IN THE INCOME TAX APPELLATE TRIBUNAL
"C"BENCH: BANGALORE

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

IT(IT)A No.260/Bang/2025
Assessment Year : 2022-23

Q2 Software Inc. 10355 Suite 100, Pecan Park Blvd. Austin, United States C/o Sharath Rao BBSR & Associates LLP Embassy Golf Links Business Park Pebble Beach, 3rd Floor Off Intermediate Ring Road Bengaluru 560071 Karnataka **PAN NO :AAACQ6327P**	**Vs.**	DCIT International Taxation Circle-2(1) Bengaluru
APPELLANT		**RESPONDENT**

Appellant by	:	Sri Sarath Rao, Smt. Vaidehi G. & Sri Dhiraj, A.Rs
Respondent by	:	Dr. Divya K.J., D.R.

Date of Hearing	:	13.11.2025
Date of Pronouncement	:	10.02.2026

O R D E R

PER KESHAV DUBEY, JUDICIAL MEMBER:

This appeal at the instance of the assessee is directed against the order of the ld. DCIT Assessment Circle 2(1), Bengaluru dated 8.1.2025 vide DIN & Order No. ITBA/AST/S/143(3)/2024-25/1071980555(1) for the assessment year 2022-23.

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

Based on the facts and circumstances of the case, Q2 Software Inc (hereinafter referred to as "Q2" or "the Appellant" or "the Company"), respectfully submits in respect of the Final Assessment Order ("FAO" or "Order") dated 8 January 2025 passed by the learned Deputy Commissioner of Income-tax, International Taxation, Circle 2(1), Bangalore ("Assessing Officer" or "AO") under section 143(3) read with section 144C(13) of the Income tax Act, 1961 ("the Act") for the Assessment Year ("AY") 2022-23 that –

1. *The FAO passed by the Learned AO and the directions passed by the Honorable Dispute Resolution Panel ("DRP") upholding the taxability of entire receipts of Appellant is bad in law and on facts of the case.*

2. *Based on facts and circumstances of the case, the AO/DRP grossly erred in law and on facts by misinterpreting the nature of offerings and services including the arrangements and thereby treating that the entire receipts of Rs. 8,13,79,239 of the Appellant as Fees for Technical Service ("FTS")/ Fees for Included Services ("FIS") chargeable to tax as per Article 12 of India-USA Double Taxation Avoidance Agreement ("DTAA").*

3. *The AO/DRP have erroneously concluded that the income from sale of software and provision of support and other related services provided to customers (that are purely ancillary to sale of software) is in the nature of FTS/ FIS as per Article 12 of India-US DTAA.*

4. *The AO/DRP have erred in not relying on the decision of the Supreme Court in the case of Engineering Analysis merely because the Appellant was not a party / petitioner in the said ruling in spite of the fact that the case of the Appellant was covered by the said decision*

5. *The AO/DRP have erred in not following the decision of the jurisdictional Tribunal in Appellant's own case for AY 2021-22 in ITA No. 1132/Bang/2023 in spite of specific submission that the factual matrix and the legal issues are identical for the subject assessment year.*

6. *The AO/ DRP have also erred in holding that the Appellant has provided technical and consultancy services to its Indian customers without appreciating the fact that the service contract of the Appellant with the Indian customer is merely for post-sale maintenance and support services and that no technical knowledge, experience, skill, know-how or process has been made available by the Appellant to customers to attract FTS/FIS as required under India-USA DTAA.*

7. *The AO/ DRP have erred on facts by holding that the Appellant has made available technical knowledge to third party sub-contractor, namely Cloud Kaptan Consultancy Services Private Limited.*

8. *The AO has erred in law and on facts by placing reliance on the "General and Administrative Service Agreement" to allege that the Appellant has provided technical and consultancy services to its Associated Enterprise ("AE"), namely MFI Flex Technologies Private Limited, without appreciating the fact that (a) the said agreement is with respect to general back-office support, administrative services to the AE; and (b) during the subject AY, no such services were provided by the Appellant and no receipts in respect of the same has been earned by the Appellant.*

9. *The AO/DRP have grossly erred in holding that existence of few clauses like confidentiality, non-disclosure, protection of Intellectual property such as trademark etc demonstrate the transfer of technical knowledge, experience, skill, know-how or process without appreciating that these are standard clauses used in almost every contract to protect the interest of the transacting parties.*

10. *The AO/DRP have erred in relying on judicial precedents which are distinguishable on facts vis à-vis the case of the Appellant.*

<u>Miscellaneous grounds</u>

11. *The AO has erred in making an erroneous arithmetical addition of interest amounting to INR 11,22,251 at Sl no 42 of the computation sheet of the final assessment order, without appreciating the fact that the TDS credit available to the Company exceeds the amount of tax liability computed and hence, there cannot be any interest liability for the said AY.*

12. *The AO has erred in stating that an amount of INR 1,49,384/- has been refunded to the Appellant in the computation sheet, whereas the same was not actually received.*

13. *The AO has therefore erred in raising an erroneous consequential demand of INR 9,26,881 for the AY 2022-23*

The Appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.

3. The ground No.1 is general in nature, which do not require any adjudication.

4. The ground Nos. 2 to 10 are inter-related with regard to treating of the amount of Rs.8,13,79,239/- received by assessee from Indian entities during the financial year 2021-22 relevant for the AY 2022-23 as fees for technical services/FIS.

4.1 The brief facts of the case are that Q2 Software Inc. ("Q2" or "the Company" or Assessee) is a company incorporated under the laws of USA and a tax resident of the USA (non-resident under Income Tax Act,1961 ("the Act"). The assessee is engaged in the business of providing cloud-based software products for banks, market places, online lenders and lessors. During the AY 2022-23, the assessee sold certain software products to the following Indian customers -

(a) The Karur Vysya Bank Ltd Central Office ("KVB");
(b) Monexo Fintech Private Limited ("Monexo"); and
(c) Home First Finance Company India Limited ("Home First").
(d) L&T Financial Holdings ("L&T")

4.2 In addition, the assessee also provides support desk services (Basic/premium support services) to its customers in relation to the software product sold. The Assessee relied on the agreement with the customer-Monexo Innovations Limited, wherein limited rights to use is granted as apparent from Clause 4 of the Agreement "Rights of use". Further, the assessee relied on support policy (Page 141 of PB) wherein the helpdesk support services include the following:

(i) Diagnostic of problems or issues with the product
(ii) Reasonable efforts to resolve reported and verifiable errors in the product so that it performs materially as described in the

product documentation.

(iii) A review of cases logged by CDSU; and if needed, a recommend specific organization and process changes to help the customer comply with the support policies

4.3 The assessee company has also provided services to Cloudkaptan Consultancy Services Private Limited ("Cloudkaptan") under a Statements of Work ("SOWs"). These services were primarily to be provided to Cloudkaptan's clients outside India to install, configure, customize and otherwise integrate Q2 software as a service product into such customers environment wherein the customers had already purchased licensed software from Q2 under a separate agreement. These consultancy services provided by Q2 to Cloudkaptan during the subject AY 2022-23 was to assist the Cloudkaptan's customers outside India.

4.4 The Break-up of the receipts of Assessee from customers is provided as follows:

Particulars	Amount
Cloudkaptan Consultancy Services Private Limited	36,68,474
Monexo Fintech Private Limited	4,13,481
The Karur Vysya Bank Ltd	5,38,69,277
Home First Finance Company India Limited	1,37,16,111
L&T Finance Limited	97,11,896
Total	**8,13,79,239**

4.5 The AO considered the entire receipts of assessee as fees for technical services (FTS) even though included services (FIS) chargeable to tax as per Article12 of India-USA DTAA. During the proceedings before DRP, the Assessee also made submission

placing reliance in assessee's own ITAT case for AY 2021-22 vide ITA No. 1132/Bang/2023 dated 20 August 2024 involving the same parties including one new party namely L&T Finance providing the very same nature of services. The DRP vide directions dated 28 December 2024, without considering the decision of the Hon'ble ITAT passed on 20 August 2024 followed its own decision for AY 2021-22 upheld the amount as FTS/FIS.

5. Aggrieved by the order passed u/s 143(3) r.w.s 144C(13) of the Act, the assessee filed the present appeal before this Tribunal.

6. At the outset, the ld. AR of the assessee submitted that the issue stands covered in its favour vide its earlier year order in **ITA No. 1132/Bang/2023 dated 20 August 2024** wherein the ITAT, after elaborately considering the facts and submissions, has concluded that the services do not constitute FTS/FIS and hence the income is not taxable in India. The nature of income and the agreements remain the same as that of the previous years. **Further, the A.R submitted that the AO order for current year AY 2022-23 is verbatim the same as that of previous year (AY 2021-22)** and provided a comparative analysis of the AO order for previous AY 2021-22 and AO order for the current AY 2022-23 as below.

6.1 Submission of the Assessee is reproduced below –

AO Observation	Assessee'sSubmissions
Para 7.7 & 7.8 of FAO **(of both AY 2021-22 & 2022-23)** The assessee is a foreign company and it is following	• Assessee's facts are not that of offshore-onsite development model. The Indian AE (MFI Flex Technologies Pvt Ltd) is purely providing software development services to its parent company, Q2 Inc and does not have any contract with the customer in India. • Q2 Inc's contracts with Indian

offshore-onsite development model wherein a major portion of the software development activity is either subcontracted to AE in India <u>or third party in India as the clients of the assessee are in India ……</u> Therefore, income is deemed to be arisen in India.	customers does not provide for transfer of technology and knowhow to the Indian customers. Certain helpdesk support services are provided to customers. • Payments received from Cloudkaptan was with respect to design and code review to Cloudkaptan with respect to <u>**Cloudkaptan's customers outside India**</u>.
Para 8.4.2.2 of FAO (of both AY 2021-22 & 2022-23) For the purposes of substantiating that Q2 is executing its contracts with Indian clients with the help of its Indian AE and third-party sub-contractors situated in India, the AO has relied on the 'Software Support Services Agreement' and 'General and Administrative Service Agreement' entered into by Q2 with its Indian AE, MFIFlex.	Reliance of the AO on the 'General and Administrative Service Agreement' entered into by Q2 with MFIFlex is misplaced as, under the said agreement, Q2 provides back-office support, administrative services to MFIFlex for which MFIFlex will pay Q2 service fees. <u>However, it is important to note that during the subject AY 2022-23, no such transaction / service has taken place between Q2 and MFIFlex and Q2 has not received any payment from MFIFlex</u>.
Para 8.4.2.5 of FAO (of both AY 2021-22 &2022-23) The AO has held that Q2 is engaged in all the stages of Software Development Life Cycle (SDLC) and that Q2 is <u>providing technical and consultancy services to the</u>	The AO has failed to prove that how, by merely being involved in all the stages of SDLC, Q2 is making available any technical knowledge, skill, know-how etc. to the AE/ sub-contractor. <u>The AO has also incorrectly referred to Q2 being engaged in all the stages of the SDLC process, since the SDLC process is part and parcel of MFI Flex's software development services to Q2</u>. The AO's reference to SDLC is therefore without any basis.

AE/sub-contractor **and the client.**	
Para 8.5 of FAO (of both AY 2021-22 & 2022-23) The AO/ DRP have concluded that Q2 would be constantly giving technical inputs to the AEs and as is evident from the Agreements with the clients, would not only be sending its trained / skilled personnel to the clients onsite but at the same time provide technical inputs to the sub-contractors	Conclusion of the AO/DRP is without any basis and not borne from facts of the case. Even assuming and without admitting the fact that technical inputs are provided to AEs, **no income is received by Q2 from the AE**. Without prejudice to all the above, the amount considered as FTS and disallowed the payment made by clients for rendition of software services on the ground that technical inputs are provided to sub-contractors.
Paras 9.4, 9.5, 11 and 17(i) of FAO (of both AY 2021-22 & 2022-23) The AO/DRP has held that the presence of confidentiality and intellectual property rights ('IPR') clauses in the agreement along with non-disclosure obligation proves the fact that technical knowledge, skill, experience, technology etc. have been made available by Q2 to the AEs / sub contractors / clients.	The AO/DRP have misdirected themself by referring to the various clauses (like confidentiality, IPR, developed technology, etc) in the Software Services Contract between Indian AE company and the parent US company (assessee company) to conclude that the Assessee company has transferred technology to the customers. This is clearly misplaced as the transfer of developed technology is the other way round (ie, from the Indian AE company to the assessee under the software services contract). The services are provided by AE to assessee as per the terms of the Agreement. Further, the Intellectual Property (IP) in services rendered by the AE to assessee vests with the assessee. Further, **AO vide page 35 para 11 observed that AE has made technology available to the assessee**. Hence, it is submitted that the conclusion of the AO is devoid of merits. Even in the context of customized software provided by the Assessee company to it is customers, the SC in Engineering Analysis (At para 117) held as follows:

	"117. The conclusions that can be derived on a reading of the aforesaid judgments are as follows: *(iv) A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, ……. no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(1)(aa) of the Copyright Act.* ***<u>It makes no difference whether the end-user is enabled to use computer software that is customized to its specifications or otherwise</u>****."* Therefore, what is important is the nature of rights in the licensing Agreement for the customized software. If it is a mere use – only right to use even if it is a customized software will not amount to royalty. The decision of the Bangalore ITAT relied on by the AO in the case of *Filtrex Technologies (P.) Ltd.[2011] 47 SOT 69 (Bangalore Trib.)* is distinguishable on facts, given that said case involved a clear knowledge transfer of the manufacture of carbon blocks used in water purification system.
Para 12 of FAO (of both AY 2021-22 & 2022-23) The test plans and implementation plans which are required for the purpose of testing and implementation are shared with the AE/ sub contractor to ensure successful running of the software…	Here again, the AO confuses himself with the testing and implementation phase of the software services provided by MFI Flex under the software services agreement. The AO has misguided himself by treating these as services provided by Q2 to its customers. Therefore, the basis of AO's conclusions is incorrect.
Para 13 of FAO (of both AY 2021-22 & 2022-23) In the maintenance	Maintenance and support services are provided so as to ensure functioning of the software. No skill, technology etc is made available to the AE or the customers. Further, the said services are to be

stage, Q2 maintains the software solution deployed at the client's site. This involves providing upgrades as desired by the client and software solution to new hardware platform etc. As per the AO, the same would amount to "make available" of knowledge etc.	considered as ancillary to the supply of the software. Where the receipts from the sale of the software supplied by Q2 itself do not give rise to any "Royalty Income" under the India – USA DTAA, the support services, which are ancillary to the main supply of right to use of software, shall also not be chargeable to tax as per the India – USA DTAA.
Para 17 (ii) of FAO (of both AY 2021-22 & 2022-23) The AO has held that the AE/ client are enjoying enduring benefit from the knowledge. He has held that the entire software is customizable to suit the needs of the client and they are provided with necessary skill by Q2 so that they can run the IT platform on their own after its deployment.	The AO has failed to appreciate that presence of a customizable software to suit the needs of a client does not imply that the technical knowledge etc. used in the development of the software itself is made available to the AE/ customer. Technical know-how of the software would not be shared with the customer and the software itself is akin to goods/copyrighted article as held by the SC. It is submitted that the support services which are ancillary to the sale of software is not FTS/FIS. Appellant relies on the following judicial precedence: (i) TSYS Card Tech Ltd [TS-36-ITAT-2023(DEL)] [Para 9] (ii) Kony Inc Vs. DCIT [2023] 147 taxmann.com 527 (Delhi Trib.) [Para 10] The service recipient is not enabled independently to make use of the technical knowledge, etc, by himself in his business or for his own benefit without recourse to Q2. The Hon'ble jurisdictional Karnataka High Court ("KHC") in the case of ***CIT vs. De Beers India Minerals (P) Ltd. [2012] 21 taxmann.com 214 (Karnataka HC)*** dealt with the concept of "make available" in detail and held as under: *"....To attract the tax liability, that* ***technical knowledge, experience, skill, know how or process which is used by service provider to render***

	technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know how or processes so as to render such technical Services*. .....Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilises for rendering technical services....”* Attention is drawn to MoU to the India-USA DTAA wherein the first part of paragraph 4(b) of Article 12 of the DTAA, the following is provided in the MoU: *"......**Generally speaking, technology will be considered 'make available' when the person acquiring the service is enabled to apply the technology**. .... **Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available**".* Further, the support services which are rendered by Q2 are not enduring in nature and is limited to the term of the agreement. Reliance is also placed on plethora of decisions which have upheld the principle of ‘make available’ condition including: (i) Murex Southeast Asia (P.) Ltd. V. DCIT [2023] 152 taxmann.com 442 (Mumbai - Trib.), (ii) Redcore (India) (P.) Ltd. vs Income-tax Officer [2019] 107 taxmann.com 317 (iii) NTT Asia Pacific Holdings Pte Ltd. [2022] 141 taxmann.com 137 (Mumbai - Trib.)
Para 17 (iii) of FAO (of both AY 2021-22 & 2022-23) The AO has held that	This is incorrect as the right to use software would be available only during the term of the agreement as the agreement is not a perpetual license. Hence the test of ‘make available’ is not

the technology remains with the client even after the particular contract comes to an end.	satisfied. Further all IPR in the software remain with Q2 itself.
Para 18.1 of FAO (of both AY 2021-22 & 2022-23) The AO has relied on the decision of AAR in P.No.28 of 1999 (AAR) ([2000] 242 ITR 208) holding that the services involved in this case satisfies the make available condition.	AAR rulings are applicable only with respect to that applicant who sought the ruling and is not a judicial precedence. Notwithstanding this, the understanding of the AO does not seem correct in this case as the AAR had held the services to be taxable as business profits, and not taxable as FIS.
Para 18.2 of FAO (of both AY 2021-22 & 2022-23) The AO has relied on the decision of the AAR in **Perfetti Van Melle Holding B.V. (342 ITR 200) (AAR)** wherein support 2021-2services were termed as FIS.	The AO has failed to note that the same ruling has been set aside by the Delhi High Court in **[2014] 52 taxmann.com 161 (Delhi)** on the basis that the applicable tax treaties were not analyzed appropriately and matter has been remanded for fresh adjudication. Hence the said ruling of the AAR can be said to non-applicable in the present case.

Notwithstanding the above, the AR of the assessee vehemently submitted the following:

The Company has earned income amounting to INR 8,13,79,239 from different parties from the following sources which are provided in **Pg 358 of PB**:

Nature of income	**Summary of arguments**
Sale of software where the Company provides right	No 'managerial' or 'consultancy' services are being rendered. With respect to technical services, it is submitted that once the sale of software is considered as sale of goods which is a copyrighted

to use the computer software through agreements with Indian customers.	article as held by the SC in the case of **Engineering Analysis [2021] 125 taxmann.com 42 (SC),** the same cannot be considered as a 'service'. Accordingly, income from such sale of goods/ article cannot be taxed as FTS under the Act. Q2 merely grants license to use software to end users and no technical services with respect to software development etc are made available to end users as far as licensing of software is concerned. The software can be used only during the term of the agreement and hence, the test of 'make available' is not satisfied and the receipts from sale of software cannot be taxed as FTS/FIS.
Support services like basic/premium support and other related services ancillary to sale of software from Indian customers.	The support services such as premium/basic support and other post-sale services are to be considered as ancillary to the supply of the software. Since the receipts from the sale of the software supplied by Q2 itself do not give rise to any "Royalty Income" under the India – USA DTAA based on the Hon'ble SC judgment, the support services, **which are ancillary to the main supply of right to use of software,** shall also not be chargeable to tax as per Article 12(4)(a) of the India – USA DTAA. Further, the 'make available' condition the India-USA DTAA is not satisfied and hence cannot be taxed as FIS/FTS.
Design and code review services to Cloudkaptan	The services provided by Q2 are in the nature of consultancy services related to design and code review for customer implementations and the same do not involve transfer or transmission of any technical knowledge to the customers, hence does not satisfy the 'make available' test. Further, the consultancy services provided by Q2 to Cloudkaptan are provided to assist the Cloudkaptan's customers outside India. Accordingly, the said services will fall within the ambit of the exception to FTS as provided in Section 9(1)(vii)(b) of the Act as the services of Q2 were used by Cloudkaptan for the purposes of making or earning an income from a source outside India (since the customers are outside India and the rendition of services are outside India). Therefore, the said receipts from Cloudkaptan cannot be taxable as FTS even under the provisions of the Act.

7. On the other hand, the Learned DR relied on the observations made by the Assessing officer and also argued that Q2 Inc has source of income from India due to some part of the services outsourced to third party vendor in India, which has not been discussed in the earlier year order.

7.1 In response, the ld. A.R submitted the following -

- AO refers to Q2 Inc having source of income in India by only referring to section 9(1)(vii) (see para 7.2 of AO order) wherein if an Indian resident is paying to a non-resident (ie, Q2 Inc), then then the non-resident will have source of income in India. There is no dispute that Q2 Inc's customers are in India and therefore source in India. The only question is whether such source of income in India constitutes "Fees for technical services" provided to Indian customers under India – USA DTAA. The AO's theory of onsite-offshore model is also incorrect (referred above) and has also been rejected by ITAT in AY 2021-22.
- The aspect of Q2 Inc using Indian third-party vendors in India for providing some of the support services (and not all) has also been referred to in Para 6.12 of the ITAT order for AY 2021-22. After considering all these facts, ITAT has decided the appeal in AY 2021-22. Merely because Q2 Inc uses services of a third-party vendor in India for some of the services, that will not impact the characterization of income received from ultimate customers. Also, most part of Q2 Inc's revenues from Indian customers are from software licensing revenue (third-party vendors are not involved) and only some part is from support services (some portion is provided by third-party vendors in India).

8. We have heard the rival submissions & perused the materials available on Record. In the instant case, the AO observed that the

assessee's entire receipts are taxable as FTS/FIS in view of the Article 12(4) of India-USA DTAA. We are of the considered opinion that the AO order for current year i.e. AY 2022-23 is verbatim the same as that of previous year (AY 2021-22). Even DRP has acknowledged the same and followed its own direction for past year. There is no difference in the AO order for AY 2022-23 as compared to AY 2021-22, which has been decided in assessee's favour by the co-ordinate bench of ITAT. In light of the foregoing, the issue stands squarely covered in assessee's favour by the order of the ITAT in **ITA No. 1132/Bang/2023 dated 20 August 2024** for the earlier year which is reproduced below -

> ***6.2*** *A plain reading of the above Article12(4) makes it clear that only such technical and consultancy services are covered by this clause as either (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information referred to in Article 12(3), or (b) 'make available' technical knowledge, experience, skill know-how etc. In the present case, only clause12(4)(b) is applicable because there was no right, property or information that was transferred. The case of the Revenue therefore hinges on the applicability of Article 12(4)(b) which applies to rendering of only such technical or consultancy services as 'make available' technical knowledge, experience, skill or know-how etc. In other words, in order to attract the taxability of an income under Article 12(4)(b), not only the payment should be in consideration for rendering of technical or consultancy services, but in addition to the payment being consideration for rendering of technical services., the services so rendered should also be such that 'make available' technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.*
>
> ***6.3*** *The definition of "fees for technical services" as given in Explanation 2 to section 9(1)(vii) of the Act is as follows :-*
>
> *Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries";*
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> ***6.4*** *Section 9(1)(vii) Explanation 2, stops with the 'rendering' of technical services, the India Singapore DTAA goes further and qualifies such*

rendering of services with words to the effect that the services should also "make available" technical knowledge, experience, skill etc. to the person utilizing the services. These words are 'which make available'.

6.5 *The meaning of the expression make available were considered by the Tribunal in the case of Raymond Ltd. Vs. DCIT (2003) 80 TTJ (Mum) 120. The Tribunal after elaborate analysis of all the related aspects observed as under:-*

> *"The words 'making available' in Article 13.4 refers to the stage subsequent to the 'making use of' stage. The qualifying words is 'which' the use of this relative pronoun as a conjunction is to denote some additional function the 'rendering the services' must fulfil. And that is that it should also 'make available' technical knowledge, experience, skill etc. The word which occurring in the article after the word 'services' and before the words 'make available' not only described or defines more clearly the antecedent noun '(services') but also gives additional information about the same in the sense that it requires that the services should result in making available to the user technical knowledge, experience, skill, etc. Thus, the normal, plain and grammatical meaning of the language employed is that a mere rendering of services is not roped in unless the person utilizing the services is able to make use of the technical knowledge, etc. by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill etc. must remain with the person utilizing the services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skill, etc. from the person rendering services to the person utilizing the same is contemplated by the article. Some sort of durability or permanency of the result of the 'rendering services' is envisaged which will remain at the disposal of the person utilizing the services. The fruits of the services should remain available to the person utilizing the services in some concrete shape such as technical knowledge, experience skill etc.*

6.6 *In Raymond's case (supra), the Tribunal also held that rendering of technical services cannot be equated with making available the technical services. In the case of CESC Ltd. Vs. DCIT (2003) 80 TTJ (Cal) (TM) 806: (2003) 87 ITD 653 (Cal)(TM) also the question regarding the scope of expression making available came up for the consideration of the Tribunal. In that case, the Tribunal was dealing with the scope of Article 13(4)(c) of the Indo-UK tax treaty which is admittedly in pari materia with Article 12(4) of the India-USA tax treaty. The majority view was that in order to be attracted by the provisions of the said article of the tax treaty, not only the services should be technical in nature but should be such as to result in making the technology available to person receiving the technical services in question. The Tribunal also referred to with approval the extracts from protocol to the Indo-US tax treaty to the effect that 'generally speaking,*

technology will be considered made available, when the person acquiring the service is enabled to apply the technology.

6.7 *In the case of De Beers India Minerals (P.) Ltd (21 taxmann.com 214) (Karnataka HC), the Hon'ble Karnataka High Court had to deal with identical issue of FTS being made available. In this case assessee is a domestic company, engaged in the business of prospecting and mining for diamonds and other minerals. For the purpose of carrying out geophysical survey, etc, assessee entered into an agreement with Furgo, accompany based in Netherlands. Furgo had a team of experts who were specialized in performing geophysical survey, etc. The said experts provided technical services to assessee under the said agreement. The AO treated the consideration paid to Furgo under the aforesaid agreement as falling within the definition of fees for technical services under India—Netherlands Tax Treaty. Hon'ble jurisdictional Karnataka High Court held that as per the Article 12 of the India Netherlands Tax Treaty, fees for technical services means the payment of any amount to any person in consideration for rendering of any technical services only; if such services make available technical knowledge, expertise, skill, know-how, etc. If the technical knowledge, expertise, skill, know-how, etc. is not made available by the service provider, who renders technical services, it would not constitute fees for technical services. Accordingly, to attract the tax liability, technical knowledge, experience, skill, knowhow, etc. which is used by services provider to render the technical services should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know-how, etc. so as to render such technical services. Further, court held that merely because business of service recipient is dependent on technical service which he receives from service provider, it does not follow that the is making use of technology which service provider utilizes for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know-how, etc. to the recipient of the technical service, the liability to tax is not attracted. Accordingly, if the technology is not made available along with the technical services and what is rendered is only technical services and the technical knowledge is withheld, then, such a technical service would not fall within the definition of technical service in Tax Treaty and not liable to tax. Based on the above requirement of taxation of FTS as above, court held that there is no doubt that the services performed by Furgo are using technical knowledge and expertise but such technical experience, skill or knowledge had not been made available to assessee and accordingly, the said services are not taxable as fees for technical services under India - Netherlands Tax Treaty. The relevant extract of the decision has been reproduced below:*

> *"22. What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it*

> *"makes available "to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill? etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph(4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin lest of rendering services and making technical knowledge available at the same lime is satisfied."*

6.8 *Further, the aforesaid decision in the case of De Beers India Minerals (P.) Ltd has been followed in the case of Sun Microsystem India (P) Ltd (48 taxmann.com 93) (Karnataka), wherein Singapore based company had provided spare management services, provision of buffer stock, defective repair services, managing local repair centers, business planning to address service levels etc to the Indian company. It was held that Singapore Company has not made available any technology or technological services to the Indian company which are required to provide the aforesaid services.*

6.9 *We have also carefully gone through the service agreement between the assessee and different service recipients shows that the Assessee also provides support desk services to its customers in relation to the software license granted by the Assessee. The ld. A.R relied on the agreement with Monexo Innovations Limited (Page 130 of PB) wherein limited rights to use is granted as apparentfromClause4 of the Agreement "Rights of use". It is support services and the technical support services of the assessee include the following:*

(i) *Diagnostic of problems or issues with the product*
(ii) *Reasonable efforts to resolve reported and verifiable errors in the product so that it performs materially as described in the product documentation.*
(iii) *A review of cases logged by CDSU; and if needed, a recommend*

specific organization and process changes to help the customer comply with the support policies

6.10 *The details of the support services provided areas follows-*

Support services	*Description*
Premium support services	*24*7support* *Fast responses for high-priority issues* *Unlimited number of support cases* *Online access to documentation and technical resources,* *Knowledge base, and discussion forums* *Packaged version updates* *Access to the support desk*
Basic Support services	*8hours/day5days/week support* *Unlimited number of support cases* *Online access to documentation and technical resources,* *knowledgebase* *Packaged version updates* *Access to support desk*

6.11 *Q2 has also provided Design/code review services to Cloudkaptan Consultancy Services Private Limited ("Cloudkaptan") under a Statements of Work ("SOWs") (Page 274-287 of PB). These services were primarily to be provided to Cloudkaptan's clients. Cloudkaptan has contracted with external customers outside India to install, configure, customize and otherwise integrate Q2 software as a service product into such customers environment wherein the customers had already purchased licensed software from assessee under a separate agreement. These consultancy services provided by assessee to Cloudkaptan during the subject AY 2022-23 was to assist the Cloudkaptan's customers outside India.*

6.12 *Apart from the above, Q2 receives the following services from Indian parties*
a. Services of Cloudkaptan as a third-party subcontractor for the performance of the software implementation, code development and code management for its customers in India.
b. Software development services (Pg 223-240 of PB) and marketing support services (Pg 257-273 of PB) from its Indian Associated Enterprise ("AE") MFiflex Technologies Private Limited' ('MFIflex').

6.13 *Q2 has also entered into General and administration services, with its AE as per which, Q2 would provide back-office support, administrative services to MFiflex. However, no such transaction has taken place during the captioned AY and no revenue has been earned by Q2 under this agreement.*

> ***6.14*** *Considering the above facts and circumstances of the case, we are of the opinion that the services rendered by the assessee and corresponding fees received by the assessee cannot be considered as FTS/FIS and it is to be considered as software licensing and help desk support services provided to its customers.*

8.1 Respectfully following the earlier year order of this Tribunal on the similar facts & issues, we are inclined to allow ground Nos. 2-10 in favour of the assessee.

9. With regard to ground No.11, we take note of the fact that the AO had erred in making an erroneous arithmetical addition in computing interest at Rs. 11,22,251 vide computation sheet. (Placed at Page 49 Sl.No 42 of Appeal Set). We also take note of the fact that the TDS credit available to the assessee exceeds the amount of tax liability computed and hence in our considered opinion, there cannot be any interest liability for the said AY. This being so in the interest of justice & fair play, we also remit this issue to the file of the AO & direct the AO to verify the records and to grant relief as per law. It is ordered accordingly. This ground of the assessee is partly allowed for statistical purposes.

10. With regard to ground No. 12, the main contention of the assessee is that in the computation sheet at Sl.No.55, the AO had stated an amount of Rs. 1,49,384/- had been refunded to the assessee, whereas the same was not actually received by the assessee. This being so in the interest of justice & fair play, we also remit this issue to the file of the AO & direct to verify the records and issue the refund if not already received by assessee in accordance with law. It is ordered accordingly. Thus, this Ground of the assessee is also partly allowed for the statistical purposes.

11. In the result the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 10th Feb, 2026

Sd/-
(Waseem Ahmed)
Accountant Member

Sd/-
(Keshav Dubey)
Judicial Member

Bangalore,
Dated 10th Feb, 2026.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.