

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

**Before Dr. B. R. R. Kumar, Accountant Member,  
Ms. Madhumita Roy, Judicial Member**

**ITA No. 3253/Del/2023 : Asstt. Year: 2021-22**

Ernst and Young U.S. LLP, C/o Authorized Representative, Ernst and Young LLP, 5 <sup>th</sup> Floor, Tower-2, Plot No. 2B, Sector-126, Noida, Gautam Budh Nagar, U.P.-201304	Vs	ACIT, International Taxation, Circle-1(2)(2), New Delhi-110002
(APPELLANT)		(RESPONDENT)
<b>PAN No. AADFE0355M</b>		

**Assessee by : Sh. S. Ganesh, Sr. Adv. &  
Ms. Ananya Kapoor, Adv.  
Revenue by : Sh. Vivek Vardhan, Sr. DR**

**Date of Hearing: 09.05.2024**

**Date of Pronouncement: 07.08.2024**

**ORDER**

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

The present appeal has been filed by the assessee against the order dated 19.09.2023 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

**"General Grounds**

*Ground 1.1: That on the facts and in the circumstances of the case and in law, the final assessment order dated 19 September 2023 passed under section 143(3) read with section 144C (13) of the Act ("impugned order") by Assistant Commissioner of Income Tax, Circle International Tax 1 (2)(2), Delhi ("Ld. AO") in conjunction with the directions passed by the Ld. Dispute Resolution Panel ("Ld. DRP") in the case of Appellant for AY 2021-22, assessing the income of the Appellant for the relevant assessment year at INR 49,70,21,380*

*as against the returned income of INR 67,74,750 is bad in law and liable to be quashed.*

*Ground 1.2: That on the facts and in the circumstances of the case and in law, the impugned order passed by Ld. AO/ DRP is contrary to correct reading and interpretation of relevant statutory provisions and therefore, the impugned order is bad in law and liable to be set aside.*

**Grounds challenging addition on account of reimbursement of secondment charges**

*Ground 2.1: That on the facts and in the circumstances of the case and in law, the Ld. AO/ DRP has erred in treating mere cost to cost reimbursements on account of secondment of employees amounting to INR 18,28,95,723 to be Fees for Technical Services ("FTS") as defined under Article 12 of India-USA Double Tax Avoidance Agreement ("DTAA") where such payments were made by Appellant for and on behalf of Indian Entities which is directly contrary to the recent judgment of the Honorable Delhi ITAT in Appellant's own case dated 20 June 2023. A copy of the said judgment is being filed along with the present appeal. It is respectfully submitted that this ITAT order directly and squarely covers the present case. The Appellant hereby incorporates the findings and reasoning in that ITAT order as part of the present Grounds of Appeal.*

*Ground 2.2: That on the facts and in the circumstances of the case and in law, the findings of the Ld. AO/ DRP, namely that, seconded personnel are employees of the Appellant and that agreement / arrangement between the Appellant and Indian Ernst & Young entities constitutes provision of services by Appellant through seconded personnel is also directly contrary to the specific findings given by the Hon'ble Delhi ITAT in Appellant's own case dated 20 June 2023.*

*Ground 2.3: That on the facts and in the circumstances of the case and in law, the Ld. AO / DRP has erred in arbitrarily concluding that the appellant is providing services through its employees satisfying the "make available technical knowledge, experience, skill, know-how or processes" condition of Article 12 of the DTAA. This finding given by the Ld. AO/ DRP namely, that "make available" condition / requirement of Article 12 of DTAA has been fulfilled is directly contrary to the specific and categorical findings of the Hon'ble Delhi ITAT in Appellant's own case dated 20 June 2023.*

*Ground 2.4: That on the facts and in the circumstances of the case and in law, the Ld. AO / DRP has erred in failing to appreciate that the present case is governed by Article 15 'Independent Personal Services' of DTAA and not Article 12 'Fee for Technical Services' of DTAA. The Ld. AO /DRP have also*

*completely disregarded provisions of Para 12(5) of the DTAA which specifically excludes from the ambit of Article 12 of the DTAA, all payments covered by Article 15 of the DTAA.*

*Ground 2.5: That on the facts and in the circumstances of the case and in law, the Ld. AO/ DRP have completely disregarded the crucial fact that the same payments have been taxed as salary in the hands of seconded personnel. The Ld. AO/ DRP have also erred in disregarding the fact that tax on said payments has already been deducted under section 192 of the Act on the basis and footing that the same payments constitute salary income assessable in the hands of seconded personnel in India.*

*Ground 2.6: That on the facts and in the circumstances of the case and in law, the Ld. A.O / DRP completely failed to appreciate that the very same amounts could not in law be subjected to tax twice, firstly in the hands of the seconded employees working in India and, secondly, again in the hands of the Appellant.*

*Ground 2.7: That on the facts and in the circumstances of the case and in law, the Ld. A.O / DRP also failed to appreciate that, similarly, the same amounts could not be subjected twice to deduction of tax at source.*

**Grounds challenging addition on account of income from professional services governed by Article 15 of the DTAA as "Fees for Included Services" under Article 12 of the DTAA**

*Ground 3.1: That on the facts and in the circumstances of the case and in law, the Ld. AO / DRP have completely failed to appreciate the crucial factor that Article 15 of the DTAA is not confined to Professional Services rendered in India. The Ld. AO/ DRP failed to appreciate that Article 15 squarely covers Professional Services rendered from abroad to entities located in India. Hence, the interpretation placed by the Ld. AO / DRP on Article 15 of the DTAA constitutes a complete rewriting of Article 15 of the DTAA, which is illegal and impermissible.*

*Ground 3.2: That on the facts and in the circumstances of the case and in law, the Ld. AO/ DRP has erred in making addition of income from professional services amounting to INR 30,73,50,907 as Fees for included services ('FIS') under Article 12 of the DTAA on the erroneous premise that such services do not qualify as "professional services" as per Article 15 of the DTAA.*

*Ground 3.2(a): That on the facts and in the circumstances of the case and in law, the Ld. AO / DRP has erred in concluding*

*that the definition of professional services under Article 15(2) of the DTAA is exhaustive in nature.*

*Ground 3.2(b): That on the facts and in the circumstances of the case and in law, the Ld. AO/ DRP, in the guise of interpreting Article 15 of the DTAA, rewritten and redrafted the Article by inserting therein new requirements / conditions which do not exist on a plain reading of Article 15 of the DTAA.*

*Ground 3.2(c): That on the facts and in the circumstances of the case and in law, the Ld. AO / DRP has erred in concluding that the services rendered by specified functionaries such as Economists, MBA Graduates, Diploma holders and other trained technical professionals do not qualify as 'professional services' under Article 15 of the DTAA completely ignoring that Article 15 of the DTAA covers the "professional services" as well as "other independent activities of similar character".*

*Ground 3.2(d): That on the facts and in the circumstances of the case and in law, the Ld. A.O/DRP failed to appreciate that a plain reading of Article 15 itself shows that it covers artistic, musical and other activities which are not governed or regulated by any statute, nor are they subjected to any disciplinary control by any specified body.*

*Ground 3.3: That on the facts and in the circumstances of the case and in law, the Ld. AO / DRP has erred in holding that professional services rendered by the appellant satisfies the make available clause and therefore qualify as FIS under Article 12 of the DTAA.*

*Ground 3.3(a): Without prejudice to above, on the facts and in the circumstances of the case and in law, Ld. AO/ DRP failed to appreciate that in any event and in any view of the matter, the mere rendering of training services, as part of rendering professional services which are covered by Article 15 of the DTAA cannot possibly be considered to comply with "make available" requirement of Article 12 of the DTAA. In any event, as already stated, the Ld. AO/ DRP also failed to appreciate that this issue is irrelevant and immaterial as no income with respect to training service(s) was earned by the Appellant under the specified contract in the subject year.*

*Ground 3.4: That on the facts and in the circumstances of the case and in law, the Ld. AO / DRP has erred in applying the facts of one agreement having training services as part of the overall scope of work to all other independent agreements without appreciating that the services under other agreements are different and findings related to one agreement cannot be applied to all agreements unanimously.*

*Ground 3.5: Without prejudice to any of the above arguments, on the facts and in the circumstances of the case and in law, even assuming, without conceding, that the taxability of the services performed by EY US is not governed by Article 15 of the DTAA, the Ld. AO / DRP failed to appreciate that in any event be taxed in India because it is undisputed position that the Appellant does not have a Permanent Establishment in India.*

**Other grounds**

*Ground 4: That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating the penalty proceedings under section 270A of the Act for alleged under-reporting of income.*

*All of the above grounds of appeal are without prejudice to and notwithstanding each other."*

3. Ernst and Young U.S. LLP is a limited liability partnership (LLP0, wherein various individual partners have partnership share in the partnership. Further, the assessee is tax resident of United States of America (USA). The assessee is in the business of providing professional services in the field of assurance, tax, transaction and business advisory services etc. to its clients across the globe including India. The assessee received an amount of Rs.18,28,95,723/- on account of reimbursement of costs with respect to employees seconded to Indian Member firm and an amount of Rs.65,20,12,778/- on account of receipts from Indian based clients for services performed in and from USA for such clients.

**Reimbursement of Secondment Charges:**

4. This issue stands covered by the order of the Co-ordinate Bench of Tribunal in assessee's own case in ITA No.

2332/Del/2022, order dated 20.06.2026. The relevant part of the said order is as under:

5. *The only issue that survives which needs adjudication is whether cost to cost reimbursement on account of secondment of employees was Fees for Technical Services [FTS] as defined under Article 12 of the India-USA Double Tax Avoidance Agreement [DTAA] and whether 3 arrangement between the assessee and Indian entities constitutes the 'provision of services' by the assessee through seconded personnel.*

6. *The assessee is a limited liability partnership firm, incorporated under the laws of United States of America and is engaged in the business of providing professional services in the field of assurance, tax, transaction and business advisory services etc to its clients across the globe including India. The assessee is eligible for availing treaty benefits as per the treaty between India and USA.*

7. *During the year under consideration, the assessee has offered its income to tax as per section 115A of the Act r.w. the provisions of Article of the India-USA Tax Treaty. Return so filed was selected for complete scrutiny and accordingly, statutory notices were issued and served upon the assessee.*

8. *During the course of scrutiny assessment proceedings, inter alia, the Assessing Officer issued a show cause notice to the assessee requiring the assessee to show cause as to why the payments received by the assessee on account seconded employees amounting to Rs. 4,50,99,38,561/- should not be taxed as FTS/Independent Personal Services [IPS] as per the treaty provisions.*

9. *The assessee filed detailed reply alongwith documentary evidences pursuant to which, the Assessing Officer framed draft assessment proceedings proposing to make the following valuations to the returned income of the assessee:*

*Total income as declared by the assessee : Rs. 32,73,620/-*

*Add: Secondment cost taxable as FTS*

*Under the provision of DTAA : Rs. 50,99,38,561/-*

*Total proposed assessed income : Rs. 51,32,12,181/-*

10. *The assessee raised objections before the DRP but without any success.*

11. *Before us, the Id. counsel for the assessee vehemently stated that the personnel, after receiving approval from EY India member firms, were seconded by the assessee to EY India member firms and were released/discharged from all the obligations and rights of employment in their home country, USA and were subsequently employed by EY India member firms for their business and as employees of such India member firms.*

12. *Referring to the deputation agreement between the assessee and the seconded personnel, the Id. counsel for the assessee pointed out that EY India member firms shall be solely responsible to pay salary and other costs of the personnel during the period of assignment and shall have the right to undertake performance appraisal of the personnel in accordance with the policies of EY India member firms.*

13. *The three EY India entities to whom employees were seconded were:*

*i) EYGBS [India] Pvt. Ltd.*

*ii) EY Global Delivery Services India LLP [EYGDS]*

*iii) Ernst & Young LLP*

14. *It is the say of the Id. counsel for the assessee that pursuant to the agreement, seconded personnel were employees of the Indian member firms and, accordingly, invoices raised by the assessee are pursuant to salary cost and other related costs paid by the assessee on behalf of India member firm for administrative convenience.*

15. *The Id. counsel for the assessee further explained that the invoices raised with respect to seconded personnel are not chargeable to tax in India as the said invoices are towards mere reimbursements of expenses incurred by the assessee on behalf of Indian entities having no profit element to it. The Id. counsel for the assessee further explained that the invoices so raised are with respect to reimbursement of salary costs and do not fall within the ambit of Article 12 FTS and Article 15 IPS under India – USA tax treaty.*

16. *The Id. counsel for the assessee emphatically stated that the invoices raised are for amounts which have already been*

*subjected to tax as per provisions of Section 192 of the Act as the same is income in the hands of the seconded personnel.*

*17. Per contra, the Id. DR strongly supported the findings of the Assessing Officer and placed strong reliance on the decision of the Hon'ble Supreme Court in the case of M/s Northern Operating Systems Pvt. Ltd. Civil Appeal No. 2289 - 2293 of 2021. The Id. DR read the relevant part of the judgment to buttress his contention that there is no error in the findings of the Assessing Officer.*

*18. We have given thoughtful consideration to the rival contentions and have carefully perused the order of the authorities below. Since the Id. DR has placed strong reliance on the judgment of the Hon'ble Supreme Court [supra], we would like to address it first.*

*19. At the very outset, we have to state that the judgment has to be read in the context in which it is delivered and in the words of the Hon'ble Supreme Court, the judgment was delivered for:*

*"48. The task of this court, therefore is to, upon an overall reading of the materials presented by the parties, discern the true nature of the relationship between the seconded employees and the assessee, and the nature of the service provided - in that context - by the overseas group company to the assessee."*

*20. The Hon'ble Supreme Court, in the above context, observed as under:*

*"33. The issue which this court has to decide is whether the overseas group company or companies, with whom the assessee has entered into agreements, 24 provide it manpower services, for the discharge of its functions through seconded employees.*

*34. The contemporary global economy has witnessed rapid crossborder arrangements for which dynamic mobile workforces are optimal. To leverage talent within a transnational group, employees are frequently seconded to affiliated or group companies based on business considerations. In a typical secondment arrangement, employees of overseas entities are deputed to the host entity (Indian associate) on the latter's request to meet its specific needs and requirements of the Indian associate. During the arrangement, the secondees work under the control and supervision of the Indian company and in relation to the work responsibilities of the Indian affiliate. Social security laws of the home country (of the secondees)*

*and business considerations result in payroll retention and salary payment by the foreign entity, which is claimed as reimbursement from the host entity. The crux of the issue is the taxability of the cross charge, which is primarily based on who should be reckoned as an employer of the secondee. If the Indian company is treated as an employer, the payment would in effect be reimbursement and not chargeable to tax in the hands of the overseas entity. However, in the event the overseas entity is treated as the employer, the arrangement would be treated as service by the overseas entity and taxed."*

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*53. Facially, or to put it differently, for all appearances, the seconded employee, for the duration of her or his secondment, is under the control of the assessee, and works under its direction. Yet, the fact remains that they are on the pay rolls of their overseas employer. What is left unsaid- and perhaps crucial, is that this is a legal requirement, since they are entitled to social security benefits in the country of their origin. It is doubtful whether without the comfort of this assurance, they would agree to the secondment. Furthermore, the reality is that the secondment is a part of the global policy - of the overseas employer loaning their services, on temporary basis. On the cessation of the secondment period, they have to be repatriated in accordance with a global repatriation policy (of the overseas entity).*

*21. And finally, the Hon'ble Supreme Court concluded as under:*

*"65. It is held, for the foregoing reasons, that the assessee was the service recipient for service (of manpower recruitment and supply services) by the overseas entity, in regard to the employees it seconded to the assessee, for the duration of their deputation or secondment. Furthermore, in view of the above discussion, the invocation of the extended period of limitation in both cases, by the revenue is not tenable. 66. In light of the above, the revenue's appeals succeed in part; the assessee is liable to pay service tax for the periods spelt out in the SCNs. However, the invocation of the extended period of limitation, in this court's opinion, was unjustified and unreasonable. Resultantly, the assessee is held liable to discharge its service tax liability for the normal period or periods, covered by the four SCNs issued to it. The consequential demands therefore, shall be recovered from the assessee. 67. The impugned common order of the CESTAT is accordingly set aside. The commissioner's orders in original are accordingly restored, except to the extent they seek to recover amounts for the extended period of limitation. The*

*demand against the assessee, for the two separate periods, shall now be modified, excluding any liability for the extended period of limitation."*

*22. A perusal of the judgment of the Hon'ble Supreme Court [supra] shows that it was in the context of manpower recruitment and supply of services for which the assessee was recipient of services and was liable to pay service tax. As mentioned elsewhere, this judgment was delivered to discern the true nature of relationship between the seconded employees and the assessee and nature of services provided in that context by overseas group companies to the assessee.*

*23. The Hon'ble High Court of Karnataka in the case of Flipkart Internet [P] Ltd 448 ITR 268 had the occasion to consider the aforementioned judgment of the Hon'ble Supreme Court relied upon by the Id. DR and the Hon'ble High Court, inter alia, held as under:*

*"viii) The Revenue has relied upon the judgment of the Apex Court in C.C., C.E. & S.T.-Bangalore (Adjudication) etc. v. M/s. Northern Operating Systems Pvt. Ltd. where the Apex Court has interpreted the concept of a secondment agreement taking note of the contemporary business practice and has indicated that the traditional control test to indicate who the employer is may not be the sole test to be applied. The Apex Court while construing a contract whereby employees were seconded to the assessee by foreign group of Companies, had upheld the demand for service tax holding that in a secondment arrangement, a secondee would continue to be employed by the original employer.*

*(ix) The Apex Court in the particular facts of the case had held that the Overseas Co., had a pool of highly skilled employees and having regard to their expertise were seconded to the assessee and upon cessation of the term of secondment would return to their overseas employees, while returning Civil Appeal Nos.2289-2293/2021 such finding on facts, the assessee was held liable to pay service tax for the period as mentioned in the show cause notice.*

*(x) It needs to be noted that the judgment rendered was in the context of service tax and the only question for determination was as to whether supply of man power was covered under the taxable service and was to be treated as a service provided by a Foreign Company to an Indian Company. But in the present case, the legal requirement requires a finding to be recorded to*

*treat a service as 'FIS' which is "make available" to the Indian Company.*

*(xi) Accordingly, any conclusion on an interpretation of secondment as contained in the M.S.A. to determine who the employer is and determining the nature of payment by itself would have no conclusive bearing on whether the payment made is for 'FIS' in light of the further requirement of "make available."*

*24. The deputation agreement between the assessee and EY India member firms are exhibited at pages 19 to 43 of the Paper Book. It would be pertinent to refer to certain relevant clauses in the agreement as under:*

*"Assignment' shall mean release of personnel by EYUS to and who is to be in employment by EYGDS India for the period of employment under the terms and conditions agreed by EYGDS and employee."*

*25. Under the head "General Terms and Conditions of Secondment":*

*"3.1 During the Period of Assignment, the International Assignees shall function solely under the control, direction and supervision of EY LLP INDIA and in accordance with all rules, regulations, policies, guidelines and other practices, generally applicable to the employees of EY LLP INDIA. International Assignees shall work exclusively for EY LLP INDIA and shall be solely responsible to EY LLP INDIA for their work during the Period of Assignment. EY LLP INDIA shall decide the nature of work of the International Assignees and EY LLP INDIA shall be solely responsible for the work of International Assignees during the Period of Assignment.*

*3.2 EYUS shall not be responsible for the work of the International Assignees or assume any risk for the results produced from the work performed by the International Assignees during the period. The International Assignees shall not be regarded as employees of EYUS and shall not in any way be subject to any kind of instructions or control of EYUS during the Period of Assignees.*

*3.3 EYUS shall not have any obligation towards EY LLP INDIA regarding the performance of international Assignees. The privity and lien of EYUS would cease during the period of employment with EY LLP India on entering of employment contract by international assignee with EY LLP India."*

*26. It can be seen from the above that EY LLP India is alone responsible for complying with the requirement of withholding of tax under the Indian Tax Laws and the same has been*

*verified 13 from the Sample Form No. 16 Exhibited at pages 96 to 98 of the assessee paper book.*

*27. The co-ordinate bench in the case of Boeing India [P] Ltd 121 Taxmann.com 276 which has been affirmed by the Hon'ble High Court of Delhi, had the occasion to consider an identical issue and held as under:*

*"30. We have given thoughtful consideration to the orders of the authorities below. We have also carefully perused the salary reimbursement agreement, which is placed at pages 296 onwards of the paper book, and as per clause 1.1, it is provided that the secondees have expressed their willingness to be deputed to BIPICL [the 20 appellant] and TBC [AE] have agreed to release these employees to BIPICL. It is provided that TBC will facilitate payment of salaries in secondees home country on behalf of BICIPL. Under the head employment status, it is provided that the secondees shall be working for BICIPL and will be under supervision, control and management of BICIPL as an employee of BICIPL.*

*31. It is clear from the afore-stated relevant clauses that the secondees were, in fact, in employment of the appellant and as per the terms, the 'A' was paying salaries at the home country of the secondees and, therefore, there was reimbursement by the appellant. These facts clearly show that the assessee has been paying to its own employees and this fact alone clearly distinguishes the facts of the decision in the case of Centrica India Offshore Ltd [supra].*

*32. The co-ordinate bench in the case of AT & T Communication Services India Pvt. Ltd. [supra], distinguishing the decision of the Hon'ble Delhi High Court in the case of Centrica India Offshore Pvt. Ltd. [supra], has held as under:*

*"30. The DRP has affirmed the decision of the Ld. AO by holding that the assessee has deducted withholding tax on 21 substantial payments and yet argued that the tax is not deductible u/s 195 of the act and provision of section 40(a)(i) cannot be invoked in the case of said payment.*

*31. The DRP has affirmed the decision of the AO by holding that the assessee has deducted withholding tax on substantial payments and yet argued that the tax is not deductible u/s 195 of the act and provision of section 40(a)(i) cannot be invoked in the case of said payment.*

*32. The Special Auditors in their Audit Report have worked out particulars of payments in respect of which no TDS was deducted u/s 40(a)(ia) of the Act. Consequently, an amount of Rs. 54,06,328/- was not to be allowed as expenditure."*

33. We have also perused the TDS certificates, Forms 15CA and 15CB, tax deducted by the assessee and all these documents are part of the paper book. There is no dispute that the assessee has deducted tax at source u/s 192 of the Act. On the given facts of the case, we are of the considered opinion that the provisions of Section 195 of the Act do not apply. Considering the facts of the case in totality, in light of judicial decisions referred to hereinabove, we do not find any merit in 22 the disallowance made by the Assessing Officer/DRP. We, accordingly, direct for deletion of addition of Rs. 56.58 crores."

28. Affirming the order of the co-ordinate bench in ITA No. 71/2022 dated 11.10.2022, the Hon'ble High Court held as under:

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

12. This Court is further of the view that the judgment in *Centrica India Offshore Pvt. Ltd (supra)* has no application to the present case as the ITAT has returned a finding that the real employer of the seconded employees continues to be the Indian entity and not the overseas entity.

13. In *Director of Income Tax (IT)-I vs. A.P. Moller Maersk A S*, the Supreme Court in Civil Appeal No.8040/2015 decided on 17th February, 2017 has held as under:-

"11. Aforesaid are the findings of facts. It is clearly held that no technical services are provided by the assessee to the agents. Once these are accepted, by no stretch of imagination, payments made by the agents can be treated as free for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is reemphasized that neither the AO nor the CIT(A) has stated that there was any profit element embedded in the payments received by the assessee from its agents in India. 16 Record shows that the assessee had given the calculations of the total costs and pro-rata division thereof among the agents for reimbursement. Not only that, the assessee have been submitted before the Transfer Pricing Officer that these payments were

*reimbursement in the hands of the assessee and the reimbursement was accepted as such at arm's length. Once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax."*

*14. A Division Bench of this Court in Commissioner of Income Tax, Delhi II vs. Karl Storz Endoscopy India (P) Ltd., ITA No.13/2008 decided on 13th September, 2010 has held as under:-*

*1. This appeal pertains to the Assessment Year 2001-02. The issue relates to the treatment which is to be given to the amount of Rs.6,59,416 paid by the assessee to its parent foreign company, i.e., Karl Storz Vertriebs GMBH & Company. The assessee had claimed that the parent company had deputed one of the employees, viz., Mr. Peter Laser to the Indian Company/assessee and the aforesaid amount represented reimbursement of the salary, which was payable to Mr. Peter Laser. The Assessing Officer (AO), however, was of the opinion that since no agreement between the assessee and the parent company was produced and even the agreement between the parent company and its employees. Mr. Peter Laser on the basis of which he was purportedly deputed to the Indian Company was produced, this amount should be treated as payment towards technical fee.*

*xxx xxx xxx*

*3. Learned counsel for the respondent-assessee has pointed out that this was not the first year in which such a claim was made. He 17 stated that the Indian Company was incorporated during the Assessment year 1998-99 and for the establishment of this company which is subsidiary to the aforesaid foreign company. Mr. Peter Laser was deputed, the amount paid from the Assessment year 1998-99 onwards were always treated as salary and accepted as such. Learned counsel for the respondent has produced the copy of the orders dated 15.06.2005 passed by the ITAT, which relates to the Assessment year 1998-99, i.e. the first year of the incorporation of the respondent-company. Perusal of this orders shows that this very issue is decided and the following findings were arrived at by the Tribunal holding that the aforesaid payment would be treated as salary to Mr. Peter Laser.*

*"10. The foreign company had deputed one of its employees to look after the affairs of the Indian Company. The salary payable to this employee was to be borne by the foreign company. The Indian company was to reimburse this salary at cost, i.e. without any mark-up. Thus, it was merely the question of payment of salary to Mr. Peter Laser. There is no question of any technical fees being paid to the foreign company. Assuming for the sake of argument that it was in the nature of technical fees paid to the foreign company; then, as rightly pointed out by the learned ITA No.71/2022 Page 8 of 9 counsel, Article 12.4 was applicable and not Article 13.4 as contended by the learned DR. Even if Article 12.4 was applicable, the said Article specifically excludes payments mentioned in Article 15. Article 15 states that salaries, wages and other similar remuneration derived by a resident of a Contracting State (Germany) in respect of an employment shall be taxable in the other Contracting State (Indian) only if the employment is exercised there. In other words, salaries paid to such personnel like Mr. Laser are taxable in India and they cannot be considered to be fees 18 for technical services. Further, even as per Section 9 of the Act, the payment cannot be treated as fees for technical service. Explanation 2 to Section 9(1)(vii) gives the meaning of the expression "fees for technical services" as per which, inter alia, any consideration which would be income of the recipient chargeable under the head "salaries", then such payment will not be considered as fees for technical services. Thus, even as per the provisions of the Act, the payment in question cannot be treated as fees for technical services. Moreover, since it is paid as salary to Mr. Laser, tax has been deducted under Section 192 of the Act."*

*4. Learned counsel also submitted that thereafter in the Assessment Year 1990-00 as well as 2000-01, the amounts reimbursed in identical manner were treated as "salary" to Mr. Laser. He further states that no appeal was filed against the aforesaid order of the Tribunal by the Revenue."*

*15. Consequently, this Court is of the view that the issues of 'receivables' as well as 'disallowance' under Section 40(a)(ia) of the Act are essentially questions of fact, which give rise to no substantial questions of law especially when the findings of the ITAT are not perverse."*

*29. Considering the facts of the case in totality, in light of the deputation agreement, we are of the considered view that cost*

*to cost reimbursement on account of secondment of employees cannot be treated as FTS as defined under Article 12 of India USA-DTAA and seconded personnel are employees of EY India firms whose income has been taxed as salary in their respective hands. Therefore, the very same amount could not, in law, be subjected twice – firstly in the hands of the seconded employees working in India and secondly again the hands of the assessee. The Assessing Officer is accordingly, directed to delete the impugned addition.”*

5. In the absence of any change in the factual matrix and legal proposition, the appeal of the assessee on this ground is allowed.

**Professional Services – Article 15 – FIS – Article 12:**

6. The AO treated the amount of Rs.30,73,50,900/- received by the assessee on account of professional services as Fees for Inclusive Services as per the Article 12 on the premise that such services do not qualify the definition of professional services as per Article 15 of DTAA.

7. Aggrieved the assessee filed objections before the Id. DRP. The adjudication of the Id. DRP on this issue is as under:

*"4.3.5 The panel has carefully considered the submissions of the assessee and has also gone through the analysis and the observations of the AO in the DAO. Article 15(2) of the India US DTAA defines the term professional services to include independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants. Hence, only those services which are enumerated in Article 15(2) qualify as professional services and consequently exempt under DTAA. The mere fact that the word "includes has been mentioned in Article 15(2) don not reply*

*that services by every conceivable kind of professionals or skill/qualification holder can be bracketed within the specified category of professional services. More particularly, as observed by the AO, the services rendered by functionaries such as economist, MBA graduates, diploma holders and other trained technical professional do not fulfill the criteria of being professional within the meaning of the term "professional services" under Article 15:21 of India US DTAA. The panel, therefore, is in agreement with the AO's observation that the quantum of receipts from Indian clients for services rendered in India which do not strictly qualify as professional services, cannot be claimed as exempt in terms Article 15 of India US DTAA. In the instant case, after examining the breakup of all the services claimed and under Article 15, the AO has found that a sum of Ra. 29,89,50,386/- does not pertain to professional services and therefore, the criteria of exemption under Article 25 is not satisfied.*

*4.3.6 Nevertheless observed by the AO in para 59 as well as in para 5.15, the receipts for sessions, other than professional services, i.e. Rs. 29,89,50,386/- are in respect of the services which are technical as well as consultancy in nature. Since, the services provided through other professionals (not strictly qualifying to be 'professional services' within the meaning of Article 15(2)), are technical in nature, Article 12 of India US DTAA, is attracted in the instant case. Further as evidenced by the service agreement, these services also include rendering training to the customers of the assesses which provides enduring benefits to the sections of the service. Consequently, the "make available" criteria as laid down in Article 12 DTAA stands satisfied. In view of the above, the panel finds no ground to interfere with the conclusions of the AO, and accordingly, the objections raised in Ground Number 3 are rejected.*

*4.3.7 In the DAO, the AO has mentioned that of the total sum of Rs. 103,63,94,946/- claimed as exempt under Article 15 of the DTAA receipts amounting to Rs. 29,89,50,386/- do not pertain to professional services but fall within FTS under Article 12 of India US DTAA. The AO is directed to spell out the breakup of the receipts claimed as exempt from professional services in the final order, so as to clearly distinguish the receipts as professional services from those categorized as FTS. Ground number 3 along with all sub grounds are accordingly disposed of."*

*4.3.3 Since, there is no change in factual and legal matrix, the arguments of the AO (in the DAO) as well the submissions of the assessee from A.Y. 2020-21, the panel finds no ground to deviate from its directions in A.Y. 2020-21. Accordingly, the directions of the panel in A.Y. 2020-21 on the issue will apply for A.Y. 2021-22 as well, mutatis mutandis. Ground number 3 along with all the sub grounds are accordingly disposed of."*

8. Subsequent to the addition by the Id. DRP, the AO made addition of Rs.30,73,50,900/- as FIS.

9. Aggrieved, the assessee filed appeal before the Tribunal.

10. The Id. AR argued at length referring to Article 12(4)(b) and Article 15 of the DTAA and also Section 194-J of the Income Tax Act, 1961. The Id. AR submitted that the assessee received the amount from its client based in India for rendering various professional services based on agreement and statement of work. The Id. AR has referred to the nature of services rendered on account of various agreements mentioned at page 84 to 91 of the paper book and argued that all the services are independent activities of similar character as that of professional services and argued that these services do qualify

as professional services as per Article 15 of the DTAA. The Id. AR argued that the Article 12 is a general provision and Article 15 is a specific provision and hence the specific provision prevails over a general provision. It was argued that even if Article 15 is not applicable then such receipts should be taxable as business receipt under Article 7 of DTAA and since the assessee has no PE in India, the business receipts would be exempt.

11. Arguing further, the Id. AR submitted that even the Section 194-J of the Income Tax Act, 1961 refers to professional or technical services and hence the technical services provider shall be considered as professional. The Id. AR argued that Article 15(2) gives an inclusive definition and therefore services of other functions also qualifies to be a professional service. The Id. AR has also referred to CBDT notification dated 12.01.1977, dated 04.05.2001 and dated 21.08.2008 which has expanded the scope of professional services with regard to Section 194-J and argued that the scope of term of "professional services" is much more wider than the Article 15 in Section 194-J and hence the services rendered by the assessee shall be considered to be the nature of professional services but not in the nature of inclusive services or technical services. The crux of the argument of Id. AR was that the professional services would stand on a wider platform than consultancy and technical service and the work executed by the assessee company was by qualified professionals and hence should treated as professional services as per Article 15.

12. The Id. DR argued that the Article 15 of India-USA DTAA is attracted if only such services rendered in India. The Id. DR submitted that the assessee rendered these services from outside India. Therefore, the transactions undertaken by the assessee cannot be covered by Article 15 of the DTAA. The Id. DR argued that the services rendered by the assessee for Indian clients by staying in USA, hence do not fall under Article 15 of DTAA. The Id. DR argued that under Article 12 of the DTAA, FIS do not include, amounts paid 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). Therefore, exemption under Article 12 is applicable to only for professional services rendered by a firm of individuals. The Id. DR argued that the term professional services has not been defined in Article 12 of DTAA but defined in Article 15(2) of DTAA which includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants and argued that only those services which are related to the activities mentioned in this Article only does qualify as professional services and exempt under DTAA. The Id. DR argued that as per the details provided by the assessee and after going through their scope of services and deliverable, the same cannot be treated as professional services rendered rather they qualify for services which are technical or consultancy in nature. The Id. DR submitted that services rendered by functionaries such as Economists, MBA Graduates, diploma

holders and other trained technical professional does not fulfill the conditions for being professional.

13. The Id. DR placing reliance on the order of the Mumbai Tribunal in the case of Deloitte Haskins & Sells (92 taxmann 279) argued that the term "profession" refers to some kind of occupation which requires special, advances education, knowledge or skill etc. and engaged in field of professional like legal, medical and accountancy. The crux of the arguments of Id. DR was that the amount received by the assessee cannot be treated as independent as personal services under Article 15.

14. Heard the arguments of both the parties and perused the material available on record.

15. We have gone through the two volumes of paper book filed by the assessee containing 222 pages.

16. The statement of work, scope of services as per the agreement is examined. It refers to the assessee was approached by the client to contribute with the implementation of software for meeting the business requirements which has been evaluated by the party to the agreement for its client. While doing so, the assessee will have responsibility of oversight, delivery and training services pertaining to organizational change management. The assessee shall provide resources for project management, organizational change management and training, business work streaming, technical infrastructure and data conversion. The assessee was supposed to provide input and feedback to the clients with regard to the performance of the services. As per the details given at paper

book page 84 to 91, the nature of the services rendered consists of expatriate tax services, TP documentation, tax services & advisory, talent management & leadership development, merger & amalgamation advisory services, HR performance improvement services, technology implementation support, valuation of tangibles for purpose of purchase consideration, payroll services, SAP implementation, customer relationship & billing. For the sake of ready reference, some of the services provided by the assessee are mentioned below:

74	Ernst & Young LLP	US01U000468956	07-08-2020	24,013	17,54,393	Obtain forensic image of the identified computer system and create a backup copies and ship the images to EY india	Sonbolian, Jay	Master of Science - Criminal Justice, Bachelor of Science - Computer Technology	Exhibit 119	Exhibit 96	Professional services of engineer
75	Avanti Exports Private Limited	US01U000468010	06-08-2020	13,957	10,19,714	Transfer Pricing documentation	Coke, Rebecca	PhD in Economics	Exhibit 118	Exhibit 7	Independent activities of similar character i.e. professional services
76	Global Business Systems Services Pvt. Ltd.	US01U000467154	05-08-2020	7,073	5,16,753	Preparation of individual tax returns	Beck, Randy	BA Finance, MSA Business Administration	Exhibit 117	No	Independent activities of similar character i.e. professional services
77	Ernst & Young LLP	US01U000460922		3,000	2,19,180	Review of Transfer Pricing Report	Jennings, Matt	BA - environmental studies/ economics, MS - Applied economics and Finance	No	Exhibit 92	Economist i.e. Independent activities of similar character (professional services)
78	International Finance & Analytics India Private Limited	US01U000456440		4,000	2,92,240	EY to prepare Global Transfer Pricing Documentation	Pashova, Tatyana	Master - International, Business and accounting, Chartered Financial Analyst	Exhibit 97	No	Independent activities of similar character i.e. professional services
79	Ernst & Young LLP	US01U000455806		1,750	1,27,855		Knoeller, Thomas	Enrolled Agent	Exhibit 98	No	Independent activities of similar character i.e. professional services
80	Ernst & Young LLP	US01U000454389		900	65,754	Transfer Pricing documentation	Olson, Eric	BS - Mechanical Engineering, MS - Mechanical Engineering, MBA - Finance and Marketing	No	Exhibit 91	Professional services of engineer
81	Splunk Services India Private Limited	US01U000504444	30-09-2020	439	32,081	Payroll services	Sullivan, Sheri	MBA	Exhibit 125	No	Independent activities of similar character i.e. professional services
82	Splunk Services India Private Limited	US01U000502335	29-09-2020	443	32,347	Payroll services	Sullivan, Sheri	MBA	Exhibit 124	No	Independent activities of similar character i.e. professional services
83	Infosys Limited	US01U000495292	18-09-2020	3,68,025	2,68,87,907	Provide advice on the Infosys implementation of SAP customer relationship and billing	Brown, Scott	Bachelors degree - Economics	Exhibit 99(b)	Exhibit 99(a)	Economist i.e. Independent activities of similar character (professional services)
84	Infosys Limited	US01U000495275	18-09-2020	3,55,286	2,59,57,195	Provide advice on the Infosys implementation of SAP customer relationship and billing	Brown, Scott	Bachelors degree - Economics	Exhibit 101	Exhibit 100	Economist i.e. Independent activities of similar character (professional services)

85	Infosys Limited	US01U000495256	18-09-2020	5,18,929	3,79,12,951	Provide advice on the Infosys implementation of SAP customer relationship and billing	Brown, Scott	Bachelors degree - Economics	Exhibit 102	Exhibit 100	Economist i.e. Independent activities of similar character i.e. professional services
86	American Express Travel Related Services	US01U000487237		1,99,065	1,45,43,711	Provide assistance with responding to findings from the recent Office of the Comptroller of the Currency exam on third party governance.	Moog, Matthew	BS - Management	Exhibit 104	Exhibit 103	Independent activities of similar character i.e. professional services
87	American Express Travel Related Services	US01U000487224		4,73,979	3,46,28,891	Provide assistance with responding to findings from the recent Office of the Comptroller of the Currency exam on third party governance.	Moog, Matthew	BS - Management	Exhibit 105	Exhibit 103	Independent activities of similar character i.e. professional services
88	Infosys Limited	US01U000486599	03-09-2020	1,05,360	76,97,601	Provide advice on the Infosys implementation of SAP customer relationship and billing	Chavannes, Ed	CISA, CISSP, CRISC, Bachelors - Business Administration	Exhibit 106	No	Independent activities of similar character i.e. professional services
89	Infosys Limited	US01U000467221	05-08-2020	1,13,240	82,73,314	Provide advice on the Infosys implementation of SAP customer relationship and billing	Chavannes, Ed	CISA, CISSP, CRISC, Bachelors - Business Administration	Exhibit 107	No	Independent activities of similar character i.e. professional services
90	Infosys Limited	US01U000451285	07-07-2020	83,740	61,18,041	Provide advice on the Infosys implementation of SAP customer relationship and billing	Chavannes, Ed	CISA, CISSP, CRISC, Bachelors - Business Administration	Exhibit 108	No	Independent activities of similar character i.e. professional services
91	Infosys Limited	US01U000449847	01-07-2020	2,92,881	2,13,97,881	Provide advice on the Infosys implementation of SAP customer relationship and billing	Brown, Scott	Bachelors degree - Economics	Exhibit 109	Exhibit 99(a)	Economist i.e. Independent activities of similar character (professional services)
				48,73,796	35,60,79,520						

17. In the background of these services, the provisions of the Income Tax Act and Articles of the DTAA are examined.

18. The provisions of Section 194J reads as under:

***"Fees for professional or technical services.***

**194J.** (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of—

(a) fees for professional services, or

(b) fees for technical services, or

(ba) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company, or

(c) royalty, or

*(d) any sum referred to in clause (va) of section 28,*

*shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to two per cent of such sum in case of fees for technical services (not being a professional services), or royalty where such royalty is in the nature of consideration for sale, distribution or exhibition of cinematographic films and ten per cent of such sum in other cases, as income-tax on income comprised therein :*

**Provided** *that no deduction shall be made under this section—*

*(A) from any sums as aforesaid credited or paid before the 1st day of July, 1995; or*

*(B) where the amount of such sum or, as the case may be, the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed—*

*(i) thirty thousand rupees, in the case of fees for professional services referred to in clause (a), or*

*(ii) thirty thousand rupees, in the case of fees for technical services referred to in clause (b), or*

*(iii) thirty thousand rupees, in the case of royalty referred to in clause (c), or*

*(iv) thirty thousand rupees, in the case of sum referred to in clause (d) :*

**Provided further** *that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed one crore rupees in case of business or fifty lakh rupees in case of*

*profession during the financial year immediately preceding the financial year in which such sum by way of fees for professional services or technical services is credited or paid, shall be liable to deduct income-tax under this section :*

**Provided also** *that no individual or a Hindu undivided family referred to in the second proviso shall be liable to deduct income-tax on the sum by way of fees for professional services in case such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family:*

**Provided also** *that the provisions of this section shall have effect, as if for the words "ten per cent", the words "two per cent" had been substituted in the case of a payee, engaged only in the business of operation of call centre.*

(2) [\*\*\*]

(3) [\*\*\*]

*Explanation.—For the purposes of this section,—*

*(a) "professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;*

*(b) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;*

*(ba) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;*

*(c) where any sum referred to in sub-section (1) is credited to any account, whether called "suspense account" or by any other*

*name, in the books of account of the person liable to pay such sum, such crediting shall be deemed to be credit of such sum to the account of the payee and the provisions of this section shall apply accordingly.*

19. As per Section 194-J, the professional services means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section.

20. Section 44AA also explains about the professions as, person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as is notified by the Board in the Official Gazette. The Section 44AA also gives leverage to add other professions as notified by the Board in the official Gazette.

21. We have gone through the notification dated 12.01.1977, S.O. 18(E) has also expanded the scope of film artist to an actor, director, editor & singer, thus, widening the scope of Section 44AA with regard to the profession "artist" to all ingrained functions of a film or cinematograph. Further, the notification no. 385(E) dated 04.05.2001 included the profession of Information Technology for the purpose of sub-Section. Thus, the individual practicing data entry, computer services viz., hardware or software or forensic specialist is considered to be a professional. Not only that vide notification dated 21.08.2008, the ambit of professional services has been

widened to include all the professional involved in "sport" which includes sport persons, coach, referee, physicians, commentator and sport columnist.

22. Further, the provisions of relevant Articles of the DTAA are examined.

23. Article 12(4)(b) reads as under:

*"ARTICLE 12 - Royalties and fees for included services -*

*1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*

*2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed :*

*(a) in the case of royalties referred to in sub-paragraph (a) of paragraph 3 and fees for included services as defined in this Article [other than services described in subparagraph (b) of this paragraph] :*

*(i) during the first five taxable years for which this Convention has effect,*

*(a) 15 per cent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that Contracting State, a political sub-division or a public sector company ; and*

*(b) 20 per cent of the gross amount of the royalties or fees for included services in all other cases ; and*

*(ii) during the subsequent years, 15 per cent of the gross amount of royalties or fees for included services ; and*

*(b) in the case of royalties referred to in sub-paragraph (b) of paragraph 3 and fees for included services as defined in this Article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 3(b) of this Article, 10 per cent of the gross amount of the royalties or fees for included services.*

*3. The term "royalties" as used in this Article means :*

*(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright or a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; and*

*(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.*

*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 payments ; 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).*

*6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for included services, being a resident of a Contracting State, carries on business in the other Contracting State, in which the royalties or fees for included services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for included services are attributable to such*

*permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be shall apply.*

*7. (a) Royalties and fees for included services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, or a resident of that State. Where, however, the person paying the royalties or fees for included services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for included services was incurred, and such royalties or fees for included services are borne by such permanent establishment or fixed base, then such royalties or fees for included services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.*

*(b) Where under sub-paragraph (a) royalties or fees for included services do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State.*

*8. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for included services paid exceeds the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of the Convention."*

24. Article 15 reads as under:

*"ARTICLE 15 - Independent personal services -*

*1. Income derived by a person who is an individual or firm of individuals (other than a company) who is a resident of a Contracting State from the performance in the other Contracting State of professional services or other independent activities of a similar character shall be taxable only in the first-mentioned State except in the following circumstances when such income may also be taxed in the other Contracting State :*

*(a) if such person has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or*

*(b) if the person's stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 90 days in the relevant taxable year.*

*2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants."*

25. We have also examined the qualifications of the engagement partners and principal responsible for engagement, we find that these consultants are having qualifications in business management, business administration, masters of science and doctorate in economics or maths, commerce & finance.

26. We have also examined the various orders of the Tribunal namely, MSEV Vs. DCIT (83 TTJ 325), EC Group India Pvt. Ltd. (84 taxmann 108) and the Hon'ble Apex Court in Union of India Vs. India Fisheries Pvt. Ltd. (57 ITR 331). The Hon'ble Apex Court held that if there is an apparent conflict between two independent provisions of law, the special provision must prevail. Respectfully, we hold that there are no two calms about the principle laid down by the Hon'ble Apex Court, there has to be two independent provisions which are in conflict between each other. In the instant case, there are two Article of DTAA which are totally different with different explanation neither overlapping nor in conflict in each other. These two Articles of DTAA operate in fundamentally different arenas and the area of operations and definitions are clear and easily discernable. With regard to the provisions of interpretation of the clause includes, it is *prima facie* extensive as held by the Hon'ble Apex Court in Hamdard (W) Laboratories Vs. Deputy Labour Commissioner (5 SSC 281) and it always includes the words, professions which are easily relatable and includable in the absence of specific mention of such profession or service. It can be inclusive of same kind of meaning like investments have to be construed with shares or securities. The principles of *eiusdem generis* have to be applied to treat the subjects which are of the same kind or alike.

27. The assessee has given the party wise breakup of services rendered to India based clients from USA at page no. 161 to 165 of the paper book which was to the tune of Rs.65.20 Cr. which includes E&Y LLP, SR Batliboi & Company LLP, Honeywell

International Inc. The details of the services extended have already been discussed at length above. On going through the services, we find that they cannot be said to be meeting the requirement of "make available" technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design" clause under Article 12(4)(b) of DTAA. Further, we have gone through the Article 12(5)(e) which states that the FIS does not include the amounts paid 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).

28. To conclude, the case of the assessee has been covered by the benefits of provisions of Article 12(4) (b) of DTAA as the "make available" criteria is not satisfied. The appeal of the assessee on this ground is allowed.

29. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 07/08/2024.

**Sd/-**

**(Madhumita Roy)**  
**Judicial Member**

**Dated: 07/08/2024**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**Sd/-**

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**