that the assessee had furnished an addendum to the LSA, which was signed on 21st September 2016. Accordingly, on analysis of the LSA, the addendum submitted by the assessee and the copies of sample invoices, the AO was of the view that the services pertained to use of Shell HR software, along with incidental services and such payments are chargeable as royalty under the Act, read with the tax treaty provisions. So far as the contention of the assessee that these services have been rendered without any mark up, and on the cost to cost basis, the AO rejected the argument on the ground that taxation of royalty both as per the provisions of the Act as well as the Treaty is provided on "gross basis". The taxation of royalty is not on net basis and had it been so, out of the receipts, expenses would have been required to be deducted for computing the net income. As regards the argument of the assessee that the payment received is for off the shelf software product, which is a copyrighted article and the argument of the assessee that the software products are standardized and not designed/customized, the AO relied

on the case of Samsung Electronics Co Ltd (Karnataka High Court) to reject the arguments of the assessee. The AO further observed that the assessee could not produce the copy of board meeting/decision or any communication from the Indian associated enterprises, which show that any decision was taken to avail the services from the assessee company, by the Indian subsidiaries. Accordingly, the AO held that the above services qualify as royalty under the Act, read with the Tax Treaty.

6. The DRP confirmed the order of the Assessing Officer. The DRP observed that for assessment in 2014-15, the facts of the assessee with respect to the aforesaid services, along with additional evidences which were filed by the assessee, were analyzed in detail. Since the facts and issues for consideration are identical for the impugned Assessment Year as those for Assessment Year 2014-15, and there was no material change in facts, the DRP confirmed the findings of the Assessing Officer.

7. The assessee is in appeal before us against the aforesaid order, holding the Shell HR services as royalty under the Act, read with Tax Treaty.

8. Before us, the Counsel for the assessee submitted that firstly, the fact that services have been rendered by the assessee to its group companies in India, has not been disputed at any stage the proceedings. Even though, the LSA along with the addendum was not present during the impugned Assessment Year, the catalogue of services was available, and was also filed before the tax authorities, during the course of assessment proceedings. Further, the tax authorities have never doubted the nature of services which had been rendered and also never doubted that the services had in fact been rendered by the assessee.

9. Secondly, it was submitted before us that the Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence (P.) Ltd. 125 taxmann.com 42 (SC)** has overturned every decision on which reliance was placed by the taxation authorities, for the purpose of holding that the payments qualify as royalty under the Act, read with the Tax Treaty.

10. Thirdly, the Counsel for the assessee submitted that HR shell people support services have been treated as non-taxable by the Assessing Officer in assessment proceedings for the A.Y. 2018-19, AY 2020-21and A.Y. 2021-22. Accordingly, it was submitted that when the Department in the later Assessment Years have themselves held that the payments do not qualify as royalty under the Act, read with the Treaty, in light of the Department's own stand that these payments do not qualify as royalty for later years, for the impugned Assessment Year as well, the payment cannot be held to be taxable as royalty.

11. Fourthly, it was argued before us that in respect of Shell India Markets Private Limited (SIMPL, the Indian payer for HR Shell Services) from whom majority of cost recharge is recovered, proceedings under Section 201 of Act were carried out for non-withholding of tax at source at the time of making payment for availing HR Shell Services. The Hon'ble Mumbai ITAT in case of **SIMPL (ITA No. 6064, 6065, 6066 and 6067/Mum/2019)** has held that the payments made by SIMPL to the assessee on account of HR Shell Services is not taxable as royalty following the Hon'ble Supreme Court ruling in case of **Engineering Analysis Centre of Excellence (P) Ltd. supra**. The assessee placed reliance on the decision of Hon'ble Mumbai ITAT in case of **SIMPL (ITA No.926 & 927/Bang/2012)**.Accordingly, in light of the above arguments,

the Counsel for the assessee submitted that the HR Shell services to not qualify as royalty under the Act, read with the Tax Treaty.

12. In response, DR submitted that for the impugned year under consideration, there was no valid agreement in place, so as to have a complete understanding of the services rendered by the assessee to its group companies in India. The assessee has placed reliance on an addendum, which was signed in the year 2016, and there was no valid agreement in place for the impugned year under consideration. Accordingly, when the nature of services itself is not very clear, assessee cannot place reliance on the Tax Treaty provisions and also on the decision of Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence (P.) Ltd. supra**.

13. Secondly, it was argued that the services were provided through the medium of Intranet, and as held by the Assessing Officer, in the assessment order, the services pertained to use of Shell HR software and therefore, the services are taxable as royalty under the Act read with the tax treaty. Accordingly, DR placed reliance on the observations made by the Assessing Officer/DRP in their respective orders.

14. We have heard the rival contentions and perused the material on record.

15. First, before deciding the issue, it would be useful to briefly discuss the nature of services rendered by the assessee. From the documents placed on record, we observe that HR Shell People Support Services is basically the support provided by the assessee to various HR -related requirements of Shell group companies. It involves various services like open resourcing (identification of vacancies within the group, coordination within the

employees for filling up such vacancies etc.), management services (preparation of group wide HR related matters such as guidance, procedures etc), personnel record maintenance (maintenance of records of employees of Shell group such as compensation structure, time and attendance, other benefits etc), Shell Open University (making arrangements for various managerial online courses for the employees of Shell group) etc. These services are provided through the HR portal known as "HR-online". In the instant facts, we observe that the nature of services and the fact of the assessee having rendered the services to its group companies, is not in dispute by the Tax Authorities. The assessee had submitted the catalogue of services rendered by the assessee, during the course of assessment proceedings. Even from the order of DRP, wherein it held that the facts and additional evidences for the impugned Assessment Year is similar to that of Assessment Year 2014-15, the nature and fact of HR Shell support services having been provided by the assessee is not in dispute. Therefore, we shall analyze the taxability of services with the understanding that the nature and the fact of the services having been rendered by the assessee is not under dispute by the Tax Authorities.

16. On going to the facts of the instant case, we are inclined to hold that the payments do not qualify as royalty for several reasons. Firstly, the Department in the subsequent years (Assessment Years 2018-19, 2020-21 and 2021-2022) has itself not tax the aforesaid payments as royalty. Secondly, we observe that the Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence Private Limited v. CIT (supra)** has effectively overturned all the decisions, on which reliance was placed by the tax authorities to hold that the payments qualify as royalty. Further, the Tribunal in the case of mirror transaction, while dealing with the issue of non-deduction of tax at source with

respect to the aforesaid payments made by the Indian group companies to the assessee, held that since the payments qualify as royalty under the Act, read with the Tax Treaty, and therefore, by placing reliance on the decision of Hon'ble Supreme Court, ITAT held that the Indian companies were not liable to deduct tax at source on such payments under Section 195 of the Act. In the case of **Shell India Markets Private Limited v. ITO I.T.A. Nos. 6064, 6065, 6066 and 6067/Mum/2019 (Assessment Years : 2009-10 to 2012-13)**, the Tribunal made the following observations:

> *"Upon careful consideration, **we find that assessee's plea that issue is squarely covered in favour of the assessee by the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited v. CIT (supra) is acceptable. The Hon'ble Supreme Court has elaborately examined the issue and has decided the issue in favour of the assessee. The Hon'ble Supreme Court has set aside the decision of Hon'ble Karnataka High Court in the case of Samsung Electronics Company Ltd. (supra), which has been relied upon by the AO.** We may gainfully refer to the concluding portion of Hon'ble Apex Court order in that case as under:- "Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in Section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (Section 9(1)(vi), along with Shell India Markets Private Limited 12 explanations 2 and 4 thereof, which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases. Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in Section 195 of the Income Tax Act were not liable to deduct any TDS under Section 195 of the Income Tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) (supra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed." 12. Respectfully following the aforesaid precedent from Hon'ble Supreme Court, we set aside the orders from authorities below, decide the issue in favour of the assessee. 13. In the result, these appeals by the assessee are allowed."*

17. Accordingly, looking into the instant facts, and the judicial precedents on the subject, we are of the considered view that payments for providing HR Shell People Support Services do not qualify as Royalty under the Act, read with the Treaty.

18. In the result, ground number 1 of the assessee's appeal is allowed.

Grounds 2, 3 and 4 of assessee's appeal: Ld. AO erred in holding that CHR Recruitment Fees, External Information Services (license for online databases) and IT Migration Support Services qualify as fee for technical services under Section 9(1)(vii) of the Act read with Article 12 of Tax Treaty

19. We shall first briefly discuss the nature of services performed by the assessee and the Assessing Officer's position with respect to each of the respective services. Since largely common arguments have been taken by the Counsel for the assessee and DR with respect to the aforesaid services, therefore, all the three grounds of appeal raised by the assessee are taken up together.

CHR recruitment services

20. Under the CHR recruitment services, the assessee manages the global recruitment and attraction team of Shell group. This team supports the regional recruitment team in the regular recruitment process apart from group related activities such as laying path to talent acquisition and presenting Shell as an attractive place. The cost incurred by the global recruitment team is shared across various shell entities, which have availed the services of the recruitment team. The said receipts towards recruiting candidates for respective Shell

entities and the cost charge out is based on the actual number of recruitments made.

21. The Assessing Officer was of the view that the services qualify as fee for technical services since under the CHR recruitment service, the expertise and experience of the global recruitment and attraction team of the assessee is being offered to its affiliates. The nature of work performed by the Shell group companies is highly technical in nature. To attract such highly technical staff, industry experience and expertise is a sine qua non. The global recruitment and attraction team has accumulated such experience and expertise in conducting recruitment of highly technical staff. This team provides consultancy and assists the regional recruitment team of the affiliates in the regular recruitment process apart from the group related activities such as laying path to talent acquisition and presenting the Shell group as an attractive place. The costs incurred by the global recruitment team are shared across various Shell entities which have availed such consultancy services of the recruitment team possessing wide experience in the field. Thus, the critical decision-making function of recruitment has been performed by the affiliates through the assistance/consultancy of the assessee. Hence clearly identifiable and highly specialized services, requiring expertise and industrial experience have been provided by the assessee.

External information services (license fees patent and subscription)

22. Under these services, the assessee subscribes to various EIS providers on behalf of Shell group and the cost for the same are pooled in by the assessee. The services provided by EIS service providers mainly consist of providing standard research reports, newsletters, market data analysis etc. The

services are akin to providing access to online databases for obtaining such reports. The databases prepare and maintain standard reports, journals etc pertaining to the oil and gas sector. The group companies access the databases for the purpose of using it internally. The assessee has an arrangement with various Shell group entities for use of these EIS services. The cost incurred by assessee for EIS services is charged to Shell group entities based on their usage of EIS services.

23. The Ld. Assessing Officer was of the view that under the external information services, the expertise and experience of the global support team of the assessee is being offered to its affiliates. The nature of work performed by the Shell group companies is highly technical in nature. This team provides consultancy and assists the regional team of the affiliates in providing standard research reports, newsletters and market data analysis. The costs incurred by the assessee company are shared across various Shell entities which have availed such information. Thus, the critical decision-making function has been performed by the affiliates through the assistance/consultancy of the assessee. Hence, it is established that identifiable and highly specialized services, requiring expertise and industrial experience have been provided by the assessee.

IT migration services:

24. Under these services, the assessee has set up a "shared services Centre" to provide a shared services to Shell group. The services pertaining to guidance/support provided by the assessee in setting up IT infrastructure of the shared services centers. Also, IT services in relation to migration of certain operations from other similar centers over the globe to Indian Centre have also

been provided by the assessee. Based on the time spent by the assessee's personnel assisting SIMPL in setting up its IT hardware system, the assessee has recharged the cost incurred.

25. The Ld. Assessing Officer was of the view that under the Shell inter-com charges, the expertise and experience of the global support team of the assessee is being offered to its affiliates. The nature of expat services work performed by the Shell group companies is highly technical in nature. This team provides consultancy and assists the regional team of the affiliates in providing services in the nature of tax administration. The costs incurred by the assessee company are shared across various Shell entities which have availed such facilities. Thus, Shell intercom function has been performed by the affiliates through the assistance/consultancy of the assessee. Hence it is established that clearly identifiable and highly specialized services, requiring expertise and experience have been provided by the assessee.

26. Further, the Ld. Assessing Officer was of the view that in all the above three services, that providing of such services would invariably lead to imparting of suitable skill sets / knowledge in the hands of the affiliates in the area in which the services are rendered with consequent improvement in experience and skill set of local employees of the affiliates. In this case, the assessee has, through its personnel, provided 'technical' services to assessee, especially since the DTAA definition of FTS expressly includes the provision of the services of personnel. Further as per the definition of FTS in the DTAA, when imparting of suitable experience or skill possessed by the assessee to the affiliates takes place, it amounts to making available the FIS/FTS and therefore the amounts received are taxable as per the DTAA. The services are enduring and they help in promoting the business of the affiliates. The employees of the

affiliates are in a position to and actually they are expected to use the knowledge gained, in the business of the affiliates. Thus, knowledge and know-how are made available to the affiliates. Hence, on an understanding of the overall effect of the services, it has to be held that the technical knowledge, experience, and skill are made available to the affiliates. Further on perusal of the nature of services, the Ld. Assessing Officer was of the view that the service provider possesses or have access to resources, know-how and expertise required to provide the covered services to service recipient. Thus, the assessee is providing services which require resources, know how, experience, skill and expertise and the service provider has been selected since it is capable of delivering such services which require resources, knowhow and expertise. Thus, the services are highly specialized services requiring expertise and skill. According to the Ld. Assessing Officer, a perusal of the services makes it obvious that the assessee provides highly technical services which are used by the affiliates of the assessee for taking important and strategic decisions.

27. The Ld. Assessing Officer further relied on the case of **GVK Industries Ltd. v. ITO 54taxmann.com 347 (SC)**, where the assessee-company was incorporated for the purpose of setting up a 235 MW gas based power project. With the intention to utilize the expert services of qualified and experienced professionals who could prepare a scheme for raising the required finance and tie-up the required loan, assessee sought services of a consultant and eventually entered into an agreement with NRC, a Switzerland based company. The Hon'ble Supreme Court held that payment made to Swiss company for rendering such consultancy services amounted to 'fee for technical service' liable to tax in India. The Hon'ble SC observed that as the factual matrix in the

case at hand would exposit, NRC had acted as a consultant. It had the skill, acumen and knowledge in the specialized field i.e. preparation of a scheme for required finances and to tie-up required loans. The nature of service rendered by the NRC, can be said with certainty would come within the ambit and sweep of the term 'consultancy service' and, therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be taxable under the head 'fee for technical service. Accordingly, the Assessing Officer relied upon the aforesaid decision to come to the conclusion that the instant services were in the nature of consultancy services, and hence in the view of the aforesaid decision rendered in the context of India-Swiss tax treaty, the services qualified as fee for technical services.

28. The assessee is in appeal before us against the aforesaid services being taxed as fee for technical services under the Act, read with India Swiss Tax Treaty. The Counsel for the assessee took before us various arguments, which can be primarily summed up as Firstly, under the India-Netherlands Tax Treaty, there is a specific clause, which provides that unless the services which were provided “make available” technology to the recipient of services, such services do not qualify as fee for technical services under the Treaty Law. In the instant facts, looking into the nature of instant services, there is nothing on record which would establish that technology was “made available” to the recipients of services, so as to fall within the ambit of fee for technical services under the India-Netherlands tax treaty. Secondly, the Counsel for the assessee argued that reliance on the GVK industries case supra is misplaced for the simple reason that the aforesaid case was rendered in the context of domestic Income Tax law provisions and the interpretation of India-Switzerland tax treaty was not under consideration before the Hon’ble Supreme Court, since

the same was never pressed into arguments. Thirdly, the Counsel for the assessee submitted that the aforesaid services have been rendered on cost to cost basis and without any mark up, and hence since, there is no income element while rendering the aforesaid services, in absence of income element/profit element, the services are not liable to taxed as fee for technical services in India. Fourthly, it was argued that these services qualify as "managerial services" and since the definition of fee for technical services under the India-Netherlands tax treaty does not contain the term "managerial services", therefore, the services fall outside the ambit/scope of fee for technical services under the India--Netherlands Tax Treaty and hence cannot be subject to tax in India.

29. In response, DR placed reliance on the observations made by the Assessing Officer/DRP in respect of the aforesaid services. The DR submitted that in the instant facts, the services are clearly technical in nature, under the Indian domestic taxation laws as well as under the tax treaty law. The DR submitted that in the instant facts, clearly, technology has been made available to the recipient of services, and since both these service provider recipients are working closely with each other over a period of time, there is a transmission of knowledge during the course of rendering the aforesaid services. Further, the argument of the Counsel for the assessee that the services qualify as managerial services is also flawed, since looking into the nature of services these are primarily technical/consultancy services and fall squarely within the definition of fee for technical services under the India-Netherlands tax treaty. Further, so far as the argument of services been rendered on a cost to cost basis is concerned, the assessee has not been able to establish that there is no profit element/income element during the course of rendering the services, even if

the argument were to be accepted that in absence of any income element, the services are not taxable in India. The profit and loss account presented by the assessee is a self serving documents and nothing concrete has been placed on record to show that services have been rendered on cost to cost basis. Further, in absence of valid agreement in place for the period under consideration, the nature of services is also not clear to decide to what extent protection of "make available" clause is available to the assessee.

30. We have heard the rival contentions and perused the material on record.

31. One of the arguments which was taken before us was that the services are "managerial" in nature, and hence falling outside the scope of FTS as given under the India-Netherlands tax treaty, since the definition of FTS does not contain the term "managerial" in the India-Netherlands tax treaty. However, on going through the nature of services being rendered under consideration, we are of the considered view that the services do not qualify as "managerial services" and looking into the nature of services, these are regular technical/consultancy services being provided by the assessee towards group associate companies. The terms managerial, technical and consultancy are not defined anywhere in the Income Tax Act, 1961. In the absence of definition under Income Tax Act the common and general meaning of these terns should be taken into consideration (**GVK Industries v ITO supra**). The ordinary meaning of the term "management" involves the application of knowledge, skill or expertise in the control or administration of the conduct of a commercial enterprise or organization. Thus, if the management of all or a significant part of an enterprise is contracted out to persons other than the directors, officers or employees of the enterprise, payments made by the enterprise for those management services, it would fall within the definition of

managerial services, within the meaning of paragraph 3 (UN-MCC). However, in the instant facts, we observe that looking into the nature of services, these services are in the nature of technical/consultancy services, and in our considered view, the same do not qualify as "managerial" services, so as to take the services away from the ambit of fee for technical services. We observe that on analysis of various services which have been provided in later assessment years, the same also, going by the nature of services, do not qualify as 'managerial services'.

32. Secondly, with regard to the arguments that the services are not liable to be taxed in India since only costs incurred in rendering the services have been recovered and in absence of any income element, the services are not taxable in India as FTS/royalty, as discussed and analysed even during the course of arguments, we observe that it is not a case where there is a clear case of cost to cost reimbursement with respect to only costs having been recovered from the respective associated enterprises, which have been incurred by the assessee in rendering the services. In the instant case, though the assessee submitted/contended that while charging for the services rendered, the assessee has only recovered the cost incurred in rendering the aforesaid services and nothing over and above the cost which has been incurred for rendering the various services, has been recovered from it's associated Enterprises. However, from the facts placed on record, the assessee, in our view (and as also noted by the Department for some of the Assessment Years under consideration) has not been able to establish that only the cost which has been incurred for rendering the services through its various employees etc alone has been recovered from its group companies. It is not a case where the assessee has incurred certain costs in purchasing certain third party software or obtained

these services from a third party etc, which have been reimbursed/recovered on cost to cost basis from its associated Enterprises India. In this case, we observe that the employees of the assessee are engaged in providing certain services, and the assertion of the assessee is that the precise cost incurred in rendering of these services have been recovered from its various addicted enterprise, on a cost basis. However, in our considered view, the assessee has not been able to demonstrate that only the precise cost incurred for rendering services has been recovered, and therefore, there is no income element at the India level, during the course of rendering of the services. Accordingly, we are not inclined to agree with the aforesaid argument of the assessee.

33. Thirdly, we observe that the Counsel for the assessee has for few years also taken the plea that the services in question/under consideration are "non-technical" services in the first instance, and hence, they are falling outside the scope of technical services under the Act read with India-Netherlands tax treaty. However, on going to the nature of services for various Assessment Years under consideration before us, we are of the considered view that these services are clearly technical in nature, involving use of technology. The authority for advance rulings in the case of **Intertek testing 175 Taxman 375 (AAR)**, while explaining the scope of the term "technical" has held that the expression 'technical' ought not to be construed in a narrow sense. It has received a wide interpretation in tune with its dictionary meaning in several cases. The AAR made the following relevant observations in this regard:

> ***"10.6*** *First, we shall consider the meaning and scope of technical and consultancy services.*
>
> *What is meant by the expression 'technical'?* ***Should it be confined only to technology relating to engineering, manufacturing or other applied sciences ? We do not think so. The expression 'technical' ought not to be construed in a narrow***

sense. It has received a wide interpretation in tune with its dictionary meaning in several cases.

In Continental Construction Ltd. v. CIT [1992] 195 ITR 81 the Supreme Court observed that "the expression 'technical services' has a very broad connotation and it has been used elsewhere in the Statute also so widely as to comprehend professional services : vide Section 9(1) (vii) ". The relevant meanings of the word 'technical' given in the New Shorter Oxford Dictionary (Thumb Index Edition) are 1. ***Of a person : having knowledge of or expertise in a particular art, science, or other subject. 2. pertaining to, involving, or characteristic of a particular art, science, profession, or occupation, or the applied arts and sciences*** *generally. In CBDT v. Oberoi Hotels India (P.) Ltd. [1998] 97 Taxman 453, the Supreme Court reiterated the view that the term 'technical services' included professional services. In the case of Dean, Goa Medical College v. Dr. Sudhir Kumar Solanki [2001] 7 SCC 645, the question was whether the expression technical institutions' takes within its fold the medical colleges. The Supreme Court observed that "the dictionary meaning of the word "technical" is also "professional" and is used in contradistinction with pure sciences to prepare the professionals in applied sciences". However, we would like to observe that it is not any or every professional service that amounts to technical service. Professionalism and an element of expertise should be at the back of such services.*

There is a decision of Andhra Pradesh High Court in which the ambit of expression 'technical service' was considered. In G.V.K. Industries Ltd. v. ITO [1997] 228 ITR 564 (AP), SSM Quadri, J. speaking for the Division Bench rejected the argument of the assessee's Counsel 'that the NRC did not render any technical or consultancy service to the petitioner-company and that it merely rendered advice in connection with the procurement of loans by it, which does not amount to rendering technical or consultancy service within the contemplation of the said clause and that the technical or consultancy service should relate to the core of the business of the petitioner-company'. ***It was observed. In our view advice given to procure loan to strengthen finances would be as much a technical or consultancy service as it would be with regard to management, generation of power or plant and machinery****. From the above discussion it follows that 'success fees' fall in line with any other technical services within the ambit of Section 9(1) (vii) (b).”*

34. Accordingly, given the wide interpretation to the term “technical” having been taken by the Courts, and looking into the nature of services which have been rendered by the assessee, we are of the considered view that the services involve extensive use of technology, and the same are “technical” in nature.

35. However, we also observe that in the instant facts, the India-Netherlands Tax Treaty, contains a specific restriction in the form of "make available" clause, which restricts the definition of fee for technical services under the Treaty Law to only those cases where services have been rendered in a manner that the technology have been "made available" to the recipient of services, meaning thereby, the necessary information/knowledge has been imparted to the recipient of services in such manner, so that in the future, they have been enabled/ empowered to perform the services themselves, without any necessity of recourse to future services being provided by the assessee. It would be useful to reproduce the relevant extracts of the India-Netherlands tax treaty for ready reference:

> *"5. For purposes of this Article, "**fees for technical services**" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :*
>
> *.....*
>
> *(b) **make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design."***

36. The scope of the term "make available" was discussed at length in the case of **Raymond Ltd. v. Dy. CIT [2003] 86 ITD 791**, in the following words:

> *"Whereas Section 9(1)(vii) stops with the 'rendering' of technical services, the DTA goes further and qualifies such rendering of services with words to the effect that the services should also make available technical knowledge, experience, skills, etc., to the person utilizing the services. The making available in DTA refers to the stage subsequent to the 'making use of stage. The qualifying word is 'which'- the use of this relative pronoun as a conjunction is to denote some additional function the 'rendering of services' must fulfil. And that is that it should also 'make available' technical knowledge, experience, skill, etc. **Thus, the normal, plain and grammatical meaning of the language employed, is that a mere rendering of services is not roped in unless the person utilising the services is able to make use of the technical knowledge, etc., by himself in his business or for his own benefit***

and without recourse to the performer of the services in future. The technical knowledge, experience, skill, etc., must remain with the person utilising the services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skills, etc., from the person rendering the services to the person utilising the same is contemplated by the article. Some sort of durability or permanency of the result of the 'rendering of services' is envisaged which will remain at the disposal of the person utilising the services. The fruits of the services should remain available to the person utilising the services in some concrete shape such as technical knowledge, experience, skills, etc."

37. The scope of the term "make available" came up for consideration recently before the Gujarat High Court in the case of **Star Rays 153 taxmann.com 226 (Gujarat)**, where the Assessee, a partnership firm, was engaged in business of cutting and polishing diamonds and export of diamonds. It had made remittances qua diamond testing service for certification of diamonds to GIA USA which set up a laboratory at Hong Kong as GIA Hong Kong and claimed that said sum was not tax deductible at source. The Assessing Officer held that assessee had made payment to GIA Hong Kong Laboratory and not GIA USA and, therefore, could not claim treaty benefit between India-USA and, that assessee was liable to deduct TDS from said remittance. Invoices for payment of fees were issued by GIA USA and accounts reflected that payment was received in offshore bank account of GIA USA. The High Court held that the assessee's case was protected under India-USA DTAA as mere rendering of services could not be roped into FTS when person utilizing services was unable to make use of technical knowledge etc.

38. Recently, the issue of "make available" came up before the Hon'ble Supreme Court in the case of **Ad2pro Media Solutions (P.) Ltd. [2024] 158 taxmann.com 432 (SC).** The facts were that the assessee was a private limited company engaged in business of providing graphic design solutions for advertising and marketing communications. It had remitted huge amounts to

US based company for marketing services without deduction of TDS. The Assessing Officer held that assessee utilized services of US Company even in negotiations with customers and in finalizing contracts, and same could not be done without sharing technical knowledge, know-how, processes or experience, hence, payment was taxable in India as FTS. The Tribunal allowed assessee's appeal holding that payments made could not be considered as royalty or FTS and hence, no TDS was required to be deducted. It was found that US Company did not have any permanent establishment in India. Further Tribunal in its order had noted that scope of work was to generate customer leads using/subscribing customer data base, market research, analysis, and online research data and that service provider had not made available any technical knowledge, experience, know-how, process to develop and transfer technical plan or technical design. The High Court by impugned order held that in view of admitted fact that services were utilized in USA, findings returned by Tribunal did not call for any interference. The Hon'ble Supreme Court dismissed the SLP filed by revenue against said impugned order of High Court.

39. Further, in our considered view, the decision of GVK industries supra is also not relevant to the instant facts, since in such case, the issue for consideration before the Hon'ble Supreme Court was whether the services relating to obtaining loan qualifies as managerial services. The aforesaid decision, is not applicable to the instant case for the reason that Hon’ble Supreme Court did not have the occasion to discuss the relevant Tax Treaty provisions, and the decision was rendered on the domestic Income Tax provisions. Accordingly, in our view, since the aforesaid decision does not apply to the instant facts, much credence cannot be given to the observations made in the decision.

40. Now coming to the instant facts, looking into the nature of services, there is nothing on record to establish that during the course of rendering of services, the technology was "made available" to the recipient of services, in such a manner that the recipient of services were enabled to perform the services in the future, by itself, without any requirement of recourse/further assistance from the assessee company. From the contents of the nature of services, we observe that neither has technology be made available to the recipient of services, nor there is any such intention to render services in a manner that the recipient of services is enabled to perform the services itself without recourse to the assessee. Accordingly, looking into the facts, we are of the considered view that the services have not "made available" technology to the recipient of services, so as to fall within the definition of FTS under the India-Netherlands tax treaty.

41. In the result, grounds 2, 3 and 4 of the assessee's appeal are allowed.

Ground number 6: Short credit of TDS (INR 51,34, 571/-)

42. Before us, the Counsel for the assessee submitted that ground number 6 is not being pressed, since this issue has been rectified by way of subsequent order under Section 154 of the Act.

43. Accordingly, ground number 6 of the assessee's appeal is dismissed as not pressed.

44. Ground Nos. 8 and 9 of the assessee's appeal or consequential, and hence, the same are not being adjudicated.

Ground number 7 (levy of interest under Section 234B in respect of non--residents)

45. Before us, the Counsel for the assessee relied upon the case of **Mitsubishi Corporation 130 taxmann.com 276 (SC)**, wherein the Hon'ble Supreme Court held that proviso to Section 209(1) issued by Finance Act, 2012 providing that if a non-resident assessee received any amount on which tax was deductible at source, assessee could not reduce such tax while computing its advance tax liability, was applicable prospectively after Assessment Year 2012-13. Therefore, during relevant Assessment Year, since assessee was a non-resident, and entire tax was to be deducted at source on payment made by payer to it and there was no question of advance tax payment by assessee, accordingly, no interest under Section 234B could be levied upon assessee. Accordingly, the Counsel for the assessee submitted that in view of the aforesaid decision clarifying the position that proviso to Section 209(1) issued by Finance Act, 2012 was applicable prospectively after Assessment Year 2012-13, there was no liability for the assessee to pay interest under Section 234B of the Act for the impugned Assessment Year, since the entire income was tax deductible at source in the hands of the payer.

46. In our considered view, in light of the aforesaid decision by the Hon'ble Supreme Court, Ground No. 7 of the assessee's appeal is allowed. We must also add that recently, the **Gujarat High Court in the case of Shell Global Solutions International BV [2024] 158 taxmann.com 352 (Gujarat)** held that where during relevant Assessment Year assessee was a non-resident, entire tax was liable to be deducted at source on payment made by payer to the assessee u/s 195 and there was no question of advance tax payment by assessee and thus, no interest under Section 234B could be levied upon assessee.

47. In the result, Ground No. 7 of the assessee's appeal is allowed.

Assessment Year 2012-13

48. Now we shall deal with the assessee's appeal for Assessment Year 2012-13. The assessee has raised the following grounds of appeal:

> *"1. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the aggregate cost recovery of Rs. 12,18,08,778 received from Hazira LNG Private Limited ('HLPL'), Hazira Port Private Limited ('HPPL') and Shell India Markets Private Limited ('SIMPL') for HR Shell People Support as royalty under section 9(1)(vi) of the Act and Article 12 of India - Netherlands tax treaty ('Tax Treaty').*
>
> *2. The learned AO based on the directions of the DRP erred on the facts and in law in treating the cost recovery of Rs. 55,86,065 received from SIMPL for grant of External Information System ('EIS') licenses (license for online databases) as royalty under section 9(1)(vi) of the Act and Article 12 of Tax Treaty.*
>
> *3. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 4,35,10,959 received from HLPL and SIMPL for CHR recruitment fees as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.*
>
> *4. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 3,28,64,600 received from SIMPL for IT migration support as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.*
>
> *5. Without prejudice to the above mentioned grounds, the learned AO based on the directions of the DRP has erred on the facts and in law in disregarding the fact that the amount received for the above mentioned cost recoveries is a mere allocation of cost incurred by SIBV without markup and hence the same is not chargeable to tax in India.*
>
> *6. The learned AO has erred in levy of interest under section 234A and 234B of the Act.*
>
> *7. The learned AO based on the directions of the DRP has erred in initiating penalty proceedings under section 274 r.w.s. 271(1)(c) of the Act against the Appellant.*
>
> *The Appellant reserves the right to add, amend, alter or vary all or any of the above grounds of appeal as they or their representative may think fit."*

49. We observe that all the issues covered in the grounds of appeal for Assessment Year 2012-13, have been dealt with by us while deciding the issue is for Assessment Year 2011-12. Accordingly, our observations for Assessment Year 2011-12 would apply to Assessment Year 2012-13 as well.

50. However, we observe that for Assessment Year 2012-13, External Information Services (EIS) has been taxed as royalty under Section 9(1)(vi) of the Act read with Tax Treaty (EIS has also been taxed as royalty for Assessment Year 2013-14 as well, though for Assessment Year 2011-12, it was taxed as FTS).

External information services (license fees patent and subscription)

51. Under these services, the assessee subscribes to various EIS providers on behalf of Shell group and the cost for the same are pooled in by the assessee. The services provided by EIS service providers mainly consist of providing standard research reports, newsletters market data analysis. The services are akin to providing access to online databases for obtaining such reports. The databases prepared and maintain standard reports, journals etc. pertaining to the oil and gas sector. The group companies access the databases for the purpose of using it internally. The assessee has an arrangement with various Shell group entities for use of these EIS services. The cost incurred by assessee for EIS services is charged to Shell group entities based on their usage of EIS services.

52. The Assessing Officer was of the view that the services qualify as royalty since access to database is not publicly available and is only available to authorized users. Further though access to database is granted online, such a

right to access would amount to transfer of right to use the copyright. Therefore, the payment received by the assessee from its affiliates is for such license to use the database maintained by EIG and such payment is treated as royalty.

53. The Counsel for the assessee submitted that the issue is now squarely covered in favour of the assessee in view of the decision of Engineering Analysis supra by the Hon'ble Supreme Court. In our considered view, in the instant facts, grant of right to access the online database would not amount to transfer of right to use the copyright, as alleged by the Assessing Officer. In this case, the Hon'ble Supreme Court made the following observations: by holding that payments do not qualify as royalty:

> *"In all these cases, the* ***'licence' that is granted vide the EULA, is not a licence in terms of Section 30 of the Copyright Act, which transfers an interest in all or any of the rights contained in Sections 14(a) and 14(b) of the Copyright Act, but is a 'licence' which imposes restrictions or conditions for the use of computer software.*** *Thus, it cannot be said that any of the EULAs in question are referable to Section 30 of the Copyright Act, inasmuch as Section 30 Copyright Act speaks of granting an interest in any of the rights mentioned in Sections 14(a) and 14(b) of the Copyright Act.* ***The EULAs in all the appeals do not grant any such right or interest, least of all, a right or interest to reproduce the computer software.*** *In point of fact, such reproduction is expressly interdicted, and it is also expressly stated that no vestige of copyright is at all transferred, either to the distributor or to the end-user. A simple illustration to explain the aforesaid position will suffice. If an English publisher sells 2000 copies of a particular book to an Indian distributor, who then resells the same at a profit, no copyright in the aforesaid books is transferred to the Indian distributor, either by way of licence or otherwise, inasmuch as the Indian distributor only makes a profit on the sale of each book. Importantly, there is no right in the Indian distributor to reproduce the aforesaid book and then sell copies of the same. On the other hand, if an English publisher were to sell the same book to an Indian publisher, this time with the right to reproduce and make copies of the aforesaid book with the permission of the author, it can be said that copyright in the book has been transferred by way of licence or otherwise, and what the Indian publisher will pay for, is the right to reproduce the book, which can then be characterised as royalty for the exclusive right to reproduce the book in the territory mentioned by the licence."*

54. In the instant case, payments for grant of access to software database would not take the case of the assessee within the definition of royalty, as defined under the India-Netherlands tax Treaty. In the instant facts, access to the software has been granted to the Indian entities and there is no transfer of copyright, so as to fall within the definition of royalty under the India-Netherlands Tax Treaty.

55. In the result, ground number 2 of the assessee's appeal is allowed

Assessment Year 2013-14

56. Now we shall deal with the assessee's appeal for Assessment Year 2013-14. The assessee has raised the following grounds of appeal:

> *"1. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the aggregate cost recovery of Rs. 19,50,28,433 received from Hazira LNG Private Limited ('HLPL'), Hazira Port Private Limited ('HPPL') and Shell India Markets Private Limited ('SIMPL') for HR Shell People Support as royalty under section 9(1)(vi) of the Act and Article 12 of India - Netherlands tax treaty ('Tax Treaty').*
>
> *2. The learned AO based on the directions of the DRP erred on the facts and in law in treating the cost recovery of Rs. 1,71,16,190 received from SIMPL for grant of External Information System ('EIS') licenses (license for online databases) as royalty under section 9(1)(vi) of the Act and Article 12 of Tax Treaty.*
>
> *3. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 5,67,02,945 received from HLPL and SIMPL for CHR recruitment fees as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.*
>
> *4. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 52,52,025 received from SIMPL for IT migration support as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.*
>
> *5. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 3,41,05,428 received from SIMPL for Real Estate and Corporate Travel Services as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.*

6. Without prejudice to the above mentioned grounds, the learned AO based on the directions of the DRP has erred on the facts and in law in disregarding the fact that the amount received for the above mentioned cost recoveries is a mere allocation of cost incurred by SIBV without markup and hence the same is not chargeable to tax in India.

7. The learned AO has erred in levy of interest under section 234A and 234B of the Act.

8. The learned AO based on the directions of the DRP has erred in initiating penalty proceedings under section 274 r.w.s. 271(1)(c) of the Act against the Appellant.

The Appellant reserves the right to add, amend, alter or vary all or any of the above grounds of appeal as they or their representative may think fit."

57. We observe that all the issues covered in the grounds of appeal for Assessment Year 2013-14, barring one issue, have been dealt with by us while deciding the issues for Assessment Years 2011-12 and 2012-13. Accordingly, our observations for Assessment Year 2011-12 and 2012-13, would apply to Assessment Year 2013-14 as well in respect of Grounds 1-4 and Grounds 6-8.

58. Now we shall discuss Ground No. 5 of the assessee's appeal for Assessment Year 2013-14, in which payments in respect of a new service have been received by the assessee.

Ground number 5: taxability of Real Estate And Corporate Travel Services as fees for technical services under Section 9(1)(vii) of the Act read with article 12 of Tax Treaty

59. The brief facts relating to these services are that Shell group has business facilities across various countries which is managed by a real estate team of the assessee. During the impugned year under consideration, payments have been made to the assessee for the work done by the real estate team of the assessee in managing the Group's property portfolio, corporate travel program,

office facilities and business centers. During the year under consideration, the assessee was engaged in provision of general business support services and other services, with respect to real estate operations and inter-company services to SIMPL.

60. The AO was of the view that under the Real Estate and Corporate Travel Services, the assessee provides consultancy and assists the regional team of the affiliates in managing real estate transactions and leveraging of global relationships and contract management with key suppliers and real estate information technology tool. The critical decision-making function of real estate consultancy has been performed by the affiliates through the assistance/consultancy of the assessee. As per the Ld. Assessing Officer, identifiable and highly specialized services requiring expertise and industrial experience of the global support team of the assessee have been provided by the assessee and the nature of work performed by the Shell group companies is highly technical in nature The AO thus concluded that the assessee, through its personnel, provided 'technical services' to assessee, especially since the DTAA definition of FTS expressly includes the provision of the services of personnel. The AO further concluded that the services performed by the assessee would invariably lead to imparting of suitable skill sets / knowledge in the hands of the affiliates with consequent improvement in experience and skill set of the local employees of the affiliates. The Ld. Assessing Officer relied on various judicial precedents in support of the above contention.

61. The assessee is in appeal before us against the aforesaid order passed by Assessing Officer holding the services as fees for technical services under the Act read with the Tax Treaty. Before us, the arguments of the Counsel for the

assessee remain the same as discussed in earlier paragraphs while dealing with other services which were held to be FTS for Assessment Year 2011-12.

62. In our considered view, in view of our observations made in the preceding paragraphs, we are of the considered view that in respect of the aforesaid services, the condition of "make available" is not satisfied and the Department has not brought anything on record to demonstrate that in the instant case, the technology was "made available" to the recipient of services, so as to fall within the ambit/definition of FTS under the India-Netherlands tax treaty. Accordingly, in our considered view, the aforesaid services do not qualify as FTS under the India-Netherlands tax treaty.

63. In the result, ground number 5 of the assessee's appeal is allowed for Assessment Year 2013-14.

Assessment Year 2014-15

64. Now we shall deal with the assessee's appeal for Assessment Year 2014-15. The assessee has raised the following grounds of appeal:

> *"1. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the aggregate cost recovery of Rs. 13,47,31,296 received from Hazira LNG Private Limited ('HLPL'), Hazira Port Private Limited ('HPPL') and Shell India Markets Private Limited ('SIMPL') for HR Shell People Support as royalty under section 9(1)(vi) of the Act and Article 12 of India - Netherlands tax treaty ('Tax Treaty').*
>
> *2. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 10,49,58,935 received from HLPL and SIMPL for External Information Services ('EIS') (license for online databases) as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.*
>
> *3. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 6,54,03,043 received from SIMPL for*

CHR recruitment fees (including HR Whitecrow cost) as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.

4. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 3,41,05,428 (actual amount is Rs. 3,74,99,268 however the learned Assessing Officer has erroneously mentioned the same at Rs. 3,41,05,428) received from SMPL for Real Estate and Corporate Travel Services as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.

5. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 834,05,096 received from HLPL, HPPL and SIMPL for HRTT - System Administration Services as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.

6. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 3,22,50,294 received from SIMPL for International tax administration Services as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.

7. The learned AO based on the directions of the DRP has erred on the facts and in law in treating the cost recovery of Rs. 3,11,42,515 received from SIMPL for IT migration support as fees for technical services under section 9(1)(vii) of the Act and Article 12 of Tax Treaty.

8. Without prejudice to the above mentioned grounds, the learned AO based on the directions of the DRP has erred on the facts and in law in disregarding the fact that the amount received for the above mentioned cost recoveries is a mere allocation of cost incurred by SIBV without markup and hence the same is not chargeable to tax in India.

9. The learned AO has erred in levying interest under section 234A and 234B of the Act.

10. The learned AO based on the directions of the DRP has erred in initiating penalty proceedings under section 274 r.w.s 271(1)(c) of the Act against the Appellant.

The Appellant reserves the right to add, amend, alter or vary all or any of the above grounds of appeal as they or their representative may think fit."

65. We observe that all the issues covered in the grounds of appeal for Assessment Year 2014-15, barring two issues, have been dealt with by us while deciding the issues for earlier Assessment Years. Accordingly, our

observations for Assessment Years would apply to Assessment Year 2014-15 as well in respect of Grounds 1-4 and Grounds 7-10.

66. Now we shall discuss ground numbers 5 and 6 of the assessee's appeal for Assessment Year 2014-15, in which payments in respect of two new services have been received by the assessee.

Ground 5: taxability of HRIT-System Administration services as fees for technical services under Section 9(1)(vii) of the Act read with Article 12 of tax treaty

Ground 6: taxability of International Tax Administration services as fees for technical services under Section 9(1)(vii) of the Act read with Article 12 of tax treaty

67. We shall first discuss the nature of services in respect of the aforesaid two services for which the payment has been received by the assessee and the Assessing Officer's observations with regard to taxability of these services.

HRIT-system Administration services

68. Under HRIT - System Administration Services, the assessee charges fee associated with Learning systems like Learning Management System, Learning projects like Competence Management, business process enhancements etc. The argument of the assessee is that this fee is charged to group companies using learning infrastructure via a learning infrastructure fee per head. This fee is in relation to recovery of cost in relation to maintaining learning systems/learning projects by the assessee.

69. The Ld. Assessing Officer in the assessment order observed that under HRIT - System Administration Services, as per the submission of the assessee company, the charges are recovered for using learning infrastructure. It includes learning management system, competence management business process enhancement. All these activities require expertise and skill. The expertise and experience of the assessee is being offered to its affiliates. The nature of work performed by the Shell group companies is highly technical in nature. This team provides learning. management competency, business process enhancement etc. The costs incurred by the business support team are shared across various Shell entities which have availed such administration services of the team possessing wide experience in the field. Thus, the critical decision-making function of administration has been performed by the affiliates through the assistance/consultancy of the assessee. Hence it is established that clearly identifiable and highly specialized services, requiring expertise and industrial experience have been provided by the assessee

International Tax Administration

70. Under these services, the Shell group is availing services of a professional consultancy firm for preparation and filing of tax returns of expatriates. The said firm raises its consolidated invoice on the Assessee in relation to the preparation and filing of tax returns of all the expatriates in the Shell group. Thus, all the costs relating to the personal tax compliances of such expatriates are pooled in the assessee. These costs, along with certain administrative costs incurred by the Assessee are then allocated by the Assessee among various Shell group entities based on the number of expatriates working with each entity. Accordingly, the Assessee has raised certain invoices on SIMPL in respect of the expatriates working with SIMPL.

71. The Ld. Assessing Officer observed that under the international tax administration services, the expertise and experience of the global support team of the assessee is being offered to its affiliates. The nature of tax administration work performed by the Shell group companies is highly technical in nature. This team provides consultancy and assists the regional team of the affiliates in providing services in the nature of tax administration. The costs incurred by the assessee company are shared across various Shell entities which have availed such facilities. Thus, tax administration function has been performed by the affiliates through the assistance/consultancy of the assessee. Hence it is established that clearly identifiable and highly specialized services, requiring expertise and experience have been provided by the assessee.

72. For both the above services, the Ld. Assessing Officer was of the view that in both the above services "make available" clause under Article 12 of the Tax Treaty is satisfied since it is clear that such services would invariably lead to imparting of suitable skill sets / knowledge in the hands of the affiliates in the area in which the services are rendered with consequent improvement in experience and skill set of local employees of the affiliates. In this case, the assessee have, through its personnel, undoubtedly provided 'technical' services to assessee, especially since the DTAA definition of FTS expressly includes the provision of the services of personnel. Further as per the definition of FTS in the DTAA, when imparting of suitable experience or skill possessed by the assessee to the affiliates takes place it amounts to making available the FIS/FTS and therefore the amounts received are taxable as per the DTAA. The services are enduring and they help in promoting the business of the affiliate. The employees of the affiliates are in a position to, and actually they are

expected to use the knowledge gained, in the business of the affiliates. Thus, knowledge and know-how are made available to the affiliates. Hence, on an understanding of the overall effect of the services, it has to be held that the technical knowledge, experience, and skill are made available to the affiliates.

73. The assessee is in appeal before us against the aforesaid order passed by Assessing Officer holding the services as fees for technical services under the Act read with the Tax Treaty.

74. Before us, the arguments of the Counsel for the assessee remain the same as discussed in earlier paragraphs while dealing with other services which were held to be FTS for Assessment Year 2011-12.

75. In view of our observations made in the preceding paragraphs, we are of the considered view that in respect of the aforesaid services, the condition of "make available" is not satisfied and the Department has not brought anything on record to demonstrate that in the instant case, the technology was "made available" to the recipient of services, so as to fall within the ambit/definition of FTS under the India-Netherlands tax treaty.

76. Accordingly, in our considered view, the aforesaid services do not qualify as FTS under the India-Netherlands tax treaty.

77. In the result, ground numbers 5 and 6 of the assessee's appeal are allowed for Assessment Year 2014-15.

Assessment Year 2015-16

78. Now we shall deal with the assessee's appeal for Assessment Year 2015-16. The assessee has raised the following grounds of appeal:

"1. The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the aggregate cost recovery of INR 11,60,44,189 received from Hazira LNG Private Limited ('HLPL') and Shell India Markets Private Limited ('SIMPL') for HR Shell People Support as royalty under Article 12 of India - Netherlands tax treaty ('Tax Treaty').

2. The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the cost recovery of INR 4,31,42,846 received from SIMPL for CHR Recruitment fees as Fees for Technical Services ('FTS') under Article 12 of Tax Treaty.

3. The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the cost recovery of INR 7,37,15,011 received from SIMPL for External Information Services ('EIS') as FTS under Article 12 of Tax Treaty.

4. The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the cost recovery of INR 16,27,778 received from HLPL for HRIT - Systems Administration Services as FTS under Article 12 of Tax Treaty.

5. The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the cost recovery of INR 5,75,38,113 received from SIMPL for IT Services as FTS under Article 12 of Tax Treaty.

6. The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the aggregate cost recovery of INR 2,82,12,881 received from HLPL and SIMPL for International tax administration services as FTS under Article 12 of Tax Treaty.

7. The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the cost recovery of INR 2,12,21,126 received from SIMPL for Health Ecotox services as FTS under Article 12 of Tax Treaty.

8. The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in treating the cost recovery of INR 4,30,64,498 received from SIMPL for Real Estate and Corporate Travel Services as FTS under Article 12 of Tax Treaty.

9. Without prejudice to the above mentioned grounds, the learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in disregarding the fact that the amount received for the above mentioned cost recoveries is a mere allocation of cost incurred by the assessee without markup and hence the same is not chargeable to tax in India.

10. The learned AO has erred on the facts and in law and learned DRP has further erred in confirming the action of the AO on the facts and in law in levying surcharge, education cess and secondary and higher education cess on the tax levied at 10% rate prescribed under Article 12 of Tax Treaty.

11. Without prejudice to the Ground No. 10 above, the learned AO has erred on the facts and in law in levying surcharge at the rate of 10% instead of applicable rate of 5% as per the provisions of the Act.

12. The learned AO has erred on the facts and in circumstances of the case and in law in giving short credit of Tax Deducted at Source to the extent of INR 30,677.

13. The learned AO has erred on the facts and in law in levying interest under Section 234A of the Act even though the Assessee has filed its return within the due date prescribed under Section 139 of the Act.

14. The learned AO has erred in levying interest under Section 234B of the Act.

15. The learned AO has erred on the facts and in law in initiating penalty proceedings under Section 274 r.w.s 271(l)(c) of the Act against the Appellant.

The Appellant reserves the right to add, amend, alter or vary all or any of the above grounds of appeal as they or their representative may think fit."

79. We observe that all the issues covered in the grounds of appeal for Assessment Year 2013-14, barring few issues, have been dealt with by us while deciding the issues for earlier Assessment Years. Accordingly, our observations for Assessment Years would apply to Assessment Year 2015-16 as well in respect of Grounds 1-4, 6, 8, 9 and Grounds 12-15.

80. Now we shall discuss ground number 5,7,10 and 11 of the assessee's appeal for Assessment Year 2015-16, in which taxability of payments in respect of two new services received by the assessee has been discussed and the issue of levy of surcharge and cess on Tax Treaty rates is discussed.

Ground No. 5: taxability of IT services as FTS under the Act, read with Tax Treaty (INR 5,75,38,113/-))

Ground No. 7: taxability of Health Ecotox services as FTS under the act, read with taxability (INR 2,12,21,126/-)

IT Services

81. During the year under consideration, the assessee has rendered certain IT services to SIMPL, which includes certain services in relation to the Physical Access Control System ('PACS) being implemented at each location. In relation to these PACS related services, the fee comprises of the following components: a) Prowatch (Physical Access Control System) - a software which is being implemented at each location to read the EVI cards when any person swipe in and out of the building: b) Prowatch configuration - updating the card readers to Prowatch: c) Recovery of project management and other overhead costs – recovery of Manpower costs for the resources working on these projects.

82. In respect of these services, the Ld. Assessing Officer was of the view that the assessee accepts that the services are technical in nature and the only objection is that the same are not taxable as such services do not fall in the scope of make available clause. The assessee has rendered certain IT services to Shell India Markets Pvt. Ltd. ('SIMPL'), a group entity, which inter alia, includes certain services in relation to the Physical Access Control System ('PACS') being implemented at each location. This requires experience and expertise of highly technical and trained staff. Thus, in such a scenario it cannot be said that technical knowledge, experience, skill etc has not been made available to the Indian entity. It is seen that the advice and assistance rendered by the assessee to the Indian entity are not transient in nature and are capable of being used by the Indian entity on its own.

Health Ecotox services:

83. During the year under consideration, the assessee rendered Health Ecotox services to SIMPL which pertains to "One Health IT System". The One Health IT system is for keeping and maintaining confidential medical information of Shell employees. The system is managed by Shell Health. The cost incurred for these services has been allocated between group companies using these services based on the actual number of full time employee per entity. As per the assessee, the fee is in relation to keeping and maintaining confidential medical information of Shell employees and therefore represents commercial / management / advisory services which are not technical in nature and therefore, the same is not taxable as FTS under Article 12 of India-Netherlands Tax Treaty. Without prejudice to the above and even for sake of argument it is assumed that the above services are technical in nature, the same does not make available any technical knowledge, experience, skills, know how, etc. and also do not consist of the development and transfer of technical plan or technical design and therefore, the revenue received by the Assessee for these services do not qualify as FTS under Article 12 of the India-Netherland tax treaty and as such not taxable in India. Without prejudice to the above, the assessee submitted that the amounts received for Health Ecotox Services represents the cost allocations and no mark-up has been charged on the said cost by the Assessee. It is to be noted that allocation of costs is based on 'actual number of full time employee'. Accordingly, the assessee submitted that receipts for Health Ecotox Services are only reimbursement of expenses and as such not chargeable to tax.

84. The Ld. Assessing Officer observed that under the Health Ecotox services, the assessee has rendered these services to SIMPL which pertains to

"One Health IT system". The One Health IT System is an add on to the Shell People system for keeping and maintaining confidential medical information of Shell employees. Here, it is seen that clearly identifiable and highly specialized services, requiring expertise and industrial experience have been provided by the assessee.

85. Further, in respect of both the above services, the Ld. Assessing Officer was of the view that it is clear that such services would invariably lead to imparting of suitable skill sets / knowledge in the hands of the affiliates in the area in which the services are rendered with consequent improvement in experience and skill set of local employees of the affiliates. In this case, the assessee have, through its personnel, undoubtedly provided 'technical' services to assessee, especially since the DTAA definition of FTS expressly includes the provision of the services of personnel. Further as per the definition of FTS in the DTAA, when imparting of suitable experience or skill possessed by the assessee to the affiliates takes place it amounts to making available the FIS/FTS and therefore the amounts received are taxable as per the DTAA. The services are enduring and they help in promoting the business of the affiliates. The employees of the affiliates are in a position to, actually they are expected to use the knowledge gained, in the business of the affiliates. Thus, knowledge and know-how are made available to the affiliates. Hence, on an understanding of the overall effect of the services, it has to be held that the technical knowledge, experience, and skill are made available to the affiliates.

86. The assessee is in appeal before us against the aforesaid order passed by Assessing Officer holding the services as fees for technical services under the Act read with the Tax Treaty. Before us, the arguments of the Counsel for the

assessee remain the same as discussed in earlier paragraphs while dealing with other services which were held to be FTS for Assessment Year 2011-12.

87. In our considered view, in view of our observations made in the preceding paragraphs, we are of the considered view that in respect of the aforesaid services, the condition of "make available" is not satisfied and the Department has not brought anything on record to demonstrate that in the instant case, the technology was "made available" to the recipient of services, so as to fall within the ambit/definition of FTS under the India-Netherlands tax treaty.

88. Accordingly, in our considered view, the aforesaid services do not qualify as FTS under the India-Netherlands tax treaty.

89. In the result, Ground Nos. 5 and 7 of the assessee's appeal are allowed for Assessment Year 2015-16.

Grounds 10-11 of the assessee's appeal pertains to the issue of levy of surcharge, education cess and secondary and higher education cess on the tax levied @ 10% rate prescribed under Article 12 of the Tax Treaty

90. We are of the considered view that that levy of surcharge and cess cannot exceed the tax rate of 10% as per Article 12 of India –Netherlands tax treaty, since the Treaty provides that the tax is to be charged on royalty and FTS shall not exceed 10% of the gross amount of royalty or FTS. Further, Article 2 of the Tax Treaty defines tax in India as "income tax including any surcharge thereon". Therefore, Article 12 read with Article 2 of the Tax Treaty makes it clear that the rate of tax at 10% would encompass surcharge and education cess as it is also in the nature of tax. Therefore, we hold that levy of

surcharge and cess over and above the taxable rate of 10% on royalty and FTS is not permissible as per the Treaty provisions. While coming to such conclusion, we are well supported by the following decisions:

- FCC Co. Ltd.145 taxmann.com 649 (Delhi - Trib.)
- Dy. CIT, International Taxation v. Marubeni Corpn. [2022] 139 taxmann.com 458 (Mum. - Trib.);
- Dy. DIT (International Taxation) v. BOC Group Ltd. [2015] 64 taxmann.com 386/[2016] 156 ITD 402 (Kol. - Trib.);
- JCDecaux S.A. v. ACIT/DCIT, International Taxation [2021] 123 taxmann.com 221/[2020] 79 ITR (T) 222 (Delhi - Trib.);
- DIC Asia Pacific Pte. Ltd. v. Asstt. DIT, International Taxation [2012] 22 taxmann.com 310/18 ITR (T) 358/52 SOT 447 (Kol.);
- Sunil V. Motiani v. ITO (International Taxation) [2013] 33 taxmann.com 252/59 SOT 37 (Mum.);
- Parke Davis & Company LLC v. Asstt. CIT [2014] 41 taxmann.com 193/62 SOT 282 (Mum.);
- ITO (Intl Taxn) v. M. Far Hotels Ltd. [2013] 32 taxmann.com 100/58 SOT 261/156 TTJ 137 (Cochin - Trib.).

91. In the result, Ground No. 10 of the assessee's appeal is allowed. Since the issue regarding levy of surcharge and the tax treaty has been decided in favour of the assessee in Ground No. 10, Ground No. 11 of the assessee's appeal does not require any separate adjudication.

92. Further, vide **Ground No. 12**, the assessee has raised the contention of grant of short credit of TDS, wherein the allegation of Department is that tax

deduction has taken place in year 2, however, the Department has also not given any credit for the tax deducted in the subsequent year as well.

93. Accordingly, the matter is being restored to the file of Assessing Officer to carry out the necessary verification, and to grant credit of TDS deducted, in accordance with law.

94. In the result, Ground No. 12 of the assessee's appeal is allowed for statistical purposes.

Assessment Years 2016-17, 2017-18 and 2017-18

95. For Assessment Years 2016-17, 2017-18 and 2017-18, we observe that the grounds raised by the assessee have already been covered as part of our order while dealing with various issues raised by the assessee for earlier Assessment Years, before us. Accordingly, our observations for earlier Assessment Years, would also apply to similar issues for Assessment Years 2016-17, 2017-18 and 2017-18. We further observe that no new/additional services have been rendered for Assessment Years 2016-17, 2017-18 and 2017-18, accordingly, since all issues pertaining to grounds of appeal raised for these years have been covered in earlier part of our order, and the grounds of appeal raised by the assessee are disposed of in light of our observations for earlier Assessment Years.

Assessment Years 2009-10 and 2010-11

96. For the above Assessment Years, the assessee has raised additional grounds challenging the validity of proceedings under Section 144C of the Act. Further, the Counsel for the assessee submitted that taxability with respect to all the services, which have been rendered for Assessment Years 2009-10 and

2010-11, are already covered while discussing the taxability for subsequent Assessment Years.

97. We observe that since we have already decided the issues relating to taxability of incomes received by the assessee as royalty/FTS under the Act/Tax Treaty in favour of the assessee, by holding that the receipts do not qualify as Royalty/FTS under the Act read with the Treaty, we are of the considered view that it would only on academic exercise to dwell upon the additional ground raised by the assessee, since the issue of taxability has already been decided in favour of the assessee in the foregoing paragraphs.

98. In the combined result, appeals of the assessee for the impugned years under consideration before us, are partly allowed for statistical purposes.

This Order pronounced in Open Court on	**20/03/2024**

Sd/-	**Sd/-**
(ANNAPURNA GUPTA)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 20/03/2024
TANMAY, Sr. PS ***TRUE COPY***

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad