

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

**BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER**

ITA No. 2299/DEL/2024[A.Y 2016-17]

HCL Australia Services PTY Ltd Vs. The Dy. C.I.T
C/o HCL Technologies Ltd, International Taxation
806, Siddharth, 96, Nehru Place 2(1)(1), New Delhi
New Delhi-110 019

PAN - AAFCH 0704 C

ITA No. 2298/DEL/2024[A.Y 2017-18]

HCL Singapore [P] Ltd Vs. The Dy. C.I.T
[Successor to Axon Solutions International Taxation
Singapore Pvt Ltd 2(1)(1), New Delhi
C/o HCL Technologies Ltd,
806, Siddharth, 96, Nehru Place
New Delhi-110 019

PAN - AADCH 6267 Q

ITA No. 2304/DEL/2024[A.Y 2013-14]

ITA No. 2305/DEL/2024[A.Y 2015-16]

ITA No. 2306/DEL/2024[A.Y 2016-17]

ITA No. 2307/DEL/2024[A.Y 2017-18]

HCL [New Zealand] Limited Vs. The Dy. C.I.T
C/o HCL Technologies Ltd, International Taxation
806, Siddharth, 96, Nehru Place 2(1)(1), New Delhi
New Delhi-110 019

PAN - AAFCH 6756 E

ITA No. 2300/DEL/2024[A.Y 2015-16]

HCL Technologies, Norway AS
C/o HCL Technologies Ltd,
806, Siddharth, 96, Nehru Place
New Delhi-110 019

Vs. The Dy. C.I.T
International Taxation
2(1)(1), New Delhi

PAN - AAFCH6360 J

(Applicant)

(Respondent)

Assessee By : Shri Ajay Vohra, Sr. Adv
Shri Neeraj Jain, Adv
Shri Dilip Sachdeva, CA
Shri Arpit Goel, CA

Department By : Shri Vijay B. Vasanta, CIT-DR

Date of Hearing : 19.08.2024
Date of Pronouncement : 30.10.2024

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

The above captioned seven separate appeals by different but connected assesseees are preferred against separate assessment orders passed by the Assessing Officer u/s 147 r.w.s 144C(13) of the Income-tax Act, 1961 [the Act, for short] pertaining to different Assessment Years.

2. Since the underlying facts are common in the appeals of the assessee, they were heard together and are disposed of by this common order for the sake of convenience and brevity.

3. The grounds of appeal taken by the assessee are as under:

1. That on the facts and circumstances of the case and in law, assessment order passed under section 147 read with section 144C(13) of the Income-tax Act, 1961 ("the Act") for assessment year 2017-18 assessing the total income of the Appellant at Rs.16,75,04,559 is without jurisdiction, illegal, void ab initio and therefore, liable to be quashed.

General

2. That the assessing officer erred on facts and in law in assessing the total income of Appellant at Rs. 16,75,04,559 instead of Rs.16,64,703, being the alleged amount of income escaped assessment in the case of the amalgamated company ie., Axon Solutions Singapore Pte Limited.

3. Reassessment proceedings initiated by the assessing officer is on non-existing therefore invalid and bad in law

2.1 That the assessing officer erred on facts and in law in initiating reassessment proceedings in the name of non-existing

entity, therefore rendering the same as illegal, bad in law and liable to be quashed and/or set aside.

4. Reassessment proceedings initiated under section 147 of the Act are without jurisdiction

3.1 That on the facts and circumstances of the case and in law, the reassessment proceedings undertaken by the assessing officer culminating in final assessment order are without jurisdiction, void ab initio and bad in law.

3.2 That the assessing officer erred on facts and in law in passing final assessment order without appreciating that the reassessment proceedings are time barred in terms of section 153(2) of the Act inasmuch as judgment of the Hon'ble Supreme Court in the case of UOI vs Ashish Agarwal [2022] 444 ITR 1 (SC) did not apply to the case of the assessee.

3.3 That the assessing officer erred on facts and in law in undertaking reassessment proceedings under section 148A read with section 148 of the Act culminating in the final assessment order, without appreciating that the information provided/disclosed along with letter issued pursuant to directions of the Hon'ble Supreme Court in the case of Ashish Agarwal (supra) does not constitute valid "information" in terms of the Explanation 1 to section 148 of the Act.

3.4 That the assessing officer erred on facts and in law in undertaking reassessment proceedings under section 148A read with section 148 of the Act culminating in the final assessment order, on the basis of statements recorded and report prepared in survey proceedings in the case of a third party, viz., HCL Technologies Ltd ("HCLT")

3.5 That the assessing officer erred on facts and in law in undertaking reassessment proceedings under section 148A read with section 148 of the Act culminating in the final assessment order, without appreciating that there is no escapement of income in the hands of the Appellant for the relevant year.

3.6 That the final assessment order pertaining to assessment year 2017-18 is barred by limitation in terms of section 149(1)(b) as the conditions mentioned therein for reopening of assessment beyond 3 years were not satisfied.

3.7 That more specifically, the assessing officer erred on facts and in law in undertaking reassessment proceedings culminating in the impugned reassessment order despite the same being time barred on account of conditions prescribed in section 149(1)(b) of the Act not being met, viz., income escaping assessment not being more than Rs.50 lakhs.

3.8 That the final assessment order is without jurisdiction, void ab initio and bad in law inasmuch as the reassessment proceedings have been initiated and final assessment order has been passed in

contravention of the procedure prescribed under section 151A of the Act.

RECEIPTS OF THE APPELLANT FROM HCLT NOT TAXABLE IN INDIA

4. Issue squarely covered in favour of the Appellant by binding decision of the Tribunal

41 That, at the outset, the assessing officer erred on facts and in law in not following the binding decision of the Delhi bench of the Tribunal rendered on identical facts in the Appellant's own case, wherein it was conclusively held that payments made by HCLT to its non-resident group entities, for onshore work performed by the latter, are not taxable in India under the provisions of the Act.

5 HCL group entities operate as a consortium; services not rendered by one entity to another

5.1 That the DRP/assessing officer erred on facts and in law, in not taking a holistic view of the Master Service Agreement entered into between HCLT and its AEs, including the Appellant, and in not holding that the same is in the nature of business arrangement with dominant intention of coming together and serving the overseas customers of HCL group; therefore, payment received by the Appellant from HCLT was not for services

rendered by the Appellant to the latter, but rather was in the nature of payment under a revenue sharing arrangement.

5.2 That the DRP/assessing officer erred on facts and in law in not appreciating that HCL group entities operate as a consortium, services in which are performed partly offshore and partly onshore and instead, erred in interpreting the pooling of interests by HCLT and its AEs for the purpose of serving overseas customers directly, as one entity providing services to the other entity.

6 Payments not chargeable to tax under section 9(1)(vii) of the Act

6.1 That the DRP/ assessing officer erred on facts and in law in holding that payments received by the Appellant during the relevant previous year from HCLT, an Indian resident, were chargeable to tax in India.

6.2 That the DRP/ assessing officer erred on facts and in law in not appreciating that the amount received by the Appellant were in respect of services performed by the Appellant outside India and delivered directly to the overseas customers for utilization in their business carried on outside India and therefore, did not accrue or arise in India so as to be chargeable to tax in India in terms of section 9(1)(vii) of the Act.

6.3 That the DRP/assessing officer erred on facts and in law in not appreciating that the exception provided in the source rule in

section 9(1)(vii) of the Act has two limbs, the first one provides a functional test for deeming the place of accrual of income based on utilization of the services in a business or profession carried on by such resident outside India, and the second limb provides a purpose test of payment fee for the purposes of making or earning any income from any source outside India, irrespective and independent of the construct or form of the agreement.

6.4 That more specifically, the DRP/assessing officer erred on facts and in law in not appreciating that the payments received by the Appellant were not chargeable to tax in India in view of the exclusion provided in section 9(1)(vii)(b) of the Act, considering that the amount received for onsite services rendered by the Appellant in foreign jurisdiction(s), were:

a. for services utilised in a business or profession (of providing onsite services by HCL Technologies Ltd) carried on outside India, and/or;

b. for the purposes of making or earning income from a source outside India (by providing onsite services).

7. Payments not chargeable to tax under the Double Taxation Avoidance Agreement ("DTAA")

7.1 Without prejudice and law the in the alternate, that on the facts and circumstances of the case and in DRP/assessing officer erred in not holding that the amount received by the Appellant,

for onsite services was not liable to tax in India, in terms of the applicable DTAA as such services did not make available any technical knowledge, skill or experience or consist of the transfer of any technical plan or design to HCLT.

7.2 Further without prejudice, that on the facts and circumstances of the case and in law, the DRP/ assessing officer erred in holding that 'make available' clause does not apply in respect of development and transfer of technical plan or design.

8. Statements not considered in correct perspective

8.1 That the assessing officer erred on facts and in law in arbitrarily referring to parts of cherry-picked statements of some of the employees of HCLT to return findings, which are contrary to facts as recorded in statements.

8.2 That the assessing officer erred on facts and in law that no opportunity was provided by the assessing officer to the assessee to cross examine the persons whose statements were recorded.

Computation of tax

9. That the assessing officer erred on facts and in law in levying surcharge and education cess on income-tax determined under the provisions of the relevant DTAA on the alleged total income of the non-resident Appellant.

10. That on the facts and circumstances of the case and in law, the assessing officer erred in levying interest under section 234A and 234B of the Act.

The Appellant craves leave to add to, amend, alter or vary the above grounds of appeal at or before the time of hearing.”

4. Representatives of both the sides were heard at length. Case records carefully perused. Relevant documentary evidence brought on record duly considered in light of Rule 18(6) of the ITAT Rules. Relevant judicial decisions considered wherever necessary.

5. The ground no. 1 and 2 are general in nature. The ground 3 and 4 and its sub-grounds 2.1, 3.1 to 3.8 has not been argued, hence no opinion is expressed on these grounds. The ld AR has argued ground no 4 to 10 and its sub-grounds, accordingly we adjudicate on these grounds only.

6. Both the parties before us fairly agreed that HCL Singapore Pte Ltd in ITA No. 2298/Del/2024 be taken as the lead case and the decision rendered thereon would apply with equal force for other assesseees also in the same group in view of identical facts, except with

variance in figures. Accordingly, we proceed to take up the appeal in ITA No. 2298/Del/2024.

7. The brief facts of the case is that the assessee, during the year, received a sum of Rs 16,64,703/- from HCL Technology Ltd (hence forth "HCLT"), its Indian affiliate for performance of Services to Deutsche Bank. The Assessee and its Indian affiliate are part of HCL group. The HCL Group is principally engaged in the following activities:

- a) the business of development and export of software and rendering Information Technology enabled Services (ITeS),
- b) Infrastructure services and
- c) Business process outsourcing.

Out of the three vertical, the software development and related ITeS alone constitutes 95% of the assessee's business.

8. The principle issue that requires adjudication is whether the receipts from HCLT by the assessee, one of the foreign AEs, on account of software, Engineering and Infrastructure service provided by the assessee, is taxable in India.

9. The assessee has contended that such income of the assessee is not chargeable to tax in India and this contention is based on the following three premises.

i) First, the HCLT and other affiliates perform services to overseas customers of HCL group (in this case Deutsche Bank) like a consortium and therefore, payment received by the assessee from HCLT was not for services rendered by the assessee to the HCLT, but rather was in the nature of payment under a revenue sharing arrangement.

ii) Second, the amount received by the assessee were in respect of services performed by the assessee outside India and delivered directly to the overseas customers for utilization in their business carried on outside India and therefore, did not accrue or arise in India so as to be chargeable to tax in India in terms of section 9(1)(vii) of the Act and more specifically under the section 9(1) (vii)(b) of the Act.

iii) Third, the amount received by the assessee, a resident of Singapore, for onsite services was not liable to tax in India, in terms of the applicable DTAA as such services did not “make

available” any technical knowledge, skill or experience or consist of the transfer of any technical plan or design to the HCLT.

10. The Assessee relied heavily on the content of the legal contracts, i.e., the Master Service Agreement (MSA) between HCLT, the assessee and the overseas client of HCL group (Deutsche Bank) to support its arguments.

11. The assessing officer’s contention is that the actual conduct of the assessee and its AEs and not the legal contract between them, determine the nature of transactions and its taxability. The AO relied on the following:

- i) various clauses of contracts
- ii) extrinsic materials such as statements of the key personnel,
- iii) the transfer pricing report of the assessee group,
- iv) the business model involved in the instant case and
- v) the submissions made by the overseas affiliates of HCL group before tax authorities in their respective jurisdictions etc.

12. After elaborate and extensive inquiry, the AO concluded that the receipts by the assessee company from HCLT is towards services rendered by the assessee to the later. The nature of receipts is

considered to be "fees for technical services (FTS)" as per the meaning of Explanation-2 to section 9(1)(vii) of the Act and is taxable under the provisions of Income-tax act as well as under the provisions of relevant DTAA (in this case India-Singapore DTAA).

13. At the very outset of the opening of the arguments, the ld. counsel for the assessee stated that the issue regarding taxability of receipts from HCL Technologies Limited ['HCLT' for short] in the hands of the assessee is covered in favour of the assessee by the decision of the coordinate bench which passed a consolidated order in assessee's own case in ITA No. 537/DEL/2021 to 596/DEL/2021 & Others vide order dated 20.12.2023. The ld AR also relied on the order passed on 29.02.2024 by the ITAT Delhi in the case of 20Foreign AEs of HCLT for AYs 2012-13 to 2018-19 in 105 appeals against order passed under section 148 of the Act and the order dated 16.08.2024 passed by ITAT Delhi in the case of HCLT for AYs 2013-14 to 2018-19.

14. On the other hand, the ld. DR contended that the coordinate bench has passed a consolidated order allowing the appeals of the assessee for the A.Y 2012-13. However, additional evidences filed by

the department as well as case laws have not been considered by the Bench.

15. We have heard the rival submissions and have carefully perused the relevant material on record. We find force in the arguments of the ld. counsel for the assessee that the issue of taxability of receipts from HCLT in the hands of the assessee is covered in favour of the assessee by the decision of the co-ordinate bench in assessee's own case for A.Y 2012-13 [supra]. We will deal with various issues raised by the AO and the decision of the coordinate bench vide order dated 20.12.2023 (supra) on each of the issues. We find that on the taxability of the receipts of foreign AEs from HCLT, the coordinate Bench has concluded that the same is not taxable in India.

16. The coordinate bench of ITAT (supra) adjudicated that the HCL group entities operate as independent contractors and the services are not rendered by one entity to another but rather it is a case of revenue sharing arrangement, as under:

"15. From the perusal of the Master Service Agreement wherein certain relevant clauses have already been reproduced above, we find that as per clause 5, the assessee has the primary responsibility for performance of software and IT services in respect of agreements entered into with overseas customers of

HCL Group; that as per clause 7, the assessee and HCLT acknowledge that performance of obligations under the Master Service Agreement may result in discovery, creation or development of inventions, methods, techniques, improvements, software designs, computer programs, strategies, data and other original works of authorship, which shall fully vest with the assessee on creation and be the property of the assessee and it is also acknowledged that the existing Intellectual Property Rights of the assessee, including any modifications or enhancements thereto that may be developed in the course of providing services under the Master Service Agreement would remain under the exclusive ownership of the assessee; that in case of default on the part of the assessee in performance of services, clause 11 of the Master Services Agreement unequivocally provides that the liability shall vest with the assessee itself ; that in case any damages, claims, demands, liabilities, costs and expenses arise due to errors or performance problems of the assessee's employees, clause 12 of Master Service Agreement again fixes the liability on the assessee to indemnify HCLT, unconditionally and irrevocably ; that clause 13 of the Master Service Agreement further establishes that both parties, i.e., the assessee and HCLT are independent contractors and no party has supervisory power over the other. We find that this agreement is the foundation defining the scope of services to be performed by the assessee and HCLT duly defining their respective obligations to the overseas customers. We find that this agreement has not been treated by the revenue as sham or an agreement entered into for the purpose of evasion of tax. Rather the revenue has

taken cognizance of this agreement and had only interpreted the contents thereon in a different manner so as to bring the activities carried out by the assessee within the ambit of domestic taxation as well as taxability under the Treaty. In our considered opinion, under the Global Delivery model, HCL group entities operate as independent contractors and services are not rendered by one entity to another. While the assessee performs services outside India in connection with contracts entered into by HCLT with foreign customers, no service or deliverable is provided by the assessee to HCLT and work is directly performed onsite at the foreign customer's location or nearshore delivery centers. In other words, the assessee does not provide any services to HCLT and the services are rendered by the assessee directly to the customers located outside India, i.e., no part of the services rendered by the assessee are transferred to India. Thus, as per the business model, the on-site services are entirely performed by the assessee from outside India and delivered for ultimate consumption or utilization by foreign clients in their business outside India. Accordingly, we appreciate the arguments of the Id. AR that the overall responsibility with HCLT is only to facilitate common linkage between HCLT, HCL group entities and customers and that the fact that HCLT is the facilitator or single contact point for the end customer does not lead to the conclusion that services are being provided by the assessee to HCLT ; that such arrangement is entirely meant for administrative convenience of the end customers, so as to circumvent the need to approach multiple entities time and again for the desired services. All the services are facilitated from one place by HCLT, which acts like

the leader in a consortium. We are of the considered opinion that the Master Service Agreement entered into between HCLT and the assessee, including other HCL group entities is in the nature of a business arrangement, by which the dominant intention of the parties to come together and serve the overseas customers is fulfilled. Receipt of payment from the overseas customer by HCLT which further distributes the same to the group entities, including the assessee, for their share of the work, cannot be held to be income in the hands of the assessee and liable to tax in India. In our view, the payment received by the assessee from HCLT is only in the nature of revenue share and should not be construed to mean that services were provided by the assessee to HCLT."

16.1 With respect to the interpretation of the clauses of contract/agreement of the assessee with HCLT and the foreign entities to whom services are rendered, the ITAT has concluded that the same postulates sharing of revenue between HCLT and the assessee, as under:

"22. In our considered opinion, the broad perusal of the agreements entered into between the parties clearly postulate a situation that both HCLT and the assessee are jointly rendering services to the customer located outside India ; billing is done on a consolidated basis on the customer by HCLT (including the services rendered by the assessee to the customer located outside India) ; payments are received by HCLT from the customer

located outside India and thereafter the revenue is shared by the HCLT with the assessee for the proportionate volume of services rendered by the assessee to the customer. It is effectively the sharing of revenue between HCLT and the assessee qua the customer located outside India. HCLT is answerable to the client located outside India and the assessee is answerable to HCLT for any mistakes pursuant to indemnification clause agreed upon in their agreement. Further the agreement with Cisco and Deutsche Bank (which had been considered by the Id. AO) specifically prohibits sub-contracting activity by the HCLT. However, the said agreement permit HCLT to use the services of its affiliates situated across the globe for rendition of services in a seamless and smooth manner.”

23.1. In view of the above, we find the allegation leveled by the Id. AO in his order that services were rendered by assessee to HCLT is in direct contravention to the findings recorded by the Id. DRP. Needless to mention that the observations of the Id. DRP are binding on the Id. AO as per section 144C(10) of the Act.”

17. The ITAT (supra) decided the receipts from HCLT are not taxable u/s 9(1)(vii) of the Act due to exclusion contained in sub-clause (b), in favour of assessee as follows:

"24. We further find that if the contention of the Id. AO i.e., the amount paid to the assessee by HCLT is to be considered towards the onsite software services provided by HCLT in the course of carrying on its business of onsite services were to be accepted, such business of providing onsite services would be considered as outsourced by HCLT to the assessee. Such business of providing onsite services is carried on outside India, in as much as such onsite services are performed outside India and is also delivered directly to the customers outside India. HCLT as a corollary would be considered as having availed the services of the assessee outside India in respect of and for the purpose of business of providing such onsite services to the customer outside India. Therefore, the amount paid by HCLT to the assessee is for the services utilized for business of onsite services carried on by HCLT outside India. Thus, such receipts in the hands of the assessee would not be taxable in India in view of first limb of the exception carved out in clause (b) of section 9(1)(vii) of the Act and cannot be deemed to accrue or arise in India."

18. The coordinate bench of ITAT (supra) decided that the payment made by HCLT to foreign AEs was for making or earning income from a source outside India as follows:

"25. Even if it has to be assumed that the payment made by HCLT for onsite services rendered by the assessee is to be construed as FTS, in any event, we find that Section 9(1)(vii)(b) of the Act carves out a second exception to the taxability of FTS paid by a resident, wherein the fee for technical services payable in respect of services utilized for the purpose of making or earning any income from any source outside India is not an Income within the ambit of section 9 of the Act. We find that HCLT had concluded its agreements with the customers in the country of the customers which is situated outside India; that the onsite services are rendered by the assessee outside India at the customer's location and no part of the service/software program is sent or performed in India; the services are directly performed on the customer's server located abroad and delivered directly to them outside India; and that the payment for onsite services is also received by HCLT from outside India in foreign exchange from the foreign customers. Hence it is very clear that the source for making or earning any income of the payer of fee for technical services, in the present case, is outside India, and therefore not taxable in India. In this regard, we find that the Id. AR rightly placed reliance on the decision of co-ordinate bench of Delhi Tribunal in the case of Chander Mohan Lall vs ACIT reported in 134 taxmann.com 292 (Delhi Trib) wherein the issue of making payment by resident Indian lawyer to the foreign attorneys for certain services rendered by them (the foreign attorneys) outside

India were sought to be treated as FTS was subject matter of consideration.”

26.1. We find that the aforesaid activities are performed by the assessee onshore at the location of the customers or at the customer's server located abroad, which is not disputed before us. The requirement analysis and application design documents prepared by the onsite team are stored in client's environment itself and can be accessed by the HCLT offshore team only upon client granting permission or access. The mere fact that the assessee is engaged in understanding the requirements of the customers and passes on the requirement plan to respective development teams for designing and coding the software module does not, per se, constitute an inter-dependent function of the HCL group. Rather, it has to be understood in a holistic manner that these are well-coordinated activities, meant to support the entire group in delivering quality products and services to the ultimate customers. All the software development work is generally divided between onsite and offsite team based on discussion with customers. The respective onsite and offsite engineers work directly with the customer's engineers and managers. The entire development environment is customer owned. On the basis of the discussions with the customer's project manager, the software work is broken into different modules and each team of HCL group of companies is allocated the development of their own module based on which entire

software product is developed. It is reiterated that no team is dependent on any other team's technical capabilities or work. At best, the teams are dependent upon each other for business reasons as independent partners who have come together to provide holistic service to the client. It is submitted that both onsite and offsite team comprises of their own technically qualified engineers who have independent technical knowledge and capabilities.

27. We find that onsite software services represent a separate and independent function of the overall business and therefore, income earned by the assessee from such activities from customers located outside India has its source outside India. As a corollary, the payments received by the assessee from HCLT for performance of the above onsite services are essentially fees for services utilized for the purpose of earning income from a source outside India by HCLT. We have already held supra that onsite services are an independent identifiable source of income. Similar is the case of with offshore services also. Hence we find lot of force in the argument of the Id. AR that HCLT maintains a clear demarcation between these activities as the team size allocated at respective onsite and offsite location is always pre-determined and agreed by the customers. Hence, the entire development process is customer driven and all projects are undertaken under the oversight of the customer's project manager. Further, such division is based

on the roles and responsibilities of each team. Under the terms of SoW, both teams work independently on the client's server and the customers are billed according to the time and efforts of each team."

19. The ITAT (supra), in respect of the interpretation and relevance of statement recorded of the various employees, held that the AO merely cherry picked some question/answer whereas the statements of the employees support the assessee only, as under:

33. From the perusal of the aforesaid statements of various employees which were recorded during the course of survey by the TDS officers, which were heavily relied upon by the Id. AO by cherry picking some of the questions and answers alone given by them, we find that prima facie all the statements of employees actually support the contentions of the assessee herein. From the aforesaid statements, it emerges that the offshore project lead or project manager of HCLT manages his offshore team in India, whereas the assessee's project lead manages his team independently, which executes work from the overseas locations directly on the customer's server. Both the project managers/ leads only coordinate with each other on need basis; that each team of HCLT and the assessee develops the particular modules as assigned to them; that the delivery team of the assessee reports to the delivery manager who sits in the foreign country and the delivery team of HCLT reports to the delivery manager who sits in

India; that both onsite and offsite personnel of the assessee and HCLT respectively are responsible for writing the code; that the offshore teams of HCLT work directly with customer managers or through project managers in India and the onsite team engineers belonging to the assessee company work directly with foreign customer's managers; that in majority of the projects, the entire development environment is owned by foreign customer; that the code and test scripts are worked on from foreign customers' servers and provided directly on the said servers; that the integration is normally done through Customer build machines that integrate the various units of code into a solution.

34. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we have no hesitation to conclude that the payments made by HCLT to the assessee could not be construed as Fee for technical services and accordingly the same is not taxable in the hands of the assessee in India as per the domestic law. Accordingly, the Ground Nos. 3,4,7 & 8 raised by the assessee are disposed off in the aforementioned terms."

20. Now we take up the two issues raised by the ld DR in the course of arguments for our considerations. The ld. DR submitted as under:

1) During the course of appellate proceedings, additional evidence in the form of complete Income Tax Return filed by the HCLT for A.Y 2012-13 was filed. On the basis of return filed

M/s HCLT it was submitted before the Bench that the entire receipts which have been held by the Hon'ble Bench to be in the nature of revenue shared by the appellant assessee with M/s HCLT has been claimed by M/s HCLT as its income from offshore supply of software and accordingly deduction u/s 10AA of the Income Tax Act has also been claimed by M/s HCLT in respect of these Incomes. The Hon'ble Bench has not mentioned the additional evidence filed by the Department in its order at all. The Hon'ble Bench has also neither rejected the additional evidence nor considered the additional evidence in its decision. Had the evidence adduced by the Department been considered by the Hon'ble Bench, the Hon'ble Bench could not have come to its ultimate conclusion that it derived from the examination of the agreements between HCLT and the assessee's which do not reflect the true intention of the parties. Thus the decision rendered sub-silentio.

2) After holding that the payment received by the assessee from HCLT is only in the nature of Revenue sharing and should not be construed to mean rendering of services to HCLT, the Hon'ble Bench also decided the alternate submission of the assessee that even if the amounts received by the assessee from HCLT is to be considered towards the onsite software services provided to HCLT, such receipts would not be taxable in India in the hands of the assessee in view of first limb of the exception carved out in clause b of section 9(1)(vii) of the Act. Before the Hon'ble Bench it was submitted that the decision in the case of Chander Mohan Lall is per incuriam of the decision of the Hon'ble Kolkata Bench

of the Tribunal Asstt. CIT VS Subhatosh Majumdar [2020] 120 taxmann.com 242 (Kolkata-Trib.) as well as decision of the Hon'ble D Bench of the Tribunal In the case of Hariharan Subhramanium, Hariharan Subhramanium Vs Ast. CIT [2020] 121 taxmann.com 189 (Delhi-Trib.). The Hon'ble Bench has not considered the decisions of Hon'ble D-Bench New Delhi and Hon'ble Kolkata Bench of the Tribunal cited by the revenue which are contrary to the decision of the Hon'ble Tribunal D Bench in Chander Mohan Lall. Thus the decision of Hon'ble Bench is pre-incuriam in the cases cited before it.

3. Thus the decision dated 20-12-2023 passed by the Hon'ble Bench is sub-silentio as well as per-incuriam and loses its binding precedence".

21. The issues raised by the Revenue was rebutted by the Id AR as follows:

"Contention No.1 of Ld. CIT DR

HCL Technologies Ltd ("HCLT") claims deduction under section 10AA of the Income- tax Act, 1961 ("the Act") against the total receipts from foreign customers, thereby implying it is not a case of revenue sharing arrangement.

Rebuttal to Contention No.1 of Ld. CIT DR

It is submitted that under a Global Delivery model, HCL group entities operate as independent contractors and render services directly to the foreign customer, the services are not rendered by one HCL group entity to another. The Hon'ble Tribunal in the decision dated 20.12.2023 passed in the case of the Appellants and other group entities in appeals for AY 2012-13, for while analyzing the agreements/ MSA with the customers, held as under:

"15... In our considered opinion, under the Global Delivery model, HCL group entities operate as independent contractors and services are not rendered by one entity to another. While the assessee performs services outside India in connection with contracts entered into by HCLT with foreign customers, no service or deliverable is provided by the assessee to HCLT and work is directly performed onsite at the foreign customer's location or nearshore delivery centers. In other words, the assessee does not provide any services to HCLT and the services are rendered by the assessee directly to the customers located outside India i.e., no part of the services rendered by the assessee are transferred to India. Thus, as per the business model, the on-site services are entirely performed by the assessee from outside India and delivered for ultimate consumption or utilization by foreign clients in their business outside India."

From the above, it is evident that no services are "made available" by the Appellants to HCLT. These are well-coordinated services rendered by two separate legal entities within the group

directly to the foreign end customers, acting as independent contractors. Further, the Appellants and HCLT are liable to bear the performance risk for their respective portion of work.

Further, agreements entered into with customers, e.g. CISCO, DB, etc. clearly establish that contractually, the Appellant, an affiliate entity of HCLT, is not treated as a 'third party' but is considered as a 'supplier' or a 'permitted assignee for executing the contracts entered into with the foreign customers. That is, the Appellant and HCLT are treated as joint suppliers and not sub-contractor to one another by the customer.

Since a single consolidated invoice was raised by HCLT on the end customers located outside India, the entire amount of sale proceeds received from the foreign end customers (including those for onsite services rendered directly by the Appellants, i.e., the Associated Enterprise(s) ("AEs") of HCLT to foreign customers outside India) was liable to be treated as forming part of the "export turnover", by virtue of deeming fiction under Explanation 2 to section 10AA of the Act, which provides that profits and gains derived from onsite development of computer software outside India shall be deemed to be profits and gains derived from export of computer software outside India, while computing the amount of deduction allowable thereunder.

It is worth mentioning that payments collected by HCLT and passed on to the Appellants for onsite services rendered by the Appellants to the foreign customers were determined on an arm's

length basis and the same has also been duly accepted as such by the TPO in the case of HCLT and the same has not been disputed by invoking sub-section (9) of section 10AA read with sub section (10) of section 801A of the Act, while computing the deduction.

All such payments which HCLT collected and passed on to the Appellants for onsite development of software, i.e., performing onsite services outside India, being delivered by the Appellants directly to the end customers outside India as part of single composite contracts entered into with the foreign end customers, were shown as "expense" by HCLT, while claiming the said deduction under section 10AA of the Act on the basis of net profits only.

From the aforesaid, it is evident that no deduction under section 10AA of the Act has been effectively claimed by HCLT in respect of payment received from end customers on behalf of the Appellants for onsite services provided by them directly to foreign customers, notwithstanding that such receipts were considered as part of 'export turnover' of HCLT for the aforesaid limited purpose of meeting the computational requirement of the deeming fiction under Explanation 2 to section 10AA only.

It is respectfully submitted that the mere fact that deduction was claimed by HCLT under section 10AA of the Act by treating the consideration received from foreign customers against consolidated invoice as "export turnover" and amount passed on to the Appellants for onsite development of software as "expense"

under a revenue sharing model put in place for administrative convenience, should not impede the main plank of the contentions of the Appellants that services were rendered by the Appellants outside India and delivered directly to the foreign end customers for utilization outside India as an independent contractor and no part of the services were delivered to HCLT, and thus, were not taxable under the Act.

It is further submitted that the aforesaid contentions were duly raised by the Ld. CIT DR during the course of hearing in the case of the Appellants/ other group entities for AY 2012- 13, and the Appellants in rebuttal made oral and written submissions before the Hon'ble Tribunal. Therefore, it is respectfully submitted that it cannot be said that the Tribunal has not considered the aforesaid contention raised by the Ld. CIT DR. Relevant extracts of supplementary submissions dated 06.07.2023 filed before the Hon'ble Tribunal in the aforesaid matter are enclosed herewith as Annexure 1 (refer page no. 4 & 5).

Contention No.2 of Ld. CIT DR

Decision dated 20.12.2023 of this Hon'ble Tribunal in the case of the Appellants and other group entities is per incuriam and sub-silentio.

Rebuttal to Contention No.2 of Ld. CIT DR

The Ld. CIT DR, it is respectfully submitted, is wholly incorrect in submitting that this Hon'ble Tribunal in order dated 20.12.2023 passed in the cases of the Appellants/ foreign AEs of HCLT has reached the conclusion that payments by HCLT to the foreign AEs, were for the purpose of making or earning income from a source outside India, by solely relying on the decision of this Hon'ble Tribunal in the case of Chandar Mohan Lall vs ACIT: [2022] 134 taxmann.com 292 (Del Trib.) and by not considering the decision of this Hon'ble Tribunal in the case of Hariharan Subramaniam vs ACIT: [2020] 121 taxmann.com 189 (Del Trib.) and decision of the Kolkata bench of the Hon'ble Tribunal in the case of ACIT vs Subhatosh Majumdar: [2020] 185 ITD 716 (Kol Trib.). Copy of decision of this Hon'ble Tribunal in the case of Chandar Mohan Lall (supra) is enclosed herewith as Annexure 2.

In the case of Chander Mohan Lal (supra) before this Hon'ble Tribunal, it is a fact that Indian/Overseas clients engaged the assessee for availing certain services. In turn, the assessee engaged foreign attorneys to perform certain services which were required to be performed in foreign jurisdictions. The Hon'ble Tribunal on that basis held that the source of income of the assessee through services rendered by non-resident attorneys in foreign jurisdictions was located outside India. That being the case, exception provided in clause (b) of section 9(1)(vii) would apply.

In the case of the Appellants and other group entities also, this Hon'ble Tribunal in order dated 20.12.2023, while dealing with the alternate contention of the Appellants relating to source of income outside India, held that HCLT has made payments to the Appellants in respect of onsite services under contracts with the foreign customers' being concluded jointly and in a corroborative manner outside India; the onsite services were rendered by the Appellants at the customer's location outside India and no part of the service/ software program was delivered or performed in India; the services were directly performed on the customer's server located abroad and delivered directly to the foreign customers outside India, the services were utilized by the foreign customers in their business located entirely outside India and the payment for onsite services was also received from the foreign customers located outside India in foreign exchange. It has, accordingly, been held that source for making or earning any income on account of fees for technical services so performed and utilized, was outside India and therefore, not taxable in India.

It is submitted that the Hon'ble Tribunal has examined the issue in entirety: after referring to the statutory provisions, facts emanating from record and binding precedent of the Hon'ble Gujarat High Court in the case of CIT vs Motif India Infotech (P) Ltd: [2018] 409 ITR 178 (Guj), categorical findings have been rendered regarding payments made by HCLT to the Appellants being excluded from the purview of Fees For Technical Services ("FTS") in terms of exclusion contained in section 9(1)(vii)(b) of

the Act. [Refer paragraph No.24 to 31@page no.32-36 of the case laws PB]

Further, the Hon'ble Tribunal also relied upon the decision of the Hon'ble Bombay High Court in the case of CIT vs IndusInd Bank Ltd: [2019] 415 ITR 115 (Bom) to hold that even after the retrospective amendment in section 9 introduced vide Finance Act, 2010, the receipts of non-resident for rendition of technical services would not be taxable in India under section 9(1)(vii)(b) of the Act, in a case where the services are not utilized in India by the payer of such fees. In other words, the Hon'ble Bombay High Court held that even though the requirement of rendition of services in India is no longer relevant after the aforesaid retrospective amendment, the condition of utilization of services (by the payer) in India is still required to be fulfilled for taxability of receipts of the non-resident in India.

Thus, the submission of the Ld. CIT DR that the decision dated 20.12.2023 passed by this Hon'ble Tribunal in the case of the Appellants and other group entities is per incuriam is grossly incorrect.

Notwithstanding the above, reliance is placed on the recent decision dated 03.07.2024 passed by the Hon'ble Delhi High Court in the case of International Management Group (UK) Ltd vs CIT: [2024] 164 taxmann.com 225 (Del), wherein the assessee was engaged by the BCCI for advisory and managerial service for establishment, commercialization and operation of the IPL. With

regard to the taxability of the consideration received by the assessee from BCCI for rendering services in relation to those years in which IPL, was held outside India, the High Court held the same to be not taxable as FTS under section 9(1)(vii)(b) of the Act, as the relocation/ geographical shift of IPL event outside India in subject financial years would mean that services rendered by IMG were utilized by BCCI for a business carried out outside India and that payment made by BCCI was for the purpose of earning income from a source outside India. Copy of decision of the Hon'ble Delhi High Court in the case of International Management Group (supra) is enclosed herewith as Annexure 3. The relevant extracts of the aforesaid decision are reproduced hereunder:

"114. The legislative history which preceded the introduction of the Explanation was dealt with in some detail by the DRP as would be evident from the following extracts of its Directions: "5. We have carefully considered the facts of the case and submission of the assessee. We have perused the abovementioned case laws. We would like to refer to Explanation below section 9(2) which has been inserted by the Finance Act, 2012 with retrospective effect from 1.6.1976. It reads as under:

"Explanation. -For the removal of doubts, it is hereby declared that forthe purposes of this section, income of a non-resident shall be deemedto accrue or arise in India under clause (v) or clause (vi) or clause[vii) of sub-section (1) and shall be included in the total Income of the non-resident, whether or not,- (i) the

non-resident has a residence or place of business or businessconnection in India: or

(ii) the non-resident has rendered services in India"

5.1 For the purposes of understanding the reasons for the change, it is relevant to refer to the Explanatory Memorandum to the Finance Bill 2012. which is reproduced hereunder:

"Section 9 provides for situations where income is deemed to accrue or arise in India.

Vide Finance Act. 1976, a source rule was provided in section 9 through insertion of clauses (v), (vi) and (vii) in sub-section (1) for income by way of interest, royalty or fees for technical services respectively. It was provided, inter alia, that in case of payments as mentioned under these clauses, income would be deemed to accrue or arise in India to the non-resident under the circumstances specified therein.

The intention of introducing the source rule was to bring to tax interest, royalty and fees for technical services, by creating a legal fiction in section 9, even in cases where services are provided outside India as long as they are utilized in India. The source rule, therefore, means that the situs of the rendering of services is not relevant. It is the situs of the payer and the situs of the utilization of services which will determine the taxability of such services in India.

5.2 From the above, it is now clear that the provisions of the Income Tax Act have been amended to include income in the hands of non-resident on accrual basis in India u/s 9(1)(v)/(vi)/(vii) whether or not the non-resident has a residence or place of business or business connection in India or the non-resident has in India. The issue has to be decided in the context of the law as applicable.

5.3 The Ld. ARs have also referred to provisions of clause (b) of section 9(1)(vii). According to the said sections, Royalty/FTS payable by a resident are deemed to accrue or arise in India where the royalty/fee is payable to a non-resident except where these are payable in respect of any right, property or information used or services utilized for the purposes of a business of profession carried on by such person outside India, for the purpose of making or earning any income from any source outside India

Both these eventualities are not cumulative but are in the alternative to each other and therefore, on non satisfaction of any one, the deeming fiction shall come into play in the case. The issue for consideration is the meaning of the expression 'such person' appearing in section 9(1) (vii)(b). In this context reference is made to the decision of the Hon'ble Delhi High Court in the case of CIT v. Havells India Ltd [2012] 21 taxmann.com 476/208 Taxman 114/352 ITR 376 (Delhi) wherein Hon'ble High Court held that in order to fall within the exception provided in section 9(1)(vii)(b) the source of income, and not the receipt, should be situated outside India. Regarding the exception of

section 9(1)(vii)(b) the Hon'ble Court held that in order to get the benefit of first exception it is necessary for the taxpayer (resident) to show that the technical services were utilized in a business carried outside India. Indirectly, the ratio decidendi has been that 'such person' appearing in section 9(1)(vii) (b) refers to the resident payer of the said fee and not the non-resident recipient. In this context, reference is made to the CBDT Circular No. 202 dt 5.7,1976, which reads as under:

5.4 In view of the above, it is evident that the intention of the legislature clarified by the Explanatory circular on the introduction of the amendment in the Income Tax Act has been to consider "such person" appearing in section 9(1)(vii)(b) with reference to the resident payer for the said amount because the expression "if the payment is relatable to a business or profession carried on by him outside India" refers to the business or profession carried out by him viz, resident payer in this context and not the non-resident payee. In view of the clear disposition of the relevant provisions of the I.T. Act, we hold that the provision of section 9(1)(vii)(b) are also satisfied and the case of the assessee is not covered by the exceptions"

115. In our considered opinion, this question is clearly liable to be answered in favor of the appellant for reasons which follow. Undisputedly, IPL in 2009 and 2014 though originally slated to be held in India, was, for exceptional reasons, shifted out and ultimately held in South Africa and UAE respectively. The services which were rendered by IMG in connection with those two

events were clearly utilized outside India and were availed of for the purposes of earning income from a source outside India. The geographical shift meant that the services rendered by IMG were utilized outside India and were integral to earning income from sources outside India. The Tribunal clearly glossed over the significance of this relocation and which had fundamentally altered the context in which IMG's services were availed. The Tribunal thus clearly erred in failing to appreciate the significance of the event itself having shifted out of India and the services thus coming to be utilized in the nations noticed above and the same being indelibly connected to the earning of income from a source outside India. (emphasis supplied)

Without prejudice, both the judgments quoted by Ld. CIT DR should be read in the context of the peculiar facts of each case where, in sharp contrast with the facts of the Appellants, the services of the assessee were admittedly engaged solely by the Indian clients for their Indian businesses. In the said case laws, the Hon'ble Delhi and Kolkata Benches of the Tribunal held that the source of income in those cases was not the filing of patent applications of the Indian clients by the foreign law firms but the assessee himself who solely has privity of contract with the Indian clients and pays to the foreign law firms/ professionals. It was held that the foreign attorneys were not engaged by the assessee's Indian clients; instead their services were availed by the assessee while in discharge of his professional obligations in India. On that ground alone, it was held that source of income for the assessee was the assessee itself and thus, was in India.

As explained above, the facts of the Appellants are completely different from those of both the case laws cited by Ld. CIT DR., as held by the Hon'ble Delhi Bench in its order dated 20.12.2023, HCL group entities operate as independent contractors under a Global Delivery model and render services directly to the foreign customers located outside India, the services are not rendered by one HCL group entity to another. Also, it may be reiterated that contractually, the Appellant, an affiliate entity of HCLT, is not treated as a 'third party' but is considered as a 'supplier' or a 'permitted assignee' for executing the contracts entered into with customers, i.e., the Appellant and HCLT are treated as joint suppliers and not sub-contractor to one another by the customer. Also, in the case of the Appellant, all customers were located outside India; the services were rendered directly by the Appellant to the foreign customers entirely outside India and the services were also utilized by the foreign customers in their businesses located outside India.

In that view of the matter, findings of this Hon'ble Tribunal in earlier decision dated 20.12.2023 passed in the case of the Appellants and other group entities, that the payments made by HCLT to the Appellants is for the purpose of earning income from a source outside India, viz., rendition of onsite services, does not warrant any interference. Accordingly, such payments cannot be deemed to accrue or arise in India in the hands of the non-resident recipients/ service providers, i.e., the Appellants, in view of the exclusion contained in section 9(1)(vii)(b) of the Act and hence, are not liable to tax in India."

22. The objections raised by the Id DR and rebuttal furnished by the Id AR are carefully considered. We agree with the contention of the assessee that HCLT has a computational requirement of the deeming fiction under Explanation 2 to section 10AA to treat the entire amount of sale proceeds received from the foreign clients as export turnover as it raises a single consolidated invoice. Further, the contention that HCLT treats the payments made to its AEs as expense and claims deduction u/s 10AA on net profit basis, has not been controverted by the Id DR. The Id DR has also not controverted the key assertion of the assessee that no deduction under section 10AA of the Act has been effectively claimed by HCLT in respect of payment received from end customers on behalf of the Appellants notwithstanding that such receipts were considered as part of 'export turnover' of HCLT. Furthermore, the Id DR could not controvert the fact that the TPO in the case of HCLT has not invoked sub-section (9) of section 10AA read with sub section (10) of section 801A of the Act, while computing the deduction. The assessee, therefore, in our considered opinion succeed in rebutting the Id DR objections on this count.

23. With respect to the contention that the ITAT decision dated 20.12.2023 is per incuriam and sub-silentio, we again agree with the submission of the assessee that the facts in the case of Hariharan

Subramaniam vs ACIT and decision of the Kolkata bench of the Hon'ble Tribunal in the case of ACIT vs Subhatosh Majumdar, which the Revenue claims has not been considered, is clearly distinguishable from the facts of the assessee. Whereas in the case of Hariharan Subramaniam and Subhatosh Majumdar, the assessee solely was privy of contract with the Indian client. It was the assessee who engaged the foreign attorneys and paid them in discharge of his professional obligations in India. On that ground alone, it was held that source of income for the assessee was the assessee itself and thus was taxable in India. In the instant case, the ITAT has held that the assessee has rendered the services to the foreign customers who are entirely outside India and the services were also utilized by the foreign customers in their businesses located outside India, and hence not taxable in India.

24. In any case, with the rendering of the decision of the jurisdictional High Court in the case of *International Management Group* (supra), the issue of the ITAT decision in the assessee case, being per-incuriam and sub-silentio, no longer remains valid. In similar facts as that of the assessee, the hon'ble High Court in the case of *International Management Group*, held that the assessee rendered services to BCCI for IPL event held outside India. The services were

utilized by BCCI for a business carried out outside India and payment made by BCCI was for the purpose of earning income from a source outside India. In such facts, the High Court held the same to be not taxable as FTS under section 9(1)(vii)(b) of the Act. The assessee, therefore, in our considered opinion succeeds in rebutting the ld DR's objections on this count also.

25. We also note that since receipts of the foreign AEs from HCLT are held to be not taxable in India under the provisions of the Act, the grounds raised qua taxability of the impugned receipts under DTAA's, was considered as academic in nature and no findings were returned and same were left open for determination. We hold so similarly for this appeal also.

26. In view of the above exhaustive foregoing discussion, we are of the considered opinion that the issues raised by the assessee in ground no 4 to 8 of the said appeal are squarely covered in favour of the assessee and against the Revenue. Accordingly, ground no 4 to 8 of the assessee are allowed.

27. The ground no 9 regarding levy of surcharge and cess and ground no 10 regarding levy of interest u/s 234A and 234B are consequential in nature.

28. In the result, similar grounds of appeal, in all the captioned appeals of all the captioned assessees in ITA No. 2299/DEL/2024 and 2298/DEL/2024; ITA 2304 to 2307/Del/2024; ITA 2300/Del/2024, are similarly decided as above, in favour of the assessee and against the revenue.

The order is pronounced in the open court on 30.10.2024.

Sd/-

**[VIKAS AWASTHY]
JUDICIAL MEMBER**

Sd/-

**[NAVEEN CHANDRA]
ACCOUNTANT MEMBER**

Dated: 30th October, 2024.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	