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

BEFORE MS MADHUMITA ROY, JUDICIAL MEMBER AND SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 2301/DEL/2024[A.Y 2014-15]
ITA No. 2302/DEL/2024[A.Y 2016-17]
ITA No. 2303/DEL/2024[A.Y 2017-18]

HCL Technologies Limited Mexico S DE RL DE CV C/o HCL Technologies Ltd, 806, Siddharth, 96, Nehru Place New Delhi-110 019	Vs.	The Dy. C.I.T Circle - 2(1)(1), International Taxation New Delhi
PAN : AAFCH 7530 N		
(Applicant)		(Respondent)

Assessee By : Shri Neeraj Jain, Adv
Shri Arpit Goel, CA

Department By : Ms. Surbhi Sharma, CIT-DR

Date of Hearing : 13.11.2024
Date of Pronouncement : 28.11.2024

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

The above captioned three separate appeals by the same assessee 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 A.Ys 2014-15, 2016-17 and 2017-18.

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 2014-15 assessing the total income of the Appellant at Rs.54,21,236 is without jurisdiction, illegal, void ab initio and therefore, liable to be quashed.

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

2.1 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.

2.2 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.

2.3 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.

2.4 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").

2.5 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.

2.6 That the final assessment order pertaining to assessment year 2014-15 is barred by limitation in terms of 1" proviso to section 149 of the Act, as substituted vide Finance Act, 2021 w.e.f. 01.04.2021 as limitation to issue notice within 6 years expired on 31.03.2021.

2.7 That the final assessment order pertaining to assessment year 2014-15 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.

2.8 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

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

3.1 That, at the outset, the assessing officer erred on facts and in law in not following the bindingdecision 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.

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

4.1 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.

4.2 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.

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

5.1 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.

5.2 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.

5.3 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.

5.4 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).

6. Statements not considered in correct perspective

6.1 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 asrecorded in statements.

6.2 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.

<u>Computation of tax</u>

7. 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.

8. That the assessing officer erred on facts and in law in not applying the beneficial, lower rate of tax provided in the DTAA on the income held to be in the nature of Fees for Technical Services and instead bringing the same to tax at higher rate of 25%."

9. 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. Ground No. 1 is general in nature. Ground 2 and its sub-grounds pertain to reassessment proceedings initiated u/s 147 of the Act. The ld AR has argued Ground no 3 to 9 and its sub-grounds, accordingly we adjudicate on these grounds only.

6. 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 17 Foreign 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 as also on order

passed on 30.10.2024 by the ITAT Delhi in the case of 4 Foreign AEs of HCLT for AYs 2013-14 to 2017-18.

7. 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.

8. On the other hand, the ld. DR did not controvert that the coordinate bench has passed a consolidated order allowing the appeals of the different associate concerns of the assessee for the A.Y 2012-13 dated 20.12.2023.

9. We have heard the rival submissions and have carefully perused the relevant material on record. We have perused the order of the co-ordinate bench dated 20.12.2023 and find force in the contention of the ld. counsel for the assessee that the issue is squarely covered in favour of the assessee and against the Revenue. The co-ordinate bench, in the said order dated 20.12.2023 held 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 ld. 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."

"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 ld. 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 ld. AO in his order that services were rendered by assessee to HCLT is in direct contravention to the findings recorded by the ld. DRP. Needless to mention that the

observations of the ld. DRP are binding on the ld. AO as per section 144C(10) of the Act."

"24. We further find that if the contention of the ld. 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."

"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 inIndia; 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 ld. 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 ld. 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."

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 ld. 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."

10. In view of the above discussion, we are of the considered opinion that the issues raised by the assessee in ground Nos 3 to 6 of the said appeal are squarely covered in favour of the assessee and against the Revenue. Respectfully following, therefore, the decision of the coordinate bench [supra], and the judicial pronouncements, 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 held as not taxable in the hands of the assessee in India as per the domestic law. Accordingly, ground Nos 3 to 6 of the assessee are allowed.

11. Ground no. 7 and 9 are consequential in nature.

12. Since the taxability of receipts from HCLT has been decided in favour of the assessee, the ground no 8 for applying beneficial, lower rate of taxation is rendered academic.

13. To sum up, in the result, all the three appeals of the assessee are allowed.

The order is pronounced in the open court on 28.11.2024.

Sd/- **Sd/-**

[MADHUMITA ROY**]** **[NAVEEN CHANDRA]**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated: 28th NOVEMBER, 2024.

VL/

Copy forwarded to:

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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	
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