

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“I” BENCH, MUMBAI**

**BEFORE MS PADMAVATHY S, AM &  
SHRI RAJ KUMAR CHAUHAN, JM**

**I.T.A. No. 3053/Mum/2017**  
(Assessment Year: 2012-13)

**I.T.A. No. 3049/Mum/2017**  
(Assessment Year: 2013-14)

**I.T.A. No. 5509/Mum/2017**  
(Assessment Year: 2014-15)

**I.T.A. No. 7313/Mum/2018**  
(Assessment Year: 2015-16)

|  |     |  |
|--|-----|--|
| <b>M/s Shell International Petroleum Co. Ltd. ,</b><br>C/o B S R & Co. LLP, 5 <sup>th</sup> Floor,<br>Lodha Excelus, Apollo Mills<br>Compound, N.M. Joshi Marg,<br>Mahalakshmi, Mumbai-400011.<br><b>PAN: AAICS0357B</b> | Vs. | <b>DCIT (International Taxation)-<br/>4(2)(1),</b><br>17 <sup>th</sup> Floor, Room No. 1708,<br>Air India Building, Nariman Point,<br>Mumbai-400021. |
| <b>Appellant)</b>  | :   | <b>Respondent)</b>   |

**Appellant / Assessee by** : Shri J.D. Mistri, Sr. Adv. / Shri  
Madhur Agrawal, Ms. Snigdha  
Gautam, AR and Ms. Reema  
Garewal

**Revenue / Respondent by** : Shri Vivek Perampurna, CIT-DR

**Date of Hearing** : 06.02.2025  
**Date of Pronouncement** : 27.02.2025

ORDER**Per Bench :**

These appeals by the assessee are against the separate final assessment order of the Deputy. Commissioner of Income Tax (International Tax)-4(2)(1), Mumbai (in short "the AO") passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (the Act) dated 02.02.2017 for Assessment Year (AY) 2012-13 & AY 2013-14, dated 30.06.2017 for AY 2014-15 and dated 16.10.2018 for AY 2015-16. Since the issues contended in these appeals are common, these appeals are heard together and disposed of through common order. The issues contended by the assessee in these appeals through various grounds are tabulated below –

| <b>Issue</b>   | <b>AY 2012-13</b> | <b>AY 2013-14</b> | <b>AY 2014-15</b>   | <b>AY 2015-16</b>   |
|--|-------------------|-------------------|---------------------|---------------------|
| General  | Ground No.1       | Ground No.1       | Ground No.1         | Ground No.1         |
| Receipts from General Business Support Services ('BSS') does not constitute 'income' | Ground No.2       | Ground No.2       | Ground No.2         | Ground No.2         |
| Receipts from General BSS does not qualify as Fees for Technical Services ('FTS')    | Ground No.3 & 4   | Ground No. 3 & 4  | Ground No. 3 & 4    | Ground No. 3 & 4    |
| Receipts towards access to SUN (software) application does not constitute income     | Ground No.5       | --                | Ground No. 9        | Ground No. 9        |
| Receipts towards access to SUN   | Ground No.6 & 7   | --                | Ground No. 10 to 12 | Ground No. 10 to 12 |

|   |                   |                  |                   |                    |
|---|-------------------|------------------|-------------------|--------------------|
| (software) application does not qualify as Royalty  |                   |                  |                   |                    |
| Receipts towards Global Standard Accounting Package (GSAP) maintenance charges does not constitute income | Ground No.8       | --               | Ground No. 13     | Ground No. 13      |
| Receipts towards GSAP maintenance charges does not qualify as Royalty                                     | Ground No.9       | --               | Ground No. 14     | Ground No. 14      |
| Receipts towards GSAP Go Live charges/ Go-Live true up does not constitute income                         | Ground No.10      | Ground No.5      | --                | Ground No. 15      |
| Receipts towards GSAP Go Live charges does not qualify as Royalty   | Ground No.11 & 12 | Ground No. 6 & 7 | --                | Ground No. 16 & 17 |
| Receipts towards access to GSAP application does not constitute income                                    | Ground No.13      | --               | Ground No.5       | Ground No.5        |
| Receipts towards access to GSAP application does not qualify as Royalty                                   | Ground No.14 & 15 | --               | Ground No. 6 to 8 | Ground No. 6 to 8  |
| Non granting of   |                   | --               | --                | Ground No.18       |

|  |              |             |               |               |
|--|--------------|-------------|---------------|---------------|
| TDS credit                               |              |             |               |               |
| Interest under section 234A, 234B & 234C | Ground No.16 | Ground No.8 | Ground No.15  | Ground No. 19 |
| Penalty under section 271(1)(c)          |              | --          | Ground No. 16 | Ground No.20  |

2. The assessee in all these appeals also raised an additional ground on the legal issue that the final assessment order of the AO is barred by limitation by placing reliance on the decision of the Hon'ble Madras High Court in the case of CIT vs. Roca Bathroom Products (P) Ltd. (2022) 445 ITR 537 (Mad.). However, during the course of hearing, the ld. AR did not press for the admission of the additional ground and accordingly the same is not admitted for adjudication.

### **ITA No.3053/Mum/2017 – AY 2012-13**

3. The assessee is a Shell Group Company incorporated in UK and it is in the business of providing consultancy services to various Shell operating company. The assessee has entered into Cost Contribution Agreement (CCA) with various Shell concerns including Shell India Markets Pvt. Ltd. (SIMPL) for the provision of Business Support Services (BSS). The BSS are primarily in the nature of Management Support Services and the cost incurred towards rendering of such services is allocated among Shell Group concerns using the allocation key on a cost to cost basis. The AO held the BSS Arrangement as Fees for Technical Services (FTS) in the hands of the assessee and accordingly brought the same to tax. The AO in this regard placed reliance on the Ruling of Authority for Advance Ruling (AAR) in the case of SIMPL (application no. 833 of 2009 dated 17.01.2012). The AO further treated the amount received by the assessee towards usage charges of SUN Maintenance Software treating the same as royalty. The AO

also treated the receipt towards cost allocation for GSAP license and Go-Live application as royalty. The assessee raised further objections against the draft assessment order of the AO, before the DRP who confirmed the addition made by the AO towards BSS services based on the AAR Ruling. The DRP also confirmed the treatment of usage charges of SUN Maintenance Software and treatment of cost allocation for GSAP license and Go-Live application as royalty. The assessee is in appeal before the Tribunal against the final order of assessment passed by the AO as per the directions of the DRP.

### **Treatment of BSS as FTS**

4. We heard the parties and perused the material on record. With regard to treatment of BSS as FTS in the hands of the assessee the ld. AR submitted that the issue is squarely covered by the decision of the Co-ordinate Bench in assessee's own case for AY 2009-10 in ITA No. 1253/Mum/2014 dated 10.09.2024 since the facts for the year under consideration are identical. Accordingly, the ld. AR submitted that the decision of the Co-ordinate Bench is application for the year under consideration also. The ld. DR did not controvert the submissions of the ld. AR. We notice that the Co-ordinate Bench while considering the identical issues for AY 2009-10 has held that

*“10. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee has entered into a Cost Contribution Agreement dated 01.04.2008 with SIMPL for general BSS which are in the nature of management support, development and provision of support and business tools, provision of marketing support, promotion of professional competence, legal services, development, communication and audit of standards of performance, contracting and procurement services, taxation advice and services, general financial advice and services, employee relations and public affairs/media advice and other business support services. The assessee contends that the cost incurred by the assessee is to be allocated amongst Shell operating companies based on cost allocation keys as per the*

*terms of CCA and further the said costs are without mark up and are charged to the cost sharers on the basis of actual cost incurred by the assessee. It also contended that the payments received without markup are in the nature of reimbursement and not in the character of income which is chargeable to tax in India. They are merely in the nature of cost-recharge as per the CCA. It is further observed that SIMPL filed an application before the Hon'ble AAR for determining its tax withholding obligation in respect of the cost contribution made by it to the assessee and the Hon'ble AAR vide its order dated 17.01.2012 held that the payments made by SIMPL to the assessee was in the nature of 'fee for technical service' as per Article 13 of India-UK DTAA for which SIMPL was liable to withhold taxes as per section 195 of the Act. Parallely the assessee's case was picked up for scrutiny where the lower authorities made an addition on the impugned payment received by the assessee from SIMPL by extensively relying on the ruling of the Hon'ble AAR which held the same to be 'fee for technical service' in the case of SIMPL. Though the assessee during the assessment proceeding had objected for placing reliance on the ruling of the Hon'ble AAR as being not binding on the assessee, the lower authorities failed to agree with the assessee's contention and held that as per section 245S of the I. T. Act, the ruling of the Hon'ble AAR had binding effect on the assessee unless there is a change in law or facts. The relevant extract of the Hon'ble AAR is cited herein under for ease of reference:*

*"We therefore rule on Que.No.(i) & (ii) that the payment made by the applicant to SIPCL for availing the General BSS under the CCA would constitute income in the hands of SIPCL and is in the nature of fees for technical services within the meaning of Article 13.4 (c) of the DTAC between India and UK; and not in the nature of royalty within the meaning of the term in Explanation 2 to Clause (vi) of Section 9(1) of the Act and under Article 13 of DTAC, while we rule on Que. No. (iii) & (iv). Based on answer to Que. No. (i) & (ii) that the payment received by SIPCL is chargeable to tax in India and the declaration provided by SIPCL that it does not have a Permanent Establishment (PE) in India in terms of Article 5 of DTAC, we rule that the applicant is under obligation to withhold tax under section 195 of the Act. "*

*11. Pursuant to the said ruling SIMPL had filed a Writ Petition before the Hon'ble Jurisdictional High Court challenging the validity and legality of the order passed by the Hon'ble AAR and the Hon'ble High Court (in Writ Petition No. 10788 of 2012 vide order dated 01.03.2024), quashed the order of the Hon'ble AAR as being not sustainable by law and by holding that the payment received by the assessee from SIMPL is not in the nature of 'fee for technical service' and further held that the services are in the nature of*

*managerial service and not technical service which are made available. The relevant extract of the said decision is cited herein under for ease of reference:*

*15. Be that as it may, the crux of the matter lies in ascertaining whether the finding of the AAR that services availed by Petitioner from SIPCL or payments made by Petitioner to SIPCL are off/for 'technical/'consultation' services and secondly, whether such services are 'made available' to Petitioner. Article 13 of DTAA reads as under:*

*“ARTICLE 13  
ROYALTIES AND FEES FOR TECHNICAL SERVICES*

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

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

*(a) in the case of royalties within paragraph (3)(a) of this Article, and fees for technical services within paragraph (4)(a) and (c) of this Article;*

*(i) during the first five years for which this Convention has effect; (aa) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first-mentioned Contracting State or a political subdivision of that State, and*

*(bb) 20 per cent of the gross amount of such royalties or fees for technical services in all other cases; and (ii) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and (b) in the case of royalties within paragraph (3)(b) of this Article and fees for technical services defined in paragraph (4)(b) of this Article, 10 per cent of the gross amount of such royalties and fees for technical services.*

*3. For the purposes of this Article, the term "royalties" means:*

*(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematograph films or work on films, tape or other means of reproduction for use in connection with radio or television*

*broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and*

*(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic*

*4. For the purposes of paragraph (2) of this Article, and subject to paragraph (5), of this Article, the term "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provisions of services of technical or other personnel) which:*

*(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph (3)(a) of this Article is received; or*

*(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph (3)(b) of this Article is received; or*

*(c) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design."*

*16. From the bare words of the Article, it is clear that income of Shivgan SIPCL will be chargeable to tax in India only if the payment by Petitioner is towards fees for 'technical services'. Under Article 13(4), the term 'fees for technical services' means payments of any kind in consideration for the rendering of any technical or consultancy services. Sub-para (c) to Article 13(4) further restricts the meaning of the term to only that which makes available technical knowledge, experience, skill, know-how or processes, or consists of the development or transfer of a technical plan or technical design.*

*17. The principle of noscitur a sociis mandates that the meaning of a word is to be judged by the company of other words which it keeps. The word 'consultancy' services follows 'technical' which is further followed by the phrase "which make available technical knowledge, experience, skill, know-how or processes, or consist of development and transfer of a technical plan or technical design." A clear reading indicates that even if consultancy services is 'stand alone', the bunch of words indicate that the said 'consultancy' necessarily relates to consultancy which makes available technical or any other knowledge, experience, skill, know-how or processes and does not relate to consultancy on managerial issues.*

18. *The Appendix 2 of CCA contains the General BSS. The list of services availed are as follows:*

*EXAMPLES OF GENERAL BUSINESS SUPPORT SERVICES:*

- *Management Support*
  - *Development and Provisions of Support and Business Tools*
  - *Provision of Marketing Support.*
  - *Development, Communication and Audit of Standards of*
  - *Performance Promotion of Professional Competence*
  - *Information Technology Advice and Services*
  - *General Financial Advice and Services*
  - *Taxation Advice and Services*
  - *Legal Services*
  - *Employee Relations and Public Affairs/Media Advice and Services*
  - *HR Advice and Services*
- Contracting and Procurement Services*
- *Other Business Support Services*

*A perusal of the list of services relate to managerial services not involving anything of a technical nature. The AAR has discussed the services appearing in the CCA and has concluded that these activities in a retail business are at the core of retail marketing and hence advice tendered in taking a decision of commercial nature is a consultancy service. The AAR has further considered the definition of the word 'Consultancy' as defined in the Oxford English dictionary and has observed that a consultant is a person who gives professional advice or services in a specialized field. However, the AAR failed to appreciate that the word 'Consultancy' appearing in the Article is to be interpreted in the context of consultancy which makes available technical knowledge, etc. and not of managerial nature. The reading of the Article clearly indicates that the consultancy service must be which makes available technical knowledge, etc. Sub-para (c) to Article 13(4) restricts such services to those which make available technical knowledge or consist of development and transfer of a technical plan or technical design. Thus, a harmonious reading of the provision of Article 13 in its entirety, clearly establishes the intent of the DTAA in making income chargeable to tax only if the services availed pertain to technical services or consultancy services. Technical services in this context mean services requiring expertise in a technology. By Consultancy Services, in this context, would mean advisory services. The categories of technical and consultancy services are to some extent, overlapping. Under paragraph 4, technical and consultancy services are considered included services only to the following extent: (1) as described in paragraph 4(a), if they are ancillary and subsidiary to the application or enjoyment of a*

*right, property or information for which a payment described in paragraph (3)(a) of Article*

*13 is received; (2) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph (3)(b) of Article 13 is received; or (3) as described in paragraph 4(c), if they make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design. Thus, under paragraph 4(c), consultancy services which are not of a technical nature cannot be included services. Thus, the services availed by Petitioner cannot be said to be technical services and Article 13 is wholly inapplicable in the facts and circumstances of the present case.*

*19. It will be useful to refer to a decision of the Madras High Court in the case of Skycell Communications Ltd and Anr. v. Deputy Commissioner of Income-Tax and Ors.8 which held as follows:*

*“8. Thus while stating that "technical service" would include managerial and consultancy service, the Legislature has not set out with precision as to what would constitute "technical" service to render it "technical service". The meaning of the word "technical" as given in the New Oxford Dictionary is adjective*

*1. of or relating to a particular subject, art or craft or its techniques : technical terms (especially of a book or article) requiring special knowledge to be understood : a technical report.*

*2. of involving, or concerned with applied and industrial sciences : an important technical achievement.*

*3. resulting from mechanical failure : a technical fault.*

*4. according to a strict application or interpretation of the law or the rules : the arrest was a technical violation of the treaty.*

*9. Having regard to the fact that the term is required to be understood in the context in which it is used, "fee for technical services" could only be meant to cover such things technical as are capable of being provided by way of service for a fee. The popular meaning associated with "technical" is "involving or concerning applied and industrial science".*

*10. In the modern day world, almost every facet of one's life is linked to science and technology inasmuch as numerous things used or relied*

*upon in every day life is the result of scientific and technological development. Every instrument or gadget that is used to make life easier is the result of scientific invention or development and involves the use of technology. On that score, every provider of every instrument or facility used by a person cannot be regarded as providing technical service.*

*11. When a person hires a taxi to move from one place to another, he uses a product of science and technology, viz., an automobile. It cannot on that ground be said that the taxi driver who controls the vehicle, and monitors its movement is rendering a technical service to the person who uses the automobile. Similarly, when a person travels by train or in an aeroplane, it cannot be said that the railways or airlines is rendering a technical service to the passenger and, therefore, the passenger is under an obligation to deduct tax at source on the payments made to the railway or the airline for having used it for travelling from one destination to another. When a person travels by bus, it cannot be said that the undertaking which owns the bus service is rendering technical service to the passenger and, therefore, the passenger must deduct tax at source on the payment made to the bus service provider, for having used the bus. The electricity supplied to a consumer cannot, on the ground that generators are used to generate electricity, transmission lines to carry the power, transformers to regulate the flow of current, meters to measure the consumption, be regarded as amounting to provision of technical services to the consumer resulting in the consumer having to deduct tax at source on the payment made for the power consumed and remit the same to the Revenue. 15. The use of the internet and the world wide web is increasing by leaps and bounds, and there are hundreds of thousands, if not millions, of subscribers to that facility. The internet is very much a product of technology, and without the sophisticated equipment installed by the internet service providers and the use of the telephone fixed or mobile through which the connection is established, the service cannot be provided. However, on that score, every subscriber of the internet service provider cannot be regarded as having entered into a contract for availing of technical services from the provider of the internet service, and such subscriber regarded as being obliged to deduct tax at source on the payment made to the internet service provider.*

*20. Thus, it is clear from the said decision that any service is construable as technical but one has to see the true import of the service actually rendered and the determination must be made in this context. There is no*

*such discussion in the Impugned order and the finding is based on a generic reference to the meaning of the word 'consultancy' as given in the Oxford English Dictionary. The AAR further holds that the list of services mentioned in the CCA is not an exhaustive list and may include other technical services. Thus Petitioner is correct in contending that the AAR has proceeded on conjectures and surmises to render the finding in the impugned order.*

*21. The AAR has further held that the services are made available to Petitioner since while providing General BSS, SIPCL works closely with the employees of the applicant and supports/advises them. It is held that Petitioner is able to use the know how/intellectual property generated from the General BSS independent of the service provider and hence the services under the agreement are clearly made available to Petitioner.*

*In order to understand the import of the words 'made available' as used in the context of Article 13(4)(c), it will be useful to refer to a decision of the Karnataka High Court in CIT, Central Circle v. De Beers (Supra). Paragraph 22 reads as follows:*

*“22. What is the meaning of “make available”. The technical or consultancy service rendered should be of such a nature that it “makes available” to the recipient technical knowledge, knowhow and the like. The service 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. In other words, to fit into the terminology "make available", the technical knowledge, skill?, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered “made available” when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of*

*consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."* (emphasis supplied)

22. Similarly, the Delhi High Court in the CIT (International Taxation)-1, Delhi v. M/s Biorad (Supra) has discussed the said concept accordingly. Paragraphs 14 and 15 read as under:

14. According to the Tribunal, the agreement between the respondent/assessee and its Indian affiliate had been effective from 01.01.2010, and if, as contended by the appellant/revenue, technical knowledge, experience, skill, and other processes had been made available to the Indian affiliate, the agreement would not have run its course for such a long period. 14.1 Notably, this aspect is adverted to in paragraphs 17 to 23 of the impugned order. For convenience, the relevant paragraphs are extracted hereafter:

"17. A perusal of the aforementioned provision shows that in order to qualify as FTS, the services rendered ought to satisfy the 'make available' test. Therefore, in our considered opinion, in order to bring the alleged managerial services within the ambit of FTS under the India-Singapore DTAA, the services would have to satisfy the 'make available' test and such services should enable the person acquiring the services to apply the technology contained therein.

"18. As mentioned elsewhere, the agreement is effective from 01.01.2010 and we are in Assessment Years 2018-19 and 2019-20.[sic.....20]. In our considered opinion, if the assessee had enabled the service recipient to apply the technology on its own, then why would the service recipient require such service year after year every year since 2010?

19. This undisputed fact in itself demolishes the action of the Assessing Officer/DRP. Facts on record show that the recipient of the services is not enabled to provide the same service without recourse to the service provider, i.e, the assessee.

20. In our humble opinion, mere incidental advantage to the recipient of services is not enough. The real test is the transfer of technology and on the given facts of the case, there is no transfer of technology and what has been appreciated by the Assessing Officer/ld. CIT(A) is

*the incidental benefit to the assessee which has been considered to be of enduring advantage.*

*21. In our understanding, in order to invoke make available clauses, technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. ” [Emphasis is ours]*

*15. We tend to agree with the analysis and conclusion arrived at by the Tribunal. ” (emphasis supplied)*

*23. Therefore, even if it is fees for technical or consultancy services, it can be only where fees are paid in consideration for making available technical knowledge, experience etc. Thus the view of the AAR that SIPCL works closely and advises the employees of Petitioner and hence makes available the services is not correct. This view in fact suffers from fallacy since the agreement continues to operate till date. If the view of AAR is to be held as correct then the contract must stand concluded as once the services and the know how, skill etc is transferred to Petitioner, the need of continuing to render said services must end. This is factually not so as the CCA is in effect till date.*

*24. Considering the above discussion it is clear that the AAR has interpreted the requirements to be satisfied for 'make available' based on its own general notion of the said term without appreciating the applicable law on the subject and also reached an erroneous conclusion that the services availed are technical services.*

*25. Moreover, the AAR has not dealt with the issue relating to the 'Permanent Establishment' of SIPCL and there is no determination on the same. Of course, that was not a subject of reference before AAR.*

*26. Thus, we have no hesitation in holding that the impugned order dated 17th January 2012 of AAR suffers from legal infirmity and is quashed and set aside.*

*27. During the course of the arguments, Mr. Mistry stated that Petitioner only seeks relief prayed in clauses (a) and (b) of the petition and does not press the other prayers. Rule is thus made absolute in terms of prayer clauses (a) and (b) which read as follows –*

*“a) That this Hon'ble Court be pleased to declare that the transactions under CCA do not amount to being technical in nature per Article 13 of DTAA between India and UK and therefore, would not be taxable in India;*

*b) That this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari and/or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records and papers of the Petitioner's case and after examining the legality and validity thereof quash and set aside the impugned order dated 17.01.2012 passed by the Authority in AAR No. 833/2009, in the case of the Petitioner and further.”*

*28. It is made clear that that the Department is at liberty to take necessary steps as available to it in law including as to whether the subject will be covered under Article 7 of the DTAA. We express no opinion. In such proceedings, if taken, the time taken in the present proceedings will stand excluded for the purpose of limitation.*

*12. From the above it is observed that the Hon'ble High Court has categorically held that the services rendered by the assessee are not in the nature of technical service and are merely managerial in nature, though in the case of SIMPL, the same has a binding effect on the assessee for the reason that it arises out of the same CCA for availing General BSS. As the ruling of Hon'ble AAR holding that the same is liable to be taxed in India as 'fee for technical service' has been reversed by the Hon'ble High Court, we find no reason to uphold the order of the ld. A.O. who in fact has relied on the Hon'be AAR's ruling to decide the issue in hand. We, therefore, deem it fit to allow the grounds of appeal raised by the assessee. As the issue relating to permanent establishment of the assessee is not specifically raised before us by both the sides in the grounds of appeal, except for the arguments enhanced by the ld. DR at the time of hearing, we decline to adjudicate on the same.”*

5. We notice that for the year under consideration also the revenue has placed reliance on the decision of the AAR in the case of SIMPL to hold that the receipts towards BSS is to be treated as FTS in the hands of the assessee which has not been reversed by the Hon'ble Jurisdictional High Court. Since the BSS rendered by the assessee is arising out of the same CCA as in the case of SIMPL, we are of the

view that the decision of the Hon'ble High Court has a binding precedence in assessee's case also. Further the facts for the year under consideration are identical to AY 2009-10 and the revenue did not bring anything on record to controvert the same. Therefore in our considered view the above decision of the Co-ordinate Bench on the impugned issue is applicable for the year under consideration also. Accordingly, we direct the AO to delete the addition made towards BSS in the hands of the assessee. Ground No.3 & 4 of the assessee raised in this regard are allowed. Ground No.2 has become academic in view of our decision on Ground No.3 & 4.

### **Treatment of cost allocation SUN and GSAP maintenance charges as Royalty**

6. The next issue for our consideration is whether the amount received by the assessee on account of cost allocation of SUN Maintenance Software application and GSAP maintenance charges is royalty under the DTAA between India and UK. In this regard the ld AR submitted that the assessee has migrated to GSAP from SUN software during the year under consideration and that the assessee has paid maintenance charges towards both the applications. The ld AR argued that it is a settled position that the amount received towards maintenance of computer software is not a payment of royalty since the charges paid are towards use of copyrighted item and not for the use of copyright itself. Therefore the ld AR argued that the provisions of section 9(1)(v) is not applicable as has been held by the AO. Our attention in this regard was drawn to the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT (2021) 125 taxmann.com 42 (SC).

7. We in this regard notice that a similar issue has been considered by the Hon'ble Jurisdictional High Court in the case of CIT(LTU) vs. Reliance Industries

P. Ltd. (2024) 164 taxmann.com 10 (Bom.) by placing reliance on the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Pvt. Ltd.(supra). The relevant observations of the Hon'ble High Court is extracted below –

*“6. We have heard the Learned Counsel for the parties. We have been taken through the impugned orders passed by the Tribunal.*

*7. The Tribunal considering the provisions of the IT Act, as also the position in law as laid down in various decisions has observed that the assessee had made purchases of computer software from the residents of Denmark and Finland. It was observed that such purchases would fall within the provisions of the Double Taxation Avoidance Agreement ("DTAA") entered between India and these countries. The Tribunal also observed that a co-ordinate Bench of the Tribunal in the assessee's own case in ITAS No.2529/Mum/2008 and ITAS No.4587/Mum/ 2010 had held that in such cases similar remittances made to the residents of Germany and France, were held to be not liable for deduction of tax at source. The Tribunal, following the decision of its co-ordinate Bench, in assessee's own case, dismissed the appeal filed by the Revenue by the impugned order.*

*8. At the outset, Learned Counsel for the parties would fairly state that the question of law as raised in the present appeals, is no more res integra in view of the authoritative pronouncement of the Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. v. CIT [2021] 125 taxmann.com 42/281 Taxman 19/432 ITR 471 In the said case the Assessing Officer, applying Article 12(3) of the DTAA entered between India and U.S.A. as also the provisions of Section 9(1)(vi) of the IT Act to the transaction between the parties, held that the transaction involved copyright, which attracted the payment of royalty and accordingly, tax was required to be deducted at source by the Indian importer. Since this was not done, it was held that the assessee was liable to make good the payment of TDS which it had not deducted. Also interest under Section 201(1)(A) of the Act was levied. The Appeal before the Commissioner was also dismissed.*

*9. In these circumstances, the proceedings had reached the Tribunal at the instance of the assessee. The assessee succeeded in these proceedings, with the ITAT setting aside the concurrent findings of both the authorities below. On such backdrop, the proceedings reached the High Court*

10. *The High Court of Karnataka, in similar proceedings, on examination of the End User Licence Agreement ("EULA") involved in such transactions found that what was sold by way of computer software, including the right or interest in copyright, which gave rise to the payment of royalty, would be an income deemed to have accrued in India under Section 9(1)(vi) requiring deduction of tax at source. The orders passed by the High Court were assailed before the Supreme Court. It is also required to be noted that similar issues had arisen before the Delhi High Court inter alia in the case of DIT v. Ericsson A.B [2011] 16 taxman.com 371/[2012] 204 Taxman 192/343 ITR 470 and DIT v. Nokia Networks OY [2012] 25 taxmann.com 225/212 Taxman 68/358 ITR 259 (Delhi) The Delhi High Court however took a view contrary to the view taken by the High Court of Karnataka. The Supreme Court examined the issues as arising from the decisions of both the High Courts in the case of Engineering Analysis Centre of Excellence (P) Ltd (supra). The Supreme Court in its decision rendered in the said case upheld the view taken by the Delhi High Court in interpreting such transactions in the context of Section 9(1)(vi) of the Act. The Supreme Court held that considering the provisions of DTAA, there was no obligation on the persons mentioned in Section 195(1) of the Act to deduct tax at source as the distribution agreements, in the facts of the case did not create any interest or right in such distributors/end users, which amounted to the use or right to use any copyright. It was held that the provisions of Section 9(1)(vi) of the Act along with Explanation 2 and 4 thereof which dealt with royalty, not being more beneficial to the assessee, had no application in the facts of the case. It would be appropriate to extract the conclusion as rendered by the Supreme Court in which reads thus:-*

*"168. Given the definition of royalties contained in Article 12 of the DTAA's mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the Income-tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income-tax Act (section 9(1)(v), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessee, have no application in the facts of these cases.*

*169. Our answer to the question posed before us, is that the amounts paid by resident Indian end- users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income*

*taxable in India, as a result of which the persons referred to in section 195 of the Income-tax Act were not liable to deduct any TDS under section 195 of the Income-tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment.*

*170. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) (pra) is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed."*

*(emphasis supplied)*

*11. It is not in dispute that transactions in the present case are similar to what had fell for consideration of the Supreme Court in Engineering Analysis Centre of Excellence (P) Ltd (supra). Also there is no dispute that there is a DTAA entered with the countries in question, with whose residents the transactions were entered into by the assessee.*

*12. In the aforesaid circumstances, it is clear that the approach of the Assessing Officer in the present case was against the correct position in law as held by the Tribunal, and now also endorsed by the Supreme Court in Engineering Analysis Centre of Excellence (P) Ltd (supra). In this view of the matter, we are in agreement with Mr. Madhur Agarwal that these four Appeals would not give rise to the question of law as noted by us hereinabove."*

8. In assessee's case the payments are made towards cost allocation of of SUN Maintenance Software and GSAP maintenance charges therefore we are of the view that the ratio laid down by the Hon'ble Supreme Court and the Jurisdictional High Court are applicable to assessee also. Therefore respectfully following the said decisions we hold that the amount received towards cost allocation of SUN Maintenance Software and GSAP maintenance charges cannot be treated as royalty and the addition made in this regard is not sustainable. Ground No.6,7 & 9 raised by the assessee in this regard are allowed. Ground No.5 & 8 on the same issue has become academic and left open.

**Treatment of cost allocation pertaining to GSAP Go-Live and access of GSAP application as Royalty**

9. During the year under consideration the assessee received payments towards cost allocation for GSAP Go-Live application. The AO held that the receipt is a Royalty both under the DTAA and under section 9(1) of the Act. The ld. AR submitted that the assessee has entered into an agreement with IBM for procurement of licence of GSAP Software and the same is customized the requirements of the assessee. The ld. AR further submitted that the cost incurred towards the licence and for Go-Live are allocated to the Shell group companies on a cost to cost basis based on the number of users. The ld. AR drew our attention to the findings given by the DRP in para-12.3.1 of the directions wherein the DRP has held that GSAP maintenance charges are similar to SUN Maintenance Charges to submit that the nature of software being accepted as identical the decision on the issue of SUN software is applicable to GSAP Software also. The ld. AR argued that the licence cost and the Go-live cost are incurred towards obtaining the right to use the GSAP Software and therefore, the decision of the Hon'ble Supreme Court in the case of Engineering Analysis (supra) is applicable for the impugned issue also.

10. We heard the parties and perused the record. The assessee during the year under consideration has migrated to GSAP Software and has incurred expenses towards procurement of licence to use the Software also expenses towards customization of the Software for Go-live. These expenses have been allocated across the group on a cost to cost basis based on the number of users. The contention of the AO is that the amount received by the assessee is in the nature of Royalty as per explanation-4 to section 9(1)(vi) of the Act. The argument of the assessee is that the amendment to section 9(1)(vi) cannot be read into the DTAA

and thus the provisions as per DTAA which is more beneficial to the assessee should only be applied in assessee's case as per section 90(2) of the Act. In this regard it is relevant to consider the following observations of the Hon'ble Supreme Court in the case of Engineering Analysis (supra) –

*100. Also, any ruling on the more expansive language contained in the explanations to section of the Income-tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income-tax Act read with explanation 4 thereof, and Article 3(2) of the DTAA. Further, the expression "copyright" has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA. For all these reasons, the determination of the AAR in Citrix Systems Asia Pacific Pty Ltd. (supra) does not state the law correctly and is the aside.*

11. From the perusal of above finding, it is clear that the if the definition of Royalty as contained in the DTAA is more beneficial to the assessee then the same should only be applied as per section 90(2) of the Act. The term "Royalty" as per Article 13(3) of the DTAA between India and UK reads as under –

*3. For the purposes of this Article, the term "royalties" means :*

- (a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and*
- (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.*

12. A plain reading of the above article makes it clear that only when the payment is made towards the right to use the copy right the same would fall within the definition of Royalty under the DTAA. In assessee's case the amount received towards cost allocation of expenses incurred towards acquiring the licence to access GSAP Software and the cost incurred towards modification for Go-live does not result any right to use the copy right, but only the right to use the copy righted software of GSAP. Therefore in our considered view, the amount paid cannot be treated as Royalty under Article 13 of the DTAA between India and UK. Further the amount received by the assessee is on a cost to cost basis without any income element in it and on that count also, the amount received cannot be treated as taxable in India. In view of this discussion and, respectfully following the above decision of the Hon'ble Supreme Court, we hold that the receipt towards cost allocation of GSAP licence and Go-live of GSAP application cannot be treated as Royalty and the addition made by the AO in this regard is not tenable. Ground No. 11, 12, 14 & 15 are allowed. Ground No. 10 & 13 are left open in view of our decision in Ground No. 11, 12, 14 & 15.

13. Ground No. 16 pertaining to interest under section 234A, 234B & 234C of the Act are consequential not warranting any separate adjudication.

14. In result, the appeal for AY 2012-13 is partly allowed.

15. From the perusal of the issues contended by the assessee for AY 2013-14 to AY 2015-16 as tabulated in the earlier part of this order, it is clear that the issues are identical to the issues contended in AY 2012-13. Further the DRP while considering the issue of the impugned payments being treated alternatively as FTS by the AO has held that the payments are in the nature of Royalty only. Therefore, in our view our decisions pertaining to the impugned payments not being in the

nature of Royalty and not liable to be taxed in India for AY 2012-13 are mutatis mutandis applicable to AY 2013-14 to AY 2015-16 also.

16. In result, the appeals for AY 2012-13 to AY 2015-16 are partly allowed.

*Order pronounced in the open court on 27-02-2025.*

**Sd/-**  
**(RAJ KUMAR CHAUHAN)**  
**Judicial Member**

*\*SK, Sr. PS*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

**Sd/-**  
**(PADMAVATHY S)**  
**Accountant Member**

BY ORDER,

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