

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'D', NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member**

**Ms. Astha Chandra, Judicial Member**

**ITA No. 2473/Del/2022 : Asstt. Year: 2018-19**

JCDECAUX S.A, C/o. JCDecaux Advertising India P Ltd., Plot No. 153, 3 <sup>rd</sup> Floor, Okhla Industrial Estate, Phase-III, New Delhi 110020	Vs	ACIT, Circle 2(1)(2), New Delhi
(APPELLANT)		(RESPONDENT)
<b>PAN No. AAC CJ 8567 A</b>		

**Assessee by : Sh. K. M. Gupta, Adv. &  
Ms. Saloni Shital, AR  
Revenue by : Sh. Om Parkash, Sr. DR**

**Date of Hearing: 12.04.2024**

**Date of Pronouncement: 03.05.2024**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the assessee against the order dated 30.06.2022 passed by the AO u/s 143(3) r.w.s. 144C(13).

2. Following grounds have been raised by the assessee:

"1. On the facts and in the circumstances of the case and in law, the Learned Assessing Officer ['Ld. AO'] erred in assessing the income of the appellant at Rs. 5,70,12,841 as against the returned income of Rs. 2,32,27,600.

2. On the facts and in the circumstances of the case and in law, the Ld. AO and Ld. Dispute Resolution Panel (DRP'), have grossly erred in holding that the Management Fee' amounting to Rs. 2,39,09,103 is taxable as 'Fees for Technical Services' (FTS) as per the Double Taxation Avoidance Agreement ('DTAA') between India and France.

2.1 *On the facts and in the circumstances of the case and in law, the Ld. AO and Ld. DRP, have grossly erred in rejecting the import of the definition of 'make available' and its interpretations to read into the DTAA between India and France by virtue of the Protocol.*

3. *On the facts and in the circumstances of the case and in law, the Ld. AO and the Ld. DRP erred in holding that Corporate Guarantee Fee amounting to Rs. 54,14,600 is taxable as Fee for Technical Services' under Article 13 of India France DTAA and section 9(1)(vii) of the Act on extraneous and vague reasons.*

3.1 *On the facts and in the circumstances of the case and in law, the Ld. DRP grossly erred in holding that corporate guarantee granted by the Appellant in relation to the money borrowed by JCD India from foreign banks are services of a managerial, technical and consultancy nature.*

3.2 *On the facts and in the circumstances of the case and in law, the Ld. AO and Ld. DRP, grossly erred in holding that corporate guarantee fee was taxable as FTS without appreciating that the facility of corporate guarantee fee did not satisfy the 'make available' test under the DTAA between India and France by virtue of the Protocol.*

3.3 *On the facts and in the circumstances of the case and in law, the Ld. AO and Ld. DR grossly erred in not appreciating that the said issue has been decided in favour of the Appellant by the Hon'ble Income-tax Appellate Tribunal (ITAT) for AY 2011-12 and 2012-13.*

4. *On the facts and in the circumstances of the case and in law, the Ld. AO and Id. DRP grossly erred in characterizing pure reimbursements by of disbursements made by the Appellant towards social security contributions amounting to Rs. 44,61,538 as fee for technical services under Article 13 of India France DTAA on extraneous and vague reasons.*

4.2 *On the facts and in the circumstances of the case and in law, the Ld. AO and Ld. DRP, grossly erred in not appreciating the documentary evidences placed on record to prove that the expenses are in the nature of reimbursement and does not have any element of income in it;*

4.2 *On the facts and in the circumstances of the case and in law, the Ld. AO and Id. DRP, grossly erred in holding that reimbursement of social security was taxable as FTS without appreciating that the reimbursements did not satisfy the 'make available' test under the DTAA between India and France by virtue of the Protocol.*

5. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying Surcharge, Education Cess and Secondary and Higher Education Cess on the income taxed on gross basis under India France DTAA.*

6. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in not allowing entire credit of tax deducted at source while calculating the tax liability of the Appellant.*

7. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest to the extent of Rs. 30,54,747 under section 234B of the Act while calculating the tax liability of the Appellant.*

8. *The Ld. AO has grossly erred by initiating penalty under section 270A of the Act mechanically and without appreciating that the Appellant has neither concealed any income nor has it furnished inaccurate information relating to any income."*

3. The assessee is a company incorporated under the laws of France and is a tax resident of France. Tax Residency Report filed before the authorities. The assessee, which is the holding company of JCDecaux Group, is engaged in the field of outdoor advertising and is the owner of all intellectual property rights including all copyrights in drawings and models, trademarks, patents, domain names and know-how developed and used by the JCD group across the globe.

4. During the year under consideration, the assessee had entered into various transactions with its Associate Enterprise ('AE') i.e., JCD Advertising India Private Limited (JCD India') which are as under:

S. No.	Nature of Receipts	Amount (INR)	Tax Treatment
1.	Royalty receivable from JCD India, for the use of trademarks and know-how	2,25,49,536	Offered to tax as Royalty'
2.	Management fee receivable from JCD India	2,39,09,103	Not taxable
3.	Corporate Guarantee Fee	54,14,600	Not taxable

	receivable from JCD India		
4.	Reimbursement of Social Security Contribution expenses incurred on behalf of JCD India	44,61,538	Not taxable
5.	Reimbursement of other expenses by JCD India	18,86,478	Not taxable
6.	Payment of IT charges	6,78,070	Offered to tax as 'FTS'
	Total receipts during the year under consideration	5,88,99,325	

### **Assessment Proceedings:**

5. The assessee filed return of income on 29.11.2018 declaring total income of Rs.2,32,27,600/-. The Assessing Officer proposed the following additions:

S. No	Particulars	Amount (in INR)
1.	Management Fee	2,39,09,103
2.	Corporate Guarantee Fee	54,14,600
3.	Reimbursement of expenses	44,61,538
Total Addition Proposed		3,37,85,241

6. The Id. AR argued that Management Fee was in the nature of FTS both under domestic law and DTAA. In doing so, the AO denied the benefit of MFN clause, as envisaged under the India-France DTAA and held the impugned services rendered by the Appellant in lieu thereof, as technical services. The Id. AR argued that similar services were rendered by the assessee to JCD India in A.Y. 2011-12 & A.Y. 2012-13 under the old agreement i.e., Functional and Technical Support Agreement (effective from January 01, 2011), in lieu of which management fees were paid to the assessee. These receipts were then treated as FTS by the revenue in those years. It was argued

that the Co-ordinate Bench of Tribunal in principle had accepted the applicability of Protocol/Most Favored Nation (MFN') clause of the India-France DTAA and invocation of the restricted provision of the India-UK DTAA (including the 'make-available' clause) by the Appellant. However, in the absence of sufficient documentary evidence, the ITAT remanded the matter back to the AO for the limited purpose of verification of documents and directed the AO to decide the said issue after considering all the necessary documents to be furnished by the assessee in support of such services including the correspondence in respect of the services.

7. It was submitted that the assessee thereafter participated in the remand proceedings. However, in order to reduce litigation and difficulty in retrieving documents for these years, the appeals for AY 2011-12 & A.Y. 2012-13 were settled under Vivad se Vishwas Scheme (VSV). Similar services were also rendered by the assessee in AY 2015-16 pursuant to General Support Agreement ("GSA") (effective from January 01, 2013) and Services Agreement (effective from April 01, 2014). The Assessing Officer characterized the receipts as FTS. An appeal then was filed by the assessee before this Tribunal. However, before the appeal could be concluded, the matter was settled under VSV to reduce litigation. Accordingly, it was submitted that the impugned issue needs to be decided afresh after examining the documents placed on record in this AY.

8. On the merits of the issue, it was submitted that during the year under consideration, the assessee rendered certain

functional and HR services to JCD India pursuant to GSA and Services Agreement entered between them. Details of the services rendered by the Appellant under GSA has been extracted at para 6 at page 20 to 22 of the Appeal Set. The Appellant provided assistance to JCD India with respect to management of human resources, the details of which are provided under Article 1 of the under the Services Agreement available at page 23 to 24 of the Paper Book. In lieu of rendition of such services, management fee amounting to Rs.2,39,09,103/- was paid to the assessee. Copies of the GSA and Services agreement were enclosed at page 11 to 21 and 22 to 27 of the Paper Book. It was submitted that the impugned services are in the nature of the management services which are required in the day-to-day running and administration of the business of JCD India. These services are in the nature of policy formation and guidance in relation to running of business as per global standard policies of the group as a whole. It was argued that the nature of services remains uncontroverted by the AO and the Id. DRP. It is submitted that in the current year, the assessee has duly filed all the necessary documents including the communication and the mode of rendering services as well as the email correspondences thereby establishing the nature of services rendered by the Assessee to JCD India. It was argued that the AO/DRP have denied the benefit of MFN clause and make available clause to the assessee in the instant case.

9. It was argued that this issue is no more res-integra and the applicability of MFN Clause has been effectively dealt with

by the Hon'ble Jurisdictional High Court in the case of Steria (India) Ltd. vs. CIT [2016] 72 taxmann.com 1 (Delhi).

*"3.....Services under the broad category of General Management Services included Corporate Communication Services, Group Marketing Services, Development Services, Information System and Services, Legal Services, Human Relation Services etc.....*

.....

....."

*18. The Court is, therefore, unable to agree with the conclusion of the AAR that the Clause 7 of the Protocol, which forms part of the DTAA between India and France, does not automatically become applicable and that there has to be a separate notification incorporating the beneficial provisions of the DTAA between India and UK as forming part of the India- France DTAA.*

*19. The next question that arises is concerning to extent to which the benefit under the India-UK DTAA can be made available to the Petitioner. As already noticed, the definition of "fee for technical services" occurring in Article 13(4) of the Indo-UK DTAA clearly excludes managerial services. What is being provided by Steria France to the Petitioner in terms of the Management Services Agreement is managerial services. It is plain that once the expression 'managerial services' is outside the ambit of 'fee for technical services', then the question of the Petitioner having to deduct tax at source from payment for the managerial services, would not arise. It is, therefore, not necessary for the Court to further examine the second part of the definition, viz, whether any of the services envisaged under Article 13(4) of the Indo-UK DTAA are "made available" to the Petitioner by the DTAA with France."*

*(Emphasis Supplied)*

10. The Id. AR argued that the Hon'ble Delhi High Court granted the benefit of the MFN clause and held that the beneficial provisions of the India-UK DTAA will be applicable to

the assessee. It was further held that the services in question were managerial services and hence didn't fall within the definition of FTS as envisaged under Article 13(4) of the Indo-UK DTAA. It was submitted that the assessee's case is squarely covered by Steria (India) Ltd. (supra) and hence the impugned addition is liable to be deleted.

11. The Id. AR relied on the following case laws:

- *SCA Hygiene Products AB vs. Dy. CIT (IT) [2021] 123 taxmann.com 152/187 ITD 419 (Mum. - Tirb.)*
- *Qutotec OYJ vs. Dy. DIT (IT) [2016] 76 taxmann.com 33/[2017] 162 ITD 541 (Kol. - Trib.)*
- *Nestle SA vs. ACIT [2019] 108 taxmann.com 237 (Delhi)*
- *Cotecna Inspection SA vs. ITO [2022] 136 taxmann.com 368 (Delhi)*
- *Galderma Pharma SA vs. ITO [2022] 138 taxmann.com 44 (Delhi)*

12. With regard to Satisfaction of the "make available" test, the Id. AR argued that the impugned services rendered by the assessee do not satisfy the "make available" test as none of the services make available technical knowledge, experience, skill, know-how etc. nor any technology has been made available to the Indian AE and the impugned services are rendered by the assessee to JCD India on a recurring basis. With regard to "make available test", the Id. AR relied on the following judgments:

- *CIT vs. De Beers India Minerals (P.) Ltd. [2012] 346 ITR 467 (Kar.)*
- *DIT vs. Guy Carpenter & Co. Ltd. [2012] 20 taxmann.com 807/207 Taxman 121/346 ITR 504 (Del)*
- *Sandvik Australia Pty. Ltd. (TS-46-ITAT-2013) (Pune ITAT)*
- *Sun Microsystems India (P.) Ltd. (48 taxmann.com 93) (Karnataka High Court)*
- *Veeda Clinical Research (P.) Ltd (35 taxmann.com 577) (Ahmadabad ITAT)*
- *Boston Consulting Group (94 ITD 31) (Mumbai ITAT)*
- *Bharti AXA General Insurance Co. Ltd (234 CTR 62) (AAR)*
- *Raymond Ltd. vs. DCIT 86 ITD 791 (Mumbai ITAT)*
- *NTT Asia Pacific Holdings Pte. Ltd. Vs. Assistant Commissioner of Income-tax, International Taxation [2022] 141 taxmann.com 137 (Mumbai - Trib.)*
- *Ernst & Young (P.) Ltd. [2010] 323 ITR 184 (AAR)*
- *C.E.S.C Ltd vs. DCIT [2003] 87 ITD 653 (Kolkata ITAT)*
- *Intertek Testing Services India (P) Ltd., In re [2008] 307 ITR 418 (AAR)*
- *Linklaters LLP vs. Deputy Commissioner of Income-tax [2017] 79 taxmann.com 12 (Mumbai - Trib.)*

13. On the other hand, the Id. DR relied on the judgments of the Hon'ble Apex Court in the case of Assessing Officer Circle (International Taxation-2(2)(2), New Delhi Vs. M/s Nestle SA in Civil Appeal Nos. 1420 to 1432/2023 vide judgment dated 19.10.2023. The relevant part is as under:

**"V. Conclusions**

88. *In the light of the above discussion, it is held and declared that:*

- (a) A notification under Section 90(1) is necessary and a mandatory condition for a court, authority, or tribunal to give effect to a DTAA, or any protocol changing its terms or conditions, which has the effect of altering the existing provisions of law.*
- (b) The fact that a stipulation in a DTAA or a Protocol with one nation, requires same treatment in respect to a matter covered by its terms, subsequent to its being entered into when another nation (which is member of a multilateral organization such as OECD), is given better treatment, does not automatically lead to integration of such term extending the same benefit in regard to a matter covered in the DTAA of the first nation, which entered into DTAA with India. In such event, the terms of the earlier DTAA require to be amended through a separate notification under Section 90.*
- (c) The interpretation of the expression "is" has present signification. Therefore, for a party to claim benefit of a "same treatment" clause, based on entry of DTAA between India and another state which is member of OECD, the relevant date is entering into treaty with India, and not a later date, when, after entering into DTAA with India, such country becomes an OECD member, in terms of India's practice."*

14. In the result, the appeal of the assessee on this ground is dismissed.

**Corporate Guarantees:**

15. During the relevant assessment year, the assessee has provided corporate guarantee to foreign banks for the money

borrowed by JCD India from these banks. For providing such corporate guarantee, the assessee charged fee from JCD India in accordance with the Corporate Guarantee Fee Agreement entered into with the Indian AE (page 28 to 29 PB).

16. The Id. AR submitted that the issue of taxability of corporate guarantee as FTS was also a subject matter of appeal before the Tribunal in earlier years i.e., AY 2011-12 & 2012-13. The Co-ordinate Bench of Tribunal vide its order dated March 20, 2022 has decided this issue in favour of the assessee by holding that the services of corporate guarantee by the Assessee is not in the nature of managerial, technical or consultancy services and hence the fee received in lieu thereof cannot be termed as FTS either under the Act or under the India-France tax treaty. The relevant portion is extracted below:

*"6.5 We have heard the rival submission and perused the relevant material on record. The Assessing Officer held that corporate guarantee fee was in lieu of the services rendered for assisting the AE in providing loan from foreign banks, but no detail of kinds of services and evidence in this regard have been brought on record by the Assessing Officer and therefore this contention of the Assessing Officer that the guarantee fee was received in lieu of the services rendered, is rejected. In our opinion, services of corporate guarantee by the assessee not being in the nature of services of managerial, technical or consultancy, the corporate guarantee fee received by the assessee cannot be termed as fee for technical services either under the section 9(1)(vii)*

*or under article of the DTAA. The ground No. 3 raised in both the appeals are accordingly allowed."*

*(Emphasis Supplied)*

*(refer para 6.5 of the ITAT Order at page 186 of the Paper Book)*

17. The Id. AR argued that even if it is assumed that the corporate guarantee fee is in the nature of managerial, technical or consultancy services, the same could not be taxed as FTS on account of the fact that such services do not make available any technical know-how, experience or skill to JCD India under the provision of the India-UK DTAA read with the MFN clause under India-France DTAA.

18. We have examined the order of the authorities below. In view of the order in the case of the assessee for A.Y. 2011-12 and A.Y. 2012-13, where in it was held that the corporate guarantees don't fall under the head FTS, the appeal of the assessee on this ground is allowed.

### **Reimbursement of expenses:**

19. At the outset, the Id. AR submitted that in support of its contention that the impugned receipt is in the nature of reimbursement, it has placed on record, the following documents:

- i) Social Security Contribution Recharge Agreement
- ii) Break up of Social Security Contribution
- iii) Copies of invoices raised by the Assessee w.r.t. such expenses

- iv) Appointment Letter issued by JCD India to its French employee i.e., Olivier Heroguella
- v) Form 16 issued by the Assessee to its French employee, Olivier Heroguella

20. It was submitted that JCD India has French nationals as its employees. In terms of the employment agreement entered into between the assessee and the employees and as part of the benefits provided by the Assessee to these employees (in addition to their salary), JCD India is required to contribute towards their social security coverage in France and such employees of JCD India are not the employees of the assessee.

21. In order to meet the expenses of the French social security contribution payable in relation to such nationals, JCD India entered into a Social Security Contribution Recharge Agreement with JCD assessee whereby the Assessee undertook to incur the social security contribution for and on behalf of JCD India which would then be reimbursed by JCD India. Accordingly, during the financial year, the assessee contributed to the social security fund in France for one of the Indian AE's employees i.e., Mr. Oliver Heroguella. The said amount was then reimbursed by JCD India to the assessee, without charging any markup. Copies of invoices raised by the assessee w.r.t. such expenses) evidencing the same is enclosed at page 125 to 137 of the Paper Book.

22. It was submitted that the Co-ordinate Bench of Tribunal in Assessee's own case in AY 2011-12 & 2012-13 remanded the issue to the AO to be decided in accordance with the judgment

of the Hon'ble Delhi High Court in the case of Centrica after verifying the various agreements as mentioned in para 7.7 at page 193 of the Paper Book and accordingly, decide the issue. However, the matter was ultimately settled under VSV.

23. It was argued that while taxing the impugned receipts as FTS, the AO has failed to provide any cogent reason for arriving at such conclusion. Further, the AO held that no documents have been placed on record by the assessee to establish that the impugned expenses are in the nature of reimbursement. The Id. AR submitted that in year under consideration although requisite documents have been furnished by the Assessee which clearly establish the nature of expenses i.e., cost to cost reimbursements. The Id. AR argued that while treating the impugned reimbursements as FTS, both the AO/DRP have erroneously placed reliance on the decision of the Hon'ble Supreme Court in the case of Centrica India Offshore Pvt. Ltd. (supra). The Id. AR tried to distinguish on facts, the details of which are enumerated herein below:

S. No.	Centrica Facts	JCD SA Facts
1	Centrica deals with reimbursement of salary expenses.	the case of the Appellant is not w.r.t. reimbursement of salary but is strictly with respect to reimbursement of social security contribution. In this regard, the Appellant would like to draw the attention of this Hon'ble Bench to Clause 3.1 of the Letter of Appointment at page 140 of the Paper Book wherein it has been mentioned in clear

		and unequivocal terms that the Benefits to be provided to the employee is in addition to the salary. It is to be noted that social security coverage in France is a benefit provided by the Indian AE to its French employee.
2	This is a pure case of secondment.	This is not a case of secondment. There is no Secondment Agreement between the two entities. In the instant case, the Indian AE i.e., JCD India has directly entered into employment agreements with the French national without any intervention of the Appellant. Your Honors would note that such Appointment Letters carves out all the terms and conditions of such employment.
3	The obligation to pay the salary was of the Foreign Company. Indian Company was merely reimbursing the salary paid by Foreign Company. Seconded employees had no right against Indian Company in case of failure of payment of salary.	The Indian AE is solely responsible for payment of all the costs viz. salary, bonus, etc. and benefits to its French employees which is clearly spelt out in the aforesaid Appointment Letter.

24. The Id. AR argued that in terms of Article 3 of the Appointment Letter, the Indian AE i.e., JCD India is under an obligation to pay the French employee's salary and wages (refer

page no. 139 and 140 of the Paper Book) and has also deducted and deposited appropriate taxes under section 192 of the Act. In support of the salary disbursed and taxes withheld by the assessee, it has issued Form 16 to its French employee which is enclosed at page 145 to 150 of the Paper Book.

25. It was submitted that the assessee had deposited the social security contribution of the French employee in his home country on behalf of the Indian AE. Your Honors would note that in the instant case, the Assessee has agreed to meet the expenses of the French social security contribution payable in relation to the French nationals, solely for administrative convenience and for keeping a record of the amount so payable within the JCD Group. Thus, the Assessee acts purely as a disbursing agent. Accordingly, JCD India made cost-to-cost reimbursements, without there being any element of mark-up or profit, to the Assessee towards the expenses so incurred.

26. The Id. AR submitted that the trite law that in the absence of any "income", reimbursements cannot be charged to tax. Reliance in this regard is placed on the following case laws wherein similar finding has been returned:

- GE India Technology Cen. (P.) Ltd. vs. CIT [2010] 327 ITR 456 (SC)
- A.P Moller Maersk AS [2017] 78 taxmann.com 287 (SC)

27. The Id. AR concluded arguing that mere deposit of social security contribution by the assessee on behalf of the Indian A cannot be categorized as 'provision of services' by the assessee

to the Indian entities. Therefore, the Assessing Officer erred in holding reimbursement of social security contribution as FTS.

28. The Id. DR relied on the judgment in the case of Centrica India Offshore Pvt. Ltd. wherein the Hon'ble Jurisdictional High Court held as under:

*"37. This brings the Court to the next issue, concerning reimbursement and the doctrine of diversion of income by overriding title. This Court notices that a case with almost identical circumstances, in In Re: AT and S India (P) Ltd., MANU/AR/0016/2006, also came up before the AAR. There, an agreement between AT&S India and its parent, AT&S Austria was entered into, by which AT&S Austria undertook to assign or cause its subsidiaries to assign its qualified employees to the AT&S India. These individuals were to work for AT&S India and receive compensation substantially similar to what they would have received as employees of AT&S Austria. They were engaged by AT&S India on a full time basis. The question before the AAR was identical to this case:*

*"Whether pursuant to the secondment agreement entered into by the applicant with AT&S Austria, the payment to be made by the applicant to AT&S Austria, towards reimbursement of salary cost incurred by AT&S Austria in respect of seconded personnel, would be subject to withholding tax under Section 195 of the IT Act, in view of the facts that (1) the payments are only in the nature of reimbursement of actual expenditure incurred by AT&S Austria. (2) AT&S Austria is not engaged in the business of providing technical services in the ordinary course of its business, (3) AT&S Austria is not charging the applicant any*

*separate fee for the secondment and (4) the seconded personnel work under the direct control and supervision of the applicant?"*

*In holding that the obligation under Section 195 would be triggered, the AAR held as follows:*

*WP(C) No.6807/2012 Page 44 "From the above analysis of both the agreements it is clear that pursuant to the obligation under the FCA, the AT&S Austria has offered the services of technical experts to the applicant on the latter's request and the terms and conditions for providing services of technical experts are contained in the secondment agreement which we have referred to above in great details. Though the term "reimbursement" is used in the agreements, the nature of payments under the secondment agreement has to satisfy the characteristic of reimbursement and that the term "reimbursement" in the agreement will not be determinative of nature of payments. The term "reimbursement" is not a technical word or a word of Article In Oxford English Dictionary, to reimburse means--to repay a person who has spent or lost money--and accordingly reimbursement means to make good the amount spent or lost. However, under the secondment agreement the applicant is required to compensate AT&S Austria for all costs directly or indirectly arisen from the secondment of personnel and that the compensation is not limited to salary, bonus, benefits, personal travel, etc. though salary, bonus, etc. and the amounts referred to in para 4.2 of the secondment agreement form part of compensation. The premise of the question that the payments are only in the nature of reimbursement of actual expenditure incurred by AT&S*

*Austria is not tenable for reasons more than one. First it is not supported by any evidence as no material (except the debit notes of salaries of seconded personnel) is placed before us to show what actual expenditure was incurred by AT&S Austria and what is being claimed as reimbursement; secondly, assuming for the sake of argument that the debit notes represent the quantum of compensation as the actual expenditure, it would make no difference as the same is payable to the AT&S Austria under the secondment agreement for services provided by it. It would, therefore, be not only unrealistic but also contrary to the terms of the agreement to treat payments under the said agreement as mere reimbursement of salaries of the seconded employees who are said to be the employees of the applicant.*

*WP(C) No.6807/2012 Page 45 To show that the real employer of such employees is the applicant and not the AT&S Austria, Mr. Chaitanya invited our attention to various employment agreements entered into between the applicant and the seconded employees and also the certificate of deduction of tax at source on their global salary. All the employment agreements are similarly worded. We have carefully gone through the employment agreement between the applicant and Mr. Markus Stoinkellner. The duration of the employment is from 1st Sept., 2005 till 30th Aug., 2008. In Article 3 thereof salary of the employee is noted as the remuneration, perquisites and other entitlements as detailed in Appendix-A. However, Appendix-A does not specify any amount. All that it says, is that the salary will be as fixed and agreed between the employee and the company from time to time and that such salary may be paid either in India or outside India but the total salary shall not exceed the*

*salary fixed as above, but no fixed salary is mentioned in the employment agreement. Other perquisites and entitlements are: travel expenses, transport, boarding, lodging; and annual leave of 30 days per year; and home leave which the employee will be entitled to once. The applicant shall have to organize an economic class return flight tickets to go on home leave. The employment agreement also provides that the employee will be responsible for meeting all requirements under Indian tax laws including tax compliance and filing of returns and the applicant is authorized to deduct taxes from the compensation and benefits payable."*

*38. The mere fact that CIOP, and the secondment agreement, phrases the payment made from CIOP to the overseas entity as „reimbursement“ cannot be determinative. Neither is the fact that the overseas does not charge a mark-up over and above the costs of maintaining the secondee relevant in itself, since the absence to mark- up (subject to an independent transfer pricing exercise) cannot negate the nature of the transaction. It would lead to an absurd conclusion if, WP(C) No.6807/2012 Page 46 all else constant, the fact that no payment is demanded negates accrual of income to the overseas entity. Instead, the various factors concerning the determination of the real employment link continue to operate, and the consequent finding that provision of employees to CIOP was the provision of services to CIOP by the overseas entities triggers the DTAAAs. The nomenclature or lesser-than-expected amount charged for such services cannot change the nature of the services. Indeed, once it is established, as in this case, that there was a provision of services, the payment made may indeed be payment for services - which may be deducted in accordance*

*with law - or reimbursement for costs incurred. This, however, cannot be used to claim that the entire amount is in the nature of reimbursement, for which the tax liability is not triggered in the first place. This would mean that in any circumstance where services are provided between related parties, the demand of only as much money as has been spent in providing the service would remove the tax liability altogether. This is clearly an incorrect reasoning that conflates liability to tax with subsequent deductions that may be claimed.*

*39. So far as the decision in M/s. E-Funds IT Solution, goes, the judgment notes the distinction between stewardship activities of employees and deputationists, which had been highlighted in Morgan Stanley. The Division Bench in E-Funds highlighted that the nature of activity undertaken by the employee is determinative of whether it constitutes a service. In the present case, the overseas entities outsource their back office support functions like debt collections/consumers' billings/monthly jobs to third party vendors in WP(C) No.6807/2012 Page 47 India. The seconded employees in the present case, oversee quality control of the work of such vendors. This work cannot be characterized as mere stewardship. What could have been left to CIOP to do is in fact being done through the seconded employees, whose expertise and training lends quality and content to the Indian entity. Therefore, it is held that the real employer of these seconded employees continues to be the overseas entity concerned.*

*40. The final issue concerns the „diversion of income by overriding title“. Here, CIOP argues that the payment made*

*to the overseas entity is not income that accrues to the overseas entity, but rather, money that it is obligated to pass on to the secondees. In other words, this money is overridden by the obligation to pay the secondees, and thus, is not „income“. This is insubstantial for two reasons. One, in view of the above findings that: (a) the payment is not in the nature of reimbursement, but rather, payment for services rendered, (b) the employment relationship between the overseas entities and CIOP - from which the former's independent obligation to pay the secondees arises - continues to hold, no obligation to use money arising from the payment by CIOP to pay the secondees arises. The overseas entities' obligation to pay the secondees arises under a separate agreement, based on independent conditions, in relation to CIOP's obligation to pay the overseas entity. Assuming the agreement between CIOP and the overseas entity envisaged a certain payment for provision of services (and not styled as reimbursement). Surely no argument could be made that such payment is affected by the doctrine of diversion of income by overriding title. If that be the case, then, as held above, the WP(C) No.6807/2012 Page 48 fact that the payment under the secondment agreement is styled as reimbursement, and limited on facts to that, without any additional charge for the service, cannot be hit by that doctrine either. The money paid by CIOP to the overseas entity accrues to the overseas entity, which may or may not apply it for payment to the secondees, based on its contractual relationship with them. This, at the very least, is independent of the relationship and payment between CIOP and the overseas entity.*

*41. Accordingly, for the above reasons, this Court holds that this writ petition is liable to be dismissed, and the ruling of the AAR stands. No order as to costs."*

29. Hence, respectfully following the judgment of Hon'ble Jurisdictional High Court, the appeal of the assessee on this ground is dismissed.

**Surcharge, education cess on FTS income:**

30. At the outset, it is submitted that the instant issue came up for consideration before this Hon'ble Tribunal in earlier years i.e., AY 2011-12 & 2012-13 (supra) wherein the ITAT directed the AO delete the education cess & secondary and higher education cess levied on the income tax on gross basis under the India-France DTAA and hence, the issue was decided in favour of the assessee. The relevant findings are reproduced below:

*"8.5 In view of the provisions of the India France treaty on the issue being similarly worded with the provisions of the India UK DTAA, following the finding of the Tribunal in the case of BOC group Ltd. (supra), we direct the Assessing Officer to delete the education cess and secondary and higher education cess levied on the Income-tax on the gross basis under the India France DTAA. The ground No. 5 in both assessment year is thus allowed."*

*(Emphasis Supplied)*

*(refer para 8.5 of the ITAT Order at page 200 of the Paper Book)*

31. In order to decide the applicability of surcharge and cess on income offered to tax at special rate under the India-France DTAA, it may be relevant to refer to Article 2 and Article 3 of the Treaty which is reproduced hereinbelow:

*"Article 2 - Taxes Covered*

*1. The taxes to which this Convention shall apply are :*

*(a) in India :*

*(i) the income-tax including any surcharge thereon;  
(hereinafter referred to as "Indian tax").*

*2. The Convention shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Convention in addition to, or in place of, the taxes referred to in paragraph 1. The competent authorities of the Contracting States shall notify each other of any substantial changes which are made in their respective taxation laws.*

*Article 3 -General Definitions*

*1. In this Convention, unless the context otherwise requires :*

*(k) the term "tax" means Indian tax or French tax as the context requires;"*

32. The relevant extract of Article 13(2) of India-France DTAA, which is reproduced herein below:

*"Article 13 - Royalties and fees for technical services and payments for the use of equipment*

*2. However, such royalties, fees and payments may also be taxed in the Contracting State, in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of these categories of income, the tax so charged shall not exceed 10 per cent of the gross amount of such royalties, fees and payments."*

33. A reading of the aforementioned provisions of the India-France DTAA clearly shows that the income tax to be paid in India covered within the scope of the DTAA is inclusive of surcharge in terms of Article 2(1) (a) of the India-France DTAA. It is to be noted that Article 2(2) further extends the scope of the 'tax' by making the said provision applicable to any identical or substantially similar taxes which might be imposed after the execution of this Treaty.

34. Education cess was first introduced by the Finance Act 2004, with effect from assessment year 2005-06 which was much after the signing of India-France DTAA. In view of the specific provisions to this effect under Article 2(2) and in view of the fact that education cess is essentially in the nature of a surcharge, being an additional surcharge, the scope of Article 2(1)(a) can be said to be extending to education cess as well.

35. Basis the above discussion, it may be said that when the Article 2(1)(a), in unequivocal terms, states that surcharge is subsumed in the income tax to be paid in Indian under the India-France DTAA and the tax rate of 10% as prescribed under Article 13 is applicable on FTS, the said tax rate shall be

deemed to inclusive of surcharge. Further, as already stated above, since cess is nothing but an additional surcharge, the tax prescribed under the DTAA @10% in the instant case shall be deemed to have included both surcharge and education cess.

36. The aforesaid contention of the assessee is further bolstered by the following case laws:

- *Dy. CIT (International Taxation) vs. BOC Group Ltd. [2015] 64 taxmann.com 386 (Kol. - Trib.)*
- *DIC Asia Pacific Pte. Ltd. vs. Asst. Director of Income Tax, International Taxation (2012) 52 SOT 447 (Kol. ITAT)*
- *Sunil V. Motiani vs. ITO (International Taxation) (2013) 33 taxmann.com 252 (Mumbai Trib.)*
- *Parke Davis and Company LLC vs. ACIT (2014) 41 taxmann.com 193 (Mumbai Trib)*
- *ITO (Intl Taxation) vs. M/s M Far Hotels Ltd in ITA Nos. 430 to 435 /Coch./2011 dated 5.4.2013 (Cochin Tribunal)*

37. Basis the above, we hold that the surcharge and education cess so levied on the income chargeable to tax at special rate is directed to be deleted.

38. In the result, the appeal of the assessee is party allowed.  
Order Pronounced in the Open Court on 03/05/2024.

**Sd/-**  
**(Astha Chandra)**  
**Judicial Member**

**Sd/-**  
**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**Dated: 03/05/2024**

\*Subodh Kumar, Sr. PS\*