IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

ITA Nos.564 and 565/Bang/2024
Assessment Years : 2013-14 and 2014-15

M/s. Goldman Sachs International, C/o Ernst & Young LLP, 14th Floor, The Ruby, 29 Senapati, Bapat Marg, Dadar West, Mumbi – 400 028. **PAN : AACCG 3292 M**	Vs.	JCIT (OSD) (International Taxation) - 1(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Hiten Thakkar, Advocate
Revenue by	:	Shri. Satish Meriga, CIT (DR)(ITAT), Bengaluru.

Date of hearing	:	08.05.2024
Date of Pronouncement	:	09.05.2024

O R D E R

Per George George K, Vice President:

These appeals at the instance of the assessee are directed against two Final Assessment Orders (FAO) (both orders dated 25.01.2024), passed under section 143(3) r.w.s. 147 r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter called 'the Act'). The relevant Assessment Years are 2013-14 and 2014-15.

2. Common issues are raised in these appeals; hence, they were heard together and are disposed off by this consolidated order. Identical grounds are raised except

for variation in figures. The grounds relating to Assessment Year 2013-14 reads as follows:

1. *The learned AO has on the facts and circumstances of the case and in law. erred in issuing a notice under section 148 of the Act dated 29 March 2021 and passing draft order dated 30 March 2023 as well as final order under section 143(3) read with section 147, 92CA and 1440(13) of the Act dated 25 January 2024, without having jurisdiction over the Appellant and accordingly. the entire proceedings conducted under section 147 of the Act are invalid and void ab initio.*

2. *The learned AO has on the facts and circumstances of the case and in law, erred in initiating reassessment proceedings under section 147 of the Act.*

3. *The learned AO has on the facts and circumstances of the case and in law. erred in not granting an opportunity of being heard pursuant to passing of order disposing objections against the reassessment proceedings and accordingly, the principles of natural justice have not been followed.*

4. *The learned AO has on the facts and circumstances of the case and in law. without issuing any show cause notice. erred in concluding that the Appellant has provided technical services to GSSPL through the seconded employees and therefore the reimbursement of salary cost amounting to INR 7,41,75,474 received by the Appellant is chargeable to tax in India as Fees for services ('FTS') gi1en that the seconded employees 'make available' their expertise and skills to GSSPL.*

5. *The learned AO erred in invoking penalty proceedings under section 271(1)(c) of the Act for concealment of particulars of income for the captioned AY.*

3. Brief facts of the case are as follows:

Assessee, M/s. Goldman Sachs International, UK, (GSI), is a foreign company. It is a part of Goldman Sachs group and is involved in the business of providing financial services. In accordance to Goldman Sachs group policy,

certain employees of the GSI were seconded to M/s. Goldman Sachs Services India Pvt. Ltd., (GSSPL) (an Indian entity). The GSSPL (Indian entity) entered into secondment agreement and the employees of the assessee were regularly seconded assignment to GSSPL. The GSSPL reimburse the salary and other related costs of the seconded employees to the assessee. On the basis of the above facts, proceedings were initiated under sections 201(1) and 201(1A) of the Act in the case of GSSPL for the Assessment Years 2013-14 and 2014-15 by treating the payments made by it to the overseas entities towards reimbursement of salary costs of seconded employees as Fee for Technical Services (FTS) as per the Income Tax Act and DTAA. Based on the proceedings initiated in the hands of payer / GSSPL, assessments were reopened under section 148 of the Act in the hands of the assessee for Assessment Years 2013-14 and 2014-15. The Draft Assessment Orders (DAOs) were passed in the case of the assessee by treating the receipts from GSSPL as FTS as per the Income Tax Act and DTAA.

4. Aggrieved by the DAOs passed for the Assessment Years 2013-14 and 2014-15, assessee filed objections before the DRP. The DRP rejected the objections raised by the assessee vide its directions dated 22.12.2023 for Assessment Years 2013-14 and 2014-15. Subsequent to the directions of the Dispute Resolution Panel (DRP), the impugned FAOs were passed on 25.01.2024.

5. Aggrieved by the FAOs passed for Assessment Years 2013-14 and 2014-15, assessee has filed the present appeals before the Tribunal. The learned AR submitted that the issue in dispute has been decided in case of payer / GSSPL by ITAT in the case of M/s. Goldman Sachs Services Pvt. Ltd., Vs. DCIT in IT(IT)A Nos.364, 365/Bang/2020 (order dated 29.04.2022). It was submitted that

Tribunal has decided that the reimbursement of salary cost is not 'FTS' as per the Act or India – UK DTAA.

6. The learned DR had submitted an adjournment application, however, the same was withdrawn by him. The learned DR submitted that though the issue is covered in favour of the assessee by the order of the Tribunal cited supra, the Department has filed an appeal before the Hon'ble High Court and the same is pending adjudication. Further, it was submitted that the order of the Co-ordinate Bench of the Tribunal in the case of the payer i.e., GSSPL cited supra is no longer binding. It was submitted by the learned DR that in paragraph 36 of the Order of ITAT in the case of the payer i.e., GSSPL, the ITAT had placed reliance on the Bangalore Bench of CESTAT. It was submitted that the Order of Bangalore Bench of CESTAT was reversed by the Hon'ble Apex Court in the case of Northern Operating Systems Pvt. Ltd., reported in (2022) 138 taxmann.com 359 (SC) and hence the ITAT Order in the case of GSSPL is not correct.

7. We have heard the rival submissions and perused the material on record. On identical facts in the case of payer i.e., GSSPL, the Bangalore Bench of the ITAT for the relevant Assessment Years had held that reimbursement of salary and other related costs are not FTS under the Act or India-UK DTAA. Hence, it was concluded by the ITAT that proceedings under sections 201(1) and 201(1A) of the Act are not justified. The relevant finding of the ITAT in the case of payer reads as follows:

> *"26.1 In the above background let us analyse the 'India Recharge and Cost Allocation" Agreement', dated 03/03/2006, between the assessee before us and overseas entity, the independent employment contract between the assessee and the seconded employees and the correspondence between the*

employee and the assessee regarding bifurcation of salary payable to them. The assessee confirms the employment of Mr. Christopher pursuant to which an agreement is entered into between the assessee and Mr. Christopher. The said agreement is reproduced herein above.

26.2. From the recitals to the 'India Recharge and Cost Allocation" Agreement', dated 03/03/2006 between the assessee and overseas entity, it is clear that, the process of secondment of employees by overseas entity to the assessee in India is initiated, when the assessee in India, requires services of seconded employees of overseas entitities, for its business projects by the assessee in India. The assessee in India then enters into an agreement for seconded with such employees. By way of illustration, we may take the case of one Laura May, who is a American national and who is on the rolls of overseas entity.

26.3. Article 3.3 *of the 'India Recharge and Cost Allocation" Agreement', dated 03/03/2006 between the assessee and overseas entity imposes obligation of compliance with tax deduction at source as per the Act, on salaries paid to the seconded employees on the assessee in India.*

26.4. A reading of Article 2*, of the Agreement between the assessee and Laura May, shows that the control and supervision of the seconded employee is with the assessee in India.*

26.5. As per Article 4 of the Agreement between the assessee and Laura May, 75% of the salary of expatriate employee will be paid by the overseas entity, that sends the employee on deputation, and that, overseas entity, continues to be the de jure employer. The assessee in India, to which the employee is sent on deputation is the de facto employer pays the balance 25%. The salary paid by the de jure employer is reimbursed by the assessee in India, to the overseas entity.

26.6. As per Article 13 f the Agreement between the assessee and Laura May shows that, the assessee in India as well as the IT(IT)A Nos. 362 to 369 & 338 to 345/Bang/2020 seconded employee shall not disclose confidential information of the other party.

26.7. Thus the Agreement between assessee in India with the seconded employee, contains following features:-

1. *She is employee of overseas entity and during his assignment to assessee India, his employment responsibilities with overseas entity will remain suspended.*
2. *That, she will be under the control and supervision of the assessee in India.*
3. ***That, she was appointed as an Associate, by the assessee in India and that during her employment in India she would be exclusively working for the assessee in India.***
4. *That, during the assignment period, part of the salary after deducting grossed up income tax, under the Act, on the total salary, will be paid in India and the balance salary payable in New York, by overseas entity on behalf of assessee which shall be reimbursed by assessee to overseas entity against a debit note.*
5. *That, during the period of assignment with the assessee in India, all other terms and conditions as per polices of the assessee company would be applicable. 26.8 The assessee is thus required to make following payments as salary package to the seconded employees:*
6.

Para No	***Context***	***Description***
2	*Employer*	*GSSPL (Indian company) is the employer*
2.2	*Exclusivity*	*Employee works exclusively for GSSPL*
4.1	*Compensation*	*Compensation is decided and fixed by GSSPL in US$, 25% of this is paid in India and 75% will be paid through the New York payroll. Overall 100% compensation responsibility is that of the Indian company and not the overseas company (as wrongly noted by CIT(A))*
4.2	*Bonus*	*Bonus amount is decided by GSSPL*
4.4	*Increment*	*Increments and bonus entitlements are decided by GSSPL, in its sole discretion*
5.1	*Place of Work*	*Place of work is in Bangalore (India)*

7	*Leave policy*	*Leave is decided as per GSSPL's local policy*
9.1	*Notice period*	*Either the employee or GSSPL can give notice (mutual) to end the employment with one month's notice*
9.2	*Termination*	*Firm has right to terminate the employment for a cause ("firm" is defined as GSSPL at para 2.1 and hence it is GSSPL which has the right to terminate the employment)*
11	*Discipline and Grievance*	*Employee is bound by the Employee Handbook of GSSPL (and not of overseas companies as noted by CIT(A) at para 23 of his order)*
16	*Miscellaneous*	*The contract is governed by the laws of India*
17	*Signatures*	*The contract of employment is signed both by the expatriate employee and GSSPL*

26.9. Admittedly, the assessee deducted tax at source u/s.192 of the Act, on the 100% salary paid to the seconded employees, and paid the same to the credit of the Central Government. The assessee only reimbursed part of the salary cost of the seconded employee to overseas entity that has already subjected to TDS under section 192 of the Act. And therefore, at the time of making such reimbursement, to overseas entity, no taxes were deducted at source by the assessee in respect of reimbursements made as, according to the assessee, it was in the nature of cost-to-cost reimbursement, and, no element of income was involved.

26.10. The assessee in India does the TDS on 100% salaries u/s 192 and pay the same to the credit of the Central Government. Form 16 at page 228- 230 issued to Christopher Roberts of PB Vol I, by the assessee in Indian, Certificate under section 203 of TDS having deducted at source and further indicates the following –

- *Employee has a PAN number in India*
- *Total taxable salary is Rs 9,761,581 (this corresponds to the US$ 130,000 as total compensation indicated in the local employment contract at para 4*
- *The Indian company does full TDS on 100% of the salaries, although 25% is paid in India and balance 75% outside India*

- *TDS done is Rs 2,834,300/-, which translates to 30.8% of Rs 9,761,58 • Employee also contributes to Indian provident fund Rs.2,57,885/-*

26.11. From conjoint reading of Article 15 of the OECD Model Convention and the articled referred to herein above, there is no doubt in our minds that the assessee in India is the economic and de facto employer of the seconded employees. It is an admitted fact that all the seconded employees are in India for more that 183 days in a 12 month period. Further all the seconded employees have PAN card as well as file their returns in India in respect of the 100 % salary, though the assessee pays only part of the salary in India.

26.12. The definition of FTS under the Act is given in Explanation 2 to Sec.9(1)(vii) of the Act that reads as follows:-

"Income deemed to accrue or arise in India.

9. (1) The following incomes shall be deemed to accrue or arise in India :-

(i) to (vi)

(vii) income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an

agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1.--For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date. Explanation 2.--For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

26.13. The definition of FTS under the Act excludes "consideration which would be income of the recipient chargeable under the head salaries." If the seconded employee is regarded as employee of the assessee in India, then the reimbursement to overseas entity, by the assessee in India would not be in the nature of FTS, but would be in the nature of 'salary', and therefore, the reimbursements cannot be chargeable to tax in the hands of overseas entity, and therefore there would be no obligation to deduct tax at source at the time of making payment u/s.195 of the Act.

26.14. Article 12(4)-(5) of India USA, DTAA deals with "Fees for technical services', as under:

4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

5. Notwithstanding paragraph 4, "fees for included services" does not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a);

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals making the payment; or

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services)."

27. Rendering of managerial, technical and consultancy services is governed by Article 12 on 'Fees for included services' of the Double Tax Avoidance Agreement, between India and US. Payments made to 'individual or firm of individuals for service rendered by them in independent professional capacity are specifically excluded since they are covered by Article 15 on Independent Personal Services. Likewise, Article 12 specifically excludes payments made towards services rendered by an 'employee' of the enterprise since services rendered under employment are covered by Article 16 on Dependent Personal Services.

28. The relevant portion of para 5(e) of Article 12 of the DTAA between India and US reads as follows: -

"Fees for included services does not include payments made - to an 'employee' of the person making the payment or - to any individual or firm

of individuals (other than a company) for professional services as defined in article 15 (Independent Personal Services).

The payments made by the Indian entity to the overseas entity is towards reimbursement of salary paid by the overseas entity to the seconded personnel. As discussed in para 14.2 to 14.7 above, for the purpose of Article 15 of the OECD Model Commentary (corresponding to Article 16 of the DTAA between India and US), the seconded personnel are employees of the Indian entity, being the economic employer. It is to be noted that the understanding as to who is the 'employee' in order to be excluded from, "fees for technical services", cannot be inconsistent with the understanding of employee for the purpose of Article 15 on income from employment, especially when Article 15 is an anti- abuse provision."

8. The learned DR had placed reliance on the judgment of the Hon'ble Apex Court in the case of Northen Operating Systems Pvt. Ltd., (supra). Reliance placed by the learned DR is not valid. The Hon'ble jurisdictional High Court in the case of Flipkart Internet Pvt. Ltd., Vs. DCIT (International Taxation) reported in (2022) 448 ITR 268 (Karnataka) had distinguished the Hon'ble Apex Court judgment and held that in the case of reimbursement of salary and other related costs for seconded employees, the dictum laid down by the Hon'ble Apex Court will not have application since the said matter pertains to service tax. The relevant finding of the Hon'ble jurisdictional High Court reads as follows:

"(viii) The Revenue has relied upon the judgment of the Apex Court in C.C., C.E. & S. T. v. Northern Operating Systems (P.) Ltd. [2022] 138 taxmann.com 359 where the Apex Court has interpreted the concept of a secondment agreement taking note of the contemporary business practice and has indicated that the traditional control test to indicate who the employer is may not be the sole test to be applied. The Apex Court while construing a contract whereby employees were seconded to the assessee by foreign group of Companies, had upheld the demand for

service tax holding that in a secondment arrangement, a secondee would continue to be employed by the original employer.

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

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

9. The Co-ordinate Bench of ITAT, Bangalore, in the case of Google LLC Vs. JCIT(OSD)/DCIT(IT) reported in (2023) 147 taxmann.com 428 (Bengaluru – Trib) had followed the above judgment of Hon'ble jurisdictional High Court in the case of Flipkart Internet Pvt. Ltd., (supra). In view of the aforesaid judicial pronouncements, we hold that reimbursement of salary and other related costs for secondment of employees by GSSPL to assessee cannot be treated as FTS as per Act or India-UK DTAA.

10. Since we have decided the issue on merits, the other grounds relating to the validity of reopening of assessment is not adjudicated and same is left open. It is ordered accordingly.

11. In the result, appeals filed by the assessee are partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	**Sd/-**
(WASEEM AHMED)	**(GEORGE GEORGE K)**
Accountant Member	**Vice President**

Bangalore.
Dated: 09.05.2024.
/NS/*

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.