

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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER, AND  
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 3382/DEL/2023 [A.Y. 2021-22]

Nunhems Netherlands B.V.  
HSIDC Building Vanijya Nikunj  
Udyog Vihar, Phase - V, Gurgaon

Vs.

A.C.I.T  
International Taxation  
Gurgaon

PAN - AAECN 4582 D

(Applicant)

(Respondent)

Assessee By : Shri Nageshwar Rao, Adv.  
Shri Pratik Rath, Adv

Department By : Ms. Anjula Jain, CIT-DR

Date of Hearing : 12.09.2025

Date of Pronouncement : 08.12.2025

**ORDER**

**PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-**

This appeal by the assessee is directed against the order dated 28.09.2023 u/s 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act, for short] for A.Y 2021-22.

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

- “1. That Ld. AO & majority Ld. DRP erred in treating remuneration of ₹3,58,03,282 received from providing testing services to Nunhems India ('AE') as royalty income under India-Netherlands DTAA. Order by majority of Ld. DRP is non-speaking and contrary to/ignoring Hon'ble Tribunal's decisions.*
- 2. That Ld. AO and majority Ld. DRP erred on facts and in law in not appreciating that the agreement is not for use of any intangible property in the form of "information concerning industrial, commercial or scientific experience" or "copyright" or "equipment" and the provision of services does not make available any technical knowledge, know how or skill, hence such services are not taxable as per DTAA as held by single member of Ld. DRP.*
- 3. That Ld. AO and Ld. DRP erred on facts and in law in not appreciating that, the Assessee is a "Service Provider" and performs specific research related activities and is not imparting or sharing any specialized knowledge or experience with its AE.*
- 4. That Ld. AO and Ld. DRP erred in facts and in law making an addition of Rs. 10,66,76,030/- received for providing IT support services to its AE by construing same as FTS.*
- 5. That the Ld. AO and Ld. DRP erred in facts in not appreciating that IT support charges are in nature of cost-to-cost reimbursement without any profit element involved.*
- 6. That Ld. AO and Ld. DRP erred in facts and in law in not appreciating that the provision of IT support services provided by the Assessee to its AE does not amount to use or right to use of "scientific, industrial and commercial equipment" and thereby cannot be treated as royalty.*
- 7. That Ld. AO and Ld. DRP failed in appreciating that the scope of royalty as under the DTAA is narrower than the definition contained in the Income Tax Act, 1961 ('Act').*
- 8. That Ld. AO and majority of Ld. DRP erred on facts and in law in not appreciating that IT support services provided to by the Assessee does not satisfy the "make available" clause under the DTAA and hence it is not liable to be taxed as Fee for Technical Services.*

*9. That the Ld. AO and Majority of Ld. DRP erred in law in ignoring decisions of Hon'ble Courts on identical facts.*

*10. That the Ld. AO has erred on facts and in law in routinely initiating penalty proceedings under section 270(A) of the Act on the ground of under reporting of income or misreporting of income.*

*11. Assessee submits that the above grounds of appeal are without prejudice to each other and further craves leave to add, alter, amend, substitute to above grounds of appeal.*

3. Briefly stated, the facts of the case are that the assessee company is registered under the law of Netherlands. The company's purpose, by collaboration with partners, is to improve vegetable varieties and solutions for customers, the vegetable value chain and consumers worldwide.

4. The assessee, during the subject year, received an amount of Rs 3,58,03,283/- on account of testing services rendered to Nunhems India Private Limited ('Nunhems India') to improve plant varieties. The assessee also received Rs 10,66,76,030 on account of reimbursement of information technology ('IT') support services from Nunhems India Private Limited ('Nunhems India'). The Assessee filed its return of income ('ROI') for AY 2021-22 on 15 March 2022 declaring NIL taxable income and claimed the above receipts as non-taxable. Subsequently, ROI filed was picked up for scrutiny, and vide assessment order dated 28 September 2023, passed under section 143(3) read with section 144C(13) of the Act,

the claim of exempt income as above, was denied and the total income was assessed at Rs 14,24,79,310/- as against NIL returned income.

5. The assessee was aggrieved and went in appeal before the DRP which after considering the facts and submissions, with a 2-1 majority, held that the receipt of amount Rs. 3,58,03,283/- on account of testing services rendered should be treated as royalty taxable as per applicable rates as prescribed under India-Netherland DTAA read with Section 9(1)(vi) of the IT Act. With respect to the amount of Rs. 10,66,76,030/- on account of reimbursement of information technology ('IT') support services, the DRP held that it partakes the nature of FTS liable to tax as per application rate under the India-Netherland DTAA u/s 9(1)(vii) of the Act

6. Now the further aggrieved assessee is in appeal before us. Before us, the ld. counsel for the assessee, on the issue of receipts from Testing Services, submitted that Testing Services were performed at Assessee's Research and Development ('R&D') center situated in Netherlands with the use of required chemicals and technologies. For the purpose of testing, Nunhems India sends sample of seeds and leaves for testing to Netherlands.

7. The ld AR further stated that the Assessee receives request for testing of seeds/leaves from Nunhems India through a common software

called as "Nautilus". The sample seeds/leaves on which testing is to be performed are sent by Nunhems India to the Assessee through courier (i.e., adopting physical mode). The testing services are performed in Netherlands and all the communication between the Assessee and Nunhems India (like placing request for test, result of test etc.) takes place through Nautilus software and through e-mails. Once the testing is performed at Assessee's R&D center, the results are provided to Nunhems India on the software itself. Copy of test reports issued by the Assessee, on sample basis, were enclosed at page 268-279 of Paper-book.

8. The ld AR submitted that these are standard services being rendered by the Assessee and referred to page 73-82 of Paper-book in relation to the process of communication for marker testing services. The ld AR further stated that the agreement with Nunhems India is for provision of services, not for imparting technical knowledge, know-how, or skill. Hence, testing services provided by the Assessee qualifies as contract for "services" and placed reliance in case of *Commissioner of Income-tax, International Taxation -1 vs. Amazon Web Services, Inc* [2025] 174 taxmann.com 1188 (Delhi)/[2025] 478 ITR 44 (Delhi)[29-05-2025] and *Commissioner of Income-tax, International Taxation vs. RELX Inc* [2024] 160 taxmann.com 109 (Delhi)[07-02-2024], wherein

Hon'ble Delhi High Court held that in case no copyright is being transferred, the same cannot be classified as royalty.

9. The ld AR stated that the testing services rendered by the Assessee are routine in nature and are provided on recurring basis. Further, the Assessee did not make available any skill, know-how, knowledge, experience, etc. known to the recipient of the service (Nunhems India) so as to equip Nunhems India to independently perform the technical function by itself in future, without the help of the Assessee (service provider) and placed reliance in the case of ***Diamond Services International (P.) Ltd. V Union of India*** (2008) 169 Taxman 201/304 ITR 201 (Bombay HC) wherein it was held that payment in relation to service of grading and certification of diamonds performed from laboratory situated in USA does not make available technical knowledge, experience, skill, etc. to enable the person acquire the service to apply the technology contained therein and also is not liable to be taxed as royalty.

10. The ld AR also pointed out that one of the members of the Dispute Resolution Panel concurred with the Assessee's contention that provision of testing services does not fall under the 'make available' clause and, therefore, is not taxable as fees for technical services. The ld AR concluded that the testing services are "services" rendered by the

Assessee (not royalty for use of intangible rights) and hence, are not taxable in the hands of the Assessee since no technology or skills of the Assessee are being made available to Nunhems India through these services.

11. Per contra, the ld. DR relied upon the orders of the Assessing Officer and the DRP. The ld DR submitted that the assessee had provided information in the form of test reports to its associate enterprise in India i.e. M/s Nunhems India Private Limited (Nunhems India) to improve plant varieties, achieving breeding progress through the assessment of external and internal traits such as plant habitus, disease resistance, yield or quality traits. Nunhems India breeding programs of seeds and business operations depend on such reports and thus has commercial significance. Further, information is also of industrial in nature as it aids to the business activity of the recipient. The ld DR stated that the test reports also share scientific knowledge, experience, skill etc., thus, imparting of information concerning technical, industrial, commercial or scientific knowledge, experience or skill and thus receipts accruing out of such activities amounts to royalty income as per the Act and under the tax treaty. The ld DR submitted that the decision of Hon'ble Supreme Court in the case of *M/s Engineering Analysis Centre of Excellence Private Limited vs CIT* are not applicable to the facts of the case as the

case laws are related to copyright royalty whereas the current case is regarding taxation of equipment royalty.

12. In rejoinder, the Id AR stated that the test reports issued by the assessee is a service and does not amount to royalty and that scope of definition of royalty under the India-Netherlands tax treaty is narrower than the definition contained under the Act. Unless the information provided can fit into 'experience', the same will not be regarded as royalty. The Id AR also submitted that the test reports provided by the assessee does not constitute 'information' as no experience is shared with Nunhems India. The Id AR emphasized that access to Nautilus software does not amount to royalty since no use/right to use of copyright contained in the software is being given by the assessee to Nunhems India.

13. We have heard the rival submissions and have perused the relevant material on record. In order to adjudicate the issue at hand, firstly, it is relevant to note the Service Agreement For Research And Development Activities between the assessee, Nunhems Netherlands B.V. and Nunhems India Private Ltd dated 28.09.2021 which confirms the understanding and practice of the parties since 01.01.2012. It provides the following:

**1. THE SERVICES**

**1.1 SERVICE PROVIDER shall support the breeding programs in India by providing marker analysis services and producing doubled haploids.**

**The marker analysis will be provided by Nunhems Biotech Services Molecular markers (NBSM) and the production of doubled haploids will be executed by Nunhems Biotech Services Cell Biology (NBSC) and Farm. These services can be rendered for all crops, but only on specific request of NUNHEMS INDIA.**

**1.2 The Parties acknowledge that SERVICE PROVIDER will provide Services as an independent contractor and that all matters relating to the direction and control of the business of NUNHEMS INDIA together with any other significant matters which are not of a routine nature will not be considered Services for the purposes of this Agreement.**

**2. REIMBURSEMENT OF COSTS**

**In consideration of Services provided by SERVICE PROVIDER under this Agreement, NUNHEMS INDIA shall pay SERVICE PROVIDER the costs incurred by SERVICE PROVIDER in the performance of Services hereunder, with a Mark-up of six per cent (6%) to such costs.**

14. The issue to be adjudicated, in the present case, is whether the Marker Testing Services and Double Haploid ('DH') Services, considering the nature of service, would fall within the definition of Royalty as enumerated in Article 12(4) of the Indo-Netherlands DTAA. Firstly we need to understand the nature of services rendered.

15. The nature of service rendered by the assessee to Nunhems India, according to the 'Service Agreement For Research And Development Activities' between the assessee, Nunhems Netherlands B.V. and Nunhems India Private Ltd, operational since 01.01.2012, is to support the breeding programs in India by providing marker analysis services and

producing doubled haploids. First of all, the 'Test report' are not simply test but are 'marker analysis services' provided by the assessee to support Nunhems India's breeding programs in India. The Cambridge English Dictionary describes the term 'analysis' as the act of studying or examining something in detail, in order to discover or understand more about it, or your opinion and judgment after doing this. Thus the 'marker analysis service' contains examination of the seeds and leaves on which the assessee and its Indian AE forms an opinion and judgement with respect to future breeding programs in India. In fact, the said Agreement by the use of term "shall" mandates the assessee to support breeding programs in India. We note from the pages 56 to 57 of the Paper book filed before us as to what is involved in the Process flow for Marker Testing Services. Firstly, Nunhems India sends some dried leaves to Nunhems Netherland for Marker analysis by placing a request, for testing of such leaves, through a common tool called as "Nautilus" which is available to Nunhems group entities. Such tool is used by all the Nunhems group entities situated in different parts of the world for the purpose of placing request for such testing of leaves. Further, the required details of such leaves are also placed on the portal. All the leaves sent from Nunhems India is labelled by Assessee as different sample with a different number. Thereafter, all those samples shared

to the Assessee are tested at Assessee's Research and Development Centre ("R&D") centre with the use of required chemicals and technologies. Once the samples are tested at R&D centre, results in Microsoft excel sheet are shared with Nunhems India through the same tool - "Nautilus". The time or total duration required to perform the above testing and sharing of the results with Nunhems India is 20-25 days (approx.). As Nunhems India lacks the technology & resources, hence the samples are sent to Nunhems Netherland for marker analysis services.

16. There is another type of service which is called Double Haploid ('DH') Services. A doubled haploid (DH) is a genotype formed when haploid cells undergo chromosome doubling. Doubled-haploid technology enhances "forward breeding" by allowing hybrids to be bred with new traits. This gives the assessee an earlier look at new lines and greater knowledge about their environmental adaptability before they are fully tested, developed and marketed. The process flow involved for DH Services is that firstly, Nunhems India sends some seeds to Assessee for DH conversion. The Assessee grows these seeds at their poly houses till the time they become a plant. Out of that plant, a tissue or cell is extracted in R&D centre and new plant is formed which is called a DH plant. From DH plant, seeds are extracted again by R&D centre and sent

back to Nunhems India. Time or total duration required to complete this process is 1.5 years (i.e., 18 months).

17. Given this factual matrix of the case, we find that the AO has treated the receipts from marker analysis services and Double Haploid s services as “Royalties” under Explanation 4 to section 9(1)(vi) of the Act read with Article 12(4) of the Indo-Netherlands DTAA, on the ground that the assessee imparts its scientific experience with Nunhems India, in the form of test reports which are used as information that decides the industrial or commercial viability of the seeds. The AO holds the view that the information, as to whether it is industrial, scientific or commercial, has to be seen from the perspective of information recipient. Thus, consideration received by the assessee is for use of or right to use of information concerning industrial, commercial or scientific experience and the same is liable to be taxed as royalty. The AO is also of the view that the access to Nautilus platform/software/application also amounts to use of or right to use of copyright and use of equipment and consideration for the same is royalty.

18. On the other hands, the assessee explains the process by stating that all the activity of placing request for such testing of leaves and seeds to getting the result, is done through a common tool called as "Nautilus"

which is available to Nunhems group entities. Once the samples are tested at R&D centre, results in Microsoft excel sheet are shared with Nunhems India through the same tool - "Nautilus". Thereafter, the assessee contends that access to Nautilus software does not amount to royalty since no use/right to use of copyright contained in the software is being given by the assessee to Nunhems India. The assessee further contends that there is limited use of software license and no copy right has been granted to the client.

19. In order to decide whether the aforesaid payments would fall under "Royalty", it would be prudent to quote the relevant provision of Indo-Netherlands DTAA which defines the Royalty in Article 12 clause 4 as under:

<sup>1</sup>[ARTICLE 12

**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.]***

***<sup>2</sup>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 laws of that State, but if the recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or the fees for technical services.]***

***3. The competent authorities of the States shall by mutual agreement settle the mode of application of paragraph 2.***

***[4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.]***

20. In our understanding the term “Royalty”, according to the definition in Article 12(4) of the Indo-Netherland DTAA as above, has two segments. To our mind the DTAA thus defines two categories of consideration- one is for use of ‘copyright’ and the other is for use of ‘information’. “Royalty”, in one segment, is payments of any kind received as a consideration for the use of, or the right to use, any **copyright** of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process. The other segment comprises of payment of any kind received as a consideration **for information concerning industrial, commercial or scientific experience**. The two segments are segregated by the use of expression “or” which is primarily a **coordinating conjunction**, used to connect alternatives. The use of the expression **or for information concerning industrial, commercial or scientific experience** therefore, signifies a distinct and separate category than the “copyright” of ‘literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process’.

21. In the instant case, considering the nature of service provided by the assessee as discussed in paragraph 15 and 16, we are inclined to agree with the AO that the assessee is supplying information in the form of scientific experience which has commercial ramification to the Indian

AE in breeding plant variety. In fact, the assessee is mandated and bound by the 'Agreement' with Nunhems India, to mandatorily support the breeding programme in India. It is because the assessee possesses and is equipped with all the technology and resources. The Indian AE doesn't have the technology & resources and hence the samples of leaves and seeds are send to the assessee for testing and analysis. The assessee tests and conducts analysis of the Leaves and Seeds sent by Nunhems India which is labelled by Assessee as different sample with a different number and thereafter, the Leaves are tested at Assessee's Research and Development Centre ("R&D") centre with the use of required chemicals and technologies. The whole process takes approx. 20-25 days (approx.) and the result are shared with Nunhems India.

22. The other type of testing which takes 1.5 years (i.e., 18 months) i.e., Double Haploid ('DH'), the process of testing of seeds is more technical which involves chromosome doubling in the seed, where the assessee grows these seeds at their poly houses till the time they become a plant. Out of that plant, a tissue or cell is extracted in R&D centre and new plant is formed which is called a DH plant. From DH plant, seeds are extracted again by R&D centre and sent back to Nunhems India. Thus, Doubled-haploid testing imparts technology and knowledge to Nunhems India to "forward breeding" by allowing hybrids to be bred with new traits

wherein it gets equipped with knowledge to create new lines and greater knowledge about their environmental adaptability before they are fully tested, developed and marketed.

23. The aforesaid activities undertaken by the assessee, demonstrates the scientific and technical knowledge of the assessee which is not available with the Indian AE. The assessee's knowledge and scientific experience has a direct link in converting an average seed, sent by the Indian AE, into a healthy double Haploid seeds. These seeds are created by controlled scientific method to produce offspring with enhanced traits, such as higher yield, significantly increase crop productivity, pest and disease resistance- potentially reducing the need for chemical pesticides and drought resistance and greater uniformity i.e., making them easier to grow and harvest.

24. We are of the considered view that the report the assessee sends to the India AE, encapsulate all the scientific experience and knowledge of the assessee, gleaned in the process of converting the seed from ordinary to double Haploid seeds, prepared over a time period spanning over 18 months. The reports sent to the Indian AE are nothing but a bank of scientific experience and advice emanating from technological and scientific method undertaken by the assessee as mandated in the "Agreement" itself.

25. In so far as the assessee's contention that the use of "Nautilus" software doesn't tantamount to Royalty as no copyright of the software is given to the Nunhems India, is concerned, we feel the same is misplaced. We are of the view that consideration paid to the assessee is not merely for the access to Nautilus software, but more specifically for the information contained in the marker analysis and report of production of double haploid which is uploaded in the Nautilus portal. In the instant case, the consideration is not for use/right to use of copyright contained in the software whose access is given by the assessee to Nunhems India, but for the information and knowledge developed out of technology and scientific experience imparted by the assessee to Nunhems India.

26. We are of thus of the considered view that the assessee is not simply providing Testing services. It provides specific information of the leaves and seeds to the Indian AE which are soaked in assessee's scientific experience where the assessee carries out experiments on the seeds sent to it, involving extraction of tissue or cell to create a new plant. Further a new breed of seed is extracted from the said plant developed by the assessee which is utilized by Nunhems India in breeding new variety of plant for commercial exploitation. The assessee through such information, in the form of test reports, provide support to the

Nunhems India to enhance and improve the vegetable varieties; enables the Indian AE to achieve breeding progress through the assessment of external and internal traits such as plant habitus, disease resistance, yield or quality traits. The assessee provides its Indian AE, plants value chain and solutions for its customers and consumers worldwide demonstrating the industrial and commercial ramification of the analysis conducted by the assessee.

27. The assessee has taken a plea that the testing services rendered by the Assessee are routine in nature and are provided on recurring basis and that the Assessee did not make available any skill, know-how, knowledge, experience, etc. known to the recipient of the service (Nunhems India) so as to equip Nunhems India to independently perform the technical function by itself in future, without the help of the Assessee (service provider). On the issue of “make available”, we are of the considered view that the Article 12(4) of the Indo-Netherlands DTAA, nowhere provides the condition of “make available” be satisfied for determining a consideration, fall under “Royalty”. The provisions of Article 12(4) of the Treaty requires that the consideration be **for information concerning industrial, commercial or scientific experience**. As we have delineated above, the Test Reports are not simply a certificate or blood report, but sharing and partaking of an

information concerning commercial and scientific experience with Nunhems India which enables the Indian AE to improve the “plant variety, and achieve breeding progress through assessment of external and internal traits such as plant habitus, disease resistances, yield and quality traits. variety of seeds of different plants”. In cases of ‘seeds’, the assessee converts the seeds sent by Indian AE into Double Haploid, grows these seeds into DH plant and extracts seeds from the said DH Plants and gives the extracted seed to the Indian AE. The entire information of scientific experience from conversion of seed into DH plant and extraction of seed from that DH plant, is captured in the Test Report which is shared with the Indian AE. This imparting of scientific experience and knowledge to the Indian AE, through Test reports, for a consideration, is independent of the “make available” clause being satisfied for the purposes of treating the said consideration fall under the definition of “Royalty” under Article 12(4) of the Treaty.

29. The assessee reliance on the *Commissioner of Income-tax, International Taxation -1 vs. Amazon Web Services, Inc* and *Commissioner of Income-tax, International Taxation vs. RELX Inc* (supra) doesn't help the cause of the assessee as facts are distinguishable. In the case of *Amazon*, the facts were that the assessee provided standardized and automated computing services/AWS services

to its customer around the globe. The hon'ble Court, interpreting the Indo-USA DTAA, held that consideration for grant of access to standard and automated facilities, of the 'right to use' scientific equipment is not 'royalty' under Article 12(4)(a) of the India-US DTAA. It also held that grant of such service does not entail transfer of any technical know-how, skill, knowledge or process and that the customers of the Assessee do not acquire any right to commercially exploit any of the Assessee's IPRs. The provision of cloud computing services does not entail placing any hardware at the exclusive disposal of the customer.

30. In the case of *Relx*, the court was concerned with issue of subscription fees and held that it would not fall within the ambit of Article 12(4)(b) of the Indo-US DTAA, since the access accorded to the Indian consumer was neither a transfer of copyright nor would it satisfy the requirement of "included service" comprising of an element where technical knowledge, experience, skill, know-how or processes was made available. The subscription fee would neither be "royalty" nor can it be validly viewed as Fees for Technical Services.

31. The reliance in the case of *Diamond Services International (P.) Ltd. V Union of India* (supra) is also distinguishable in facts. The hon'ble Court in the said case, held that payment in relation to service of grading and certification of diamonds performed from laboratory

situated in USA does not make available technical knowledge, experience, skill, etc. to enable the person acquire the service to apply the technology contained therein and also is not liable to be taxed as royalty.

32. In none of the above cases, the hon'ble Courts was not concerned with the definition of "Royalty" under Article 12(4) of the Indo-Netherlands DTAA, being consideration **for information concerning industrial, commercial or scientific experience** under the specific facts of the instant case. In the instant case, it is very relevant to note with regard to test on seeds, the assessee doesn't only sends test reports to its Indian AE, it converts the "seeds" into Double Haploid (DH) plant and provides the seeds, with enhanced properties, extracted from the said DH plants, for commercial exploitation. Such creation of 'enhanced' seeds involves technology and scientific experience whose information is passed on to the Indian AE. These distinguishing features in the instant facts of the case, makes it different from the facts of the cases decided by the hon'ble Courts in the above cases. We therefore hold that the said receipts from Testing service, satisfies the condition enumerated in Article 12(4) of the Indo-Netherlands Treaty to be considered as "Royalty". The ground 1 to 3 are dismissed.

33. Ground Nos. 4 to 9 is with regard to addition of Rs. 10,66,76,030/- received for providing IT support services to its AEs by construing the same as Financial Statements. Facts relating to this issue, in brief, the assessee received consideration for IT support services of Rs. 10,66,76,030/- from Nunhems India. The assessee submitted that the above charges have been recovered on cost to cost basis. The AO treated the said receipts of Rs. 10,66,76,030/- for usage of IT infrastructure in the nature of FTS liable to tax as per application rate under the India-Netherland DTAA and u/s 9(1)(vii) of the Act and added the same to the income of the assessee. Aggrieved, the assessee went in appeal before the DRP who concurred with the Assessing Officer. Now the further aggrieved assessee is in appeal before us.

34. Before us, the ld AR vehemently argued that the said receipts are merely reimbursement of IT support services. The assessee has engaged third party, TCS Netherlands, to provide a bundle of IT support services to Nunhems affiliate entities across the globe. Wherever Nunhems India faces any technical issues/ requires any technical support in relation to IT, Nunhems India raises a ticket by way of e-mail (describing the issue being faced) to TCS helpdesk. Subsequently, TCS Netherlands within stipulated time period resolves the technical issue. In relation to such services, the third party raises invoices on the Assessee and Assessee

raises corresponding invoices (on cost-to-cost basis without any markup) on group affiliates of other countries to recover IT support service cost attributable to such countries. The Id AR furnished the copies of invoice (for the month of March 2021) amounting to EURO 4,39,943.65 (excluding taxes) raised by third party on the Assessee (enclosed as Item 14.4 of Paper-book (kindly refer page 263 of Paper-book), to show that the invoices issued by the Assessee to Nunhems India and other group affiliates is mere cost to cost reimbursement without any profit element involved and hence, the Id AR claimed the same as not taxable.

35. The Id AR placed reliance on the decision of *DIT vs. A.P. Moller Maersk AS* [2015] 63 taxmann.com 303 (SC) wherein it was held that payments received by taxpayer towards reimbursement of costs incurred for global telecommunication facility provided to Indian agents could not be termed as FTS.

36. The Id AR reiterated that it is a settled principle that control over the equipment is mandatory to establish use of such equipment by the payer. In the present case, the Assessee did not have physical control or possession over the equipment used by the Assessee. Reliance is placed in case of *Rackspace US Inc., vs DCIT* (Supra) (1634/Mum/2016, 1075/Mum/2017, 3507/Mum/2017) (Mumbai - Trib.), wherein, the Hon'ble Mumbai Tribunal held that income earned by assessee (a US

company) from rendering cloud hosting services to Indian customers, doesn't constitute royalty under Article 12 of India-USA DTAA due to absence in possession/physical control by customers over the servers/equipment.

37. The Id AR further drew our attention towards the SOW entered between the Assessee and third party providing IT services (enclosed as Item 16.1 of Paper-book), to show that the Assessee and other group affiliates cannot solve IT issues on its own in future independently. Every time the Assessee and group entities have to knock the doors of the third party for these IT support services. The technology used in rendering the IT support services are not being transferred for further use of Nunhems group. In other words, the Assessee/ other group entities are not enabled to apply the technology on their own.

38. The Id AR submitted that in the present case, the services rendered by the Assessee are routine in nature and are provided on recurring basis. The Assessee did not 'make available' any skills, know-how, knowledge, experience, etc. known to the recipient of the service so as to equip him to independently perform the technical function himself in future, without the help of the service provider and hence, the same is not taxable as fees for technical services.

39. The Id DR, on the other hand, vehemently argued that IT services for various business processes, network administration and maintenance of platforms/applications are technical Services and consideration received by the assessee is FTS as per the Act and the tax treaty. The Id DR submitted that the assessee through TCS Netherlands provides IT support services including IT Infrastructure services, data center services, cyber security, applications, and maintenance of various business suit applications etc. The assessee provides the said services for all the group concerns by centrally procuring the infrastructure and services and then recovers the cost for use of infrastructure and charges for maintenance of the same.

40. The Id DR stated that the assessee provides IT support services which include user authorization, system maintenance, cyber security, data center services, applications and maintenance of various business suites applications etc. Thus, it is not a case of procurement of services rather it is case of making available complete infrastructure to AEs. Therefore, it is a clear case of making available IT infrastructure and AEs are charged on actual usage basis. The assessee is also maintaining the IT infrastructure and in the process charges maintenance fee form the group concerns. It is immaterial as to whether such IT Infrastructure is owned by the assessee or not.

41. The Id DR stated that the requirement of possession or control of equipment with the user, is not provided in law law does not provide for any such and relied on the decision of the Hon'ble Madras High Court in the case of ***Verizon Communication Singapore Pte Limited*** which held that after the amendment introduced in the year 2012, with effect from 01.06.1976, irrespective of possession, control with the payer or use by the payer or the location in India, the consideration would nevertheless be considered as royalty. It is the say of the Id DR that the Explanation 5 to section 9(1)(vi) makes it clear that possession or location of equipment is immaterial for taxing the same as royalty. The retrospective amendment has removed all doubts in so far as the expression 'use or right to use' has to be understood in the context of possession, control or location of equipment/ right /property /information. The Id DR contended that the services rendered by the assessee to the Indian AE fall within the definition of Fees for Technical Service (FTS) as per article 12(5)(b) of the tax treaty and covered under section 9(1)(vii) of the IT Act-1961 and Article-12 of the tax treaty

42. The Id DR relied on the decision in the ***Intertek Testing Services***, in (2008) (307 ITR 418), by Authority of Advance Ruling (AAR) that the expression "technical services" cannot be construed in narrow sense as also on in the case of ***G.V.K. Industries*** 371 ITR 453 (SC), wherein it

was held by the apex court that advice given by a financial consultancy firm on the modalities of procuring loans shall be regarded as technical and consultancy service; Hon'ble Supreme Court in the case of **Continental Construction Ltd. vs. CIT** 195 ITR 811 (SC) which has held that the advice rendered by the lawyer would be a piece of 'technical service'. In the case of **CBDT Vs. Oberoi (India) (P.) Ltd.**, 97 Taxman 453 (SC), it was held that services provided by hotel consultants and specialists to a Foreign Hotel was 'technical service'.

43. We have heard the rival submissions and have perused the relevant material on record. To adjudicate the issue, it would be relevant to narrate the provision of DTAA defining "Fees for Technical Services".

The Treaty states as under:

**5. For purposes of this Article, "fees for technical 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 :**

<b>(a)</b>	<b>are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received; or</b>
<b>(b)</b>	<b>make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.</b>

**<sup>2</sup>[6. Notwithstanding paragraph 5, "fees for technical services" does not include amounts paid :**

<b>(a)</b>	<b>for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property;</b>
<b>(b)</b>	<b>for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;</b>
<b>(c)</b>	<b>for teaching in or by educational institutions;</b>

(d)	<i>for services for the personal use of the individual or individuals, making the payment; or</i>
(e)	<i>to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 14 (Independent Personal Services) of this Convention.]</i>

***7. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of one of the States, carries on business in the other State, in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for technical services are effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 14, as the case may be, shall apply.***

44. We find from the perusal of Master Service Agreement ("MSA"), regarding routine IT support services, between the assessee and Tata Consultancy Services Netherlands BV ("TCS Netherlands"), that TCS Netherlands along with its local supplier, would provide IT support services to the Assessee and Nunhems India wherein Nunhems India may request for end to end IT support services including IT infrastructure services, data centre services, cyber security, applications, and maintenance of various business suite applications etc to be rendered by TCS Netherlands / local supplier on behalf of TCS Netherlands.

45. In this arrangement, whenever Nunhems India face any technical issues/require any technical support in relation to IT, it raises a ticket by way of e-mail (describing the issue being faced) to IT helpdesk. Subsequently, TCS within stipulated time period resolves the technical

issue. In relation to such services, TCS Netherlands raises invoices on the Assessee and Assessee raises corresponding invoices (on cost-to-cost basis without any markup) on group affiliates of other countries to recover IT support service cost attributable to such countries.

46. Admittedly, the said receipts are merely reimbursement of IT support services, where whatever the third party, TCS Netherlands, charges the assessee, the same is recouped from the Indian AE. We find that the reliance on the decision of *DIT vs. A.P. Moller Maersk AS* [2015] 63 taxmann.com 303 (SC) wherein it was held that payments received by taxpayer towards reimbursement of costs incurred for global telecommunication facility provided to Indian agents could not be termed as FTS is apt and applies on the facts of the instant case.

47. We further find that TCS provides a bundle of IT support services and the IT infrastructure remains under the control of TCS. In the instant case, the physical control or possession over the equipment remains with TCS and not with the assessee and hence the case of *Rackspace US Inc., vs DCIT* (supra) squarely applies wherein, the Hon'ble Mumbai Tribunal held that income earned by assessee (a US company) from rendering cloud hosting services to Indian customers, doesn't constitute royalty under Article 12 of India-USA DTAA due to absence in possession/physical control by customers over the servers/equipment.

48. We further note that each time the Indian AE is faced with IT issues, it cannot solve the same on its own independently. We note from the Agreement that the Assessee and its group entities have to seek support from TCS and the technology used in rendering the IT support services are not being transferred for further use of Nunhems group. We are inclined to agree with the assessee that the services rendered by the Assessee are routine in nature and are provided on recurring basis and the Assessee never 'makes available' any skills, know-how, knowledge, experience, etc. known to the recipient of the service so as to equip him to independently perform the technical function himself in future, without the help of the service provider and hence, the same is not taxable as fees for technical services. We are therefore of the considered view that when the "make available" clause is not satisfied, the receipts for IT support services cannot be brought under the ambit of FTS under the Article 12(5) of the Indo-Netherlands Treaty. We are fortified in our view by the decision of the hon'ble Delhi High Court, in the case of *The Commissioner Of Income Tax (international Taxation)-1, Delhi v. M/s Bio-rad laboratories (singapore) Pte Ltd* in ITA 564/2023 date 03.10.2023 held that

*"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/Id. 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."*

49. Similarly, the decision of the hon'ble Delhi Court in the case of **Relx** (supra) squarely applies to the facts of this issue wherein it held that access to data base did not constitute rendering of any technical or consultancy services and in any case did not amount to technical knowledge, experience, skill, know-how or processes being made available to subscriber neither there was any transfer of copyright. It would also be pertinent to refer to the relevant observations of the Hon'ble High Court in the case of **Amazon** (supra) which read as under:

**"35. The aforesaid explanation clearly indicates that the services offered by the Assessee does not entail transferring of any skill, knowledge, technology or process to its customers. The cloud computing models indicate that the Assessee has developed an infrastructure and permits the customers to access the hardware and software for developing their own content.**

**36. There is no cavil that the customers do not control the cloud computing hardware or software. They also have no right to commercially exploit the same.**

50. The factual matrix of the instant case, lead us to believe that the “make available” clause is not satisfied. Applying the above noted judicial precedents, we therefore hold that the receipts on account of reimbursement of IT Support services are not liable for tax as FTS u/s 9(1)(vii) of the Act. Accordingly, we allow the grounds Nos. 4 to 9 raised by the assessee.

51. Ground No. 10 relating to penalty u/s 270(A) of the Act is premature and needs no adjudication.

52. In the result, appeal of the assessee in ITA No. 3382/DEL/2023 is partly allowed.

The order is pronounced in the open court on 08.12.2025.

Sd/-

**[VIKAS AWASTHY]**  
**JUDICIAL MEMBER**

Sd/-

**[NAVEEN CHANDRA]**  
**ACCOUNTANT MEMBER**

Dated: 08<sup>th</sup> December, 2025.

VL/

Copy forwarded to:

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

Asst. Registrar,  
ITAT, New Delhi

Sl No.	PARTICULARS	DATES
1.	<i>Date of dictation of Tribunal Order</i>	
2.	<i>Date on which the typed draft Tribunal Order is placed before the Dictation Member</i>	
3.	<i>Date on which the typed draft Tribunal Order is placed before the other Member</i>	
4.	<i>Date on which the approved draft Tribunal Order comes to the Sr. P.S./P.S.</i>	
5.	<i>Date on which the fair Tribunal Order is placed before the Dictating Member for pronouncement</i>	
6.	<i>Date on which the signed order comes back to the Sr. P.S./P.S</i>	
7.	<i>Date on which the final Tribunal Order is uploaded by the Sr. P.S./P.S. on official website</i>	
8.	<i>Date on which the file goes to the Bench Clerk alongwith Tribunal Order</i>	
9.	<i>Date of killing off the disposed of files on the judiSIS portal of ITAT by the Bench Clerks</i>	
10.	<i>Date on which the file goes to the Supervisor (Judicial)</i>	
11.	<i>The date on which the file goes for xerox</i>	
12.	<i>The date on which the file goes for endorsement</i>	
13.	<i>The date on which the file goes to the Superintendent for checking</i>	
14.	<i>The date on which the file goes to the Assistant Registrar for signature on the Tribunal order</i>	
15.	<i>Date on which the file goes to the dispatch section</i>	
16.	<i>Date of Dispatch of the Order</i>	