

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, D: NEW DELHI**

**BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER**

ITA No. 3700/Del/2023 [Assessment Year: 2021-22]

GE Engine Services LLC, USA C/o 1 st Floor, Building- 7A, Standard Chartered Building, DLF Cyber City, Phase III, Gurugram- 122002 Haryana	Vs	ACIT Circle Int Tax 1(3)(1), Civic Centre Minto Road New Delhi- 110 002
PAN- AADCG1809R		
Assessee		Revenue

Assessee by	Sh. Ravi Sharma, Adv. Ms. Shruti Khimta, AR
Revenue by	Sh. M.S. Nethrapal, CIT (DR)

Date of Hearing	12.12.2025
Date of Pronouncement	11.03.2026

ORDER

PER BRAJESH KUMAR SINGH, AM,

This appeal filed by the assessee is directed against the Final Assessment Order (FAO) passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 20.10.2023 pursuant to the directions of

the Hon'ble Dispute Resolution Panel (DRP) vide order dated 13.09.2023 u/s 144C(5) of the Act for Assessment Years (AY.) 2021-22.

2. Ground no. 1 of the appeal and the submissions of the assessee are reproduced as under :

On the facts and circumstances of the case & in law, the assessment order passed by the Ld. AO under section 143(3) read with section 144C of the Act is bad in law.

Assessee's submission

The above ground is a general ground which agitates against the action of the Ld. AO in making an addition to the returned income of the Appellant on a misunderstanding of fact and misapplication of law. The detailed contentions are stated in the ensuing paragraphs.

2.1 The above ground is general in nature and does not require any separate adjudication.

3. Ground no. 2 of the appeal and the submissions of the assessee are reproduced as under :

On the facts and circumstances of the case & in law, the assessment order is erroneous and bad in law as it was passed on an incorrect understanding of facts and incorrect interpretation of the provisions of law. In doing so,
a. the Ld. AO erred in basing the conclusions upon the open domain enquiry which have no link/applicability to the facts of the case

B. Assessee's submission

The above ground is a general ground. It is submitted that the Ld. AO has passed the final assessment order in complete disregard to facts and submission made by Appellant during the course of the assessment proceedings.

3.1 The above ground is general in nature and does not require any separate adjudication and is dealt later in this order.

4. Brief facts of the case : GE Engine Services LLC is a company incorporated in USA and during the relevant year the assessee had carried out overhaul/ repair services of aircraft engines on an offshore basis at its facility located outside India that also entailed supply of spare parts on offshore basis.

4.1 The assessee filed its return of income for A.Y 2021-22 on 14.03.2022 declaring total income of Rs. 37,71,935 and claimed refund for Rs 60,22,600/- The case was selected for scrutiny under CASS and Notice u/s 143(2) of IT Act dated 27.06.2022 was issued to the assessee. During the course of assessment proceedings, the AO noted that the assessee had received income earned from supply of parts in the nature of offshore supply in the subject AY and the assessee had received the following receipts during the consideration AY:

Nature of revenue	Customer Name	Amount of revenue (INR)	Income offered to tax in India out of (2)
Receipts towards repair and overhaul support	Air India	4,48,32,61,364	Nil
	Fly-By-Wire International Pvt. Ltd.	1,43,32,405	
	Tata Sia Airlines Limited	10,82,34,216	
	Zest Aviation Pvt. Ltd.	63,39,542	
	Karnavati Aviation	88,95,453	
	Airasia(India) Limited	9,53,88,000	
	Total	4,71,64,50,980	

4.2 The AO thereafter reproduced the relevant extracts of the order in the case of the assessee for AY 2019-20 and noted that since the factual matrix of the case was similar to the assessment proceedings concluded for AY 2019-20 show caused the assessee as to why the assessment in the present year should not be concluded in the lines of preceding year for AY 2019-20. It may be mentioned year in AY 2019-20 the AO had taxed similar receipts of Rs. 976,68,90,940/- @ 10% as Fees for Technical services under section 9(1) (vii) of the Act as well as per Article 12 (4) (b) of India-USA DTAA.

4.3 Before proceeding further the assessee vide its submission dated 01-12-2025 submitted that against the order of the AO passed upon setting aside the matter to the file of DRP by the Coordinate bench of the Tribunal in ITA in appeals for AY

2018-19 & 2019-20 bearing ITA no 1859 & 1860/Del/2022 (order dated September 29, 2022) the assessee has filed a writ petition before the Hon'ble Delhi High Court seeking quashing of the impugned orders on the ground that they are barred by limitation, which are still pending before the Hon'ble Delhi High Court. The relevant extracts of the submission of the assessee are reproduced as under :

1.1 "The subject matter for AY 2021-22 was listed for a clarification hearing on November 28, 2025 During the course of the hearing the Hon'ble Bench sought the status of the proceedings for the previous years.

1.2 The principal issue in the present appeal concerns the taxability of receipts arising from the performance of offshore aircraft engine repair and overhaul activities, which have been classified as "Fee for Included Services" (FIS) by the tax authorities. It is pertinent to note that since the assessment order for the subject year makes specific reference to the assessment proceedings to the findings of previous year ie. AY 2019-20, the Hon'ble Bench sought the details of the proceedings for the previous year

1.3 Pursuant to the Bench's direction, the Appellant herein-below submits the status of proceedings for the earlier years ie. AY 2018-19 & 2019-20 referenced in the assessment order for the subject appeal

1.4 It is submitted that the appeals for AY 2018-19 & 2019-20 bearing ITA no 1859 & 1860/Del/2022 (order dated September 29, 2022) (enclosed as Annexure A) where the issue of taxability of the impugned receipts was raised before the Hon'ble Tribunal, was disposed of and the matter was remanded to the Hon'ble Dispute Resolution Panel with the following directions

"9. This is a classic case wherein the directions of the lid. DRP have been circumvented by the Assessing Officer by resorting to provisions of Section 14-1013), While we decline to comment and interfere on the hierarchical structure and discipline of the revenue authorities Viz, the Id. DRP and the AO, it is a fact on record that the directions of the hf. DRP have not been followed by the Assessing Officer. This was due to the fact that the Id. DRP has chosen not to give unambiguous directions to the Assessing Officer. We have contemplated on this issue of remanding the matter to the Id. DRP or to the AD. We find that the id. DRP and the

Assessing Officer are the quasi-judicial authority as per the provisions of the Income Tax Act. Remanding the matter to the file will only lengthen the proceedings wherein the AO who is not very clear of the directions choose not to implement the same which in turn necessitates the AO to refer the matter and seek clarification from the id. DRP. Hence, we hereby remand the matter back to the id. DRP to issue a clear implementable direction to the AO.”

(emphasis supplied)

1.5 In pursuance thereof, the Hon'ble DRP issued its Directions dated March 24, 2025, and the consequential Orders Giving Effect COGEs) were passed by the Learned Assessing Officer on March 25, 2025. A copy of the DRP Directions and the OGEs passed in pursuance of the Tribunal order as enclosed as Annexure B.

1.6 However, as the Directions and consequential OGEs for AY 2018-19 and 2019-20 were issued well beyond the time limits prescribed under the Income Tax Act, 1961, the Appellant has filed a writ petition before the Hon'ble Delhi High Court seeking quashing of the impugned orders on the ground that they are barred by limitation. A copy of the daily order of the Hon'ble Delhi High Court is enclosed as Annexure C.

1.7 Even otherwise, it is respectfully submitted that the issue in appeal is no longer res integra and is covered by the recent decisions of the Hon'ble Tribunal in the case of Pratt & Whitney Canada Corp. v. DCIT (ITA No. 665/DEL/2025) (enclosed herewith Annexure D) and Rockwell Collins Southeast Asia Pte Ltd v. DCIT (ITA No. 2409/Del/2023) (enclosed herewith as Annexure E).

1.8 The above summary of facts is being submitted for your Honors' kind consideration.”

4.4 During the course of the assessment proceedings for AY 2021-22, the assessee submitted before the AO that the said amount of Rs. 471,64,50,980/- was not taxable either under section 9(1)(vii) of the Act nor under Article 12(4)(b) of the India-USA DTAA. The reasons for its non-taxability have been summarized by the Ld DRP in

para no. 4.3.1 vide its order dated 13-09-2023 and the relevant extracts of the same are reproduced as under:

1. *the repair/overhaul services are effectuated outside India and that there is no technical knowledge that can be said to have been transferred to the customers in India by virtue of rendering the aforesaid services.*
2. *the conduct of repair & maintenance activities the interacting between the Applicant's team and Indian customers' team was minimal as the entire process (starting from inspection/ testing of part to repair/ replacement/exchange of faulty part to test check of the entire part) was carried out outside India, at the offshore repair facility of the Applicant.*
3. *a repair/overhaul of any equipment cannot be undertaken unless the defects/issue(s) faced are identified by the Applicant. For carrying out repair activities, it is essential the work to be performed or parts that are required to replace in a formal job card which is referred to as a work scope as defined in the above extracts. After preparation. the work scope is then sent to the customer for approval. The customer and applicant thereafter discuss the content of work scope and finalize it mutually.*
4. *the receipt earned towards performance of repair / overhaul activities is not taxable in India either as FTS under section 9(1)(vii) of the Act or as FIS as per Article 12 of the India-US DTAA. The submission of the Applicant on this aspect is as under:*
5. *The Applicant is not providing any ancillary or subsidiary services as ascribed under para (a), therefore, it is required to be seen if these services fall under sub-para (b) above. Technical or consultancy services would fall under FIS only if they make available technical knowledge, experience, skill, know how or processes or consist of development or transfer of a technical knowledge or plan.*
6. *The Applicant's responsibility is limited to restoration of the aircraft engines specifically covered under the respective agreements. For doing the same, the Applicant is required to repair the faulty parts of the engine and to replace the faulty part (which are irreparable) with a fresh spare*

part. Majority of repair/ overhaul support involves replacement of faulty parts with a fresh/refurbished spare part.

7. The agreement with the Indian customers does not indicate that the Applicant is required to impart training to the employees of the Indian customer.

8. The repair / overhaul activities were performed outside India; and the employees of Indian customer were not present at the repair station (situated outside India) at the time of performance of repair activities. Thus, the activities performed by the Applicant does not result in imparting of technical skill, know-how, knowledge, etc. to the employees of Indian customers as they did not witness the repair functions themselves were not given the understanding of process followed for performing the repair activities otherwise as well.

9. The "make available" condition prescribed under Article 12(4)(b) of the India-US DTAA is said to be satisfied if the service provider imparts technical knowledge, experience, skill, knowhow, or processes to the service recipients. The receiver of the services can be said to acquire the relevant skills used by the services provider only if he acquires those skills in such way that he can himself use or apply them independently without getting any assistance or being dependent on the service provider in future. From the explanation provided under the MOU, it can be inferred that the receiver of the services can be said to acquire the relevant skills used by the services provider only if he acquires those skills in such a way that he can himself use or apply them independently without getting any assistance or being dependent on the service provider in future.

10. In the instant case, the activities performed by applicant may require specialized skills and technological expertise but by no stretch of imagination these activities make available any technical knowledge, experience, skill, know-how or processes to the Indian customers.

11. The offshore overhaul and repair work undertaken by the Applicant does not make available technical knowledge, experience, skill etc. to its customers in India as:

- *The customers cannot apply the technology on their own and / or cannot undertaken the repair work on their own.*

In fact, the customers continued to engage with the Applicant for such offshore work in subsequent years on an ongoing basis.”

4.5 The assessee also submitted before the AO that the taxability of the offshore repair work may at best be covered under the purview of Section 9(1)(vii) of the Act and/or Article 12 of the India-US DTAA. Further, the assessee submitted that as per provisions of section 90(2) of the Act, a non-resident has the option of being taxed in India under provisions of the Act or provisions of the DTAA entered between India and the country of residence of such non-resident, whichever is more beneficial and accordingly, the Assessee sought to invoke the beneficial provisions of the India-US DTAA, and submitted its contentions in support of its position that the receipts from repair and overhaul support received from Indian customers are not taxable in India as the condition of ‘make available’ as laid down in Article 12 (4) (b) of INDIA-USA DTAA was not satisfied.

4.6 However, the same was not accepted by the AO and the AO treated the amount of Rs. 471,64,50,980/- @10% as fees for technical services u/s 9(1)(vii) of the income tax act 1961 as well as per Article 12 (4)(b) of INDIA-USA DTAA. As noted

above the AO had considered the factual matrix of the present assessment year to the factual matrix of the case for the AY 2019-20 in the case of assessee, therefore, the relevant extracts of the rebuttal of the assessee submissions by the AO in the assessment order for AY 2019-20 as reproduced in the draft assessment order dated 28-12-2022 for AY 2021-22 are reproduced as under:

Rebuttal of assessee contentions:

The assessee is a company incorporated under the laws of United States of America and is a tax resident of USA. It has submitted that it would carry out supply of spare parts from outside India and also carry out repair work on an offshore basis at its facilities located outside India. The assessee further submitted that the revenue earned from the said work mentioned in the aforesaid agreement is not taxable in India. The assessee also said that the receipt is not taxable in India as per beneficial provisions of Article 12 (royalty and fee for included service) of the India USA DTAA.

The reply of the assessee has been perused but not found tenable. It is to be noted based on discussion in foregoing paras and on basis of contract agreement the services have been provided to Indian customer as repair and maintenance, overhaul are of technical nature. Such services are technical in nature and are taxable u/s 9(1)(vii) read with article 12 of India USA DTAA.

Section 9(1)(vii) of the Act is reproduced below for ready reference:

(vii) income by way of fees for technical services payable by-

- (a) *the Government; or*
- (b) *a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person⁹⁰ outside India or for the purposes of making or earning any income from any source outside India⁹⁰; or*
- (c) *a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India ⁹⁰ or for the purposes of making or earning any income from any source in India:*

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 recipient⁹² or consideration which would be income of the recipient chargeable under the head "Salaries":]

The explanation to section 9 further reads as:

[Explanation. For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,-

- (i) the non-resident has a residence or place of business or business connection in India; or*
- (ii) the non-resident has rendered services in India.]*

(emphasis supplied)

As can be seen from above, the place of rendering of services is immaterial. The services may be rendered or provided either in India or outside India. Therefore the claim of the assessee that it has provided 'offshore' repair, overhaul and maintenance services stands on feeble legs and is liable to be rejected.

Judicial precedent:

Delhi High Court

Director of Income Tax Delhi vs M/S Lufthansa Cargo India on 27 May, 2015

Delhi

HON'BLE Delhi High Court in this case is of the opinion that the ITAT was unduly influenced by all the regulatory compulsions which the assessee had to face. besides international convention and domestic law that mandated aircraft component overhaul, the manufacturer itself as a condition for the continued application of its warranty, and in order to escape any liability for lack of safety, required periodic overhaul and maintenance repairs unlike normal machinery repair, aircraft maintenance and repairs inherently are such as at no given point of time can be compared with contracts such as cleaning etc. component overhaul and maintenance by its very nature cannot be undertaken by all and sundry entities. the level of technical expertise and ability required in such cases is not only exacting but specific, in that, aircraft supplied by manufacturer has to be serviced and its components maintained, serviced or overhauled by designated centres. it is this specification which makes the aircraft safe and airworthy because international and national domestic regulatory authorities mandate that certification of such component safety is a condition precedent for their airworthiness. the exclusive nature of these services cannot but lead to the inference that they are technical services within the meaning of section 9(1)(vii) of the act. the ITAT's findings on this point are, therefore, erroneous, this question is accordingly answered in favour of the revenue.

On the basis of submission of assessee as well as discussion in the foregoing paras the services provided by the assessee are in the nature of fees for technical services u/s 9(1)(vii) of the income tax act 1961.

According to India-USA DTAA under article 12

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

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

AS it is clear from the above discussion as these services are provided as per On point agreement which is a trademark of parent company and it include repair services on wing and offwing support as well as technical training and assessee share its technical plan the workscope is prepared with mutual agreements and training is also provided as these services are of technical nature and therefore qualified as fees for included services as per article 4(b) as well of INDIA-US DTAA:

As per contract for Onpoint engine service agreement with jet airways

"repair specifications: the mutually agreed repair specification which establishes the minimum baseline to which an engine or part thereof will be inspected, repaired, modified, reassembled and tested to make an engine serviceable. such repair specifications will meet or exceed the recommendations of the OEM operational specification, applicable OEM maintenance or overhaul manuals and customer's maintenance plan that has been approved by the AAA.

workscope -the document written by GE and approved by customer describing the prescribed repair or approach to repair of an engine to meet the requirement of the repair specifications, including appropriate reliability and performance enhancements.

"Workscope planning guide"-the document published by GE aviation which describes the on condition maintenance concept for the engines this document communicates the timing and extent of work required to enable operators reliability, performance, and maintenance cost goals."

The description of above services clearly brings out that the assessee as provided these services from offshore basis and it is the customer whose sole responsibility was to detect the problem related to engine, and thus assessee is helping, guiding, and assisting customer by providing technical training and sharing technical plan and data with the customer to detect the problem and take maintenance decision and these things cannot be done without sharing the technical knowledge. The assistance and guidance is provided using skill, expertise and experience of the Assessee which it gained over a period of time and have expertise in it. Thus, the Applicant is making available his technical expertise in the area to Indian customer enabling it to take better decisions and perform its functions in more effective manner The activities are completely different from activities where final solution is provided. Once these advices and training is given by the assessee, the final task is performed by Indian customer as "IT remains the sole responsibility of airline to conclusively identify and resolve aircraft and engine faults or adverse trends and make all maintenance decision affecting airlines aircraft." And these tasks cannot be performed without having technical knowledge, skill and

experience and thus assessee develop and transfer of a technical plan or technical design to Indian customer, knowledge to detect the fault and take repair and maintenance decision. Indian customer becomes wiser with each advice, training and so that on that issue he can perform the task

As assessee make available technical plan, workscope were prepared by mutual agreement the employees of Indian customers gain the technical knowledge of detecting and taking decision for maintainance that issue in future independently. The service provided is continuous, since new issues keep coming up every now and then. But that does not mean that service recipient does not learn from the previous work. The Assessee has acknowledged that it has necessary expertise and the services which are given under trademark onpoint are specialized service of GE. This knowledge and expertise also keeps getting updated and hence, the need to share it customer is on a continuous basis. As there is sharing of technical plan and data and provide training related to diagnosis, overhaul and troubleshooting as part of Onpoint engine service programme hence assessee services are in nature of fees for technical nature as per income tax act 1961 as well as per india-usadtaa article 12(4)(b).

Without prejudice to the above, it is to be noticed that the assessee's own filings before the income tax authorities that the assessee is a "Limited Liability Company (LLC)" incorporated in the state of Delaware in USA. LLCs are fiscally transparent entities according to the US tax law, i.e., their income is not subject to tax in their own hands in the USA. Therefore, such corporations do not qualify as residents of USA in terms of the Article 4 of the India-USA DTAA.

2.1 Article 1 of the India-US DTAA states that the treaty is applicable to "residents of one or both of the Contracting States". Article 4 of the DTAA defines the term "resident of a Contracting State". Article 4 states-"For the purposes of this Convention, the term "resident of a Contracting State" means

any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature....

4.3 Thus, only persons or entities that are liable to tax in their country under the laws of their country are considered resident for the purpose of the DTAA. In the treaty context, the term "laws of that State" means taxation laws of the State. It is beyond doubt and is a matter of fact that LLCs are not liable to tax in the USA. It is also undisputed that for taxation purposes, the assessee is a LLC.

*4.4 LLCs also do not come under the special clause for partnerships and trusts laid down in paragraph 1(b) of Article 4 of the DTAA, which states "in the case of income derived or paid by a **partnership, estate, or trust**, this term [resident] applies only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners or beneficiaries". It is clear from a reading of paragraph 1(b) of Article 4 of the DTAA that it covers only partnership, estate or trust. The assessee is a corporation (LLC) in the eyes of US tax law. Corporations or Limited Liability Corporations are not covered under the special clause of paragraph 1(b) of Article 4 of the DTAA. Thus, in the case of LLCs, even if the shareholders are resident in USA, Treaty benefits are not available to the corporation.*

4.5. Thus, the assessee is not a resident of USA in terms of the definition of resident given in Article 4 of the India-US DTAA, and is therefore not entitled to the benefit and applicability of the DTAA.

14. In view of the above, assessed at an income of Rs.9,76,68,90,940 @10% for fees for technical services u/s 9(1)(vii) of the income tax act 1961 as well as per Article 12 (4)(b) of india-USA DTAA. Charge interest u/s 234A, 234B, 234C & 234D as applicable. Since the assessee has misreported its income, I

consider it a fit case to initiate penalty proceedings u/s 270A of the Act and therefore, the same are being initiated separately.

7. Since the factual matrix of instant case was similar to assessment proceedings concluded for AY 2019-20, hence, Assessee was issued show cause notice dated 05.12.2022 asking as under:

"With respect to assessment proceedings, Notice u/s 142 of IT Act dated 10.10.2022 was issued However, even after passing 2 months from the issue of original Notice, full and complete compliance has still not been made. Infact, very basic submissions such as details of gross revenue received in subject AY (query no.4) has also not been provided. This is viewed as deliberate attempt to derail the statutory assessment proceedings which is getting time barred on 31.12.2022.

Therefore, you are now required to show cause why should assessment should not be concluded in the lines of preceding AY, i.e. AY 2019-20."

8. In response to the same assessee filed reply on 08/12/2022. The response of the assessee has been considered and perused. Submission of assessee is also on similar lines as made in AY 2019-20. Therefore, reasons discussed in AY 2019-20, are equally applicable in subject AY also.

Therefore receipts as fees for technical services amounted Rs.4,71,64,50,980/- will be u/s 9(1)(vii) of the income tax act 1961 as well as per Article 12 (4)(b) of India-USA DTAA.

Addition of Rs 4,71,64,50,980/-

9. Accordingly, the total income of the assessee company is recomputed as under:

<i>Returned Income</i>	<i>37,71,935</i>
<i>Add. Receipts as fees for technical services taxable 10% for u/s 9(1)(vii) of the Income Tax Act, 1961</i>	<i>4,71,64,50,980</i>
<i>Total</i>	<i>4,72,02,22,915</i>

10. *Proposed to be assessed at income of Rs.4,72,02,22,915/-. As the assessee has underreported its income while filing the return of income, therefore, I consider it a fit case for initiation of penalty proceedings u/s 270A of the Act. A notice will be issued with final assessment order.*

(emphasis supplied by us)

4.7 Thus, the AO proposed an addition of Rs. 471,64,50,980/- to be taxed @ 10% for fees for technical services u/s 9(1)(vii) of the Act as well as Article 12(4)(b) of the India-US DTAA. Further, the AO also held that without prejudice to the above. the assessee was not a resident of USA in terms of the definition of resident given in Article 4 of the India-US DTAA and, was therefore, not entitled to the benefit and applicability of the DTAA.

5. Aggrieved with the said order, the assessee filed its objections before the DRP. The DRP by its order dated 13.09.2023 upheld the findings of the AO in the draft assessment order on both counts i.e. taxability of Rs. 471,64,50,980/- @ 10% for fees for technical services u/s 9(1)(vii) of the Act as well as Article 12(4)(b) of the

India-US DTAA and the AO's without prejudice finding that the assessee was not a resident of USA in terms of the definition of resident given in Article 4 of the India-US DTAA and, was therefore, not entitled to the benefit and applicability of the DTAA. The relevant extracts of the order of the Ld DRP are reproduced as under issue wise along with our findings :

On the issue of LLC :

"4.2.1 Ground number 2 relates to the denial of the benefits of India-US DTAA to the assessee by the AO holding that the Assessee, being an LLC, is not covered under Article 4 of India-US DTAA. The assessee has contended that the AO has wrongly denied the benefits of DTAA to the assessee. The assessee has relied upon a number of case laws in this regard. The panel has considered the submissions. The assessee is a Limited Liability Company ('LLC') incorporated under the laws of the USA. LLCs are fiscally transparent entities according to the US tax law, i.e., their income is not subject to tax in their own hands in the USA. Therefore, such corporations do not qualify as residents of USA in terms of the Article 4 of the India-USA DTAA. Article 1 of the India-US DTAA states that the treaty is applicable to "residents of one or both the contracting states". Article 4 of the DTAA defines the term "resident of a Contracting State. Article 4 states- "For the purposes of this convention, the term "resident of a contracting state: means any person who, under the laws of that state, liable to tax therein by reason of..... incorporation, or any other criterion of a similar nature,...."

4.2.2 Thus, only persons or entities that are liable to tax in their country under the laws of their country are considered resident for the purpose of the DTAA. In the treaty context, the term "laws of that states" means taxation laws of the state. It is beyond doubt and is a matter of fact that LLCs are not liable to tax in the USA. It is also undisputed that for taxation purposes, the assessee is an LLC. LLCs also do not come under the special clause for partnership and trusts laid down in the paragraph 1(b) of Article 4 of the DTAA, which states in the case of income derived or paid by a partnership, estate, or trust, this term [resident] applied only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that state as the income of a resident, either in its hands or in the hands of its partners or beneficiaries". It is clear from a reading of paragraph 1(b) of Article 4 of the DTAA that covers only partnership, estate or trust. The assessee is a

corporation (LLC) in the eyes of US tax law. Corporations or Limited Liability Corporations are not covered under the special clause of paragraph 1(b) of Article 4 of the DTAA. The assessee is a tax transparent entity in USA. In order to be eligible for benefits under Indo-US DTAA, the assessee must be satisfying the criteria of being resident of the contracting state that is the USA in this case. This in turn implies that the assessee must be 'liable to tax' under the laws of US. The assessee clearly fails to meet the requirement of being the resident of the contracting state within the meaning of Article 4 of DTAA. In view of the above, the Panel finds no infirmity in the conclusion of the AO in treating the assessee not eligible for treaty benefits. Hence, the objections raised in Ground 2 are rejected.

6. Aggrieved with aforesaid findings of the DRP, the assessee is in appeal before us on the following grounds of appeal

“ 3. On the facts and circumstances of the case & in law, the Ld. AO/DRP grossly erred in denying the entitlement to the Appellant of the benefit under the India-US DTAA by erroneously holding that the Appellant, being an LLC, is not covered under Article 4 of the India-US DTAA. In doing so,

3.1. the Ld. AO erred in contending that the Appellant is not liable to tax under the laws in USA.”

7. In this regard, the Ld. AR filed a written submission and the relevant extracts of the same are reproduced as under:

14.1 It is humbly submitted that the Appellant is a single member LLC formed in the state of Delaware, USA. The sole member of the LLC is General Electric Company, which is a tax resident of the US. Any income earned by the Appellant is thus taxed in the hands of its sole member i.e. General Electric Company. A copy of the Tax Residency Certificate (TRC) is attached at Page No 24-25 of the Paper Book.

14.4 It may be relevant to highlight that the US Revenue Department has certified that the Appellant is a business unit of a US tax resident, meaning thereby that the any taxes liable to be paid on the income earned by the Appellant will be paid by the U.S. corporation (copies of TRC for the year under consideration are placed at Page no. 24-25 of the Paperback). It is respectfully submitted that the interpretation proposed

by the Ld. AO is erroneous as the same will render a tax treaty otiose in case of economic double taxation i.e., taxability of the cross-border income in the hands of different taxpayers.

Hence, the action of the Ld. AO denying the treaty benefit to the Appellant is devoid of any legal merits and is liable to be discarded at the very outset.

TRC IS A CONCLUSIVE AND SUFFICIENT PROOF TO ESTABLISH RESIDENCY

14.5 *It is most humbly submitted that the Appellant has filed the Tax Residency Certificates before the Assessing Officer during the assessment proceedings. For ready reference, the relevant extract of the TRCs has been reproduced hereunder:*

“Taxpayer: GE Engine Services LLC

TIN: 31-1466360

Tax year: 2020

I certify that, to the best of our knowledge, the above-named Limited Liability Company is a branch, division, or business unit of a U.S. corporation that is a resident of the United States of America for purposes of U.S. taxation”

14.6 *A perusal of the above TRC highlights the following:*

- a. That the appellant assessee through a fiscally transparent entity is referred to as the taxpayer:*
- b. That it has been allotted a Tax Identification Number*

14.7 *It is respectfully submitted that this issue is now fully and squarely covered in favour of the Appellant. In this regard, Your Honours kind attention is drawn to the recent order of the **Hon’ble Delhi Tribunal** in the case of **General Motors Company USA Vs ACIT***

(ITA No. 2359/Del/2022 and ITA No. 2360/Del/2022) wherein the Hon'ble Tribunal after analysing the language used in the TRC of a single member LLC (identical to the language used in the Applicant's TRC) held that a fiscally transparent entity qualifies as a resident under Article 4 of the Indo-US Tax Treaty and consequently eligible for treaty benefits under the India-US DTAA.

The relevant extract is reproduced below for the Hon'ble Panel's ready reference:

"4.3 ...We consider it appropriate to reproduce the language used in the TRC dated 30.03.2015 available at page 14 of the paper book which is as follows:-

"I certify that, to the best of our knowledge, the above-named Limited Liability Company is a branch, division, or business unit of a U.S. corporation that is a resident of the United States of America for purposes of U.S. taxation."

*4.4 The aforesaid discussion further establishes that under US federal income tax law, an LLC with a single owner is disregarded as separate from its owner unless the LLC elects to be treated as a corporation for US federal income tax purposes. The ability of the LLC to elect its tax classification under US federal income tax law also supports the legal situation or aspect of the LLC being liable to tax. Further, **where a LLC is disregarded as separate from its tax owner for US federal income tax purposes, the tax owner of the LLC pays tax on the tax owner's share of the taxable income attributed from the LLC.** This further supports the legal situation of a LLC being liable to tax, i.e., **the LLC is essentially 'liable to tax'** but the income is attributed to its tax owner and such tax is imposed and paid by its respective tax owner, like US consolidated group rules where all affiliated US corporations file a single US federal income tax return.*

.....

4.7 The ld. tax authorities below have fallen at both the counts by though considering the assessee to be a fiscally transparent entity has not considered to be not qualifying to be a person under Article 4 and, at the same time, have failed to appreciate that

the phrase 'liable to tax' has to be interpreted in the way that the assessee is liable to tax under the authority of the US Income-tax law. We are of the considered view that the intent of the Indo-US Treaty has to be given precedence wherein the concept of fiscally transparent entity is the recognized way of recognizing the phrase 'liable to tax.'"

(emphasis supplied)

(refer para 4.3 to 4.7 at Page no 373-375 of the CLC)

*Similar view has been canvassed by the Co-ordinate Bench of the Delhi Tribunal in the case of Wild **West Domains, LLC Vs ACIT** (I.T.A No.1774/Del/2022). (refer para 11 to 17 at Page no 394-402 of the CLC)*

7.1 Further, the assessee also relied upon the decision of the co-ordinate Bench in the case of Go Daddy.com LLC Vs. DCIT(supra).

8. On the other hand, the Ld. CIT(DR) supported the orders of the authorities below.

9. We have heard both the parties and perused the material available on records. The assessee submits that it is a single member LLC formed in the state of Delaware, USA and the sole member of the LLC is General Electric Company, which is a tax resident of the US. Further it submitted that any income earned by the assessee was thus taxed in the hands of its sole member i.e. General Electric Company. A copy of the Tax Residency Certificate (TRC) was also attached at Page No 24-25 of the Paper Book. On the perusal of the above certificate, it is seen that it was certified by the

US tax authorities that to the best of their knowledge, the above-named Limited Liability Company was a branch, division, or business unit of a U.S. corporation that is a resident of the United States of America for purposes of U.S. taxation. Therefore, in this regard the submission of the assessee that a perusal of the above TRC highlights that the assessee though a fiscally transparent entity is referred to as the taxpayer and it has been allotted a Tax Identification Number. Further, the assessee submits that the US Revenue Department has certified that the Assessee is a business unit of a US tax resident, meaning thereby that the any taxes liable to be paid on the income earned by the assessee will be paid by the U.S. corporation and the assessee in the capacity of LLC is liable to taxation is acceptable. In this regard the assessee has placed reliance on the three orders of the co-ordinate Bench of the Tribunal in the case of *General Motors Company USA Vs ACIT(supra)*, *Wild West Domains, LLC vs ACIT(supra)* and *Go Daddy.com LLC Vs. DCIT* where it is held that to avail the tax benefit under the treaty it was not necessary that the assessee should be paying the actual taxes but what was important that the assessee was liable to pay taxes. In view of the above submissions, the Ld. AR submitted that the interpretation proposed by the Ld. AO is erroneous as the same will render a tax treaty otiose in case of economic double taxation i.e., taxability of the cross-border income in the hands of different taxpayers and requested for allowing the benefit of the India-USA DTAA.

9.1 It is seen that on similar facts, the co-ordinate Bench of the Tribunal in the case of *Wild West Domains, LLC vs ACIT (supra)* for AY. 2019-20 by an order dated 29.07.2024 had allowed the appeal of the assessee and had granted the benefit of India-USA Tax Treaty to an LLC which was the assessee in the cited case. The relevant extracts of the said order in Para No. 11-70 are reproduced as under:

“ 11. Heard rival submissions, perused the orders of the authorities below. Perusal of the final assessment order, we observed that the AO had stated that assessee had furnished TRC for only that part of the year for which it was not an LLC. However, the Ld. Counsel for the assessee invited our attention towards the paper book at pages 34 and 38, wherein copy of TRC issued by Department of the Treasury Internal Revenue Service, Philadelphia, USA and submitted that assessee was recognized as tax payer for the year 2019 and 2018. We observed from the TRCs issued by the Department of Treasury Internal Revenue Service, Philadelphia it was certified that the assessee Limited Liability Company (LLC) is a branch, division or business unit of US partnership. It was also certified that the partnership has filed an information return in Form 1065, US partnership return of income and each of the partners listed in the TRC i.e. GD Subsidiary Inc. and GoDaddy Inc. are residents of the United States of America for purposes of US taxation. Therefore, in our view these TRCs issued by Department of Treasury Internal Revenue Service, Philadelphia

USA clearly recognizes the assessee Limited Liability Company having two partners are residents of United States of America filing US partnership return of income. Therefore, the observation of the AO that the assessee has furnished a copy of TRC for only part of the year for which it was not an LLC appears to be not correct.

12. Further it is the observation of the AO that income of the assessee is not liable to be taxed in the hands of the USA instead of it is taxed in the hands of the shareholders, therefore, the assessee is a fiscally transparent entity in its country of resident as it allows all income to pass through it. In other words it is the observation of the AO that assessee do not enjoy the benefits of income it earns to passes it for the enjoyment of its partners. Therefore, the AO is of the view that the assessee lacks beneficial ownership for income earned by it from India and in turn is not eligible to be considered as a resident for the purposes of India US DTAA. In so far as the TRCs are concerned as we have mentioned earlier, both the TRCs issued by US Authorities clearly show that the assessee is a resident of US filing returns and was treated as resident for the purpose of taxation.

13. In the case of Union of India Vs. Azadi Bachao Andolan (supra) the Hon'ble Supreme Court held as under:

“ It is urged by the learned Attorney General and Shri Salve for the appellants that the phrase 'liable to taxation' is not the same as 'pays tax'. The test of liability for taxation is not to be determined on the basis of an exemption granted in respect of any particular source of income, but by taking into consideration the totality of the provisions of the income-tax law that prevails in either of the Contracting States. Merely because, at a given time, there may be an exemption from income-tax in respect of any particular head of income, it

cannot be contended that the taxable entity is not liable to taxation. They urge that upon a proper construction of the provisions of Mauritian Income Tax Act it is clear that the FIIs incorporated under Mauritius laws are liable to taxation; therefore, they are 'residents' in Mauritius within the meaning of the DTAC.....

.....We are inclined to agree with the submission of the appellants that, merely because exemption has been granted in respect of taxability of a particular source of income, it cannot be postulated that the entity is not 'liable to tax' as contended by the respondents.....

There is substance in the contention of Mr. Salve learned counsel for one of the appellants, that the expression 'resident' is employed in the DTAC as a term of limitation, for otherwise a person who may not be 'liable to tax' in a Contracting State by reason of domicile, residence, place of management or any other criterion of a similar nature may also claim the benefit of the DTAC. Since the purpose of the DTAC is to eliminate double taxation, the treaty takes into account only persons who are 'liable to taxation' in the Contracting States. Consequently, the benefits thereunder are not available to persons who are not liable to taxation and the words 'liable to taxation' are intended to act as words of limitation ”.....

....."85. In our view, the contention of the respondents proceeds on the fallacious premise that liability to taxation is the same as payment of tax. Liability to taxation is a legal situation; payment of tax is a fiscal fact. For the purpose of application of article 4 of the DTAC, what is relevant is the legal situation, namely, liability to taxation, and not the fiscal fact of actual payment of tax. If this were not so, the DTAC would not have used the words, "liable to taxation ", but would have used some appropriate words like "pays tax".....

.....87. In a Manual on the OECD Model Tax Convention on Income and on Capital, at paragraph 4B. 05,

while commenting on Article 4 of the OECD Double Tax Convention, Philip Baker points out that the phrase 'liable to tax' used in the first sentence of Article 4.1 of the Model Convention has raised a number of issues, and observes:

.....

....."It seems clear that a person does not have to be actually paying tax to be "liable to tax" - otherwise a person who had deductible losses or allowances, which reduced his tax bill to zero would find himself unable to enjoy the benefits of the convention. It also seems clear that a person who would otherwise be subject to comprehensive taxing but who enjoys a specific exemption from tax is nevertheless liable to tax, if the exemption were repealed, or the person no longer qualified for the exemption, the person would be liable to comprehensive taxation....."

(Emphasis Supplied by us)"

14. In the case of Sarva Capital LLC Vs. ACIT (153 taxmann.com 618) the coordinate bench of Delhi Tribunal following the decision of the Apex Court in the case of Azadi Bachao Andolon (supra) held that the tax exemption granted under the domestic tax laws does not lead to the conclusion that the entities availing such exemption are not liable to taxation. The term liable to taxation must be distinguished actual payment of taxation and thus, the contention of the revenue that the LLC in the present case is not liable to taxation was rejected. While holding so the Tribunal observed as under:

" 16. One more objection of the Assessing Officer is that the assessee, being a fiscally transparent entity having no liability to tax in Mauritius due to exemption in capital gain income under the domestic laws of Mauritius, cannot claim benefits of avoidance of double taxation. In our view, this issue has also been addressed by Hon 'ble Supreme Court in case of Azadi Bachao Andolan (supra). While dealing with this particular issue, the Hon'ble Supreme Court interpreted the expression "liable to taxation" as used in Article 4 of India-Mauritius DTAA as well as the domestic law of Mauritius and held that merely because tax exemption under certain specified head of income including capital gain from sale of shares has been granted under the domestic tax laws of

Mauritius, it cannot lead to the conclusion that the entities availing such exemption are not liable to taxation. The Hon'ble Supreme Court categorically rejected Revenue's contention that avoidance of double taxation can arise only when tax is actually paid in one of the contracting States. Hon'ble Court held that 'liable to taxation' and 'actual payment of tax' are two different aspects. Thus, keeping in view the ratio laid down by Hon'ble Supreme Court, as aforesaid, the reasoning of the Assessing Officer that since, the assessee is not liable to tax under Article 4 of the India-Mauritius Treaty, it cannot claim benefit of Treaty provisions, is liable to be rejected. ”

(Emphasis Supplied by us)”

15. We further observed that with respect to taxability of tax transparent entities such as single member LLCs being eligible to avail treaty benefits, the Mumbai Bench of the Tribunal in the case of Linklaters LLP Vs. ITO (supra) in the context of eligibility of LLP to avail the benefit of India UK Tax Treaty, the Tribunal has held that the India UK Tax Treaty would apply to a UK Limited Liability Partnership even though it was a pass through entity for UK tax purposes. While holding so the Tribunal observed as under:

“56. Modalities or mechanism of taxation may vary from jurisdiction to jurisdiction, as domestic law is a sovereign function and a bilateral tax treaty, or even the need of uniformity in entity classification approach - no matter how desirable someone may consider it to be, does not dictate such modalities of taxation being legislated. The fact of taxation, however, can be decided in an objective and uniform manner. Take, for example, a situation, in which the residence country of partnership does not regard it as a taxable unit and the entire income from partnership is taxed in the hands of the persons constituting such partnership, and some of those partners are not even residents of the tax jurisdiction in which partnership firm is resident. In such a situation, in case partnership firm seeks treaty protection from the other Contracting State, it could possibly be argued that income of the partnership firm is not entirely taxable even in the

Contracting State in which partnership firm has fiscal domicile, and, therefore, the income of the partnership was not taxed in the residence State. However, in a situation in which entire income of the partnership firm is taxed in the residence country - whether in its own hands or in the hands of the partners - this objection can hardly be taken. From a country perspective, what really matters is whether the income, in respect of which treaty protection is being sought, is taxed in the treaty partner country or not. That is clearly the underlying principle based on which residence definition is modeled.....

71. Viewed in the light of the detailed analysis above, in our considered view, it is the fact of taxability of entire income of the person in the residence State, rather than the mode of taxability there, which should govern whether or not the source country should extend treaty entitlement with the Contracting State in which that person has fiscal domicile. In effect thus, even when a partnership firm is taxable in respect of its profits not in its own right but in the hands of the partners, as long as entire income of the partnership firm is taxed in the residence country treaty benefits cannot be declined.....

75. A view is thus indeed possible that, given the context in which the expression 'liable to taxation by reasons of his domicile, residence, place of management or any other criterion of similar nature' is employed i.e., in the context of ascertaining fiscal domicile - as evident from the title of article as 'Fiscal domicile', it is sufficient that under the assignment or distributive rules of the treaty, the residence State has a right to tax income of the partnership firm - irrespective of the fact the position whether or not such a right is actually exercised by the residence State. The undisputed objective of article 4 is to ascertain fiscal domicile of a person, and the heading of article 4, as we have reproduced earlier in this order, is "Fiscal

domicile". In our humble understanding, as long as de facto entire income of the enterprise or the person is subjected to tax in that tax jurisdiction, whether directly or indirectly, the taxability test must be held to have been satisfied. Of course, the other possible approach to such a situation is that as long as the tax jurisdiction has the right to tax the entire income of the person resident there, whether or not such a right is exercised, the test of fiscal domicile should be satisfied. Viewed thus, all that matters is whether that tax jurisdiction has a right to tax or not; the actual levy of tax by the tax jurisdiction cannot govern whether a person has fiscal domicile in that jurisdiction or not.....

79. In view of the above discussions, as also bearing in mind the entirety of the case, we hold that the Assessee was indeed eligible to the benefits of India-UK tax treaty, as long as entire profits of the partnership firm are taxed in UK — whether in the hands of the partnership firm though the taxable income is determined in relation to the personal characteristics of the partners, or in the hands of the partners directly. To that extent, objection taken by the learned Departmental Representative, on the question of admissibility of India-UK tax treaty benefits, is held as maintainable but rejected on merits.....”

16. The ratios of the above decisions squarely applies to the fact situation of the assessee. Reliance placed by the Ld. DR on the decision of the coordinate bench in the case of Go Daddy.com LLC Vs. DCIT in ITA No.8085/Del/2018 dated 23.09.2022 is of no help to the Revenue. Perusal of the order of the Tribunal in the case of Go Daddy.com LLC (supra), we find that the assessee in that case did not claim any benefit under the India-USA tax treaty as regards the disputed issue of the income received from web hosting services, web designing, SSL certification services etc. categorically given a finding to this effect observing as under:

“12. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. Before we proceed to decide the issue on merit, we must make it clear that learned counsel appearing for the assessee has categorically submitted before us that the assessee is not claiming any benefit under the India-USA Tax Treaty as regards the disputed issue. In view of the aforesaid submission of learned counsel appearing for the assessee, we confine ourselves to examine the issue, as to whether, the amount received by the assessee from registration of domain name amounts to royalty under section 9(l)(vi) of the Act.”

17. In view of the above discussion and respectfully following the above decisions, we hold that the assessee is a tax resident of USA and is entitled for the benefit of DTAA between India-USA. Ground no.2 of grounds of appeal of the assessee is allowed. ”

9.2 Following the same order, the co-ordinate Bench by an order dated 01.10.2025 in the case of **GoDaddy.com, LLC vs ACIT (Supra)** had allowed similar benefits to the assessee and the relevant extract of the said order in Para No. 13 is reproduced as under:

“ 13. Ld. DR has relied the order of ld. Tax authorities below. After taking into consideration all submissions and the material on record we find that ld. AO has erred in giving a findings that being a LLP the assessee is not eligible for treaty benefits. The law in this regard is quite settled as it is now settled that the term, ‘liability to taxation’ has to be distinguished from actual payment of taxation. ‘Liability to taxation’ indicates the powers of taxing an income though the incidence of taxation and actual payment may be different. The reliance of the ld. counsel on the decision of the coordinate bench in the case of Wild West

Domains, LLC (supra) certainly takes care of the issue wherein relying the decision of the Mumbai Bench of the Tribunal in the case Linklaters LLP vs. ITO (Int. Taxation) 40 SOT 51 and Herbert Smith Freebills LLP vs. ACIT (TS 822-ITAT-202 (Del Trib.) the coordinate bench has given benefit of DTAA, irrespective of the fact that the assessee in that case was fiscally transparent entity in USA, like the present assessee. Accordingly, ground No.2 is sustained in favour of the appellant.”

9.3 As noted above in para no 9 of this order that the facts are identical to the facts of the aforesaid two cases, in as much as that in the present case, the assessee has been allotted Tax Identification Number and it was certified by the US tax authorities that to the best of their knowledge, the above-named Limited Liability Company was a branch, division, or business unit of a U.S. corporation that is a resident of the United States of America for purposes of U.S. taxation. Further, the Hon’ble Supreme Court in the case of Union of India vs Azadi Bachao Andolan (supra) held as under :

In our view, the contention of the respondents proceeds on the fallacious premise that liability to taxation is the same as payment of tax. Liability to taxation is a legal situation; payment of tax is a fiscal fact. For the purpose of application of article 4 of the DTAC, what is relevant is the legal situation, namely, liability to taxation, and not the fiscal fact of actual payment of tax. If this were not so, the DTAC would not have used the words, "liable to taxation ", but would have used some appropriate words like "pays tax".....

9.4 Similarly the co-ordinate Bench of the Tribunal in the case of Go Daddy.com LLC vs ACIT (supra) after observing that the law in this regard is quite settled as it is now settled that the term, 'liability to taxation' has to be distinguished from actual payment of taxation. 'Liability to taxation' indicates the powers of taxing an income though the incidence of taxation and actual payment may be different and had allowed the benefit of the India-USA DTAA to the assessee being an LLP.

9.5 Therefore, in view of the facts has discussed above and relying upon the above quoted orders we hold that the assessee being an LLP is entitled to the benefit of the India-USA DTAA ground no. 3 to 3.1 of the appeal is allowed.

10. The findings of the DRP on the issue of taxability of Rs. 471,64,50,980/- @ 10% for fees for technical services u/s 9(1)(vii) of the Act as well as Article 12(4)(b) of the India-US DTAA

4.3 Ground number 3. On the facts and circumstances of the case & in law, the Ld. AO grossly erred in treating the receipt towards the performance of offshore aircraft engine repair and overhaul activity by the Assessee as Fee for Included Services ('FIS) under the India-US DTAA as well as Fees for technical services under Section 9(1)(vii) of the Income Tax Act, 1961.

----- XXXXXX -----

4.3.2 DRP has considered the factual and legal submissions of the assessee. It has been submitted that no technical services have been made available by the assessee to the Indian customers and no technical training has been provided to its Indian customers. The Assessee has not transferred technical plan and data to the Indian customers. That none of the employees of the

Assessee visited India during the year for providing the services. The offshore repair activity involves replacement or refurbishment of parts, sub-parts, components, consumables, etc. and no standalone services are rendered to the India customers. The panel notes that there is no fundamental change in the crucial facts of the case from earlier years. Thus, the facts recorded by the AO in respect of the earlier years are applicable to AY 2021-22 as well. For the purposes of treatment of receipts on account of services of technical nature as FTS under section 9(1)(vii) of the Act, the place of rendering of services is immaterial. The services may be provided in India or outside India. Thus, the assessee's argument that the services were rendered from outside India and that no person of the assessee visited India during the relevant FY cannot be a determining factor to decide if the services for which payments were received by the assessee from Indian customers are FTS or otherwise. From an overall reading of the contractual arrangement for provision of repair and overhaul services between the assessee and the Indian customers, it emanates that the assessee is not only providing the services of overhaul and repair of engine parts for Indian Airlines including supply of spare parts, which per se are prima facie technical in nature, but is also helping, guiding and assisting Indian customers by providing technical training and sharing technical plan with the customers to take maintenance related decisions. This necessarily involves sharing of knowledge, skill and know-how on the part of the assessee satisfying the make available criteria laid down under India US DTAA. Without prejudice to the fact that the nature of services rendered by the assessee are not only technical in nature but also meet the "make available criteria" as specifically required under Article 12 of India US DTAA, the assessee being a fiscally transparent entity in US does not satisfy the criteria of being a resident of USA and is, therefore, not entitled to the beneficial provisions of the treaty. It is therefore enough that the receipts qualify as FTS within the meaning of section 9 of the Act to bring the receipts to tax as FTS. As already held above while adjudicating on ground 2 above, the assessee is not entitled to treaty benefits as claimed by it. Further, the services provided by the assessee to Indian customers are clearly technical in nature and the place of rendering of services is immaterial to qualify the same as FTS. In view of the above, the panel is fully in agreement with the AO's conclusion that the receipts towards repair and overhaul support by the assessee from

*Indian customers deserve to be brought to tax as FTS, as concluded by the AO. Consequently, the panel finds no infirmity in the proposed variations made by the AO and accordingly, the objections raised in **ground number 3 are rejected.**”*

11. Aggrieved with the aforesaid findings of the Ld. DRP the assessee is in appeal before us on followings ground of appeal :

4. On the facts and circumstances of the case & in law, the Ld. AO grossly erred in treating the receipt towards performance of offshore aircraft engine repair and overhaul activity by the Appellant as Fee for Included Services ('FIS') under the India-US DTAA as well as Fes for technical services ('FTS') under Section 9(1)(vii) of the Act. In doing so,

4.1. the Ld. AO erred in contending that the Appellant has made available its technical expertise to the Indian customers.

4.2. the Ld. AO erred in contending that the Appellant has provided technical training to its Indian customers

4.3. the Ld. AO erred in contending that the Appellant has transferred technical plan and data to the Indian customers

4.4. the Ld. AO erred in not appreciating the fact that no services were rendered in India & none of the employees of the Appellant visited India during the year for providing the services

4.5. the Ld. AO erred in not appreciating the fact that the offshore repair activity involves replacement or refurbishment of parts, sub-parts components, consumables, etc. and no standalone services are rendered to the Indian customers

11.1 In support of the above ground the assessee filed a written submissions vide submissions. The relevant extracts of the submissions filed by the assessee are as under:

- 15 “ *The Appellant is a company incorporated under the laws of the United States of America (‘USA’). It is a tax resident of USA under Article 4 of the India-USA Double Tax Avoidance Agreement (‘DTAA’). Copy of the tax residency certificate for the relevant period is attached at Page No 24-25 of the Paper Book.*
- 16 *The Appellant is one of the leading providers of aircraft engine maintenance support and undertakes various related activities. The Appellant is engaged in the business of carrying out engine repair and overhaul activities. The customers of the Appellant are airline companies which use sophisticated GE engines in their aircrafts. These engines are required to be handled in a proper manner to ensure their smooth and efficient functioning. The Appellant carries out overhaul, repair work, supply of spare parts, inspection/ testing activity, on an offshore basis i.e. in its facilities located outside India.*
- 17 *For this purpose, the Indian customers enter into a separate contract with the Appellant under which the role of the Appellant is to provide services to restore the engines in accordance with the repair specification, etc. Pursuant to these service arrangements, the Appellant (at a location situated outside India) provides labor, materials, parts and undertakes necessary repairs to return the engine to a serviceable condition.*
- 18 *The Indian customers’ engines and/or its parts that are to be repaired are transported by the customer from their premises in India to an offshore repair facility for undertaking necessary repair work by the Appellant. On receipt of such parts, the Appellant’s team inspects these parts for the nature and extent of maintenance work required to restore the engine. The maintenance work involves replacement of certain parts or sub-parts, components, consumables, filters, O-rings and/ or exchange and/ or refurbishment of some items.*
- 19 *Post maintenance work, such parts / components are re-shipped by the Appellant to its customers, and the delivery as well as the title and risk of loss in replaced and/ or exchanged, refurbished parts is transferred to the customers outside India.*
- 20 *The typical workflow undertaken by the Appellant engine repair process is laid out below:*

a. **Step 1 – Scheduling and removal of engine:** *The customer approaches the Appellant to book a time slot for getting the engine repaired. The Appellant checks its database internally and provides the details of available time slots to the customer; thereafter, the customer books a suitable time slot. The customer team removes the engine from the aircraft and then ships the same to the Appellant’s offshore repair shop located outside India.*

b. **Step 2 - Engine Receipt and Health check-up:** *The Appellant receives the engine from the customer at its center and thereafter it performs a health check-up of engine to understand the services which would be required to be performed in order to restore the engine. The Appellant thereafter, captures the list of activities that are to be performed or parts that are to be replaced on a formal job card – known as “worksopce”, which is then sent to the customer for approval. The customer and the Appellant discuss the contents of the proposed worksopce and finalise the “worksopce” mutually.*

8. **Step 3 - Repair work and delivery of Engine:** *Based on the agreed worksopce, the Appellant dismantles, carries out detailed inspection and then performs repair activities at their centers located outside of India. The repair activities may require replacement of parts. After the repair services are carried out, the engine is assembled, tested and delivered back to the customer.*

9. **Step 4 - Installation:** *The customer receives the engine and installs the same back in the Aircraft.*

15.1 *It is submitted that the Ld. AO has erred in holding that the repair/overhaul activities carried out by the Appellant during the relevant year had resulted in the satisfaction of the conditions prescribed under Article 12(4)(b) of the India-US DTAA; and thus, has reached an erroneous conclusion that the receipt towards such repair/overhaul activities will qualify as FIS. Further, the Ld. AO has erred in holding that the repair support (including supply of spare part) provided by the Appellant shall qualify as FTS in accordance with the provisions of section 9(1)(vii) of the Act.*

15.6 *The Ld. AO in the impugned assessment order has alleged that receipt earned by the Appellant towards performance of repair /overhaul activities will qualify as FTS /FIS on the basis of following assertions:*

- a. *After placing reliance on Clause 2.6.3 - 'Data Review' of the sample customer agreement (copy enclosed at page 38-119 of the Paper book) -"It remains the exclusive responsibility of customer to conclusively identify and resolve any aircraft or engine faults or adverse trends."; the Ld. AO contended that identifying and resolving any aircraft or engine faults or adverse trends requires technical knowledge and thus, Appellant has developed and transferred technical plan or technical design to the Indian customer.*
- b. *The Ld. AO by placing reliance on various terms of the sample customer agreement such as Clause 2.6 (Diagnostics), Clause 2.6.2 (Technical Support), Clause 2.9 (Workscope and documentation) etc has alleged that the Appellant has made available technical knowledge to the Indian customers.*
- c. *The Ld. AO alleged that the Appellant prepared the workscope basis mutual agreement of the employees of Indian customers and has alleged that this activity has resulted into imparting of technical knowledge to the employees of the Indian customers.*
- d. *The Ld. AO has contended that services being highly technical, technical modules are shared with the customers along with technical plan and data*

15.7 The entire foundation of the addition made by the Ld. AO is based on the Workscope shared by the Appellant with the customer. For ease of reference, the definition of Workscope as per the terms of contract is extracted hereinbelow:

"Workscope - the document written by GE and approved by Customer describing the prescribed repair or approach to repair of Equipment to meet the requirements of the Repair Specifications, including appropriate reliability and performance enhancements.

(refer page no 99 of the Paper Book)

It is the humble submission of the Appellant that a repair/overhaul of any equipment cannot be undertaken unless the defects/issue(s) faced are identified by the Appellant. Further, to carry out repair activities, it is essential for the Appellant to first identify the issues in the engine and then accordingly, list out the work to be performed or parts that are required to replace in a formal job card which is referred to as a workscope as defined in the above extracts. After preparation, the workscope is then sent to the customer for approval. The customer and Appellant thereafter discuss the content of workscope and finalise it mutually.

Therefore, the subject step is a part of normal process which is typically performed for conducting the repair activities. In view of the above, the assertion/allegation made by the Ld. AO that the Appellant is making available technical knowledge or sharing technical plans to the customer through the workscope is far-fetched and cannot be sustained.

15.8 *In this regard, the Appellant wishes to submit that the receipt earned towards performance of repair / overhaul activities is not taxable in India either as FTS under section 9(1)(vii) of the Act or as FIS as per Article 12 of the India-US DTAA. The submission of the Appellant on this aspect is as under:*

(a) The Ld. AO has erred in concluding that the receipts earned by the Appellant from the Indian customers will qualify as FIS as per Article 12(4)(b) of the India-US DTAA

15.9 *As per section 90 of the Act, a non-resident is entitled to be governed by the provisions of the Act or DTAA, whichever is more beneficial to him. The subject principle has also been reinforced by Apex Court in case of **P.V.A.L. Kulandangan Chettiar [2004] 267 ITR 654**. Thus, the taxability of the income earned by the Appellant for aircraft engine repair and overhaul activities shall be examined with reference to the provisions of India-US DTAA.*

15.10 *In Article 12 of the India-US DTAA, which deals with the 'Royalties and Fees for Included Services', provides that FIS arising in India may be taxed in India only if the services qualify as FIS as per the definition provided under Article 12(4) of the DTAA which defines FIS as under:*

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

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

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

15.11 *Under the present factual matrix, the Appellant is not providing any ancillary or subsidiary services as ascribed under para (a), therefore, it is required to be seen if these services fall under sub-para (b) above. From a reading of clause (b), it can reasonable inferred that technical or*

consultancy services would fall under FIS only if they make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or design.

15.12 *It is reiterated that the Appellant wishes to submit that the Ld. AO has erred in concluding that the activities performed by the Appellant has resulted in making available technical knowledge to the Indian customers and has also resulted in transfer of technical plan to them.*

(b) Ld. AO has erred in contending that the Appellant has made available its technical expertise to the Indian customers

15.21 *It may also be noted that, given the nature of equipment, the Original Engine Manufacturer's warranties are deemed void if any person other than an authorized service provider undertakes repairs or overhauls the engines and therefore, even for argument' sake if it is assumed that the customers are trained to undertake the repairs, they would not be willing to perform such tasks on their own.*

15.22 *Further, it is stated in the customer agreement that the Appellant will prepare and provide to customer a "worksopce" identifying the services required to return the aircraft engine to serviceable condition. It is further mentioned in the agreement that a "worksopce" is a document written by the Appellant and approved by customer describing the prescribed repair or approach to repair of Equipment to meet the requirements of the repair specification. After looking at these clauses of the agreement, the Ld. AO observed that the 'worksopce' was prepared by the Appellant in mutual agreement with the employees of the customers. Basis this fact pattern, the Ld. AO alleged that the preparation of worksopce with mutual agreement of the employees of customers has resulted in impartation of technical skill or knowledge to the employees of the Indian customers.*

15.25 *The Appellant submits that the "make available" condition prescribed under Article 12(4)(b) of the India-US DTAA is said to be satisfied if the service provider imparts technical knowledge, experience, skill, know-how, or processes to the service recipient. The Memorandum of Understanding ("MOU") entered between India and USA, defines the term 'make available' with suitable examples. According to the MOU entered between the parties the services which do not make available any technical knowledge/technology are excluded from the ambit of the term "FIS" as defined in Article 12(4)(b) of the India-US DTAA. Relevant extract of MOU is reproduced as under:*

"... technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills etc. are made available to the person purchasing the service, within the meaning of paragraph 4(b)...."

15.26 From the explanation provided under the MOU, it can be inferred that the receiver of the services can be said to acquire the relevant skills used by the service provider **only if he acquires those skills in such a way that he can himself use or apply them independently without getting any assistance or being dependent on the service provider in future.** The term 'make available' has been subject to intense judicial scrutiny and is a subject matter of many pronouncements in India. There's a judicial consensus on the subject that the make available test can be said to be satisfied where:

- 'The recipient of the service' is in a position to draw an autonomous functionality from such transfer, and be able to utilize the knowledge or knowhow in the future, without recourse to the service provider; or
- the recipient of the service is being enabled to carry out such technical activity independently.

15.30 In view of the above facts and legal position, it is clearly evident that the offshore overhaul and repair work undertaken by the Appellant does not make available technical knowledge, experience, skill etc. to its customers in India as:

- The customers cannot apply the technology on their own and / or cannot undertake the repair work on their own.
- Infact, the customers continued to engage with the Appellant for such offshore work in subsequent years on an ongoing basis.

(c) Ld. AO has erred in contending that the Appellant has transferred technical plan and data to the Indian customers

15.31 During the year under consideration, the Appellant has provided aircraft engine repair and overhaul services only which entails supply of spare parts. The Appellant was not involved in any development and transfer of technical plan or technical design to the Indian customers. Thus, the assertions made by the Ld. AO in the impugned assessment order are incorrect and are not based on the actual activities performed by the Appellant.

15.32 The Ld. AO highlighted the clause 2.6.3 of the customer agreement which states that "It remains the exclusive responsibility of customer to conclusively identify and resolve any aircraft or engine faults or adverse trends.", and concluded that Appellant has provided technical module, technical

plan and data to the customer in order to help the customers in identifying the fault and take decision for repair and maintenance services.

11.2 Further, the Ld. AR also submitted that the issue in appeal was no longer res integra and is covered by the recent decisions of the Hon'ble Tribunal in the case of ***Pratt & Whitney Canada Corp. v. DCIT (ITA No. 665/DEL/2025)*** and ***Rockwell Collins Southeast Asia Pte Ltd v. DCIT (ITA No. 2409/Del/2023)***.

12. On the other hand, the Ld. CIT(DR) relied upon the orders of the authorities below.

13. We have heard both the parties and perused the material available on record. As noted above, the assessee company is incorporated under the laws of the United States of America ('USA') and the customers of the Assessee are airline companies based in India which use GE engines in their aircrafts. Further, the Assessee carried out overhaul, repair work, supply of spare parts, inspection/ testing activity, on an offshore basis i.e. in its facilities located outside India in respect of GE engines in their aircrafts.

13.1 For this purpose, the Indian customers enter into a separate contract with the Assessee under which the role of the Assessee is to provide services to restore the engines in accordance with the repair specification, etc. Pursuant to these service

arrangements, the Assessee (at a location situated outside India) provides labour, materials, parts and undertakes necessary repairs to return the engine to a serviceable condition. The Indian customers' engines and/or its parts that are to be repaired are transported by the customer from their premises in India to an offshore repair facility for undertaking necessary repair work by the Assessee. On receipt of such parts, the Assessee's team inspects these parts for the nature and extent of maintenance work required to restore the engine. The maintenance work involves replacement of certain parts or sub-parts, components, consumables, filters, O-rings and/ or exchange and/or refurbishment of some items. Post maintenance work, such parts / components are re-shipped by the Assessee to its customers, and the delivery as well as the title and risk of loss in replaced and/ or exchanged, refurbished parts was transferred to the customers outside India. For such services, the assessee had received a sum of Rs. 471,64,50,980/- from different airline companies which was taxed by the AO @ 10% as Fees for Technical services under section 9(1) (vii) of the Act as well as per Article 12 (4) (b) of India-USA DTAA.

13.2 There is no dispute to the submissions of the assessee that as per provisions of section 90(2) of the Act, that the assessee being a non-resident has the option of being taxed in India under provisions of the Act or provisions of the DTAA entered between India and the country of residence of such non-resident, whichever is more beneficial and accordingly, the Assessee's claim for availing the beneficial

provisions of the India-US DTAA is justified and acceptable. Relying upon Article 12 (4) (b) of INDIA-USA DTAA the assessee submitted that the receipts from repair and overhaul support received from Indian customers were not taxable in India as the condition of ‘make available’ as laid down in Article 12 (4) (b) of INDIA-USA DTAA was not satisfied.

13.3 In this regard, the relevant provisions of Article 12(4) of India-US DTAA are reproduced as under :

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

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

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

13.4 Under the present factual matrix, the submission of the Assessee that it was not providing any ancillary or subsidiary services as described under para (a) and therefore, it is required to be seen if these services fall under sub-para (b) above is acceptable. In this regard from a reading of clause (b), it can be reasonably inferred that technical or consultancy services would fall under FIS only if they make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or design to its Indian customers

in this case. As stated above the assessee submits that it did not make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or design to its Indian customers from whom amount of Rs. 471,64,50,980/- was received during the year. In this regard the assessee also relied upon the two orders of the coordinate bench of the Tribunal in the case of *Pratt & Whitney Canada Corp. v. DCIT (supra) and Rockwell Collins Southeast Asia Pte Ltd vs DCIT (supra)*

13.5 We notice that in the case of *Pratt & Whitney Canada Corp. v. DCIT (ITA No. 665/DEL/2025)*, the Assessing Officer passed draft assessment order under section 144C(1) of the Act on 23.03.2024 and held that the payments received from the Indian customers on account of repair, maintenance and related services of aircraft engineering amounting to Rs. 242,65,46,501/- is taxable income of the assessee as Fees for Technical services ('FTS') under the provisions of section 9(1)(vii) of the Act and under the provisions of India-Canada DTAA. The Assessing Officer in the cited case noted that the assessee had received the following receipts from its Indian customers.

<i>Sl. No.</i>	<i>Nature of Income</i>	<i>Amount (in INR.)</i>	<i>Taxability in return of income filed</i>
	<i>Income from repair and maintenance of aircraft engines</i>	<i>2,36,18,82,958</i>	<i>Non-taxable</i>
	<i>Sale of Publications in relation to aircraft engines</i>	<i>1,38,86,712,</i>	
	<i>Receipts from engineering services</i>	<i>12,86,000</i>	
	<i>Support Services in relation to aircraft engine</i>	<i>4,01,103</i>	
	<i>Total receipts declared in the return of income filed</i>	<i>2,37,74,56,773</i>	

13.6 The assessee submitted before the AO in the cited case that the assessee had claimed receipts from aforesaid services as non-taxable while filing return of income for the subject year on the ground that since the services of repair, maintenance, publication, engineering and support services resulting in income of Rs. 2,37,74,56,773/- did not “make available” any technical knowledge, skill, know-how or process or consisted of the development and transfer of a technical plan or technical design, the same did not qualify as Fees for Technical Services (‘FTS’) as per the provisions of India-Canada Double Taxation Avoidance Agreement (‘DTAA’).

13.7 The Tribunal after examining the entire facts and the India-Canada DTAA held that the AO had not been able to establish that a technical knowledge was

transferred to the customers to make them self-sufficient/ reliant in using the technology and that the customer had derived an enduring benefit and utilised the knowledge or know-how on his own in future without the aid of the service provider.

The relevant findings of the order of the Tribunal are reproduced as under:

“17. We have heard the rival submissions and have carefully perused the materials on record. The issue before us to be adjudicated is the taxability of receipts from Indian customer on account of repair and maintenance on aircraft engines to be treated as FTS under the India-Canada DTAA and the India-Singapore DTAA. We find that both the India Canada DTAA and the India -Singapore DTAA have the “make available” clause to be complied with for the receipts being treated as FTS. Article 12(4)(b) of India-Canada DTTA provides as follows:

Article 12.4. For the purposes of this Article, 'fees for included services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

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

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

5. Notwithstanding paragraph 4, 'fees for included services' does not include amount paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 5(a);

(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;

(c) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals making the payment; or

(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 14.

Similarly, the India-Singapore DTTA defines FTS similarly as follows:

Article 12 (4). The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:

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

(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or

(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

18. We find that both the Treaties incorporate the “make available” clause for treating the payments as FTS. On the issue of meaning of and satisfaction of the clause “make available”, the Hon'ble Jurisdictional

High Court in the case of Goodrich Corporation ITA No. 173/2025 (Del) vide order dated 23.05.2025 has held as under:

“14. In CIT v. De Beers India Minerals P. Ltd.: (2012) 346 ITR 467, the Karnataka High Court had explained the import and meaning of ‘make available’ as used in Article 12(4) of the India USA DTAA as under:

“21. 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, skills, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.”

15. *This court in a recent decision in CIT v. Relx Inc.: (2024) 470 ITR 611 had concurred with the view of this court in CIT v. Bio-Rad Laboratories (Singapore) Pte. Ltd.: (2023) 459 ITR 5 and observed as under:*

15. Similarly, in order for that income to fall within the ambit of “fees for included services”, it was imperative for the Department to establish that the assessee was rendering technical or consultancy services and which included making available technical knowledge, experience, skill, know-how or processes. As has been found by the Tribunal, the access to the database did not constitute the 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.

16. We note that while explaining the meaning liable to be ascribed to the expression “make available”, the court in CIT v. BioRad Laboratories (Singapore) Pte. Ltd. had affirmed the following opinion as expressed by the Tribunal. This is evident from a reading of paras 14, 14.1 and 15, which is extracted below (459 ITR p. 7): (SCC OnLine Del paras 14 and 15) ”

14. According to the Tribunal, the agreement between the respondent-assessee and its Indian affiliate had been effective from 1-1-2010, and if, as contended by the appellant-Revenue, technical knowledge, experience, skill, and other processes had been made available to the Indian affiliate, the agreement would not have run its course for such a long period.

14.1. Notably, this aspect is adverted to in paras 17 to 23 of the impugned order. For convenience, the relevant paras are extracted hereafter:

‘A perusal of the aforementioned provision shows that in order to qualify as fees for technical services, the services

rendered ought to satisfy the “make available” test. Therefore, in our considered opinion, in order to bring the alleged managerial services within the ambit of fees for technical services under the India-USA Double Taxation Avoidance Agreement, the services would have to satisfy the “make available” test and such services should enable the person acquiring the services to apply the technology contained therein agreement is effective from 1-1-2009 and we are in Assessment Years 2018 2019 and 2019-2020. In our considered opinion, if the assessee had enabled the service recipient to apply the technology on its own, then why would the service recipient require such service year after year every year since 2009?

This undisputed fact in itself demolishes the action of the assessing officer/Dispute Resolution Panel. The facts on record show that the recipient of the services is not enabled to provide the same service without recourse to the service provider i.e. the assessee.

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/learned Commissioner of Income Tax (Appeals) is the incidental benefit to the assessee which has been considered to be of enduring advantage.

In our understanding, in order to invoke make available clauses, technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider.’ (emphasis is ours) 15. We tend to

agree with the analysis and conclusion arrived at by the Tribunal.”

19. *The co-ordinate bench of ITAT Delhi in ITA No. 988/DEL/2024 Goodrich Corporation order dated 22.08.2024 had held as under:*

“3. The assessee is a non-resident, TRC holder of USA primarily engaged in the business of providing services in the nature of repair & maintenance of aircraft equipment. (emphasis supplied)

4. Before the AO, the assessee submitted that for the purpose of repair & maintenance, the aircraft equipment are shipped outside India where they are repaired and sent back to Indian customer to India and hence they do not qualify the clause of ‘make available’. However, the AO held that the on ground aircraft services provided by the assessee qualify it as ‘make available’.

5. The ld. DRP held that “repair and maintenance services of aircraft parts is a very specialized field requiring technical expertise skill and experience at every stage. They are specific and customer based. Customer of the assessee are airlines which operate passenger and goods carrier. They are not equipped in handling the issues related to break down of aircraft. It is a complete and separate science and art in itself. The services provided by way of repair and maintenance are technical in nature and fall under ambit of services under Fee for Technical Services. As discussed above, once it is established that the services which have been provided are specialized customer-based services, what remains to see is whether they pass the test of make available or not under India USA DTAA. Interpretation of make available clause will differ with specific areas of the services under consideration. For instance, interpretation of make available for a concern providing services for the agricultural sector vis-à-vis education sector would be vastly different from each other. In the same way interpretation of make available is different for a concern engaged in providing services revolving around a highly specialized

sector such as Aircraft industry. The make available clause deals with not only making available technical knowledge or know-how or processes or consist of the development and transfer of a technical plan or technical design but also deals with imparting experience and skill. Within the make available clause itself the enduring benefit would be different for all the items mentioned in it for example the enduring benefit of a technical design or know-how cannot be same as enduring benefit coming from imparting of skill or experience. In the former case enduring benefit will outlive the enduring benefit brought in by the latter. In case of assessee company, the enduring benefit and make available fall under skill/experience which is shared by assessee company with its customers. Both the parties in these service transactions are engaged in highly specialized work which can be rendered and availed by them only and once the skill/experience is rendered, it continues to give benefit until required again. When it comes to services rendered as skill and experience, the make available and enduring benefit, will almost always have a comparatively short shelf life in this context. This being the case, it cannot be ignored that the make available clause and enduring benefits are satisfied and the service is not of the nature which is so highly technical and specialized that it should be taxed as Fee for Technical Services.”

6. From the above, we find that it could be technical services but the ‘make available’ clause is totally absent. The repairs & maintenance services are ‘not made available’ to the clients so that in future they can repair & maintain their own. There is no transfer of technology, no transfer of skill or knowledge or processes. There is no imparting of experience or benefit. The Id. DRP wrongly interpreted that the ‘enduring benefit’ gained by the client by the way of repairs & maintenance is akin to ‘make available’ which cannot be accepted. Rather, it should be the enduring benefit to the clients to undertake repairs & manage the maintenance services, then only it can be considered that the ‘make available’ clause is satisfied. Since, such

‘make available’ clause is not satisfied, the services cannot be treated as FTS as per India-USA DTAA.”

20. *The ld. counsel for the assessee also relied on the decision of the co-ordinate bench in the case of **Rockwell Collins Southeast Asia Pte Ltd ITA No. 2409/DEL/23** dated **14.11.2024** wherein it has followed the order of the ITAT, Delhi in the case of Goodrich Corporation [supra] and has held as under:*

“the revenue earned by the assessee from rendition of repairs and maintenance services of aircraft equipment cannot be construed as FTS both under the Act as well as under the treaty. Accordingly, Ground Nos. 4 and 5 raised by the assessee are allowed.”

21. *There is a recent development in the case of the assessee's own customer namely Global Vectra Helicorp Ltd. vs DCIT [2024] 159 taxmann.com 282 (Delhi - Trib.), where the co-ordinate bench has held that repair and maintenance services rendered to Global Vectra are not liable to be taxed either under the provisions of the Act or under the provisions of India-Canada DTAA. In the said case, Global Vectra made payments to certain non-residents including assessee in lieu of repair and maintenance services related to Helicopter parts/engine which was rendered outside India on which tax was not deducted u/s 195 of the Act by Global Vectra reason being the said transactions were not in the nature of FTS and therefore, not taxable in India. In the said case, the ITAT held that the repair services are not liable to be taxed under the provisions of the Act as the entire repair and maintenance of helicopter parts was carried out outside India and nothing was done in India by the non-resident payees.*

22. *Further, in relation to 'make available' clause, the ITAT upheld the order of first appellate authority and held that the payments made by Global Vectra to the residents of countries where the respective tax treaty provisions have 'make available' clause such as USA, UK, Australia, Canada and Singapore are not liable to be taxed in the hands of the payee*

*(including the assessee) and hence, there was no liability to deduct taxes at source u/s 195 of the Act as there was no income chargeable to tax in the hands of the assessee as per section 195 of the Act. In the case of **Global Vectra Helicorp Limited [supra]**, Delhi ITAT held as under:*

“18. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. Undisputedly, in the assessment years under dispute, the assessee had made payments to certain non-residents towards repair and maintenance of helicopter parts. As per the process followed by the assessee for repair and maintenance, it's engineering department identifies helicopter parts required for or are due for maintenance/overhaul in terms with DGCA guidelines. Once the engineering department identifies the helicopter parts required for maintenance/overhaul, it puts up a request to the Procurement Department. On receipt of request, the Procure Department issues repair orders and sends the parts to be repaired to the respective non-resident entities, who undertake the repairing/overhauling of such parts. On receipt of such repair order and parts, the non-resident entities issue an estimate/quote of charges for repair and maintenance work. On approval of such estimate/quote by the Procurement Department, the non-resident companies undertake necessary repair and maintenance work of the said parts. After repair/overhaul, the non-resident entities send the repaired parts/item along with invoices for repair and maintenance work carried out. On receipt of the invoices and helicopter parts, the assessee makes the payments after taking necessary declaration and documents from the non resident entity. It is further evident, to support its contention that there was no requirement for deduction of tax at source as the income of the non-residents are not taxable in India, the assessee had furnished the details of maintenance/repair, sample copies of invoices, sample copies of airway bills evidencing that the parts of the helicopters were sent outside India for carrying out necessary repair and sample copies of Form 15CB and 15CA etc. The Assessing Officer, however, held

that the services rendered by the non residents are technical and consultancy in nature, hence, quantifies as FTS requiring withholding of tax under section 195.

19. On a careful reading of section 195(1) of the Act, it is very much clear that the provision gets triggered only when payment made to the non-resident entity is chargeable to tax under the provisions of the Act. Thus, what is required to be examined is whether the payments made by the assessee to nonresidents are chargeable to tax under the provisions of Act. As discussed earlier, in the assessment years in dispute the assessee has made payment to entities resident in USA, UK, UAE, Australia, Canada, Singapore, Spain, Netherlands and France. Undisputedly, India has entered into DTAA's with all these countries. However, the provisions in the treaties with the respective countries are at variance.

20. Insofar as taxability of FTS is concerned, treaties can be classified in the following categories:

i. In the first category USA, UK, Australia, Canada and Singapore are placed since the definition of FTS under these treaties are more or less identical and contain make available condition to qualify as FTS.

(emphasis supplied by us)

ii. In the second category countries like, Netherlands, Spain and France can be put in as the definition of FTS in treaties are wider in scope and do not contain make available clause.

iii. In the third category UAE can be put as in the treaty with UAE there is no provision concerning FTS.

21. Insofar as the countries falling in the first category, such as, USA, UK, Australia, Canada and Singapore, admittedly, the treaty provisions have make available clause. Therefore, to treat a

particular receipt to be in the nature of FTS, it has to be demonstrated that in course of rendition of services, the service provider had made available technical knowledge, know-how, skill etc. to the service recipient so as to enable him to perform such services in future independently without any assistance of the service provider.

22. In the facts of the present appeal, the Assessing Officer has failed to demonstrate with cogent evidence that the make available condition enshrined in the concerned treaties are satisfied. In fact, learned first appellate authority has recorded a categorical factual finding that in course of rendition of service technical knowledge, know-how, skill, etc. has not been made available to the service recipient by the service provider. Thus, in absence of any contrary material brought on record by the Revenue, we concur with the view expressed by learned first appellate authority. Once the payments do not qualify as FTS under the respective treaty provisions, in terms with section 90(2) of the Act, treaty provisions being more beneficial would override the provisions contained in the domestic law. That being the legal position, in our view, the payments made to the residents of USA, UK, Australia, Canada and Singapore, being not chargeable to tax in India, section 195 is not applicable. Accordingly, we hold that the assessee was not required to deduct tax at source while making payment to residents of the aforesaid countries.”

23. The factual matrix in the instant case of the assessee is that the assessee manufactures, sells and provide servicing of gas turbine engines, such as turbofan, turboprop and turboshaft engines and Auxiliary Power Units (APU). When a customer purchases an aircraft from an aircraft manufacturer, it also purchases the engine associated with the aircraft which belongs to PWCC. As opposed to the large commercial engines market or APU, aircraft manufacturers do not typically offer engine alternatives to their platforms for regional aviation, general aviation, or helicopters

(PWCC main products) and hence, customers purchasing an aircraft will necessarily purchase PWCC's engine. The customer acquires title to the engines from the aircraft manufacturer, not from PWCC and generally the repair and maintenance plan with PWCC is decided at the time of sale of engine along with the aircraft to the customers. Under the repair and maintenance services, company offers customers two options for maintenance:

- (i) enrolling in a Pay Per Hour (PPH) program/maintenance plans or*
- (2) independent repairs as and when required.*

24. In such a scenario, what we have to determine is whether when the assessee provides repairs and maintenance services to its customers, does it transfer the technical knowledge and expertise to its customer so that the customer can carry out the repairs and maintenance of the aircraft/engines itself. We find that the AO has not established that such a technical knowledge is transferred to the customer to make them self sufficient/relient in using the technology and that the customer has derived an enduring benefit and utilized the knowledge or know-how on his own in future without the aid of the service provider. We do not find that the technical knowledge, skills, etc remained with the customer receiving the services even after the particular contract comes to an end. Thus, we are of the considered view that the requirement of "make available" clause as per the India-Canada DTAA and India-Singapore DTAA are not satisfied in the case of the assessee. Since the receipts on account of repair and maintenance received by the assessee during the subject year from other customers are of similar nature as the receipts from Global Vectra discussed above, therefore, the above judgement applies to all the receipts from repair and maintenance received by the assessee. In view of the judicial precedence as discussed above, we have no hesitation to hold that the receipts on account of repair and maintenance services received by the assessee are not liable to be taxed as FTS

in the hands of the assessee during the subject year. Ground 4 to 6 are allowed.”

(Emphasis supplied by us)

13.8 Similarly, the co-ordinate Bench of the Tribunal in the case of ***Rockwell Collins Southeast Asia Pte Ltd v. DCIT (ITA No. 2409/Del/2023)*** wherein Ground Nos. 4 and 5 raised by the assessee are with regard to taxability of Rs. 12,78,69,526/- received towards repairs and maintenance services rendered by the assessee. The details of the said receipts are reproduced as under:

Nature of Income	Amount (in Rs.)	Taxability	Comment
Repair services for aircraft equipment	12,78,69,526	Non-Taxable under the Act as well India-Singapore tax Treaty	In dispute

”

13.9 The relevant findings of the Tribunal in this case in Para No. 6 to 12 are reproduced as under :

“ 6. We have heard the rival submissions and perused the material available on record. Assessee is a company established under the laws of Singapore and is engaged in providing repair and maintenance services of aircraft equipment to Indian customers. For the captioned year, the assessee filed its return of income on 13 January 2021 declaring total income as NIL. The assessee claimed credit of the entire taxes deducted at source ('TDS') of Rs. 76,08,630/- as refund during the subject year. During the year under consideration, the Assessee has earned following receipts from Indian customers:-

<i>Nature of Income</i>	<i>Amount (in Rs.)</i>	<i>Taxability</i>	<i>Comment</i>
<i>Repair services for aircraft equipment</i>	<i>12,78,69,526</i>	<i>Non-Taxable under the Act as well India-Singapore tax Treaty</i>	<i>In dispute</i>
<i>Income from HR consulting and e-business (Information technology) services</i>	<i>4,65,72,618</i>	<i>Non-taxable under the Act as well India-Singapore tax treaty</i>	<i>Not in dispute</i>

7. The assessee provides repair and maintenance service for aircraft equipment to Indian customers. This is the primary business of the Assessee for which the assessee charge repair and maintenance fees. For the purpose of repair and maintenance, the aircraft equipments are shipped outside India where aircraft equipments are repaired and sent back to the customers in India. In this regard, the assessee enclosed the specimen document in relation to shipment of equipment including the e mail communications in pages 301 to 330 of the Paper Book to prove the fact that the repairs were carried out outside India. The assessee earned revenue of 12,78,69,526/- from Indian customers on account of such repairs and maintenance services. The assessee also submitted the copy of agreement, purchase orders along with copy of invoices raised on the Indian customers on sample basis which are enclosed in pages 211 to 248 of the Paper Book. The ld AR drew our attention to the steps involved in the rendition of repairs and maintenance services by the assessee as under:-

Step 1: Intimation of need for repair and maintenance services by the customer

Step 2: Customer sends the aircraft equipment to the designated facility of the Assessee in Singapore

Step 3: On receipt of the equipment, the Assessee evaluates repairs to be undertaken, provides estimate to customer for their approval

Step 4: Post receipt of the customer's approval, the Assessee performs necessary repairs at the designated facility

Step 5: Post completion of repairs at the designated facility in Singapore, the Assessee informs the customer and confirms the place of delivery to ship back the equipment.

8. The ld AO however held that the sum of Rs. 12,78,69,526/- received by the assessee in the course of rendering repair services for aircraft equipment would have to be construed as „Fee for Technical Services (FTS)“ both under u/s 9(1)(vii) of the Act as well as under the India Singapore Double Taxation Avoidance Agreement (DTAA). The ld AO observed that the consideration received by the assessee for rendering repair and maintenance services are in the nature of „technical and consultancy services“ since the solution provided by the assessee through a automated process by using of data provided by the customers involved

special knowledge. The assessee raised an objection that services are rendered outside India. The ld AO buttressed this argument of the assessee by observing that place of rendition of service is not important as long as the services are utilized for a business or profession carried on in India. The ld AO also observed that income of the recipients would be chargeable to tax in the country where the source of payment is located i.e. where the buyer is located. In support of this proposition, he relied on the decision of the Hon'ble Supreme Court in the case of GVK Industries reported in 332 ITR 130 (SC). The ld AO also observed that the repairs and maintenance services were made available to the Indian customers so that they can use it independently without the support of the assessee. The equipments/ parts are essential parts of an aircraft and due to lack of technical expertise in India, the equipments are sent to Singapore for technical repair and maintenance. Once the parts are sent back to customer in India, the client is equipped to use that part and fly the aircraft. Unless, the Assessee does not „make available“ the required technology to the client in India, it is not possible for the Aircraft clients to operate those aircrafts. In addition to repair and maintenance agreement, both the parties also exchange the proprietary information. There are restrictions placed on both the parties to prevent the use or the disclosures to any person outside the organization of all the data received i.e. the Assessee is sharing „secretive and confidential“ data with the customers in India which signifies that technical know-how and information is being „made available“ to the clients in India.

9. The assessee vehemently pleaded that the revenues earned by it on account of repairs and maintenance of aircraft equipment do not

constitute payment for „technical services“ as defined in Explanation 2 to section 9(1)(vii) of the Act ; and that the repairs and maintenance services are routine maintenance services and not technical services as per the Act. The assessee placed reliance on the decision of the coordinate bench decision of this Tribunal in the case of Global Vectra Helicorp Ltd reported in 159 taxmann.com 282 (Del Trib) wherein it was held that the since the entire repairs and maintenance of Helicopter parts was carried out outside India and nothing was done in India, the payment in the nature of repair and maintenance services is not chargeable to tax in India in the hands of the non- resident. Admittedly, in the instant case, the assessee is a tax resident of Singapore and hence, the revenues earned thereon would not be chargeable to tax under the Act. The assessee also placed reliance on the decision of the Delhi Tribunal in the case of DLF Ltd Vs. ITO reported in 111 taxmann.com 214 (Del Trib) wherein that assessee made payment to UK based company for aircraft maintenance which was in nature of routine repairs and maintenance and the same would not fall under the category of FTS u/s 9(1)(vii) of the Act. It was also pleaded that the expression „technical repairs“ are different from „technical services“ and reliance was placed on the decision of the Hyderabad Tribunal in this regard in the case of BHEL-GE-Gas Turbine Servicing Pvt. Ltd reported in 24 taxmann.com 25 (Hyd Trib). The assessee also pleaded that it has no Permanent Establishment (PE) in India. Hence, the payment received towards repairs and maintenance of aircraft would fall at best under the category of works contract constituting business receipts and in absence of PE in India, the same would not be taxable even as per the India Singapore Treaty. In support of this proposition, the assessee relied on the decision of the Mumbai

Tribunal in the case of DHL Air Ltd Vs. DCIT reported in 86 taxmann.com 277 (Mum Trib) wherein, it was held that services for repairs and maintenance of aircraft cannot be termed as technical services as defined in section 9(1)(vii) of the Act and rather it falls under the category of works contract as per section 194C of the Act which fact is also clarified by CBDT in its Circular No. 715 dated 08.08.1995 vide Question No. 29. Further, the assessee also submitted that co-ordinate bench of Delhi Tribunal in the case of Parasrampuria Synthetics Ltd reported 20 SOT 248 (Del Trib) held that use of services of technically qualified persons to render the services did not bring the amount paid as “fee for technical services” within the meaning of Explanation 2 to Section 9(1)(vii) of the Act. Similar decision was rendered by Delhi Tribunal in the case of Spicejet Ltd reported in 145 taxmann.com 622 (Del Trib). The assessee also pleaded that the services rendered by it does not make available any technical knowledge, technical plan or design which would enable the user to carry out the repairs of the aircraft on its own. Accordingly, even if the services rendered by the assessee are construed as technical services under the Act, the same could not be construed as FTS under the treaty since the same does not make available technical knowledge to enable the end user to use the same by its own. In this regard, the assessee placed reliance on the decision of Hon’ble Karnataka High Court in the case of De Beers India Minerals Pvt. Ltd reported in 21 taxmann.com 214 (Kar HC) and decision of the Hon’ble Jurisdictional High Court in the case of Guy Carpenters reported in 20 taxmann.com 807 (Del HC), among other decisions. However, none of the aforesaid submissions were appreciated by the ld AO and ultimately the services rendered by the assessee were

construed as FTS taxable u/s 9(1)(vii) of the Act as well as under Article 12 of India-Singapore Treaty.

10. From the modus operandi operated by the assessee for rendering of repairs and maintenance services, we find that the aircraft equipments are shifted outside India for repairs. The repairs are carried out outside India. The equipment after due repairs and maintenance are shipped back to the customers in India. There is absolutely no transfer of any technology, nor technical plan or design or make available technical knowledge to the recipient of the services, which would enable the recipient to carry out repairs on its own without the assistance of the assessee. In our considered opinion, the services rendered do not satisfy the „make available“ clause prescribed in Article 12 of India-Singapore treaty. Further, no technical knowledge, experience, skill, knowhow, technical plan or technical design was made available or transferred by the assessee to any party while rendering the said services. No representative of the assessee had come to India for rendering any services. The entire repairs and maintenance services, at the cost of repetition, are rendered only outside India. The crisis calls are attended over phone from Singapore. No training whatsoever is given by Singapore entity to the Indian representatives. Further, it is not in dispute that the assessee does not have any PE in India. These facts are very clear from the sample Dispatch plus Product Service Agreement entered into by the assessee with Inter Globe Aviation Pvt. Ltd which is enclosed in pages 211 to 248 of the Paper Book. The copies of the invoices raised by the assessee are enclosed in pages 261 to 264 of the Paper Book.

11. The ld DR before us vehemently pleaded that the ld AO had applied „source rule“ in the instant case. She doubted the fact as to whether services per se were rendered in Singapore by the assessee. She stated that services of Airbus are rendered in France which is in public knowledge. We find that this argument to be completely absurd and devoid of merit in view of the fact that no consideration was received by the assessee from Airbus. Further, this was not even the case of the ld AO for treating the receipts as FTS in the hands of the assessee. We further find that the issue in dispute is squarely covered by the co-ordinate bench decision of the Delhi Tribunal in the case of Goodrich Corporation Vs. ACIT in ITA No. 988/Del/2024 for AY 2018-19 dated 22.08.2024 which is a sister concern of the assessee, wherein, exactly the identical issue was subject matter of consideration. For the sake of convenience, the relevant operative portion of the said order is reproduced hereinunder:-

“Repairs and Maintenance Services-FTS or not 3.

‘The assessee is a non-resident, TRC holder of USA primarily engaged in the business of providing services in the nature of repair & maintenance of aircraft equipment.

4. Before the AO, the assessee submitted that for the purpose of repair & maintenance, the aircraft equipment are shipped outside India where they are repaired and sent back to Indian customer to India and hence they do not qualify the clause of 'make available'. However, the AO held that the on ground aircraft services provided by the assessee qualify it as 'make available'.

5. The Id. DRP held that "repair and maintenance services of aircraft parts is a very specialized field requiring technical expertise skill and experience at every stage. They are specific and customer based. Customer of the assessee are airlines which operate passenger and goods carrier. They are not equipped in handling the issues related to break down of aircraft. It is a complete and separate science and art in itself. The services provided by way of repair and maintenance are technical in nature and fall under ambit of services under Fee for Technical Services. As discussed above, once it is established that the services which have been provided are specialized customer-based services, what remains to see is whether they pass the test of make available or not under India USA DTAA. Interpretation of make available clause will differ with specific areas of the services under consideration. For instance, interpretation of make available for a concern providing services for the agricultural sector vis-à-vis education sector would be vastly different from each other. In the same way interpretation of make available is different for a concern engaged in providing services revolving around a highly specialized sector such as Aircraft industry. The make available clause deals with not only making available technical knowledge or know-how or processes or consist of the development and transfer of a technical plan or technical design but also deals with imparting experience and skill. Within the make available clause itself the enduring benefit would be different for all the items mentioned in it for example the enduring benefit of a technical design or know-how cannot be same as enduring benefit coming from imparting of skill

or experience. In the former case enduring benefit will outlive the enduring benefit brought in by the latter. In case of assessee company, the enduring benefit and make available fall under skill/experience which is shared by assessee company with its customers. Both the parties in these service transactions are engaged in highly specialized work which can be rendered and availed by them only and once the skill/experience is rendered, it continues to give benefit until required again. When it comes to services rendered as skill and experience, the make available and enduring benefit, will almost always have a comparatively short shelf life in this context. This being the case, it cannot be ignored that the make available clause and enduring benefits are satisfied and the service is not of the nature which is so highly technical and specialized that it should be taxed as Fee for Technical Services."

6. From the above, we find that it could be technical services but the 'make available' clause is totally absent. The repairs & maintenance services are 'not made available' to the clients so that in future they can repair & maintain their own. There is no transfer of technology, no transfer of skill or knowledge or processes. There is no imparting of experience or benefit. The Id. DRP wrongly interpreted that the 'enduring benefit' gained by the client by the way of repairs & maintenance is akin to 'make available' which cannot be accepted. Rather, it should be the enduring benefit to the clients to undertake repairs & manage the maintenance services, can then only it be considered that the 'make available' clause is

satisfied. Since, such 'make available' clause is not satisfied, the services cannot be treated as FTS as per India-USA DTAA.

7. The appeal of the assessee on this ground is allowed.”

12. In view of the aforesaid observations and respectfully following the judicial precedent hereinabove, we hold that the revenue earned by the assessee from rendition of repairs and maintenance services of aircraft equipment cannot be construed as FTS both under the Act as well as under the treaty. Accordingly, Ground Nos. 4 and 5 raised by the assessee are allowed.

13.10 The facts in the present case are similar to the above cited cases. In this case the Assessing Officer had added the sum of Rs. 471,64,50,980/- @10% for fees for technical services u/s 9(1)(vii) of the income tax act 1961 as well as per Article 12 (4)(b) of INDIA-USA DTAA. The AO had relied upon the decision of the Hon'ble High Court in the case of Director of Income Tax Delhi vs M/S Lufthansa Cargo India (supra) to hold that the services rendered by the assessee were in the nature of fees for technical services u/s 9(1)(vii) of the Act.

13.11 After careful consideration of the business of the assessee and considering the decision of the Hon'ble High Court in the case of Director of Income Tax Delhi vs M/S Lufthansa Cargo India (supra) relied by the AO, we are of the considered view

that the revenue has an arguable case to show that the services rendered by the assessee to the airlines companies based in India are technical services within the meaning of section 9(1)(vii) of the act but in view of the discussion made later in this order, the receipts from repair and overhaul support received from Indian customers are not taxable in India as the condition of 'make available' as laid down in Article 12 (4) (b) of INDIA-USA DTAA is not satisfied in this case.

13.12 Further, we note that the Assessing Officer in view of the findings as reproduced earlier in this order held that in this case the assessee had made available the technical services and thus was taxable as per the provisions of Article 12(4)(b) of the India-USA DTAA. In this regard the main findings of the AO are reproduced once again for ready reference :

“The description of above services clearly brings out that the assessee as provided these services from offshore basis and it is the customer whose sole responsibility was to detect the problem related to engine, and thus assessee is helping, guiding, and assisting customer by providing technical training and sharing technical plan and data with the customer to detect the problem and take maintenance decision and these things cannot be done without sharing the technical knowledge. The assistance and guidance is provided using skill, expertise and experience of the Assessee which it gained over a period of time and have expertise in it. Thus, the Applicant is making available his technical expertise in the area to Indian customer enabling it to take better decisions and perform its functions in more effective manner The activities are completely different from activities where final solution is provided. Once these advices and training is given by the assessee, the final task is performed by Indian customer as "IT remains the sole responsibility of airline to conclusively identify and resolve aircraft and engine faults or adverse trends

and make all maintenance decision affecting airlines aircraft." And these tasks cannot be performed without having technical knowledge, skill and experience and thus assessee develop and transfer of a technical plan or technical design to Indian customer, knowledge to detect the fault and take repair and maintenance decision. Indian customer becomes wiser with each advice, training and so that on that issue he can perform the task

As assessee make available technical plan, workscope were prepared by mutual agreement the employees of Indian customers gain the technical knowledge of detecting and taking decision for maintainance that issue in future independently. The service provided is continuous, since new issues keep coming up every now and then. But that does not mean that service recipient does not learn from the previous work. The Assessee has acknowledged that it has necessary expertise and the services which are given under trademark onpoint are specialized service of GE. This knowledge and expertise also keeps getting updated and hence, the need to share it customer is on a continuous basis. As there is sharing of technical plan and data and provide training related to diagnosis, overhaul and troubleshooting as part of Onpoint engine service programme hence assessee services are in nature of fees for technical nature as per income tax act 1961 as well as per india-usadtaa article 12(4)(b)."

13.13 The above findings of the AO have been carefully perused by us but not found to be acceptable. The above findings of the AO at best shows that the engineers/ technicians working for the Indian customers may be getting wiser and learning certain skills in its interaction with the assessee but the question is whether it is on account of making available of the said skills by the assessee or it is individual skill of the person to acquire some related skills as stated by the AO. We also note that

in Article 12(4)(b) of the Act India-USA DTAA it mentions to “make available” technical knowledge in other items as mentioned there in, which in our considered view is that the assessee has to “make available” the said technical knowledge with a design and with a conscious efforts and not by implication as the case has been made out by the Assessing Officer in the present case. The engineers/technicians working with the Indian customers will have a knowledge of aeronautical engineering relating to the aeroplanes which includes its engine for which they have been hired by the respective Indian companies for which they were paid. But the issue here is if the Indian customers could get their engines repaired by their in-house engineering team then why the Indian customers would send the engines to the assessee at the service centres by paying such huge amount towards “Receipts towards repair and overhaul support”. Flying of an aeroplane is an engineering miracle but it has to observe zero error norms of safety. In this regard, Hon’ble Delhi High Court in the case of Director of Income Tax Delhi vs M/S Lufthansa Cargo India (supra) observed that there are strict guidelines to keep the aircrafts safe and airworthy because international and national domestic regulatory authorities mandate that certification of such component safety is a condition precedent for their airworthiness. Under these circumstances, the airlines were bound by the agreements to send its engines for repair and overhaul to the assessee.

13.14 Upon careful observations of the above findings/observations of the AO we find that the AO has not established that technical knowledge which is being utilized by the assessee for the “receipts towards repair and overhaul support” (for which the assessee has received the sum of Rs 471,64,50,980/-) is transferred to the customer to make them self -sufficient/reliant in using the technology and that the customer has derived an enduring benefit and utilized the knowledge or know-how on its own in future without the aid of the service provider. We do not find that in the present case the technical knowledge, skills, etc remained with the customer receiving the services even if after the particular contract comes to an end. Further, the assessee in its submission before the Ld DRP for AY 2021-22 had stated that in fact, the customers continued to engage with the Applicant for such offshore work in subsequent years on an ongoing basis which has not been contested by the revenue. Thus, we are of the considered view that the requirement of “make available” clause as per the India-USA DTAA are not satisfied in the case of the assessee. We are also of the considered view that the business is not run with a charity motive in this highly competitive business environment both locally and globally and the assessee would not be sharing or make available its technical expertise to the Indian customers to lose its own business or to create a competitor for itself unless the assessee is paid for making available the said technology, which in the present case the revenue has failed to show that any amount for making

available the said technology or any amount attributable towards making available of such technology was paid by the Indian customers to the assessee.

13.15 Further, as noted above in the case of Pratt & Whitney Canada Corp. v. DCIT (supra) and Rockwell Collins Southeast Asia Pte Ltd v. DCIT (supra) had considered India-Canada DTAA and India-Singapore DTAA wherein the requirement of “make available” was required to be satisfied to tax fees for technical services in the source country making the said payments like the similar requirement in Article 12(4)(b) of the India-USA DTAA and also on similar facts (as reproduced earlier in this order and the significant finding showing the facts similar to case of the assessee duly highlighted) the co-ordinate Bench of the Tribunal had held that the receipts on account of repair and maintenance services received by assessee was not liable to be taxed as FTS in the hands of the assessee during the subject year.

13.16 We therefore, in view of the facts as discussed above by us and relying upon the respective orders of the co-ordinate Bench in the case of Pratt & Whitney Canada Corp. v. DCIT (supra) and Rockwell Collins Southeast Asia Pte Ltd v. DCIT (supra), we hold that the receipts on account of repair and overhaul services amounting to Rs. 471,64,50,980/- received by assessee was

not liable to be taxed as FTS in the hands of the assessee during the subject year and the same is deleted. Grounds no 4 to 4.5 of the appeal are allowed.

14. Ground No. 5 of the appeal is reproduced as under :

On the facts and circumstances of the case & in law, the Ld. AO erred in levying interest of INR 2,54,93,760 and INR 15,80,61,312 under section 234A and 234B of the Act, respectively.

14.1 This ground is consequential in nature. The AO directed to charge interest as per law while giving effect to this order. Ground no 5 of the appeal is allowed for statistical purposes.

15. Ground No. 6 of the appeal is reproduced as under :

On the facts and circumstances of the case & in law, the Ld. AO erred in initiating the penalty proceedings under section 270A of the Act.

15.1 This ground is premature in nature and hence dismissed.

16. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 11th March, 2026.

Sd/-
VIKAS AWASTHY
(JUDICIAL MEMBER)

Dated- 11.03.2026.
Pooja Mittal, Sr. PS.

Sd/-
BRAJESH KUMAR SINGH
(ACCOUNTANT MEMBER)

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi,