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

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER AND SHRI ANIKESH BANERJEE, JUDICIAL MEMBER

ITA 1023/Mum/2024	**-**	**A.Y. 2014-15**
ITA 1024/Mum/2024	**-**	**A.Y. 2015-16**
ITA 1025/Mum/2024	**-**	**A.Y. 2017-18**
ITA 1026/Mum/2024	**-**	**A.Y. 2018-19**

Commissioner of Income-tax International Taxation-3, Mumbai, Room No.1601, 16th Floor, Air India Building, Nariman Point, Mumbai-400 021	**vs**	**M/s JEFFERIES LLC** C/o Ernest and Young LLP 14th Floor, The Ruby 29 Senapati Bapat Marg, Dadar West Mumbai-400 028 **PAN : AACCJ8881D**
APPELLANT		**RESPONDENT**

C.O.Nos.92 to 95/Mum/2024
(Arising out of ITA Nos.1026, 1025, 1024 & 1023/Mum/2024)
(Assessment Years: 2014-15 to 2018-19)

M/s JEFFERIES LLC C/o Ernest and Young LLP 14th Floor, The Ruby 29 Senapati Bapat Marg, Dadar West Mumbai-400 028 **PAN : AACCJ8881D**	**vs**	**Commissioner of Income-tax (International Taxation)-3,** Mumbai, Room No.1601, 16th Floor, Air India Building, Nariman Point, Mumbai-400 021
CROSS OBJECTOR		**RESPONDENT**

Assessee by	:	Shri Nishant Thakkar
Revenue by	:	Shri Anil Sant, Addl. CIT DR

Date of hearing : 27/06/2024
Date of pronouncement : 28/ 06/2024

O R D E R

PER BENCH:

Instant appeals of the revenue and Cross Objections by the assessee are preferred against the common order of theLearned Commissioner of Income-tax (Appeal)-57, Mumbai [for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), for Asst Years2014-15 to 2018-19, date of order 29/12/2023. The impugned orders were emanated from the order of the ld. Assistant Commissioner of Income-tax, (International Taxation) Ward 3(1)(1), Mumbai(in short, 'the A.O.') passed under section 143(3) / 144C(13) of the Act, date of order 02/02/2017.

2. During the hearing, both the Ld.AR & Ld.DR mentioned that appeals in all the years have same factual background and having common issue. All the appeals are filed by the Revenue and the Cross Objections are filed by the assessee. Therefore, all the appeals and the cross objections are taken together, heard together and are disposed of together. **ITA No.1023/Mum/2024**&**CO 95/Mum/2024** are taken as the lead cases.

ITA No.1023/Mum/2024 (Revenue's Appeal)

3.1 The following are the grounds taken by the revenue:

"i. Whether on facts and in circumstances of the case and in the law, the Ld.CIT(A) was erred in not upholding addition of income made on account of the

administrative support services rendered by the assessee company to its Indian entity M/s. Jefferries India Pvt Ltd ("JIPL") as 'fests for technical services/included services which is taxable in India under Article 12 of the double taxation avoidance agreement between India and United States of America (Treaty[1]) since, the assessee 'makes available' technical knowledge, experience, skill, know-how, or process to JIPL?

ii. Whether on facts and in circumstances of the case and in the law, the Ld.CIT(A) was correct in holding that the administrative support services are routine in nature and none of the services provided by the assessee resulted in knowledge or know-how being transferred to JIPL without appreciating the fact that the business strategies, administrative and management support services rendered regularly by the assessee company constitute specialised nature and 'cannot by any stretch of imagination called 'routine' especially when data and information about the clients and customers has been accessed by engaging third party firms to collect, collate and provide such information to the assessee company which ultimately passed on the same to the Indian subsidiary entity JIPL for its own used in India to meet with and comply with statutory requirements of India and even to meet its business goals?

iii. Whether on facts and in circumstances of the case and in the law, the Ld.CFT(A) has failed to appreciate that fact that the Indian subsidiary of the assessee JIPL has deducted tax at source u/&. 195 of the Income Tax Act on payments made by it to the assessee @10% applicable to "technical service fees".'

iv. Whether on the facts, in circumstances of the case and in law, the Ld.CIT(A) was correct in holding that reimbursement of expenses are not taxable as fees for technical/ included services merely relying on decision of the tribunal in the assessee's own case for AY2 012-13 which is not accepted by the Department?

v. Whether on the facts, in circumstances of the case and in law, the Ld.CIT(A) has failed appreciate the fact that expenses reimbursed constitute the expenses incidental to the rendering of services by the assessee company to its subsidiary JIPL in India and are clearly classifiable under the category of "technical service fees" defined in Section 9(l)(iii) of the IT Act read with Article 12(4) of the India-USA DTAA.

vi. *The' appellant craves leaveto amend or alter any ground or add a new ground which may be necessary."*

Assessee's C.O. No.95/Mum.2024 (Arising out of ITA 1023/Mum/2024)

3.2 Similarly, following are the grounds taken by the assessee in its cross objection:-

"The Learned CIT(A) erred in not appreciating the fact that the administrative support fees are recovered at cost (i.e. without any mark-up) and the said fact has been accepted in the Unilateral Advance Pricing Agreement dated 8 August 2019 between the Central Board of Direct Taxes and JIPL as well.

The learned CIT(A) erred in dismissing the fact that the assessment order under section 143(3) of the Act read with section 144C(3) of the Act dated 2 February 2017, and the reassessment order under section 143(3) read with section 147 read with section 144C(3) dated 10 February 2020, are without jurisdiction and bad in law as much as the same have been passed beyond the time limit prescribed in section 153 of the Act.
The learned CIT(A) erred:

a. in not appreciating the fact that the re-assessment order dated 10 February 2020 passed under section 143(3) read with section 147 and section 144C(3) of the Act is bad in law, void ab initio and liable to be set aside.

b. in not appreciating the fact that the reassessment proceedings initiated under section 147/ 148 of the Act are inherently without jurisdiction and untenable in law as there was no tangible material available with the Learned AO to form reasons to believe that income of the Appellant has escaped assessment.

c. in not appreciating the Respondent declared all particulars and details in the original return of income filed for the relevant AY and the AO being satisfied with the same processed it under section 143(1) of the Act. Thus, reopening of the case without bringing any new tangible material is wholly invalid and bad in law.
The learned CIT(A) erred:

a. In dismissing the fact that the reassessment order passed under section 143(3) read with section 147 read with section 144C(3) of the Act dated 10 February 2020, was passed without a document identification number and hence, the order shall be regarded as invalid and deemed to never been issued.

:

b. in not providing a copy of the remand report submitted by the Learned AO to JLLC.

The learned CIT(A) erred in concluding that there is no requirement for issuing notice under section 143(2) of the Act to initiate re-assessment proceedings and only issuing the said notice prior to concluding the re-assessment proceedings is a compliance of the provisions of the Act.

6. On the facts and circumstances of the case, the learned CIT(A) erred in upholding the action of the Learned AO to levy interest under section 234D of the Act.

7. On the facts and circumstances of the case, the learned CIT(A) erred in upholding the action of the Learned AO to initiate penalty proceedings under section 271(1)(c) of the Act for additions made in the assessment/re-assessment order.

The above grounds of objections are all independent and without prejudice to one another.

The Respondent craves leave to amend or alter any ground or add new ground at any time before or at the time of hearing of the appeal."

4. The brief fact of the case is that the assessee is a foreign company incorporated in United States of America. The assessee company i.e. Jefferies LLC provides "Administrative Support Services" to Jefferies India Pvt Ltd(in short JIPL) against which the assessee company receives payments from JIPL. For the impugned assessment year, the assessee company had filed its return of income declaring NIL income. Subsequently the case was selected for scrutiny assessment and during assessment proceedings it was noted by the ld. AO that receipts of

Rs.72,80,069/- on account of “Administrative Support Services” as well as reimbursements amounting to Rs.11,46,63,298/- received from JIPLwere not offered for taxation. The assessment was completed treating the receipts amounting to Rs.72,80,069/- in the nature of “Fee for Technical Services” (in short FTS) and accordingly assessed income of the assessee amount of Rs.72,80,069/- in the impugned assessment order.

Further, the assessee company has provided “Administrative Support Service” to JIPL, as per the agreement entered into with JIPL. JIPL is registered with Securities and Exchange Board of India as a Category Merchant Banker and a stock Broker. The principal activities of JIPL are to provide merchant banking and investment advisory services to investors, corporate and stock broking services to domestic and foreign Institutional Investors. The “Research Management Support Services” are rendered towards compliance advice/support, general financial statement preparation, regulatory reporting. Information technology helpdesk support, internal audit of systems, etc. During the impugned assessment year the assessee company provided “Administrative Support Service” to JIPL and the Administrative support charges received from JIPL wereamount Rs.72,80,069/- which was taxed in India. The assessee was also in receipt amount of Rs.11,46,63,298/- from JIPL on account of reimbursement of expenses which was not offered for taxation while filing the return of income by the assessee. The assessee has claimed that the reimbursement of expenses received from JIPL is not taxable in India. While making the payments, JIPL has deducted tax at source.Accordingly, TDS amounting to Rs.51,04,694/- on the above payment has been claimed as Refund in the return of income.

The assessee has received reimbursements to the tune of Rs.11,46,63,298/- from JIPL on account of reimbursement of expenses but has claimed the same as not liable to tax in India as per the India-USA Double Taxation Avoidance Agreement (DTAA). It has claimed the said receipts as not taxable in India, since these cannot be characterized as "Fees for Technical/included services" as per the tax treaty. Similar additions were also made in A.Y. 2013-14, 2015-16 and 2016-17.The aggrievedassessee filed the appeal before the ld. CIT(A). Considering the covered issues of ITAT Mumbai Bench the ld. CIT(A) allowed the appeal of the assessee for all impugned assessment years. Being aggrieved on the appeal order the revenue has filed an appeal before us. On the other hand, the assessee has also filed Cross Objection before us against the impugned appeal order related to legal issues.

5. The Ld. DR vehemently argued and filed a written submission which is kept in the record. The Ld.DR specifically mentioned that the issue is duly dismissed by the said ld. CIT(A) is unjustified. The Ld. DR fully relied on the assessment order. The relevant paragraphs of written submission filed by the Ld. DR are reproduced as below:-

> ***"Characterized as FTS within the meaning in the DTAA and fall under Section 9 Explanation 2(vi) of the Act.***
>
> ***Reliance is further placed on the following findings made by the AO:***
>
> *1. The services provided by the Assessee company equip the Indian entity to manage its services efficiently based on the reports, analytics expertise across the world made available by the Assessee company. What is required merely is that the fruits of the services remain available to the person utilizing the services in some concrete shape such as experience, skill etc. Such benefits are available to the Indian companies in the shape of services mentioned Schedule A of the Inter group agreement. Therefore, the services would fall within the*

purview of FTS as the knowledge the users in India are utilize is the expertise of the assessee company is the business.

2. In the case of assessee, the administrative support service is provided to the Indian entity which is utilized in running its business and the employees of the Indian entity are assisted to carry on their business model of services on their own in compliance with Indian Generally Accepted Accounting Principles without reference to the service provider. It is not as if for 'making available', the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the service agreement on its expiry.

3. As per the MOU to the India-US DTAA, the term make available means that the person acquiring the service is enabled to independently apply the technology. The fact that the services are "continuous" does not by itself imply that is provided. The word "enable" is used in the sense that the services should be such that they make the recipient able or wiser in the subject matter. This is even more evident from the fact that it is the recipient who applies the knowledge and skill and the provider only supports the recipient with knowledge and skill. The services in this scenario are continuous to ensure that the assistance provided and applied by the recipient can be reviewed and continuous experience that is being gained globally can be supplied to the recipient for further enabling it to perform its tasks better.

4. The Authority for Advance Ruling in the case of Re Perfetti VAN Melle Holding B.V (AAR No.869 of 2010, dated 9th December 2011) held that services in nature of operational and other support services being ancillary and subsidiary to the function for which payment for royalty was made are taxable as "Fee for Technical Service" under Article 12(5) A between India and Netherland. The Authority was of the view that "the expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilize the knowledge of know how in future on his own". This view of the Authority was also referred in

the recent Advance Ruling in the case of Re AREVA T & D India Ltd (AAR No. 876 of 2010 dated 7th February 2012) and was held that as the employees of the applicant would get equipped to carry on the services/business on their own without reference of the service provider, after the completion of the term of the agreement. The services provided are taxable as Fee for Technical Services (FTS) Authority in the case of Perfetti held that for the services to fall under 'rendering of technical or consultancy services', mere development of technical plan of technical design should be sufficient compliance. It need not be necessary that technical plan and design was ' made available' to the recipient.

5. In the case of Mersen India (P) Ltd. The AAR (A.A.R. No. 1074/2010 dated 16.04.2012) observed that the payments by Indian company to French company towards advisory services is fees for technical services. In this case, the French company was provided services in nature of assistance, professional and - administrative consultation and training - various clauses of service agreement contained provision for service which related to overall management and direction, marketing and managing account and financial operations to the Indian company.

6. The Advisory/Support services is stated to have been used by the Indian entity in the course of their normal business activities. The services rendered by the assessee company to the Indian company JIPL are utilized by them for the betterment and improvement of their business model and other practices, which is ultimately reflected in the increase in profitability of JIPL. Thus, the business strategies, administrative and management support services of the assessee company is ultimately made use by the management for their administrative purposes for which they have paid high service fees to them. Moreover, the employees of the JIPL are all very educated and highly qualified. The said companies recruit the best talent available in the Indian market, from the most premiere of institutions and hence it would be impossible to imagine

that the advisory services provided by the assessee company is not absorbed and utilized by them in the management of their projects. Thus, there is an element of 'make available' involved in whatever administrative/advisory service that may have been received by JIPL.

7. The non-resident assessee company, the service provider (SP) has provided services through third party to the Indian entities who are the service recipients. If the expenses were not met by the service recipient (SR), the expenses would have been met by the service provider. As a natural consequence, the service provider might have charged the additional amount (which was to be met out for expenses) from the SR. The expenses of the service provider, which were to be met out by the service provider in the normal course of business operations. So, what was paid by the SR for the services done by the service provider is technical service fees payable as per the agreement plus the expenses met out by the SR.

8. It is also pertinent to note that the fees for Included/Technical Services are taxed on the Gross Amount. That is why the taxation rate is lower when compared to the general rate of taxation. The fees for technical services are taxed at a lower rate (and on gross basis) only to take care of the expenses to be met in providing the technical services. Since the fees for technical services are taxed on a gross basis, no expenses can be allowed as deduction. The expenses met out by the assessee are nothing but the expenses of the services provider in providing the services. Since expenses cannot be allowed while taxing the fees for included services, the amount of reimbursement also should be added with the fees for included services. Section 2(24)(iva) also considers these payments as income of the services provider.

The Hon'ble Kerala High Court in the case of Cochin Refineries vs. CIT - 222 ITR 354 has held that the reimbursements of expenses are taxable. The facts and the held portion as reported in the ITR is reproduced below:-

"Cochin Refineries requested a foreign company, F. to evaluate whether the coke produced from blend of vacuum bottoms and clarified oil from Bombay High crude was suitable for making anodes for the aluminium industry. The tests were carried out in the USA in regard to which the assessee made payment of Rs.....The assessee alsopaid Rs.....And Rs..... which were payments in the nature of reimbursement of thepayments made to the personnel of the said consultant F. All these payments were assessed u/s.9(l)(vii) of the Income tax Act, 1961. This was upheld by the Tribunal. On a reference: Held that the services rendered by the foreign company. It would be in the nature of technical services and would therefore, consequently, be covered fully by the Explanation to section 9(l)(vii) of the Income Tax Act, 1961. Even with regard to the two payments of Rs..... and Rs..... in the nature of reimbursement of paymentsmade to the personnel. No different situation would be available because there payments would be part and parcel in the process of advice of a technical character and would fall for coverage only within the meaning of the above Explanation. The amounts were assessable to tax in India.

Based on the discussion in the above paragraphs the reimbursements received by JLCC also fall under the purview of FTS and accordingly, the amount received of Rs.11,46,63,298/- by way of reimbursements is assessed as income of the assessee in the nature of 'Fees for Technical/Included Services' and taxed accordingly.

In light of the above legal and factual scenario, it is prayed that the grounds of appeal of the Appellant may kindly be dismissed, if deemed fit."

6. The Ld.AR mentioned that the issue prevails that the explanation of definition of 'FTS' charges.As per insertion of Explanation of Finance Act, 2010 with effect from 01/04/1976 is liable for the tax as per the revenue. But the

charges 'FTS' is for technical services which is received by the assessee is duly covered by the Article 12(4)(b) of DTAA between India and US Tax Treaty. In earlier years, the issue was duly covered by the Co-ordinate bench of ITAT-Mumbai in assessee's own case for A.Y. 2012-13 in **ITA No.5674/Mum/2017, date of pronouncement 28/03/2023**. The relevant paragraph is duly mentioned by the Ld.AR which is reproduced as below:-

> *"11. From the above, we observe that the assessee provides the administrative and day to day management services to the JIPL, this fact is confirmed by the observation and relevant material placed before us that the Indian entity JIPL does not have any support team and administrative set up to carry out the business independently. All the support services are provided by the intra-group entities and particularly, the administrative and day to day management services are provided by the assessee. The Ld.CIT(A) has confused with the two schedules viz., Schedule A and Schedule B and came to wrong conclusion by observing the bill copies submitted before him for reimbursement of certain charges for which the assessee has outsourced certain services for the whole group and whatever the services are utilized by the assesse are alone charged to the JIPL. Therefore, in our considered view, the services provided by the assesseein order to support and provide the administrative and day to day management services to the JIPL are in the nature of group support services. These services are not to fall under the category of FIS or FTS. This is supported by the decision of ITAT Delhi bench in the case of Everest Global Inc. v. DDIT (2022) 136 taxmann.com 404, it is held as under: -*
>
> *"9.3 We have carefully considered the rival submissions and perused the facts on record. Article 12(4)(b) of the India-USA DTAA provides the meaning of the term FIS 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:*
>
> *……..*

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

9.4 Now coming to the facts of the present appeal, the assesee has rendered management support services of the description listed at Annexure C of Master Support Services Agreement to Everest India on independent and non-exclusive basis. These services are centralized services which are being provided to all group entities in order to maintain uniformity and rationalize and standardize the practices across global location. No element of profit is earned by the assesee in course of rendering these services. These services include-

1. Management Oversight

a *Strategic direction*
b *Contract review*
c *Financial and legal guidance*
d *Client Relationship Management*
e *Insurance*
f *Peer Review*

2. Marketing

a *Brand Awareness*
b *Marketplace analysis*
c *Competitive analysis*
d *Webinars*
e *Leadership forum*
f *Speaking engagements*

3. Finance and Accounting

a *Payroll*
b *General ledger*
c *Employee time and expense*
d *Revenue and expense accruals*
e *Payables*
f *Accounts Receivables*
g *Cash Management*

h *Financial Reporting*
i *Budgeting*
j *Line of credit access management*

4. Human Resource management

a *Recruiting*
b *Compensation*
c *Benefits administration*
d *Legal*

5. Information Technology

a *Laptop Maintenance*
b *Help desk support*
c *Desk side support*
d *User Id and password*
e *Remote access*
f *System/antivirus*
g *Intranet*
h *Inter site communication links, email, voice mail etc*
i *Standard computer platform*
j *New hardware and software*
k *Training on IT resources*
l *Licenses and compliance*
m *Computer and phone networks*

6. Training

a *Global training conferences*
b *Monthly training sessions*
c *Ad hoc training as required*

7. Legal

a *Contract review*
b *Litigation management*
c *Other legal services as required*

9.5 We agree with the contention of the assesee that managerial services are outside the scope of the meaning of FIS under Article 12(4) of the IndiaUSA DTAA. Wherever the intention of the legislature is to include managerial services within the scope of FTS/ FIS, the same has been expressly mentioned therein. This contention of the assesee finds support by the jurisdictional Delhi Court judgment in the case of Steria (supra). The relevant para of the judgment is reproduced below.

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."

9.6. The assesee's case also finds support from the MOU annexed to the India-USA DTAA explaining the FIS wherein it is clarified that clause 4(b) of Article 12 excludes any service that does not make technology available to the person acquiring the service.

"Memorandum of Understanding (MOU) annexed to the India-USA DTAA dated 15.05.1989 concerning FIS states as under:

Article 12 includes only certain technical and consultancy services. But technical services, we mean in this context services requiring expertise in a technology. By consultancy services, we mean in this context advisory services. The categories of technical and consultancy services are to some extent overlapping because a consultancy service could also be a technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in a technology is required to perform it.

Under paragraph 4, technical and consultancy services are considered included services only to the following extent: (1) as described in paragraph 4(a), if they

are ancillary and subsidiary to the application or enjoyment of a right, property or information for which are royalty payment is made; or (2) as described in paragraph 4(b), if they make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design. Thus, under paragraph 4(b), consultancy services which are not of a technical nature cannot be included services. {emphasis supplied}

Paragraph 4(b)

Paragraph 4(b) of Article 12 refers to technical or consultancy services that make available to the person acquiring the services, technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plant or technical design to such person. (For this purpose, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person). This category is narrower than the category described in paragraph 4(a) because it excludes any service that does not make technology available to the person acquiring the service. Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available.

{emphasis supplied}

Typical categories of services that generally involve either the development and transfer of technical plans or technical designs, or making technology available as described in paragraph 4(b), include :

1. *Engineering services (including the sub-categories of bioengineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical, metallurgical, and industrial engineering) ;*

2. *Architectural services ; and*

3. *Computer software development.*

Under paragraph 4(b), technical and consultancy services could make technology available in a variety of settings, activities and industries. Such services may, for examples, relate to any of the following areas :

1. *Bio-technical services ;*
2. *Food processing ;*
3. *Environmental and ecological services ;*
4. *Communication through satellite or otherwise ;*
5. *Energy conservation ;*
6. *Exploration or exploitation of mineral oil or natural gas;*
7. *Geological surveys ;*
8. *Scientific services ; and*
9. *Technical training."*

From the above, it is evident that none of the services provided by the assesee are in the nature of FIS.

9.7 Further, considering the services provided by the assesee (listed above), in our view, these are not technical services nor do they require any technological knowledge, skill or experience. There is no transfer of technology involved. Everest India is not enabled to apply any technology on its own without recourse to the service provider i.e. the assesee. These services have not resulted in any enduring benefit to Everest India by way of any knowledge which could be applied by it on its own in future without depending on the assessee. These are general managerial services which are received by the assesee on recurring basis. Therefore, the test laid down under Article 12(4)(b), in our considered view, are not satisfied in the present factual scenario.

9.8 Thus, management fee received by the assesee from Everest India is not taxable as FIS under the provisions of India-USA DTAA. Accordingly, this ground is allowed in favour of the assesee."

12. Further, the coordinate bench decided similar issues in the case of EdenredPte Ltd v. DDIT [2020] 118 taxmann.com 2 (Mumbai – Trib.) and held as under: -

"9. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

We find that the services provided under the management agreement broadly include (i) consultancy services to support the sales activities of Surf Gold, (ii) legal services, (iii) financial advisory services and (iv) human resource assistance. There is no dispute here that under the provisions of section 9(1)(vii) of the Act, rendering of management services will be taxable as FTS. However, Edenred, by virtue of section 90(2) of the Act, is eligible to rely on the provisions of the India-Singapore DTAA, should the same be more beneficial than the provisions of the Act. In this regard, we fruitfully rely on the judgment of the Hon'ble Delhi High Court in the case of New Skies Satellite BV & Ors (ITA No. 473/2012) wherein it is held that provisions of DTAA shall prevail over the provisions of the Act, if they more beneficial.

At this moment, we refer to Article 12(4) of the India-Singapore DTAA which explains the expression 'make available' as under:

"Article 12(4):

The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through 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, which enables the person acquiring the services to apply the technology contained therein; or*

c *consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein."*

Thus as per the India-Singapore DTAA, the services in the nature of managerial, technical or consultancy nature are taxable as FTS if such services are 'made available' to the service recipient.

We find that in the instant case, the management services are provided only to support SurfGold in carrying on its business efficiently and running the business in line with the business model, policies and best practices followed by the Edenred group. These services do not make available any technical knowledge, skill, knowhow or processes to SurfGold.

9.1 Now we discuss the case laws relied on both sides.

We begin with the reliance placed by the Ld. counsel. In the case of De Beers Mineral (P.) Ltd., the Hon'ble Karnataka High Court has observed as under :

"The technical or consultancy services rendered should be aimed at and result in transmitting of technical knowledge etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending on the provider."

In the case of Intertek Services (307 ITR 418), the AAR has observed on the term 'make available' as under :

"By making available the technical skills or know-how, the recipient of service will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. In other words, to fit into the terminology 'make available', the technical knowledge, skills etc. must remain with the person receiving the services even after the particular contract comes to an end. The services offered may be the product of intense technological effort and lot of technical knowledge and experience of the service provider would have gone into it. But, that is not enough to fall within the description of services which make available the technical knowledge, etc. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in future without depending on the provider."

In the case of M/s BharatiAxa General Insurance Co. Ltd., the AAR has ruled as under :

"9. The definition of FTS as contained in clause (b) of Article 12.4 is explicitly designed to restrict the scope and ambit of the technical and consultancy services. Even if we proceed on the basis that some of the services have the flavour of imparting technical knowledge and experience to the recipient of service, the further question is whether such provision of services enables the person acquiring the services to apply the technology contained therein. This test specifically laid down in clause (b), in our view, is not satisfied and the legal position clarified by this Authority while interpreting more or less similar Treaty provisions applies with greater force to the present case in view of the narrow language employed in the India-Singapore DTAA.

Providing comments and suggestions after reviewing the strategies and plans developed by the Applicant, giving suggestions to the Applicant to improve the product developed by it so as to bring it in line with the common practices followed by other AXA entities across the globe, providing HR support assistance, assisting the Applicant in choosing cost effective re-insurance partners, reviewing the actuarial methodologies developed by the Applicant and providing suggestions and inputs to achieve standard actuarial practices and processing guidelines in connection with the settlement of claims, marketing and risk analysis, fall short of the requirements laid down in the definition of fees for technical services in DTAA between India and Singapore. It will be too much to say that by providing such services (assuming they are technical or consultancy services), the Applicant receiving the services is enabled to apply the technology contained therein i.e. the technology, knowledge, skills, etc. possessed by the service provider or technical plan developed by the service provider. We do not find anything in the IT support services that answer the description of technical services as defined in the Treaty."

9.2 Then we turn to the case laws relied on by the Ld. DR. in US Technology Resources Pvt. Ltd. (supra), in terms of management service agreement between the assessee and the USA company, the latter provides highly technical services which are used by the assessee for making managerial decision, financial decision, risk management decision etc. The service of technical input, advice, expertise etc. rendered by the USA company are technical in nature as provided in clause 4(b) of the Article 12 of the DTAA. It is found that this case is reversed by

the Hon'ble Kerala High Court in 97 taxmann.com 642 dated 09.08.2018, wherein it is held that fees for management services received by US company would not be taxable in India as there is no transfer of technical knowledge by US company to Indian company.

In Shell India Markets (P.) Ltd. (supra), the applicant is an Indian company, it has a network of retail fuel stations in India. SIPCL is a group company of assessee incorporated in UK. It is in the business of providing consultancy services to various group companies. The applicant has entered into Cost Contribution Agreement (CCA) with SIPCL for provisions of General Business Support Services (BSS). While providing General BSS, SIPCL works closely with the employees of the applicant and supports/advices them. Thus, General BSS is made available to the applicant. However, we find that subsequently, after considering the decision in the case of Shell India (supra), the Mumbai ITAT in the case of Linklaters LLP (ITA No. 1690/Mum/2015) dated 31.01.2017 held that from none of legal advisory services it can be said that technical knowledge, skill, experience, knowhow or process remained with the clients to whom services were rendered by the assessee, even after the rendition of services was completed and agreement came to an end. These services were of purely legal advisory nature; it cannot be said that recipient of the services was in a position to duplicate similar skill or technology or techniques in future without the aid or assistance of the assessee for carrying out similar assignments.

In the case of Perfetti Van Melle Holdings BV (supra), the applicant is a company based in Netherlands and it is in the business of manufacture and sale of sugar confectionary and gun. It also provides operational and other support services for the benefit of companies of Perfetti group situated in various countries. It has entered into a service agreement with the group company (Perfetti India). The AAR held that when the expertise in running the industry run by the group is provided to the Indian entity in the group to be applied in running the business, the employees of the Indian entity get equipped to carry on that business model on their own without reference to service provider, when the service agreement comes to an end. It is not as if for making available, the recipient must also be conveyed specially the right to continue the practice put into effect and adopted under the service agreement on its expiry. It is found that this case is reversed and set aside for fresh adjudication by the Hon'ble Delhi High Court in 52 taxmann.com 161 dated 30.09.2014 and hence cannot be made applicable.

9.3 We find that in view of the factual matrix delineated at para 9 above, the case laws narrated at para 9.1 hereinbefore i.e. De Beers Mineral (P.) Ltd; Intertek Services; M/s BharatiAxa General Insurance Co. Ltd. are applicable to the instant case. Therefore, we delete the addition of Rs.73,61,951/- made by the AO towards management services fees and allow the 3rd ground of appeal."

13. From the above discussions and case law, the services provided by the group entities or holding company to its subsidiaries as support services to run their business effectively will not be considered as FTS or FIS under the treaty and these services does not amount to make available technical or skill or expertise while providing these services. Therefore, in our considered view, the services provided by the assessee to its subsidiaries are only to support to function the administration and day to day management of JIPL considering the fact that JIPL does not have any infrastructure to carry out any administration and day to day management. These facts are confirmed by the lower authorities and also facts on record. Therefore, these services are outside the ambit of FIS and FTS. Hence, we are inclined to allow the grounds raised by the assessee."

7. We heard the rival submission and considered the documents available in the record. The moot issue is that the assessee received amount to Rs.72,80,069/- on account of "Administrative Support Services"and also the reimbursement of amount to Rs.11,46,63,298/- received from JIPL which have not been offered for tax in ROI. As per the revenue, the FTS is liable for the tax under section 9(1)(vii) of the Act. The word 'technical services' is preceded by the word 'managerial' and succeeded by the word 'consultancy'. Since the expression technical services is duly covered for tax, in case of reimbursement, it is also enabled taxed in India. But considering Article 12(4)(b) of DTAA, the "Administrative Support Services" is re-defined, and issue is duly covered by the order of the Co-ordinate bench of ITAT in assessee's own case (supra). So, both

the amounts are not liable for tax in India U/s 9 of the Act. Further, the observation of Ld.C IT(A) in appeal order is reproduced as below: -

"6.3.1 The facts of the case of the appellant are that the appellant and M/s. Jefferies India Pvt. Ltd. entered into an agreement for providing administrative support services. For providing administrative support services, the appellant received Rs.19,07,598/-. The same was not offered for taxation as per India-US DTAA, particularly, Article 12(4) of the DTAA. On the other hand, the AO was of the view that the administrative services provided to JIPL were utilized in running its business. Further, the employees of JIPL were assisted to carry out the business mode of services on their own. Thus, the employees were enabled to work independently by acquiring the services from the appellant. The AO was of the view that acquiring the services from the appellant by highly qualified employees of JIPL was in the nature of makeavailable of administrative/advisory services by the appellant to JIPL. Thus, administrative support services were fees for technical/included services which were taxable in India. During the appellant proceedings, the appellant has submitted that on similar facts and circumstances, in respect of administrative support services, the ITAT-Mumbai, in its own case for AY. 2012-13 has held that providing administrative support services did not 'make available' of services by the appellant to M/s. Jefferies India Pvt. Ltd. and hence those services were not qualified as fees for technical services. The appellant further submitted that in APA Agreement for AY. 2018-19 onwards and for roll back years upto AY. 2014- 15, the administrative support services were accepted without any mark-up and on cost-to-cost basis. The appellant has also relied upon various decisions to support the argument that providing services on year-to-year basis and routine services for day-to-day administration did not result into make available of services.

6.3.2 From perusal of the order of the ITAT for AY. 2012-13 in appellant's own case, it is seen that the issue related to taxability of administrative support services as FTS has been decided by the ITAT in favour of the appellant. For ready reference, relevant para of the decision of ITAT is reproduced as under: "13. From the above discussions and case law, the services provided by the group entities or holding company to its subsidiaries as support services to run their business effectively will not be considered as FTS or FIS under the treaty and these services does not amount to make available technical or skill or expertise while providing these services. Therefore, in our considered view, the services provided by the

assessee to its subsidiaries are only to support to function the administration and day to day management of JIPL considering the fact that JIPL does not have any infrastructure to carry out any administration and day to day management. These facts are confirmed by the lower authorities and also facts on record. Therefore, these services are outside the ambit of FIS and FTS. He nce we are incline to allow the grounds raised by the assessee." The facts and circumstances of the grounds related to administrative support services for AY. 2012-13 and those in AY. 2013-14 are similar. There is no material change in the facts and circumstances of the case for the present year, therefore, respectfully, following the decision of the ITAT in appellant's own case for AY. 2012-13, the administrative support services are not considered as FTS or FIS.

6.3.3 The appellant has relied upon the APA accepted for AY. 2018-19 and roll back years upto AY. 2014-15. The appellant relying upon the APA has tried to explain that the administrative support services were not taxable as FTS/FIS. As far as the finding of the APA are concerned, the findings are in relation to the transfer pricing of the transaction. From perusal of the APA Agreement for AY. 2018-19, it is seen that the APA has not decided the issue whether the administrative support services were fees for technical services/included services. Therefore, reliance of the appellant on APA is of no help to the appellant as far as the taxability of administrative support services as FTS/FIS are concerned. In view of the above, receipt of Rs.19,07,598/- from JIPL for providing administrative support services by the appellant are held as not taxable in India as FTS or FIS."

In our considered view, we cannotcircumvent the order of co-ordinate bench in case of taxation on FTS which covered by DTAA of IU treaty. We do not find any plausible ground to interfere in appeal order. The grounds of the revenue are failed, and both the additions are deleted.

8. Further, in **ground No.6** for A.Y. 2017-18, the Ld.AR placed that the issue is not arising because, the Treaty rate is @15% is higher than the domestic rate @10%. So, the ground No.6 of ITA No.1025/Mum/20-24, the levy of surcharge at

tax rate is rejected. In our considered view, ground no 6 of the revenue is dismissed.

In the result, appeal of the revenue **ITA No.1023/Mum/2024** is dismissed.

9. Since the facts and circumstances in all other appeals are identical, the decision arrived at above shall apply mutatis mutandis to other appeals also.

10. Regarding the cross objections filed by the assessee, the Ld.AR placed that the Cross Objections are infructuous in this case, which stands dismissed.

10. In the result, both the appeals in **ITA Nos 1023 to 1026/Mum/2024** filed by the Revenue and the **Cross Objections No.92 to 95/Mum/2024** filed by the assessee are dismissed.

Order pronounced in the open court on 28th day of June, 2024.

Sd/-	sd/-
(NARENDRA KUMAR BILLAIYA)	(ANIKESH BANERJEE)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai,दिनांक/Dated: 28/06/2024
Pavanan

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्डफाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar), **ITAT, Mumbai**