

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES : D : NEW DELHI

BEFORE SHRI ANUBHAV SHARMA, JUDICIAL MEMBER  
AND  
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER

ITAs No.1558 to 1561/Del/2022  
Assessment Years: 2016-17 to 2019-20

ITA No. 3027/Del/2023  
Assessment Year : 2021-22

GoDaddy.com, LLC,  
C/o Go Daddy India Domains and  
Hosting Services P. Ltd.,  
1<sup>st</sup> Floor, 01A167, Wework  
Bristol Chowk,  
Platina Tower,  
M.G. Road, Sector-28,  
Gurgaon,  
Haryana – 122 002.

Vs ACIT,  
Circle 1(3)(1),  
International Taxation,  
New Delhi.

PAN: AAECG7133K

(Appellant)

(Respondent)

Assessee by : Shri Ravi Sharma, Advocate  
Revenue by : Ms. Prajna Paramita, CIT-DR

Date of Hearing : 30.10.2024

Date of Pronouncement : 01.01.2025

ORDER

PER ANUBHAV SHARMA, JM:

These are appeals preferred by the assessee against the final assessment orders of the Asstt. Commissioner of Income Tax, Circle International Taxation

1(3)(1), New Delhi (hereinafter referred to as the Ld. AO, for short). Further details of the orders of the ld. AO are as under:-

ITA No.	Assessment Year	AO who passed the final assessment order & Date of order	Section of the Income Tax Act, 1961 ('the Act', for short) under which the AO passed the order
1558/Del/2022	2016-17	ACIT, Circle International Taxation 1(3)(1), New Delhi, dated 09.05.2022	147 r.w.s. 144C(13)
1559/Del/2022	2017-18	- Do -	- Do -
1560/Del/2022	2018-19	- Do -	143(3) r.w.s. 144C(13)
1561/Del/2022	2019-20	- Do -	- Do -
3027/Del/2023	2021-22	ACIT, Circle International Taxation 1(3)(1), New Delhi, dated 31 <sup>st</sup> August, 2023	- Do -

2. The facts in brief are that Godaddy.com, LLC, a Delaware limited liability company, is one of the world's largest Internet Corporation for Assigned Names and Numbers ("ICANN") accredited domain name registrars and provides other web services to its customers across the world. The Appellant, through its website (Godaddy.com) is engaged in the business of providing facilitation of domain name registration, web hosting, web designing, SSL certification and other services. The nature of the services provided by the Appellant are outlined in the submissions of the appellant, as below:-

- a) Domain name registration and transfer services:** GD LLC registers and transfers both generic top-level domains, including the prominent domains such as .com, .net, .org, and .info, as well as country code top level domains including, .us, .ca, .mx, .fr, .it, .de, and .es. Any user desirous of obtaining particular domain can access the website of GD LLC and place a request for the same. GD LLC checks the availability of a particular domain name with registry of domain names, as appointed by ICANN. Upon confirmation, GD LLC registers the desired domain name for the customer in its name. The customer enters into a contract for registration of the domain in its own name directly with GD LLC and also pays for such services through the channels as provided by GD LLC.
- b) Website hosting and e-mail:** GD LLC provides web hosting services which allow its users to develop their own websites / web pages by using the development tools and applications which are available online on GD LLC website. GD LLC hosts the website of its users on its servers/ dedicated servers located outside India. Such websites are accessible from the servers by anyone on a 24x7 basis. GD LLC also offers to install and configure supporting applications for such websites on its servers.
- c) Web Designing services:** GD LLC assists its users in creating various designs for website header, website content, website logo, business card, letterhead etc., so that the users can build their own website. The relevant tools and applications required for the above services are available on the website of GD LLC itself.

- d) Sale of on-demand products:** GD LLC provides its domain users with email, calendar and other standard services with limited features. Additional features (like multiple email ids', additional space, synchronization etc.) are also available to the users for a service fee, which varies based on the service level requested by the users.
- e) SSL certification services:** GD LLC also provides SSL certification services, which ensures that the message to be sent is properly encrypted and reaches the intended recipient. GD LLC is a "Certifying Authority" ("CA") and is eligible to issue SSL certificates to the users, who request for such certificate for a defined consideration. As a CA, GD LLC is required to maintain detailed records of what certificates have been issued and the information used to issue such certificates. Further, GD LLC may be subject to audit regularly to make ensure that it has followed defined procedures.

An SSL is a software that encrypts messages flowing to and from a web page it protects to avoid eavesdropping or overhearing of such messages by any person. While an SSL certificate is not really necessary to secure a data, a certificate ensures that the certificate holder is really who he claims to be. Without a trusted signed certificate, while the data may be encrypted, the party with whom the communication is being undertaken may not be the one who is the intended recipient of the communication.

3. During the years under consideration, the Appellant had rendered the aforementioned services to its Indian customers from outside India. As for convenient reference the facts of AY 2016-17, are referred to and cited. The

details of revenue earned by the Appellant from various streams during the AY 2016-17 are set out below:

<b>Particulars</b>	<b>Amount (INR)</b>
Income from domain name registration services	96,56,25,598
Income from web hosting services, web designing, SSL certification services and sale of on-demand products (together “ <b>non-domain services</b> ”)	93,23,40,477
<b>Total</b>	<b>1,89,79,66,075</b>

3.1 For the year under consideration, the assessee had filed its return of income under section 139(1) of the Act on September 29, 2016, offering its income from web hosting, web designing, SSL certification and sale of on-demand products amounting to Rs.93,23,40,477/- to tax as fee for technical services" ("FTS") under the provisions of section 9(1)(vi) read with section 115A of the Act. The return of income filed by the assessee was not picked up for scrutiny assessment by the Ld. AO. However, subsequently, reassessment proceedings under section 147 of the Act were initiated vide notice section 148 of the Act dated April 9, 2019. In compliance with the said notice, the assessee furnished its return of income under section 148 of the Act on May 6, 2019, declaring the same total income (i.e. Rs. 93,23,40,477/-) that was initially offered to tax in the original return of income filed under section 139(1) of the Act.

Pursuant to the filing of the said return of income under section 148 of the Act, the assessee was supplied with the reasons for issuance of notice under section 148 of Act, in accordance with the decision of Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd. vs. ITO [2003] 259 ITR 19 (SC)**. The Ld. AO sought various information and documents from time to time during the reassessment proceedings and the assessee duly complied with all requests in a timely manner. Furthermore, during the course of re-assessment proceedings, the assessee also filed an additional claim with the Ld. AO for availing benefits under the provisions of India-USA tax treaty and furnished copies of TRCs obtained from the Department of Treasury, Internal Revenue Service, USA. The assessee also filed a detailed submission, providing factual and legal arguments as to why such income should not be charged to tax as royalty or FTS under the provisions of the Act read with India-USA tax treaty. Copies of the submissions filed by the Assessee from time to time are provided in the paper book to the synopsis.

4. In conclusion of the assessment proceedings, the Ld. AO vide draft assessment order dated September 28, 2021, has held as under:

- a. **Income from domain name registration charges**— The Appellant's receipts from facilitation of domain name registration charges squarely fall within the definition of 'royalty' as per section 9(1)(vi) of the Act as well as Article 12(3)(a) of India-USA Double Taxation Avoidance Agreement ("DTAA" or "tax treaty") as (i) they are received for granting the right to

use the servers of the Appellant, (ii) providing domain name registration services is a precondition for rendering web hosting etc. services, (iii) it is a highly technical process and (iv) because of its inherent quality.

b. **Income non-domain services** –The Appellant’s receipts from provision of non-domain services such as web hosting, web-designing services etc. are taxable as fees for technical services (“FTS”) as per section 9(1)(vii) of the Act as well as Article 12(4)(a) of India-USADTAA as (i) they are ancillary and subsidiary to the application or enjoyment of domain registration, (ii) involve high-technique, and (iii) fulfill the make available criteria as provided under Article 12(4)(b) of India-USA DTAA.

c. **Denial of the benefit of the India-USA tax treaty**– The Appellant is not entitled to benefits under the India-USA tax treaty as only persons or entities that are ‘liable to tax’ under the laws of that country are considered to be residents for the purpose of tax treaties and since LLCs are fiscally transparent entities according to tax laws of the USA, their income is not ‘subject to tax’ in their own hands in the USA and should not qualify as ‘residents’ of USA in terms of Article 4 of India-USA DTAA.

5. Assessee approached the Dispute Resolution Panel (“DRP”) and filed its objections and the DRP vide directions issued under section 144C(1) of the Act, affirmed the findings and conclusion in the draft order. Consequently, the Ld. AO, following the directions of the Ld. DRP, passed a final assessment order, dated May9, 2022. Aggrieved, the Appellant filed the subject appeal before this Tribunal, raising **following grounds:-**

*“1. On the facts and circumstances of the case and in law, the final assessment order passed by the Ld. Assistant Commissioner of Income Tax (Ld. AO) making an addition of INR 1,89,79,66,075/- is contrary to provisions of the Income-tax Act, 1961 ('the Act') and therefore, void-ab-initio.*

#### *ELIGIBILITY TO AVAIL BENEFIT UNDER INDIA-USA TAX TREATY*

*2. On the fact and circumstances of the case & in law, the Ld. AO as well as Ld. Dispute Resolution Panel ("DRP") has erred in not allowing to the Appellant, the benefit available to it under the India-USA Double Taxation Avoidance Agreement (DTAA') and holding that the Appellant is not liable to tax and hence, does not qualify as a tax resident under Article 4 of the India-US DTAA*

#### *TAXABILITY OF INCOME FROM DOMAIN NAME REGISTRATION SERVICES*

*3. On the facts and circumstances of the case and in law, the Ld. AO as well as the Ld. DRP grossly erred in holding that the Appellant's receipts from domain name registration services amounting to INR 96,56,25,598/- should be brought to tax as royalty and in doing so has failed to appreciate:*

*(i) that the receipts are not taxable under section 9(1)(vi) read with section 115A of the Act.*

*(ii) that the receipts are not taxable under Article 12(3) of the India-USA DTAA*

*(iii) that domain name not being a property owned by the Appellant could neither be licensed for use or right to use nor could give rise to any element of royalty for that reason.*

*(iv) that registration services are not in connection with any existing intellectual property*

#### *TAXABILITY OF INCOME FROM WEB HOSTING SERVICES ETC.*

*4. On the facts and circumstances of the case and in law, the Ld. AO as well as the Ld. DRP has erred in alleging that the Appellant's receipts from web hosting, sale of on demand products, web designing, SSL certification services etc., amounting to INR 93.23.40.477/- should be charged to tax as fee for technical services and in doing so has failed to appreciate:*

*(1) that the receipts are not taxable under section 9(1)(vii) read with section 115A of the Act.*

*(ii) that the receipts are not taxable under Article 12(4) of the India-USA DTAA*

*(iii) that the charges received for web hosting services etc., is not ancillary and subsidiary to application or enjoyment of domain registration.*

*LEVY OF INTEREST UNDER THE PROVISIONS OF THE ACT*

*5. On the facts and circumstances of the case and in law, the Ld. AO erred in levying interest under section 234A of the Act.*

*6. On the facts and circumstances of the case and in law, the Ld. AO erred in levying interest under section 234B of the Act.*

*INITIATION OF PENALTY UNDER SECTION 274 READ WITH 271(1)(c) OF THE ACT*

*7. On the facts and circumstances of the case and in law, the Ld. AO erred in mechanically initiating proceedings under section 274 read with 271(1)(c) of the Act.*

*The above grounds of appeal are mutually exclusive and without prejudice to each other. The Appellant craves leave to add, alter, amend and / or modify any of the grounds of appeal at or before the hearing of the appeal.”*

6. The Ld. Counsel of the assessee has argued the issue ground wise and as with regard to **the Ground No. 3**, which arises out of Taxability of income from domain name registration services, it was submitted that during the year under consideration, the Appellant had earned income amounting to INR 96,56,25,598/- from providing domain name registration services to Indian customers. The return of income filed by the Appellant was not picked up for scrutiny assessment. However, subsequently, reassessment proceedings under section 147 of the Act were initiated against the Appellant by the Ld. AO

wherein detailed submissions were filed by the Appellant, providing factual and legal arguments as to why such income should not be charged to tax as 'royalty' or FTS / 'fee for included services' ("FIS") under the provisions of the Act read with India-USA DTAA. However, the Ld. AO had passed the assessment order and held that the income from domain name registration services squarely fell within the definition of 'royalty' as per section 9(1)(vi) of the Act as well as Article 12(3)(a) of India-USA DTAA.

7. As with regard to the same the Ld. Counsel submitted that the Appellant is an ICANN accredited domain name Registrar which facilitates the registration of domain names. Any Registrant/ customer desirous of registering a domain name can approach any one of these Registrars (including the Appellant) to check whether the proposed domain name is available. The Appellant would then ask the relevant Registry whether the proposed domain name is available, which would then check its database and inform the 'Registrar' (i.e. the Appellant) accordingly. If the domain name is available (i.e. it is not registered in the name of anyone else), the customer would get the domain name registered with Registry with the help of the Appellant and would pay a periodical fee to the Appellant, a portion of which would be retained by the Appellant with the other parts going to the relevant Registry and ICANN.

7.1 The Appellant, being a Registrar, is not the owner of domain name that it helps to register and does not hold any proprietorship rights in the names used

domain names. This is affirmed by clause 3.5 of the Accreditation Agreement between the Appellant and ICANN and reference to Page 203 of the Paper book and clause 2 of the agreement between the Appellant and its customers, available at Page 57 of the paper book, was made. It was contended that in the absence of ownership over the domain names, the Appellant cannot confer the right to use or transfer the right to use such domain names to another person / entity. Therefore, the income earned by the Appellant from domain name registration services is not chargeable to tax in India as 'royalty' under the provisions of section 9(1)(vi) of the Act as well as Article 12(3)(a) of India-USA DTAA.

8. We find that this view has also been affirmed by Hon'ble Delhi High Court in the Appellant's own case for AY 2013-14 to AY 2015-16 (ITA Nos. 891/2018, ITA 261/2019 and ITA 75/2023) wherein, vide order dated December 11, 2023, it has been held that the income earned by the Appellant from assisting customers in registration of domain names cannot be treated as 'royalty' under the provisions of section 9(1)(vi) of the Act itself. The relevant findings are reproduced hereunder:

*“15.2 A close perusal of the aforementioned clause would show that **what is agreed between the appellant/assessee and its customers is that mere registration of a domain name does not create any proprietorship rights in the name used as the domain name or in the domain name registration either in the appellant/assessee or the customers or even any other third party.***

*15.3 Therefore, the submission advanced on behalf of the appellant/assessee, i.e., that since it is not the domain name's owner, it cannot confer the right to use or transfer the right to use the domain name to another person/entity, deserves acceptance.*

*16. We are also of the view that passing off and injunction actions are entertained by the Courts where domain name registrations are brought about in bad faith or to perpetuate fraud. The Courts tend to grant injunctive relief where the defendant, in such actions, is seen to be feeding off the plaintiff's goodwill and causing confusion amongst its customers regarding the origin of the subject goods and services. Such reliefs are granted on the basis that the definition of the expression "mark" includes a "name", and in turn, the expression "trademark" so defined to include a mark, distinguishes the goods and services of one person from those of others. Therefore it is possible in a given situation that a domain name may have the attributes of a trademark. [See section 2m read with section 2zb of Trademarks Act, 1999].*

*16.1 The Supreme Court, in Satyam Infoway, held that it is the registrant (and not the Registrar) who owns the domain name, and can protect its goodwill by initiating passing off action against a subsequent registrant of the same domain name/a deceptively similar domain name. The observations made in the following paragraphs of Satyam Infoway, being apposite, are extracted hereafter:*

*"What is important for the purposes of the present appeal is the protection given to intellectual property in domain names. A prior registrant can protect its domain name against subsequent registrants. Confusing similarity in domain names may be a ground for complaint and similarity is to be decided on the possibility of deception amongst potential customers. The defences available to a compliant are also substantially similar to those available to an action for passing off under trademark*

*law... What is also important is that the respondent admittedly adopted the mark after the appellant. The appellant is the prior user and has the right to debar the respondent from eating into the goodwill it may have built up in connection with the name..."*

*16.2 From a perusal of the above, it is clear that the Court in Satyam Infotech was concerned only with the rights of the domain name owner and not the Registrar, while determining whether passing off action can be initiated in relation to domain names. Given this position, the Tribunal's reliance on this judgment is misconceived.*

*16.3 In this case, however, we need not travel down this path, as the appellant/assessee is only acting as a Registrar and thus offering its services to its customers for having their domain names registered.*

*16.4 The aforementioned principle may have been attracted if the appellant/assessee had granted rights in or transferred the right to use its domain name, i.e., Godaddy.com, to a third person. Therefore, the fee received by the appellant/assessee for registration of domain names of third parties, i.e., its customers, cannot be treated as royalty."*

9. Ld. DR could not cite before us any new or different set of facts for the present years to claim that the clauses of the relevant agreements are not identical to the years for which the above mentioned order was passed by the Hon'ble Delhi High Court. Thus the ratio of the said decision should apply and the income earned by the Appellant from providing domain name registration services to Indian customers during the year under consideration cannot be held to be taxable in India under the provisions of section 9(1)(vi) of the Act as well as Article 12(3)(a) of India-USA DTAA. Ground no. 3 is sustained.

10. In regard to the **ground no. 2 and 4**, arising out of eligibility of assessee for benefit of DTAA and taxability of income from non-domain services such as web hosting, web designing services etc., the Ld. Counsel has pointed out that during the year under consideration, the Appellant had earned income amounting to INR 93,23,40,477/- from providing web hosting, web designing, SSL certification services and sale of on-demand products Indian customers. The Appellant had claimed that the income earned by it from provision of non-domain services was not chargeable to tax in India in accordance with the provisions of the Act read with India-USA DTAA. However, in the assessment order, the Ld. AO had held that the abovementioned income earned by the Appellant was taxable in India as FTS / FIS as per section 9(1)(vii) of the Act as well as Article 12(4)(a) of India-USA DTAA.

11. Ld. Counsel has submitted that in the assessment order, the Ld. AO had denied the benefits of the India-USA DTAA to the Appellant by alleging that since LLCs are fiscally transparent entities according to USA tax laws, their income is not 'liable to tax' in the USA and thus, they should not qualify as 'residents' of USA as per Article 4(1)(a) of the India-USA DTAA for the purpose of availing benefits provided therein. Furthermore, the Ld. AO had also held that since the Appellant is a corporation as per the USA tax laws, it should also not come under the provisions of Article 4(1)(b) of the India-USA DTAA, which state that entities like partnerships, estates or trusts can be considered to

be residents of the USA if the income derived by them is ‘subject to tax’ in the USA either in their own hands or in the hands of their partners/ beneficiaries.

11.1 In this context the Ld. Counsel has submitted that the issue is no more res integra after the decision of co-ordinate bench in the case of the Appellant’s sister concern, **Wild West Domains, LLC vs ACIT** (ITA No.1774/Del/2022) where it has been held that fiscally transparent entities are entitled to the benefits of the relevant DTAA where a valid TRC has been issued by the revenue authorities of the concerned jurisdiction.

11.2 Ld. Counsel has also pointed out that whilst deciding upon the taxability of income earned by the Appellant from provisions of non-domain services, the Ld. AO had repeatedly and deliberately referred to the India-USA DTAA and concluded that such income was taxable as FTS/FIS since it was ancillary and subsidiary to the application or enjoyment of domain registration and fulfilled the ‘make available’ criteria provided in Article 12(4)(b) of India-USA DTAA. The relevant extract of the assessment order is reproduced hereunder:-

*“.....Besides, both the services/facilities i.e., web hosting and domain name registration flow from the same server, it is only because of the peculiar nature of the two i.e. web hosting and domain name registration fall under different categories i.e. the first under FTS (because it involved high technique and **make available condition are fulfilled** as discussed earlier) and latter under royalty (because of the right it confers and the*

*equipment it provides as discussed earlier). [refer Page 15 of the assessment order]*

.....

*6.6 Therefore, as discussed in the paragraphs above, the web hosting charges etc. of Rs. 932,340,477/- are taxable as Fees for Technical services Section 9(1)(vii) the act as well as Article 12(4)(a) of the tax treaty as it is ancillary and subsidiary to the application or enjoyment of domain registration.” [refer Page 16 of the assessment order]*

11.3 Ld. Counsel has submitted that under the India-USA DTAA where payments received for provision of ‘technical’ and ‘consultancy’ services are considered to be taxable as FIS if they are ancillary and subsidiary to the application or enjoyment of a right, property or information for which ‘royalties’ are received. Such a clause does not find mention in section 9(1)(vii) of the Act which defines scope for taxation of ‘FTS’. Similarly, the concept of ‘make available’ clause is also a special feature of the India-USA DTAA and is not present in the Act.

11.4 It was submitted that in fact, even in the decision of the coordinate bench of this Tribunal in Appellant’s own case for AY 2015-16 (ITA 8085/DEL/2018), it has been held that since web hosting services etc. are ancillary to domain name registration services, the consideration received for provision of such services must be treated as be treated as FTS.

11.5 Thus, in order to examine the allegations made by the Ld. AO, it is important to examine the taxability of the income earned by it from web hosting, web designing services etc. under the India-USA DTAA and for that the Ld. Counsel has submitted that the provisions of Article 12(4) of the India-USA DTAA define the term “FIS” to mean payments for technical or consultancy services that either 1) are ancillary and subsidiary to the application or enjoyment of a right, property or information for which royalties are received or 2) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design. He submitted that as far as the **first limb** of the above definition is concerned, in the assessment order passed for the year under consideration, the Ld. AO has held that since web hosting, web designing services etc. are ancillary and subsidiary to the application or enjoyment of domain name registration services, the income earned by the Appellant from provision of said services must be treated as FTS/FIS as per Article 12(4)(a) of the India-USA DTAA. He stressed that the income earned by the Appellant from domain name registration services has now been considered to be outside the purview of ‘royalty’ in light of the recent decision of Hon’ble Delhi High Court under the provisions of the Act itself. Accordingly, since the payments for domain name registration services cannot be considered as ‘royalties’, the payments received for providing web hosting, web designing services etc. cannot

be said to be in the nature of FIS as per Article 12(4)(a) of the India-USA DTAA.

11.6 As far as the **second limb** of the above definition is concerned, the Id. Counsel submitted that in the assessment order passed for the year under consideration, the Ld. AO has held that the web hosting, web designing services etc. rendered by the Appellant fulfill the 'make available' criteria laid down under Article 12(4)(b) of the India-USA DTAA. He submitted that in order to understand that the meaning of the term "make available", it would be relevant to draw reference to Memorandum of Understanding ("MOU") entered between India and the USA. The MOU entered between India and USA for "royalties and fee for included services" provides that for a fee to be regarded as FIS, the underlying assumption is that the same makes available any technical knowledge, experience, skill, know-how or process which enables the person acquiring the services to apply the technology. According to the MOU, mere rendering of services is not taxable as FIS unless the service recipient is able to make use of the technical knowledge, etc. without recourse to the performer of the services in future. A transmission of the technical knowledge, experience, skills, etc. from the person rendering the services to the service recipient is contemplated under the meaning of FIS.

11.7 The Id. Counsel contended that the above understanding has also been endorsed by various judicial authorities including the **Hon'ble Karnataka High**

**Court** in the case of **CIT vs. De Beers India Minerals (P) Ltd. [2012] 346 ITR 467** wherein the court held that for a service to fit into the terminology “make available”, it should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. The Court opined that merely providing services developed through significant technological effort and expertise isn't sufficient. It emphasized that the service recipient must not only benefit from the provider's technical knowledge and skills but also absorb them to independently utilize similar technology or techniques in the future, without relying on the provider. He submitted that the above view has also been taken in the following judicial precedents:-

- ✓ DIT vs. Guy Carpenter & Co Ltd [2012] 346 ITR 504 (Delhi High Court)
- ✓ Raymond Limited vs DCIT [2003] 86 ITD 791 (Mumbai Tribunal)
- ✓ DCIT vs. PanAmSat International Systems Inc. [2006] 9 SOT 100 (Delhi Tribunal)
- ✓ ACIT v. Paradigm Geophysical Pty. Ltd. [2010] 1 ITR(T) 178 (Delhi)
- ✓ National Organic Chemical Industries Ltd. vs. DCIT (2005) 96 TTJ 765 (Mumbai ITAT)
- ✓ Intertek Testing Services India (P) Ltd., In re [2008] 307 ITR 418 (AAR)
- ✓ C.E.S.C Ltd. v Dy. CIT [2003] 87 ITD 653 (Kolkata ITAT)

- ✓ Bharti AXA General Insurance Co. Ltd. v. DIT [2010] 194 Taxman 1 (AAR)

11.8 Ld. Counsel has submitted that in the instant case, it is relevant to note that the Appellant offers various packages to its customers for, hosting their websites on its servers, procure various tools for designing their web pages and avail other web services. Such services remain active for a fixed time period. Upon expiry of such fixed period, the service package is required to be renewed and the users are not permitted to continue using such services on their own. Furthermore, the users are not equipped to apply or deploy such services on their own independently without resorting back to the Appellant. Accordingly, rendition of such services in no manner ‘makes available’ any technical knowledge, experience, skill, know-how, or processes or involves development or transfer of any technical plan or technical design to the users.

11.9 As with regard to the above, our attention is drawn towards the following judicial precedents wherein it has been opined that the consideration received from provision of web hosting services is not subject to tax as FTS / FIS:-

- ✓ Decision of the coordinate bench of this Tribunal in the case of **Millennium Infocom Technologies Ltd. [2009] 117 ITD 114 (Delhi)** wherein it was opined that providing of space on the servers by the non-residents for the purpose of hosting of the website will not result in the provision of technical service for a fee and accordingly, such payments cannot be taxed as FTS / FIS in India.

- ✓ Recent decision of coordinate bench of this Tribunal in the case of **Campus Eai India Pvt. Ltd. [TS-631-ITAT-2023(DEL)]** wherein, following the decision of **Millennium Infocom Technologies Ltd. (supra)**, it was held that the income from web hosting services do not constitute ‘royalty’ or FTS as per the provisions of the Act read with India-Mauritius DTAA.
  
- ✓ Decision of coordinate bench of this Tribunal in the case of **Amazon Web Services, Inc. [TS-419-ITAT-2023(DEL)]** wherein it was held that the payments made for cloud computing / AWS services, which inter alia includes cloud hosting, is not taxable as FTS / FIS under the provisions of the Act read with India-USA DTAA. The Tribunal concluded that the AWS services provided by the assessee are standardized services that do not provide any technical services to its customers nor satisfy the ‘make available’ test as the customer will not be able to make use of the technical knowledge, skill, process etc. used by the assessee in providing cloud services by itself in its business or for its own benefit without recourse to the assessee in future.
  
- ✓ Decision of Pune Tribunal in the case of **ITO vs.M/s Sunguard Availability Services LLP (ITA No.258/PUN/2021)** wherein the Bench held that Cloud Infrastructure Managed Private Cloud and Colocation services provided by the assessee does not satisfy the condition stipulated by Article 12(4)(b) of India-USA DTAA which requires that the services concerned should “make available technical knowledge” to the recipient/payer such that that the payer concerned is independently able to make use of the technical know-how etc. coming from the service provider’s side.

- ✓ Decision of Ahmedabad Tribunal in the case of **Esm Sys Pvt. Ltd. vs. ITO [TS-347-ITAT-2020(Ahd)]** wherein the Tribunal held that payment of web hosting charges by the Appellant to a USA Co. do not constitute FIS as it does not involve any sharing of knowledge or know-how or any technology or fulfils the ‘make available’ condition as enshrined in Article 12(4) of the India-USA DTAA.

12. Ld. DR has relied the order of ld. Tax authorities below.

13. After taking into consideration all submissions and the material on record we find that ld. AO has erred in giving a findings that being a LLP the assessee is not eligible for treaty benefits. The law in this regard is quite settled as it is now settled that the term, ‘liability to taxation’ has to be distinguished from actual payment of taxation. ‘Liability to taxation’ indicates the powers of taxing an income though the incidence of taxation and actual payment may be different. The reliance of the ld. counsel on the decision of the coordinate bench in the case of **Wild West Domains, LLC** (supra) certainly takes care of the issue wherein relying the decision of the Mumbai Bench of the Tribunal in the case **Linklaters LLP vs. ITO (Int. Taxation) 40 SOT 51** and **Herbert Smith Freebills LLP vs. ACIT (TS 822-ITAT-202 (Del Trib.)** the coordinate bench has given benefit of DTAA, irrespective of the fact that the assessee in that case was fiscally transparent entity in USA, like the present assessee. Accordingly, ground No.2 is sustained in favour of the appellant.

14. Next we have no hesitation to accept the proposition set up by the Id. Counsel that once ground no. 3 is decided in favour of assessee and the receipts from domain name registration services are held to be not liable to be taxed as royalty income then by alleging them to taxable being ancillary and subsidiary to the application or enjoyment of a right, property or information for which are royalties are received, cannot be accepted.

14.1 In fact it is even questionable that non-domain name services can be ancillary and subsidiary to the application or enjoyment of a right, property or information for domain name services. As for this we need to examine what exactly is scope non-domain service. Here we will like to examine the discussion of the Id. AO on this count and we find that Id. AO on page 15 of impugned order has **observed as follows:-**

*“It can be seen that domain registration is **an integral part** of the services which are offered by the assessee. **The assessee in its submissions has not distinguished how domain registration charges are different from web hosting charges**, the latter being duly admitted by the assessee itself as royalty which is duly reflected in its return of income. **Domain registration partakes the character of web hosting charges since without domain registration being in place, web hosting is not possible.** As domain registration charges have been essentially charged for granting right to use the servers of the assessee, domain registration being the precondition to web hosting etc, and same being highly technical process and because of its inherent quality, the same squarely falls under the definition of royalty under the provisions of the Act and the Double Taxation Avoidance Agreement. **Besides, both the services/facilities ie. web hosting and domain name registration flow from the same server**, it is only because of the peculiar nature of the two i.e. web hosting and domain name registration fall under different categories i.e. the first under FTS (because it involved high technique and make available condition is fulfilled as discussed earlier) and latter under royalty (because of the right it confers and the equipment it*

*provides as discussed earlier). Here, it is likely that the assessee is not offering receipts from domain registration because it has to pay certain fixed percentage to ICANN which is not being paid by the US Government. However, it is the relationship of assessee and ICANN which should not affect the Indian Revenue in any way. In case, the assessee feels the burden of taxation because of ICANN payments, the assessee should recover the same (tax) payable to India from ICANN.”*

14.2 The aforesaid findings of Id. AO show a lack of understanding of the nature of non-domain services. Though domain names and web hosting are often purchased together, they are actually two different things. A domain name is the permanent address of a website on the Internet. It's what people type into their web browsers to find a particular website. Purchasing, registering, and using a domain name for a website, will make it much easier for site visitors to remember the entity connected to the domain name. When they enter domain name in their browsers, their computer sends a request to a cluster of servers called the Domain Name System (DNS). We don't really need to know what goes on behind-the-scenes here. The important thing to remember is that the DNS then responds with the IP address of that website's hosting server, which is how people are able to use domain name to reach a website of a particular entity or individual.

14.3 Web hosting is where website files are stored. Hosting is the disk space, bandwidth, and tools used to create and maintain a website. It is like the home of website where it actually lives. A good way to think about this is if the domain name were the address of an individual's house, then web hosting would be the

actual house that the address points to. All websites on the internet need web hosting. This web hosting company may be the same company which has provided the domain name or a different company. This computer, also known as a hosting server, contains website's files and sends them back to the users' web browsers. Web hosting companies specialize in storing and serving websites. They provide resources like RAM, bandwidth, and CDN, which help improve the speed and performance of a website. Web server is basically a computer that usually runs websites. It is used to host websites and contain one or more websites. It stores web server software and website's component files. It processes network requests of users and serves them with files that create web pages. A web host provides multiple web servers to host many different websites, ensuring they are accessible on the internet. One can even set up a web site on two separate servers from two different hosting companies with the same domain just by ensuring that domain names are set up on both servers.

14.4. So the Id. AO has erred in concluding that for web hosting and domain same server of assessee is used and that makes it integrated services. While the fact is that they are entirely different set of services with different set of technical aspects involved in making a web site come live. A person may buy domain and hosting from different providers. It even has benefits like buying domains and hosting from different providers can give you more flexibility and control over your website, as such person is able to choose the best provider for each service.

It is sometimes more cost-effective, as one may find better deals on either domain or hosting by shopping around. Thus Id. AO has fallen in error to consider web hosting charges and other non-domain services charges as FTS, being ancillary and subsidiary to the application or enjoyment of domain name registration.

15. Next examining the 'make available' aspect we find that same has been sufficiently clarified in various decisions cited before us. It is essential to apply the 'make available' clause that there should be some element of transmitting technical knowledge by which an enduring benefit ensues. However, in a case of purchase of domain name or hosting services or other non-domain name services, there is actually no transmission of technical knowledge and the person acquiring domain name or availing hosting services merely pays for customized services available with the service providers. The customized technology and services of the provider are fairly available to everyone who proceeds to acquire a domain name or pays for web hosting services. There is no transfer of any knowledge or know-how by the service provider which can deliver any enduring benefit to said person. In fact, to make the website operational on the basis of ownership of a domain name and having services of web hosting, the person creating a website has to independently engage its technological inputs which may be unique to the needs of that person in terms of the objectives of the website.

15.1 Thus the income from provision of non-domain services (such as web hosting, web designing services etc.) do not ‘make available’ any technical knowledge, experience, skill, know-how, or processes or result in transfer of any technical plan or technical design to the users. Accordingly, the consideration received by the Appellant for rendering such services should fall outside the ambit as FIS as per Article 12(4)(b) of the India-USA DTAA. **Ground no. 4 is sustained.**

16. Ground no.1 being general and remaining ground being consequential are accordingly allowed.

17. Consequent to aforesaid discussion, as the discussion of issues applies *pari materia* to all the appeals, the same are allowed.

Order pronounced in the open court on 01.01.2025.

Sd/-

(BRAJESH KUMAR SINGH)  
ACCOUNTANT MEMBER

Sd/-

(ANUBHAV SHARMA)  
JUDICIAL MEMBER

Dated: 01<sup>st</sup> January, 2025.

dk

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

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