

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

**BEFORE SHRI AMIT SHUKLA, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 6436/Mum/2024
(Assessment Year: 2014-15)**

**I.T.A. No. 6439/Mum/2024
(Assessment Year: 2015-16)**

**I.T.A. No. 6470/Mum/2024
(Assessment Year: 2016-17)**

**I.T.A. No. 6440/Mum/2024
(Assessment Year: 2017-18)**

**I.T.A. No. 6441/Mum/2024
(Assessment Year: 2018-19)**

**I.T.A. No. 6442/Mum/2024
(Assessment Year: 2019-20)**

**I.T.A. No. 6443/Mum/2024
(Assessment Year: 2020-21)**

**I.T.A. No. 6444/Mum/2024
(Assessment Year: 2021-22)**

Deputy Commissioner of Income Tax (IT), Circle-421, Room No. 627, 6th Floor, Kautilya Bhavan, BKC, Bandra (E), Mumbai-400051.	Vs.	Sita Information Networking Computing USA Inc. Finance Directors Office Sita Inc. USA, Suite 900, 3100 Cumberland BLVD. Atlanta GA 30339, USA-999999 PAN: AAVCS5544D
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Appellant)	:	Respondent)
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Appellant /Assessee by	:	Shri P.J. Pardiwala/ Ninad Patade, AR
Revenue / Respondent by	:	Shri Vivek Perampurna (CIT-DR) / Krishna Kumar- Sr. DR
Date of Hearing	:	27.03.2025
Date of Pronouncement	:	02.04.2025

ORDER

Per Padmavathy S, AM:

These appeals by the revenue are against the separate orders of the Commissioner of Income Tax (Appeals) – 58, Mumbai (in short "CIT(A)") all dated 18.10.2024 for assessment years (AYs) 2014-15 to 2021-22. The only issue contended by the revenue in all these appeals pertain to CIT(A) deleting the addition made by the Assessing Officer (AO) towards Passenger System Solutions treating same as taxable in the hands of the assessee as Fees For Technical Services (FTS) under section 9(1)(vii) of the Income Tax Act (the Act) as well as under Article 12 of the DTAA between India and USA.

2. The assessee is a company incorporated in the USA and is a tax resident of USA. The Assessee is, therefore, eligible to claim benefits under the India-USA DTAA. The Assessee is engaged in the business of providing a range of application services to the global air transport sector, including Airport Systems Solutions ('Airport Services') and Passenger Systems Solutions ('Passenger Services'). The Assessee has earned income from licensing the use of its Airport Services software, which enables airlines and airports to use shared resources at airports to access their respective IT applications in real time for passenger check-in, bag drop and

boarding. The Assessee has also earned income from services rendered to Indian airlines - mainly to National Aviation Company of India Limited [otherwise known as Air India Limited] - under its Passenger Services contracts. These services are provided from the Assessee's data centre in Atlanta, Georgia, USA, and comprise of automated passenger reservations, fares, ticket pricing, and related services. The Assessee does not have any place of business, office, or branch in India. The AO while completing the assessment under section 143(3) r.w.s.144C(3) of the Act treated the income arising out of both Airport Services and Passenger Services as taxable in the hands of the assessee by holding that the said services are in the nature of FTS under section 9(1)(vii) as well as Article 12 of the DTAA between India and USA and accordingly taxable in India. On further appeal the CIT(A) deleted the additions made towards Airport Services by placing reliance on the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Center of Excellence Private Limited ([2021] (432 ITR 471) (SC)). The CIT(A) also deleted the addition made with respect to Passenger Services by holding that the said services cannot be taxed under section 9(1)(vii) for the reason that these services do not involve human element, by placing reliance on the decision of the Hon'ble Supreme Court in the case of Bharti Cellular Limited [2010] 330 ITR 239 and Kotak Securities Limited [2016] 383 ITR 1. The CIT(A) held the Passenger Services to be not taxable under Article 12 of the DTAA between India and USA also stating that no technology is made available to recipient of the services nor is there transfer of any technical knowledge, experience, skill, know-how or processes, nor does it consist of the development and transfer of a technical plan or technical design. The revenue is in appeal contending the relief given by the CIT(A) towards Passenger Services. The details of return filed by the assessee and the receipts towards Passenger Services for all the AYs under consideration is tabulated below –

AY	Date of filing of ROI	Income Returned – Rs.	Receipt towards Passenger Services – Rs.
2014-15	30.09.2015	Nil	66,57,78,795
2015-16	30.09.2015	Nil	78,68,93,397
2016-17	30.03.2017	Nil	144,94,39,072
2017-18	29.03.2018	Nil	114,42,43,597
2018-19	06.03.2019	14,51,020	166,94,52,671
2020-21	26.03.2020	45,52,310	128,33,75,829
2021-22	11.03.2022	9,59,140	46,50,56,498

3. We heard the parties and perused the material on record. The facts pertaining to the issue under consideration are that the assessee has entered into Passenger Services contracts with Indian airlines, mainly to National Aviation Company of India Limited [‘NACIL’, otherwise known as Air India Limited] towards rendering of services through Passenger System Solutions. These Passenger services are provided from the assessee's data centre in Atlanta, Georgia, USA. Under the agreement in order to provide NACIL and its travel agents with on-line access to the service, remote access to the software is granted by the assessee. The services provided by the appellant as contained in Schedule 5A_1 of the agreement are in connection with the Core PSS and Related Applications, Frequent Flyer Program (FFP) and Internet Booking Engine (IBE). The assessee provides a full airline passenger reservation and departure control service comprising of the following elements:

- Reservations
- Fares & Pricing
- Departure Control
- Message Switching
- Flight Information & Flight Tracking
- Baggage Reconciliation
- Internet Booking and
- Frequent Flyer services

4. The main contention of the ld AR before us is that these services are standard services rendered using the software technology and that they are not the technical services. The ld AR argued that the Passenger Reservation System Services (“PSS”) software of the Assessee is not made available to either NACIL or any of the other customers worldwide but is used by the Assessee itself on the mainframe computers which it owns in its Atlanta Data Center, in Georgia, USA, in order to provide services to those customers in connection with passenger reservations, flight bookings, electronic tickets, etc. The ld AR further submitted that the prospective passengers, travel agents and airline staff can access the services remotely using the e-commerce web site located at the Atlanta Data Center of the Assessee. The AO held that the services rendered by assessee would fall in line with technical services within the ambit of section 9(1)(vii). The AO also held that the services rendered are in the nature of fee for Included services under Article 12(4)(b) of the India US DTAA. The ld AO in this regard placed reliance on the decision of Authority for Advance Ruling (AAR) in the case of AREVA T&D India Limited (ATDIL) (Application No. 876 of 2010, Dated. 7th February, 2012) and Perfetti Van Melle Holding B.V., (AAR No 869 of 2010, dated 9 December 2011), and also on the decision of the Cochin Bench of the Tribunal in the case of US Technology Resources P. Ltd [(2013) 28 ITR 26 (Cochin) (Trib.)]. During the course of hearing the ld AR brought to our attention that the said ruling of AAR and the decision of the coordinate bench have been subsequently reversed by the Hon'ble High Courts.

5. For the purpose of examining the taxability of the impugned receipts towards passenger services under DTAA, we will look at the relevant provisions of Article 12 of the India USA DTAA which *reads as under* –

ARTICLE 12

ROYALTIES AND FEES FOR INCLUDED SERVICES

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

2. to 3. ***

4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(a)		are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
(b)		<u>make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.</u>

PROTOCOL

Paragraph 4(b) of Article 12 refers to technical or consultancy services that make available to the person acquiring the services, technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plant or technical design to such person. (For this purpose, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person). **This category is narrower than the category described in paragraph 4(a) because it excludes any service that does not make technology available to the person acquiring the service. Generally speaking, 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 may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are 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.

6. A combined perusal of the above makes it clear that a particular service will be considered as fees for included services only when the person acquiring the service is enabled to apply the technology. It is also clear that even if the provision

of the service requires technical input by the person providing the service, it may not fall within the ambit of Article 12(4)(b) unless the technical knowledge, skills, etc., are made available to the person purchasing the service. In assessee's case from the perusal of the nature of Passenger Services, it is clear that no technology per se is made available to NACIL and that the services are rendered using the software supported by the data centre of the assessee in USA. Accordingly there is merit in the contention of the Id AR that these services are rendered using the technology and are not in the nature of technical services. Further we notice that there are plethora of judicial pronouncements where it has been held that unless the technical knowledge, skills etc., are made available by the service provider, the same cannot be held as FTS to be taxed in India under the DTAA which specifically provides so. the observations of CIT(A) in this regard in AY 2016-17 as extracted below are relevant –

“6.5.7. As held in the various decisions listed hereunder, for a payment to qualify as being in the nature of Fee for Included Services under the tax treaty, it is necessary that the services make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

- Shell India Markets (P.) Ltd. [2024] 463 ITR 222 (Bombay High Court)
- Interoute Communications Ltd. [2023] 153 taxmann.com 392(Bombay High Court)
- Guy Carpenter & Co. Ltd. [2012] 346 ITR 504 (Delhi High Court)
- Buro Happold Ltd. [2019] 103 taxmann.com 344 (Mumbai ITAT)
- Reliance Jio Infocomm Ltd. [2019] 111 taxmann.com 371 (Mumbai ITAT)
- Mahindra & Mahindra Limited [2009] 30 SOT 374 (SB - Mumbai ITAT)
- WNS North America Inc. [2013] 146 ITD 435 (Mumbai ITAT)
- United Helicharters (P.) Ltd. [2013] 60 SOT 58 (Mumbai ITAT)
- Raymonds Limited 86 ITD 791 (Mumbai ITAT)
- B4U International Holdings Ltd. [2012] 52 SOT 545 (Mumbai ITAT)
- IATA BSP India [2014] 64 SOT 290 (Mumbai ITAT)
- ONGC [2019] 103 taxmann.com 165 (Delhi ITAT)
- NQA Quality Systems Registrar Ltd [2005] 92 TTJ 946 (Delhi ITAT)
- Outotec India (P.) Ltd. [2015] 59 taxmann.com 108 (Delhi ITAT)

- CPP Assistance Services (P.) Ltd. [2023] 147 taxmann.com 484 (Delhi ITAT)
- Infobip Ltd. [2023] 150 taxmann.com 503 (Delhi ITAT)
- UK Grid Solution Ltd. [2023] 149 taxmann.com 209 (Delhi ITAT)
- Bio Rad Laboratories Inc. [2023] 149 taxmann.com 342 (Delhi ITAT)
- TSYS Card Tech Ltd. [2023] 149 taxmann.com 195 (Delhi ITAT)
- Batlivala & Karani Securities (India) (P.) Ltd. [2016] 159 ITD 924 (Kolkata ITAT)
- ABB Inc. [2015] 69 SOT 537 (Bangalore ITAT)
- Cadila Healthcare Ltd. [2017] 162 ITD 575 (Ahmedabad ITAT)
- Veeda Clinical Research (P.) Ltd. [2013] 144 ITD 297 (Ahmedabad ITAT)
- Sandvik Australia Pty. Ltd. [2013] 141 ITD 598 (Pune ITAT)
- Akamai Technologies Inc., In re [2018] 404 ITR 495 (AAR)
- Ernst & Young (P.) Ltd, In re [2010] 323 ITR 184 (AAR)
- Bharati AXA General Insurance Co. Ltd. [2010] 326 ITR 477 (AAR)
- Anapharm Inc. [2008] 305 ITR 394 (AAR)
- Endemol India (P.) Ltd. [2013] 40 taxmann.com 345 (AAR)

Further, the Bombay High Court in the following cases has decided the case in favour of the assessee where the services did not make available technical knowledge, experience, skill, know-how or processes, or consist of development and transfer of a technical plan or technical design.

- Shell India Markets (P.) Ltd. [2024] (463 ITR 222) (Bom. High Court) has held as under:

"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:

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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."

- The Bombay High Court in the case of Interoute Communications Ltd. [2023] (153 taxmann.com 392) has dismissed the appeal filed by the revenue authorities wherein the Tribunal has come to a conclusion that the revenue earned by the assessee was only for a service rendered and not in the nature of making any technology available to the persons receiving the service.

As discussed above, in facts of the present case, the services rendered during the years under appeal are standard services without involvement of human intervention for the processing of data out of its data center in Atlanta, Georgia. Further, there is no technology that is made available to Air India nor is there transfer of any technical knowledge, experience, skill, know-how or processes,

nor does it consist of the development and transfer of a technical plan or technical design.

6.5.8 In view thereof and based on the various decisions relied upon by the appellant, it is clear that the income of Rs. 78,68,93,397/- does not qualify as fees for included services under the tax treaty as well. Accordingly, the income is not taxable as FIS under the tax treaty. **Thus, grounds of appeal Nos. 9 to 13 are allowed.”**

7. In view of these discussions and placing reliance on the judicial precedence we see no infirmity in the order of the CIT(A) in holding that the impugned receipts are not taxable in the hands of the assessee in India. Accordingly the grounds raised by the assessee with regard to the same for AY 2014-15 to 2021-22 are dismissed.

8. Since we have dismissed the ground of the revenue for the reason that the receipts towards Passenger Services are not taxable under Article 12 of the DTAA between India and USA, the contention of the revenue that the same is taxable under section 9(1)(vii) of the Act has become academic and not adjudicated separately.

9. In result the appeals of the revenue for AY 2014-15 to AY 2021-22 are dismissed.

Order pronounced in the open court on 02-04-2025.

Sd/-
(AMIT SHUKLA)
Judicial Member

**SK, Sr. PS*

Sd/-
(PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
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CIT

- 4.
- 5.

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai