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

BEFORE SH.C.N. PRASAD, JUDICIAL MEMBER
AND
SH. NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No.2168/Del/2023
Assessment Year: 2020-21

Ernst and Young U.S. LLP C/o Authorised Representative, Ernst and Young LLP, 5th Floor, Tower-2, Plot No.2B Sector 126 Noida, Gautam Budh Nagar PAN No.AADFE0355M	**Vs.**	**ACIT Tax- Cir Int. Tax 1 (2)(2) New Delhi**
(APPELLANT)		**(RESPONDENT)**

Appellant by	**Sh. S. Ganesh, Sr. Advocate** **Ms. Shailja Anand, Advocate** **Ms. Ananya Kapoor, Advocate**
Respondent by	**Sh. Vijay B. Basanta, CIT DR**

Date of hearing:	20/02/2025
Date of Pronouncement:	19/05/2025

ORDER

PER NAVEEN CHANDRA, AM:

This appeal by the assessee is directed against the order of the ACIT Tax- Cir Int. Tax 1(2)(2) New Delhi dated 30.12.2023 u/s 143(3)

r.w.144C(13) of the Income – tax Act, 1961 [hereinafter referred as 'the Act'] pertaining to A.Y. 2020-21.

2. The assessee has raised the following grounds of appeal :

Ground 1.1: That on the facts and circumstances of the case and in law, the final assessment order dated 30 May 2023 passed under section 143(3) read with section 144C (13) of the Act ("impugned order") by Assistant Commissioner of Income Tax, Circle International Tax 1(2) (2), Delhi ("Ld. AO") in conjunction with the directions passed by the Ld. Dispute Resolution Panel ("Ld. DRP") in the case of Appellant for AY 2020-21, assessing the income of the Appellant for the relevant assessment year at INR 98,58,95,110 as against the returned income of INR 67,19,060 is bad in law and liable to be quashed.

Ground 1.2: That on the facts and the circumstance of the case and in law, the impugned order passed by Ld. AO/ DRP is contrary to correct reading and interpretation of relevant statutory provision and therefore, the impugned order is bad in law and liable to be set aside.

Ground 1.3: That the directions dated 11 May 2023 passed by the DRP are void ab initio and non-est as the same have been issued without a valid document identification number (DIN) as well as without uploading on the income tax portal, thus, falls foul of the pre-requisitions enunciated by the CBDT Circular No. 19/2019 dated 14 August 2019 mandating generations/ allotment/ quoting of Document Identification Number on all communications/correspondence/ order by the Income Tax Department. Reliance in this regard is placed on

Honorable Delhi High Court's judgement in the case of Brandix Mauritius Holdings Ltd. [TS-184-HC-2023(DEL)] wherein the appeal against the order passed by the Hon'ble Delhi ITAT quashing the final assessment order not bearing DIN was dismissed.

Grounds challenging addition on account of reimbursement of secondment charges

Ground 2.1: That on the facts and circumstances of the case and in law, the Ld. AO/ DRP has erred in treating mere cost to cost reimbursements on account of secondment of employees amounting to INR 68,02,25,664 to be Fees for Technical Services ("FTS") as defined under Article 12 of India-USA Double Tax Avoidance Agreement ("DTAA") where such payments were made by Appellant for and on behalf of Indian Entities which is directly contrary to the recent judgement of the Honorable Delhi ITAT in Appellant's own case dated 20 June 2023. A copy of the said judgement is being filed along with the present appeal.

Ground 2.2: That on the facts and circumstances of the case and in law, the findings of the Ld. AO/DRP, namely that, seconded personnel are employees of the Appellant and that agreement /arrangement between the Appellant and Indian Ernst & Young entities constitutes provision of services by Appellant through seconded personnel is also directly contrary to the specific findings given by the Hon'ble Delhi ITAT in Appellant's own case dated 20 June 2023.

Ground 2.3: That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in arbitrarily concluding that the appellant is providing services through its employees satisfying the

"make available technical knowledge, experience, skill, know-how or processes" condition of Article 12 of the DTAA. This finding given by the Ld. AO/ DRP namely, that "make available" condition /requirement of Article 12 of DTAA has been fulfilled is directly contrary to the specific and categorical findings of the Hon'ble Delhi ITAT in Appellant's own case dated 20 June 2023

Ground 2.4: That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in failing to appreciate that the present case is governed by Article 15 'Independent Personal Services of DTAA and not Article 12 'Fee for Technical Services' of DTAA. The Ld. AO/DRP have also completely disregarded provisions of Para 12(5) of the DTAA which specifically excludes from the ambit of Article 12 of the DTAA, all payments covered by Article 15 of the DTAA

Ground 2.5: That on the facts and circumstances of the case and in law, the Ld. AO/ DRP have completely disregarded the crucial fact that the same payments have been taxed as salary in the hands of seconded personnel. The Ld. AO/ DRP have also erred in disregarding the fact that tax on said payments has already been deducted under section 192 of the Act on the basis and footing that the same payments constitute salary income assessable in the hands of seconded personnel in India.

Ground 2.6: That on the facts and circumstances of the case and in law, the Ld. A.O / DRP completely failed to appreciate that the very same amounts could not in law be subjected to tax twice, firstly in the

hands of the seconded employees working in India and, secondly, again in the hands of the Appellant.

Ground 2.7: That on the facts and circumstances of the case and in law, the Ld. A.O/ DRP also failed to appreciate that, similarly, the same amounts could not be subjected twice to deduction of tax at source,

Grounds challenging addition on account of income from professional services governed by Article 15 of the DTAA as "Fees for Included Services" under Article 12 of the DTAA

Ground 3.1: That on the facts and circumstances of the case and in law, the Ld. AO/DRP have completely failed to appreciate the crucial factor that Article 15 of the DTAA is not confined to Professional Services rendered in India. The Ld. AO/ DRP failed to appreciate that Article 15 squarely covers Professional Services rendered from abroad to entities located in India. Hence, the interpretation placed by the Ld. AO/DRP on Article 15 of the DTAA constitutes a complete rewriting of Article 15 of the DTAA, which is illegal and impermissible.

Ground 3.2: That on the facts and circumstances of the case and in law, the Ld. AO/ DRP has erred in making addition of income from professional services amounting to INR 29,89,50,386 as Fees for included services ('FIS') under Article 12 of the DTAA on the premise that such services do not qualify as "professional services as per Article 15 of the DTAA.

Ground 3.2(a): That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in concluding that the definition of

professional services under Article 15(2) of the DTAA is exhaustive in nature.

Ground 3.2(b): That on facts and circumstances of the case and in law, the Ld. AO/ DRP, in the guise of interpreting Article 15 of the DTAA, rewritten and redrafted the Article by inserting therein new requirements / conditions which do not exist on a plain reading of Article 15 of the DTAA.

*Ground 3.2(c): That on the facts and circumstances of the case and in law, the Ld. AO / DRP has erred in concluding that the services rendered by specified functionaries such as Economists, MBA Graduates, Diploma holders and other trained technical professionals do not qualify as 'professional services' under Article 15 of the DTAA completely ignoring that Article 15 of the DTAA covers the *professional services" as well as "other independent activities of similar character". Ground 3.3: That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in holding that professional services rendered by the appellant satisfies the make available clause and therefore qualify as FIS under Article 12 of the DTAA.*

Ground 3.3(a): Without prejudice to above, on the facts and circumstances of the case and in law, Ld. AO/ DRP failed to appreciate that in any event and in any view of the matter, the mere rendering of training services, as part of rendering professional services which are covered by Article 15 of the DTAA cannot possibly be considered to comply with "make available" requirement of Article 12 of the DTAA. In any event, as already stated, the Ld. AO/ DRP also

failed to appreciate that this issue is irrelevant and immaterial as no income with respect to training service(s) was earned by the Appellant under the specified contract in the subject year.

Ground 3.4: That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in applying the facts of one agreement having training services as part of overall scope of work to all other independent agreements without appreciating that the services under other agreements are different and findings of one agreement cannot be applied to all agreements unanimously.

Ground 3.5: Without prejudice to any of the above arguments, on the facts and circumstances of the case and in law, even assuming, without conceding, that the taxability of the services performed by EY US is not governed by Article 15 of the DTAA, the Ld. AO / DRP failed to appreciate that it cannot be placed under any other Article of the DTAA and thus, result in taxability of income earned from rendering professional services in India.

Other grounds

Ground 4: That on the facts and the circumstances of the case and in law, the Ld. AO has erred in initiating the penalty proceedings under section 270A of the Act for under-reporting of income against the appellant, which is bad in law.

All of the above grounds of appeal are without prejudice and notwithstanding each other.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of

appeal, to enable the Hon'ble Panel to decide the appeal according to law.

3. The representatives of both the sides were heard at length, the case records carefully perused and we have duly considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules.

4. Brief facts of the case is that Ernst & Young U.S. LLP is a limited liability partnership (LLP), wherein various individual partners have partnership share in the partnership. Further, the assessee is tax resident of United States of America (USA). The assessee is in the business of providing professional services in the field of assurance, tax, transaction and business advisory services etc to its clients across globe including India. The assessee has no fixed base in India.

5. The assessee filed return of income for A.Y 2020-21 on 22.03.2021 declaring total income of Rs. 67,19,060/- and claimed refund for TDS amounting to Rs 8,15,73,480/-. The assessing Officer, in the course of assessment proceedings found that the assessee had received Rs 68,02,25,664/- on account of employees seconded to Indian Member

firms. As the receipts on account of secondment was assessed as Fees for Included Service (FIS) in AY 2019-20, the AO made an addition of Rs 68,02,25,664/- on account of receipts from secondment as FTS in this year also. The AO also made an addition of Rs 29,89,50,386/- on account of FIS, being the fees received for the professional services rendered, thus assessing the total income at Rs 98,58,95,110/-. The aggrieved assessee approached the DRP which upheld the additions made by the AO.

6. The aggrieved assessee has now approached before the ITAT.

7. The ld counsel of the assessee at the outset stated that the ground no 1 including 1.1 and 1.2 are general in nature. The ground no 1.3 regarding DIN is not pressed. The ld AR submitted that ground no 2 and its sub grounds are covered by the decision of ITAT in assessee's own case for AY 2019-20 in ITA no 2332/Del/2022 dated 20.06.2023 and in ITA 3253/Del/2023 dated 07.08.2024 for AY 2021-22.

8. With respect to ground no 3 and its sub grounds regarding addition made by the A.O. of the amount of Rs 29,89,50,386 being the fees received by the assessee for the professional services rendered by the

highly experienced professionals of the assessee, the ld AR submitted a written submission as follows:

8.1 This addition has been made by the A.O. by denying to the Appellant the benefit of Article 15 of the India-U.S.A. Double Taxation Avoidance Agreement (DTAA) which deals with taxability of fees received by a firm of individuals from performance of professional Services or other independent activities of similar nature. The A.O has held that these receipts are not in the nature of professional services and hence, these receipts were Fees for Included Services (FIS) covered by Article 12 of the DTAA as the "make available" test is satisfied. If the same had been held to be Fees for Professional Services covered by Article 15, then they would be taxable only in USA and not in India as the Appellant does not have a fixed base in India (undisputed by the A.O.) and the stay condition is not applicable to the Appellant Firm (undisputed by the AO).

8.2 The reason given by the DRP and the A.O. for holding that these receipts to be taxable as Fees for Included Services under Article 12 and not Professional Services covered by Article 15 is that economists, engineers, MBA graduates, diploma holders and other trained technical personnel do not belong to a professional body which governs the

profession, such as the Medical Council of India, Bar Council of India and Institute of Chartered Accountants of India

8.3 It is the submission that the reasoning given by the A.O is patently erroneous, for the following reasons:-

(a) The Appellant being firm of individuals rendering professional services is covered by Article 15 of the DTAA.

(b) Article 15(2) of the DTAA gives an inclusive definition of "professional services"

8.4 The assessee submits that firstly the Article 15(2) gives an inclusive and not an exhaustive definition of "professional services". Secondly, many of the services expressly mentioned in Article 15(2) are rendered by persons who do not belong to and are not governed by any professional organization with disciplinary power and control such as scientists, literary persons, artists, teachers, engineers. By confining Article 15 only to persons who are governed by a professional organization, the A.O. has sought to completely re-write Article 15, which is not permissible.

8.5 The very same issue has been dealt with and the Appellant's claim has been allowed by the recent Judgment of this Hon'ble Tribunal in the Appellant's case for A.Y. 2021-22. The ITAT held that the said amounts are

not FIS because the "make available" requirement of Article 12(4)(b) of the DTAA is not satisfied. On this short ground, alone and by itself, the Appellant is entitled to succeed in this A.Y. also. Further, the ITAT has also expressly placed reliance on Article 12(5)(e) of the DTAA on the footing that the receipts were professional fees covered by Article 15.

8.6 The assessee further submits that the AO considered the receipts as FIS on the same reasons as in AY 2021-22 i.e., the persons rendering the services though highly qualified, experienced and trained, are not subject to a governing professional body. The Tribunal holding that the receipts are not FIS, described in detail the highly skilled nature of the services rendered by the persons in question and also their high qualifications and extensive training and experience. The Tribunal also has set out the provisions of section 194J of the I.T. Act which deals with Fees for Professional services. The ITAT considered the definition of "professional services" in the Explanation (a) to section 194J which specifically refers to "engineering profession’ and also to "profession of technical, consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or section 194J. These activities are thus regarded by the statute as professions though they have no governing professional body. The ITAT made a specific reference to the

notification dated 12/01/1977 S.O 18(E) and also the notification no 385(E) dated 4/5/2001 which include in the description of "professionals" all kinds of film personalities such as actors, directors, editors and singers etc and all persons in the profession of information technology including persons practicing data entry and rendering all kinds of computer software and hardware services. Further, the notification dated 21/8/2008 includes in the term "professionals all sports persons such as coaches, referees, commentators and sports columnists. This Hon'ble Tribunal has thus treated all these persons as "professionals' though none of them belong to any governing professional body.

8.7 The assessee further submits that the ITAT, specifically referred to the definition of "professional services in Article 15(2) of the DTAA which includes independent "scientific, literary, artistic, educational or teaching activities". None of the persons in these activities belong to any governing professional body. Hence, the Appellant prays before your Honors that a clear finding may also be given that Appellant's case falls within the meaning of 12(5)(e) of the DTAA and is accordingly, covered by Article 15 of the DTAA.

8.8 The assessee reiterates that the ITAT in its order for A.Y. 2021-22 has rejected the A.O.'s contention that Article 15 must be confined to services rendered only by members of a governing professional body. Furthermore, the language of Article 15(2) of the DTAA, and the provisions of the I.T. Act and the said notifications, clearly defines the 'professional services' in unrestricted manner.

9. Per contra, the ld DR relying heavily on the assessment order of the AO, submitted that the ITAT has given no finding on the application of Article 12(5)(e) of the treaty. The ld DR argued that Article 15 of the Indo-USA DTAA should not be given a wider meaning because in such event the meaning of Article 12(5)(e) would become irrelevant. The ld DR further stated the ITAT decision for AY 2021-22 has not decided the applicability of Article 15 on the facts of the case of the assessee.

10. In the rejoinder, the ld. AR submitted that the Article 12 applies to the resident of the contracting state whereas Article 15 refers to 'professionals' and thus there is no overlap in Art 15 and Art 12. The ld AR reiterated that Art 15 provides an inclusive definition and is not exhaustive. It is stated that wherever there is confusion with regard to definition, the definitions in parent law may be applied for clarification

and workable interpretation such as Income Tax Act 1961 and definition of professional provided in section 194J, 44AA, CBDT notifications, for the meaning of 'professionals services' be considered.

11. We have heard the rival submissions and have perused the relevant material on record. We find that as far as the ground 2 and its sub grounds regarding receipts on secondment charges being taxable as FIS, the issue is covered in favour of the assessee vide ITAT order in assessee's own case for AY 2019-20 which held as follows:

> ***"5. The only issue that survives which needs adjudication is whether cost to cost reimbursement on account of secondment of employees was Fees for Technical Services [FTS] as defined under Article 12 of the India-USA Double Tax Avoidance Agreement [DTAA) and whether the arrangement between the assessee and Indian entities constitutes the 'provision of services' by the assessee through seconded personnel.***
>
> ***xxxxxx***
>
> ***"29. Considering the facts of the case in totality, in light of the deputation agreement, we are of the considered view that cost to cost reimbursement on account of secondment of employees cannot be treated as FTS as defined under Article 12 of India USA-DTAA and seconded personnel are employees of EY India firms whose income has been taxed***

as salary in their respective hands. Therefore, the very same amount could not, in law, be subjected to tax twice-firstly in the hands of the seconded employees working in India and secondly again the hands of the assessee. The Assessing Officer is accordingly, directed to delete the impugned addition."

12. We also find that the abovementioned decision has been followed and reiterated by the coordinate bench of Tribunal in its recent Judgment dated 7/8/2024 in the assessee's own case for A.Y 2021-22 at para 5 which reads as ***"In the absence of any change in the factual matrix and legal proposition, the appeal of the assessee on this ground is allowed."*** We find that in the impugned year, the factual matrix being same as before, has not been controverted. In view of the same, ground 2 is allowed.

13. The remaining issue that requires our adjudication relates to ground no 3 and its sub-grounds regarding addition made by the A.O. of the amount of Rs 29,89,50,386 being the fees received by the assessee for the professional services rendered by the professionals of the assessee.

14. We heard the rival submissions and have perused carefully the materials on record. We find that the case involves denial of benefit of Article 15(2) and Article 12(5)(e) of the India-U.S.A. Double Taxation

Avoidance Agreement (DTAA). We further find that the A.O has held that the receipts are not in the nature of professional services and hence, these receipts were Fees for Included Services (FIS) covered by Article 12(4) of the DTAA and that the "make available" test is satisfied.

15. We further find that the reason alluded by the DRP and the A.O. for holding that these receipts are taxable as Fees for Included Services under Article 12(4) and not Professional Services covered by Article 15(2) is that economists, engineers, MBA graduates, diploma holders and other trained technical personnel do not belong to a professional body which governs the profession, such as the Medical Council of India, Bar Council of India and Institute of Chartered Accountants of India.

16. It is relevant therefore to analyse the provisions of the DTAA for adjudicating the issue. Article 15(2) of the DTAA defines "professional services" as under-

> ***"15.2 The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants."***

12.5 Notwithstanding paragraph 4, "fees for included services" does not include amounts paid :
*(a) ****
*(b)****
*(c) ****
*(d)****
(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).

We are of the opinion that definition of professional service in Article 15(2) do not provide an exhaustive definition of "professional services" but an inclusive one. The definition encompasses several categories which pertain to services which neither belong to nor are governed by any professional organization with disciplinary power and control such as scientists, literary persons, artists, teachers, engineers. We are therefore inclined to agree with the assessee that confining Article 15(2) to persons who are governed by a professional organization, would mean re-writing Article 15(2), which is not permissible.

17. We further find that the coordinate bench of ITAT in assesse's own case in ITA 3253/Del/2023 for A.Y. 2021-22 vide order dated 07.08.2024 after discussing the various provisions of DTAA such as Article 12 and 15

and the provisions in Income Tax Act defining the 'professional services such as section 194J and 44AA, had held that the said amounts are not FIS because the "make available" requirement of Article 12(4)(b) of the DTAA is not satisfied. The ITAT held as follows:

> *"25. We have also examined the qualifications of the engagement partners and principal responsible for engagement, we find that these consultants are having qualifications in business management business administration, masters of science and doctorate in economics or maths, commerce & finance.*
>
> *******
>
> *27. The assessee has given the party wise breakup of services rendered to India based clients from USA at page no. 161 to 165 of the paper book which was to the tune of Rs.65.20 Cr. which includes E&Y LLP, SR Batliboi & Company LLP, HoneywellInternational Inc. The details of the services extended have already been discussed at length above. On going through the services, we find that they cannot be said to be meeting the requirement "make of available" technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design" clause under Article 12(4)(b) of DTAA. Further, we have gone through the Article 12(5)(e) which states that the FIS does not include the amounts paid to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).*
>
> *28. To conclude, the case of the assessee has been covered by the benefits of provisions of Article 12(4) (b) of DTAA as the "make available" criteria is not satisfied. The appeal of the assessee on this ground is allowed.*

29. In the result, the appeal of the assessee is allowed.

18. We are further of the view that the term 'professional services' as defined in Article 15(2) of the DTAA are supported by the definitions in the Explanation (a) to section 194J which specifically refers to "engineering profession' and also to "profession of technical, consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or section 194J. These activities are thus regarded by the statute as professions though they have no governing professional body. We also find that the ITAT drew assistance from the notification dated 12/01/1977 S.O 18(E) and also the notification no 385(E) dated 4/5/2001 which include in the description of "professionals" all kinds of film personalities such as actors, directors, editors and singers etc and all persons in the profession of information technology including persons practicing data entry and rendering all kinds of computer software and hardware services. Further, the notification dated 21/8/2008 includes in the term "professionals all sports persons such as coaches, referees, commentators and sports columnists. This Hon'ble Tribunal has thus treated all these persons as "professionals' though none of them belong to any governing professional body.

19. In view of the discussion above, we are inclined to agree with the assessee that "professional services' as defined in Article 15(2) of the DTAA cannot be circumcised by putting them as belonging to any governing professional body. We are therefore of the considered view that the assessee falls within the meaning of 12(5)(e) of the DTAA and hence benefit of Article 15 of the DTAA cannot be denied to it. Accordingly, we direct the AO to delete the addition on this count. The ground no 3 and its sub-ground is allowed.

20. Ground no 4 relating to initiation of penalty u/s 270 is pre-mature.

21. In the result, the appeal of the assessee in ITA No.2168/Del/2023 is allowed.

Order pronounced in the open court on 19.05.2025.

Sd/-	**Sd/-**
(C.N. PRASAD)	**(NAVEEN CHANDRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

NEHA, Sr. PS
Date:- 19.05.2025
Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(Appeals)
5.DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Sl. No.	***Particulars***	***Date***
1.	*Date of dictation of Tribunal Order:*	
2.	*Date on which the typed draft Tribunal order is placed before the Dictation Member:*	
3.	*Date on which the typed draft Tribunal Order is placed before the other Member:*	
4.	*Date on which the approved draft Tribunal Order comes to the Sr. PS/PS:*	
5.	*Date of which the fair order is placed before the Dictating Member for pronouncement:*	
6.	*Date on which the signed order comes back to the Sr. PS/PS:*	
7.	*Date on which the final Tribunal Order is uploaded by the Sr.PS/PS on official website:*	
8.	*Date on which the file goes to the Bench Clerk along with Tribunal Order.*	
9.	*Date of killing off the disposed of files on the judiSIS Portal of ITAT by the Bench Clerk:*	
10.	*Date on which file goes to the Supervisor (Judicial):*	
11.	*The date on which the file goes to the Asst. Registrar for endorsement of the order:*	
12.	*Date of dispatch of the order*	