



2025:DHC:5529-DB



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 14.07.2025

+ **ITA 92/2025 and CM APPL. 22267/2025**

TUNGSTEN AUTOMATION ENGLAND LIMITED
(FORMERLY KNOWN AS TUNGSTEN NETWORK
LIMITED)Appellant

Versus

DEPUTY COMMISSIONER OF INCOME TAX,
INTERNATIONAL TAXATION, CIRCLE 3(1)(1)
NEW DELHIRespondent

AND

+ **ITA 93/2025 and CM APPL. 22294/2025**

TUNGSTEN AUTOMATION ENGLAND LIMITED
(FORMERLY KNOWN AS TUNGSTEN NETWORK
LIMITED)Appellant

Versus

DEPUTY COMMISSIONER OF INCOME TAX,
INTERNATIONAL TAXATION, CIRCLE 3(1)(1),
NEW DELHIRespondent

Advocates who appeared in this case:

For the Appellant	: Mr Deepak Chopra and Ms Priya Tandon, Advocates.
For the Respondent	: Mr Sunil Agarwal, SSC with Mr Shivansh B. Pandya, Mr Viplav Acharya, Ms Priya Sarkar and Mr Utkarsh Tiwari, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE TEJAS KARIA

JUDGMENT



VIBHU BAKHRU, J

1. The appellant [**Assessee**] has filed the present appeals under Section 260A of the Income Tax Act, 1961 [**the Act**] impugning a common order dated 18.12.2024 passed by the Income Tax Appellate Tribunal [**the Tribunal**] in ITA Nos.2237/Del/2024 and 2238/Del/2024 captioned *Tungsten Network Ltd. v. Deputy Commissioner of Income Tax* in respect of the assessment years [**AYs**] 2016-17 and 2017-18.
2. The Assessee had preferred the said appeals before the Tribunal impugning separate assessment orders dated 12.03.2024 passed by the Assessing Officer [**AO**] under Section 147 read with Section 144 of the Act in respect of AYs 2016-17 and 2017-18. The final assessment orders were passed pursuant to directions issued by the Dispute Resolution Panel [**DRP**] under Section 144C(5) of the Act by separate orders dated 22.02.2024 passed in respect of each of the relevant AYs 2016-17 and 2017-18.
3. The Assessee is a company incorporated under the laws of the United Kingdom [**UK**] and is a tax resident of the UK. The Assessee is a wholly owned subsidiary of Tungsten Corporation Plc, which is also a company incorporated in the UK. The Assessee had not filed its return of income for the relevant assessment years as, according to the Assessee, it did not have any income which was taxable under the Act. The AO received information to the effect that the Assessee had received certain amounts during the financial years relevant to the assessment years in question – an amount of ₹2,93,92,810/- during the previous year relevant to AY 2016-17 and a sum of ₹3,31,98,980/- during the previous year relevant to AY 2017-18 – from



Genpact India Pvt. Ltd. [GIPL] being a company incorporated in India. According to the AO, these receipts suggested that the Assessee's income for the relevant assessment years had escaped assessment. Accordingly, the AO issued separate notices under Section 148A of the Act, both dated 30.06.2021, in respect of AYs 2016-17 and 2017-18 respectively.

4. By virtue of the decision rendered by the Supreme Court in *Union of India & Ors. v. Ashish Aggarwal*¹, such notices were deemed to be notices issued under Section 148A(b) of the Act and the Assessee was afforded an opportunity to respond to the said notices. The said proceedings culminated in the AO passing two separate orders dated 26.07.2022 under Section 148A(d) of the Act holding that it was a fit case for issuance of notices under Section 148 of the Act in respect of AYs 2016-17 and 2017-18. Accordingly, the AO issued separate notices, both dated 28.07.2022, under Section 148 of the Act in respect of AYs 2016-17 and 2017-18.

5. The Assessee did not file the returns of income pursuant to the notices issued under Section 148 of the Act. The AO issued notices under Section 142(1) of the Act seeking certain information from the Assessee. The Assessee submitted its response to the said notices and acknowledged that it had received amounts of ₹1,46,96,822/- and ₹1,46,95,988/- during the previous year relevant to AY 2016-17. However, part of the said amount pertained to financial year [FY] 2014-15 relevant to AY 2015-16. It claimed that it had issued invoices during the previous year relevant to AY 2016-17 amounting to 1,80,877/- GBP, which translated approximately to ₹1,45,84,438/-, computed by considering the average exchange rate of



₹80.63/-. Similarly, the Assessee also acknowledged that during the previous year relevant to AY 2017-18, the Assessee had raised invoices amounting to 2,71,314/- GBP, which translated approximately to ₹2,47,13,604/- computed at the average exchange rate of ₹91.09/-. The Assessee also acknowledged that during FY 2016-17 relevant to AY 2017-18, it had received an amount of ₹3,31,98,980/-, which included advance pertaining to FY 2017-18.

6. The Assessee also forwarded the copies of the invoices raised as well as its Tax Residency Certificate [TRC]. Additionally, the Assessee provided the agreements entered into between OB10 Limited [OB10] – an entity which was subsequently acquired by the Assessee – and Genpact International Inc. [GIL]. GIPL is an affiliate of GIL. The Assessee claimed that the amounts received for rendering services under the said agreements were its business income and were not chargeable to tax under the Act as it did not have any permanent establishment [PE] in India.

7. The AO did not accept that the amounts received by the Assessee from GIPL were not chargeable to tax under the Act. According to the AO, the said amounts were required to be treated as “fees for technical services” [FTS] within the scope of Article 13 of the India-UK DTAA².

8. Accordingly, the AO issued separate draft assessment orders under Section 144C(1) of the Act dated 31.05.2023 in respect of AYs 2016-17 and

¹ [2022] 444 ITR 1.

² Convention between the Government of Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains has entered into on 26.10.1993 and as amended subsequently.



2017-18. In terms of the said orders, the AO assessed the Assessee's income for AY 2016-17 at ₹2,93,92,810/-, and ₹3,31,98,980/- in respect of AY 2017-18.

9. The Assessee filed its objections to the draft assessment orders before the DRP contesting the proposed assessments. The DRP disposed of the said objections in terms of separate orders dated 22.02.2024 upholding the AO's view that the amounts received by the Assessee from GIPL were chargeable to tax under the Act as well as India-UK DTAA, as FTS. Pursuant to the directions of the DRP, the AO passed final assessment orders dated 12.03.2024 under Section 147 read with Section 144C(13) of the Act. As noted above, the Assessee appealed the said assessment orders before the Tribunal, which were dismissed by the impugned order 18.12.2024.

QUESTIONS OF LAW

10. The present appeals were admitted by this Court by orders dated 17.04.2025 and the following questions of law were framed for consideration of this Court:

Questions of law framed in ITA No.93/2025

- “A. Whether the Appellant was taxable in respect of receipts of INR 2,93,92,810/- under the provisions of the Act or the India - UK DTAA?
- B. Whether the Tribunal erred in law in re-characterising business receipts by the Appellant as FTS under Explanation 2 to section 9(1)(vii) of the Act and Article 13(4)(c) of the India – UK DTAA?”

Question of law framed in ITA No.92/2025



- “A. Whether the Appellant was taxable in respect of receipts of INR 3,31,98,980/- under the provisions of the Act or the India - UK DTAA?
- B. Whether the Tribunal erred in law in re-characterising business receipts by the Appellant as FTS under Explanation 2 to section 9(1)(vii) of the Act and Article 13(4)(c) of the India – UK DTAA?”

11. As noticed above, the questions of law are worded, essentially, in similar terms. During the course of the hearing, the learned counsel for the parties focused their submissions on the question whether the amounts received by the Assessee – ₹2,93,92,810/- during the previous year relevant to AY 2016-17 and ₹3,31,92,980/- during the previous year relevant to AY 2017-18 – could be construed as FTS within the meaning of Article 13 of the India-UK DTAA. Concededly, if the Assessee prevailed in its case that the said receipts were not FTS within the scope of Article 13(4)(c) under India-UK DTAA, the question whether the said receipts could be construed as an FTS within the meaning of Explanation 2 to Section 9(1)(vii) of the Act would not be material. Thus, we have confined our examination, at this stage, to the following question:

“Whether the amounts received by the Assessee from GIPL/Genpact India Pvt. Ltd. can be construed as an FTS under Article 13 of the India-UK DTAA”.

ANALYSIS

12. At the outset, it would be relevant to examine the nature of the services rendered by the Assessee resulting in the receipts, which are held to be taxable. And, whether the said services fall within the scope of FTS under



Article 13(4)(c) of the India-UK DTAA.

13. The Assessee claims that it carries on the business of providing electronic invoice deliveries through its secure e-invoicing platform. It claims that the said platform enables the businesses supplying products and services to automatically generate e-invoices instead of creating and printing them manually. The Assessee has granted a non-exclusive license to GIPL for using its cloud hosted platform. During the relevant period, GIPL had used the platform to render services to GlaxoSmithKline Services Unlimited [GSK], a company which is not a tax resident in India.

14. The terms and conditions on which the license was granted to GIPL are contained in the Master Partner Agreement dated 13.01.2009 [MPA] entered into between OB10 and GIL. As noted above, OB10 was acquired by the Assessee and there is no dispute that the Assessee had stepped into its shoes.

15. The recitals of the MPA are relevant and are set out below:

- “(A) OB10 is the operator of OB10 Services, the global e-invoicing network and wishes to make these services available to the Partner.
- (B) The Partner is in the business of providing software and professional service solutions to its existing or potential customers (“End Users” or “Buyer”) and desires to promote, market, offer and/or sell the OB10 Services either as a stand alone service or as part other services provided by the Partner (the “Partner Services”) to End Users.”



16. Article 2 of the MPA sets out the Scope of the Grant to GIL and the same is reproduced below:

“2. Scope of Grant to the Partner

2.1 On the Effective Date and subject to the terms and conditions of this Master Partner Agreement, OB10 grants the Partner a non-exclusive, non-transferable licence for the Term to recommend market and/or sell the OB10 Services to End Users in the Territories. The End User must be an entity that OB10 can service out of its existing operations (unless otherwise agreed by OB10 in its complete discretion). The Territories in which the scope of this Master Partner Agreement may apply can be amended by mutual written agreement between the parties. Any additional requirements in relation to the scope of this Master Partner Agreement will be agreed between the parties

2.2 Subject to the terms of this Master Partner Agreement, OB10 reserves the right to market, solicit, promote or sell or otherwise transfer or distribute the OB10 Services as a stand alone service and/or as part of a third parties technology platform anywhere in the world to any organisation whether directly or indirectly.

2.3 The Partner is granted a licence of the rights itself to use the OB10 Services for itself and/or its Affiliates subject to the terms and conditions in this Master Partner Agreement and any SOW agreed between the parties.

2.4 Save under clause 7.3 below the Partner will act as principal and no obligations will be created for OB10 towards the End User.

2.5 The rights granted to the Partner under this Master Partner Agreement are granted to the Partner subject to the Partner engaging with OB10 for each End User under the terms and conditions appearing in Annex B hereto (the ‘Terms and Conditions for the OB10 Services’) and for the fees stated in Annex C (Fees for the OB10 Services), unless agreed otherwise by the parties on a case by case basis.

2.6 The Partner has discretion over the price at which it resells the OB10 Services.”



17. It is apparent from the above that in terms of MPA, the Assessee (OB10) had granted a “*non-exclusive, non-transferable licence for the Term to recommend market and/or sell the OB10 Services to End Users in the Territories*”. Paragraph 2.3 of the MPA also expressly indicates that the license is granted to the Partner (GIL) for use of itself or its affiliates (in this case – GIPL).

18. Paragraph 2.4 of the MPA also expressly provides that the ‘Partner’ would act as a principal and no obligations will be created for OB10 towards the ‘End Users’.

19. Articles 5A and 5B of the MPA set out the respective obligations of the parties to the MPA. The said Articles are set out below:

“5(A) Partner Obligations

5.1 The Partner shall use all reasonable efforts to:

(a) inform and collaborate with OB10 to market, promote the use of OB10 Services through co-operation with its sales force and OB10’s sales force and business to business channels to its existing on any potential End Users; provided that the Partner shall not be obligated to sell or promote the use OB10 Services for all of its existing or potential End Users.

(b) ensure that its sales force and other personnel who promote and market the use of the OB10 Service have proper skills training to enable them to demonstrate the use of the OB10 Service in a competent and professional manner;

(c) not do anything which could be materially prejudicial to the goodwill and business reputation of OB10.

5.2 The Partner warrants and undertakes to OB10 that it shall not make any representation or give any warranty or guarantee regarding the capability of the OB10 Services that is greater than the representation, warranties or guarantees that OB10 would



give under its normal course of business or any additional representations, warranties or guarantees that are agreed by the parties in writing on a case by case basis.

5.3 The Partner shall fully indemnify OB10 and keep OB10 fully and effectively indemnified against all claims, demands and costs (including all reasonable legal costs), expenses and liabilities of whatsoever nature arising out of any breach of this clause 5.2.

5.4 The Partner shall be solely responsible for its sales activities to an End User to be carried out in accordance with this Agreement. If the Partner reasonably requires sales support from OB10, OB10 shall subject to adequate notice, use reasonable endeavours to attend any meetings or provide such sales support

5(B) OB10's Obligations.

5.6 OB10 shall make reasonable efforts (either directly or indirectly through it's agents, sub-contractors or partners) to provide training to full time employees of the Partner to enable them to promote and use the OB10 Services in accordance with this Master Partner Agreement. The scope and terms and conditions of this training shall be agreed between the parties.

5.7 Both parties shall agree the content and frequency of reports to be made by either party in order for either party to fulfil their obligations under this Master Partner Agreement

5.8 In respect of some of the OB10 Services, OB10 provides standard service levels and/or standard service credits Where both parties agree that such service levels and/or service credits apply for an End User, they will be incorporated in the relevant SOW. For the avoidance of doubt, Partner shall only be entitled to rely on any service levels or claim any service credits from OB10 where the same service levels or service credits have been passed onto an End User."

20. Paragraph 7.2 of the MPA also specifically provides that the Partner would be solely responsible for entering into a direct contractual relationship with all End Users, outlining its responsibilities to the End User. It was also agreed that the parties would discuss and agree upon the specific services to



be rendered as well as other terms and conditions. Paragraph 7.2 of the MPA is set out below:

“7.2 Re-Sale Model.

(a) Subject to the terms of this Master Partner Agreement, the Partner shall be solely responsible for entering into a direct contractual relationship with all End Users outlining its responsibilities to the End User including those in any SOW between Partner and OB10.

(b) The parties will discuss and agree (i) which specific OB10 Services (ii) the duration of those OB10 Services and (iii) the amount Transactions that the End User shall require and their payment profile and (iv) other terms and conditions that will apply to that End User (other than those already highlighted in Annex B (Terms and Conditions for the OB10 Services). Such provisions shall be incorporated into an SOW for that End User. A sample SOW is appended to this Master Partner Agreement as Annex D (Sample SOW).”

21. It is also relevant to refer to Article 12 of the MPA, which specifically provides that the ownership of the intellectual property would vest with the respective parties. It was expressly provided that OB10 (which stands substituted by the Assessee) would *“retain all right, title and interest in and to the OB10 Services (including without limitation the OB10’s proprietary source code in the OB10 Services and any Documentation)”*.

22. The expression “OB10 Services” as used in MPA is defined in terms of Clause (f) of Article 1 as under:

“(f) OB10 Services	means the services provided by OB10 in any SOW. The OB10 Services in their entirety are described in Annex A.”
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Annexure ‘A’ to the MPA set out in detail the scope of OB10 Services. The



‘core service’ as set out in Annexure ‘A’ is reproduced below:

“B. Core Service

Set up

1. Preparation and maintenance of one (1) Partner Profile for the Partner within the parameters of the OB10 Network.

2. Supplier Enrolment

OB10’s responsibilities include.

a. **Website**, OB10 will host and maintain a Client-specific website at no additional cost that provides a portal for all Supplier-related communications, giving them access to all Supplier communications.

b. **Assistance with all Internal Communications**: OB10 will assist Buyer in educating Buyer personnel and has developed various tools to assist with this, such as, newsletter content, posters, desk drop materials, web and on-site seminars, where OB10 staff will present alongside Buyer to these groups.

c. **Analysis of Supplier Data**: OB10 will analyse Supplier data provided by Buyer to identify Suppliers that are already live on the OB10 network, or those that are known and already in the enrolment process for other OB10 Clients. The balance of the Suppliers will be split into managed and direct campaigns.

d. **Assistance with preparing External Communications**: OB10 provides assistance in the creation of communication packs for Suppliers including the first letters, follow-up letter, web seminars and where applicable presentations. The OB10 PM will provide templates of communication packs used for previous successful campaigns with other organisations. These templates are available in various European languages. The Project Manager will offer advice and guidance about the type of message required in order to obtain the maximum success of the Supplier enrolment campaign OB10 can also assist in any press release that may be issued.

e. **Managed campaigns**. Each Supplier in a Managed Campaign is allocated an OB10 enrolment professional who is responsible



for working with the Supplier to assist with any queries, to explain the options, persuade them where possible, and when the Supplier progresses, to ensure they use the service correctly. The Supplier can choose to send invoices as a data file, or using the web-portal. If the Supplier chooses to use the integrated service (to send a data file) they will also work with the supplier implementation team in order to create and test a unique profile on OB10.

f. **Direct Campaigns:** Each supplier in a direct campaign will be added to the OB10 Network so that they can use the web-portal

g. **Reporting:** OB10 will provide Buyer with reports at regular agreed intervals showing the status of each active campaign for supplier enrolment. The PM will discuss the results shown by these reports and provide ideas to improve the take up if needed

h. **Data Cleanse:** OB10 can assist with projects to enhance supplier data, to update contact information for suppliers, subject to the fees in the agreement. All data that is enhanced this way is provided to Buyer.

i. **Supplier Mailings:** OB10 will at Buyer request mail shot or e-mail suppliers as part of the supplier enrolment service subject to the fees in the Agreement. This includes: printing letters and information packs on premium quality paper, stuffing envelopes, addressing and posting.

3. The provision of the services of a program manager to provide reasonable assistance and guidance in enrolling to the OB10 Network suppliers of the Buyer and Users located and registered for VAT (or local equivalent) in the Countries.

4. Processing and Transmission of Data

OB10 and Partner agree (within the parameters of the OB10 Network) how Data Transmission will take place, selecting one or more of the Approved Data Transmission Options. This will form part of the Partner Profile for that Partner. (The Partner may select a non-approved Data Transmission option, see Additional Services below).

5. OB10 will take invoices from Suppliers either as files of data (in the form agreed by OB10 and the relevant supplier) or via the



OB10 supplier portal. This Data will then be formatted and/or translated, so that it is consistent with the relevant Partner Profile. The OB10 Network will also augment Data with the agreed standing data from the relevant Partner Profile for that Partner.

6. Data Transmission will encompass a data file of the invoices that have been prepared as stated above and a rendered image of those invoices in HTML, TIFF and/or PDF form.

7. OB10 shall use industry standard encryption technology to encrypt Data being transmitted to where the Partner's choice of Approved Data Transmission Option or non-approved Data Transmission option supports this

8. OB10 will implement all reasonable and industry standard protections to prevent the delivery of data files or data images from the OB10 Network to Partner containing Harmful Code. Notwithstanding the foregoing. Partner shall agree that it remains responsible for ensuring that they have satisfactory Harmful Code detection technology and firewall technology implemented and operating to protect the integrity of their systems, environment and data and OB10 shall not be responsible for any damage or loss caused by any failure on their part to do so.

9. Partner may (at its option) elect to accept the delivery by OB10 of attachments from Suppliers. If Partner elects to do so, Partner accepts and acknowledges that attachments from Suppliers are transmitted by OB10 on an "as is" basis and are not subject to any Harmful Code interrogation.

Minor Changes to Partner Profile

10. Minor changes notified to OB10 by Partner in writing (i.e. changes that are within the parameters of the OB10 Network and can be implemented by OB10 support, such as changes to Partner information, contact details or PO ranges) will be implemented within five (5) days of receipt of all relevant information at no additional charge

File Restoration (Due to OB10 Default)



11. If Data is lost or corrupted due to a default of OB10 under the terms of any SOW, OB10's sole liability and Partner's sole remedy shall be for (i) OB10 to reconstruct any such Data free of charge; or (ii) if the Data cannot be restored, for OB10 to provide Partner with a credit for the fees received by OB10 in respect of the collection, processing or storage of such data. (subject in the case of each of (i) and (ii) to the cap on liability contained in any SOW.

OB10 Support Desks

12. OB10 supports the availability of the OB10 Services by providing a support desk from 8 a.m to 6 p.m UK Monday to Friday (excluding UK public holidays)."

23. The MPA also includes standard form of the statement of work [SOW], which was required to be entered into for provision of services. The Assessee (OB10) entered into SOW dated 01.04.2009 effective from 05.07.2010, whereby the SOW was suitably amended to include the details of the specific services.

24. The Assessee claims that it, essentially, provides electronic invoice delivery and related services such as conversion of raw data into electronic format, archiving and other ancillary services. The Assessee claims that it simplifies and streamlines complex invoice to pay process, thus, offering legal and tax compliant invoicing in various jurisdictions. The Assessee had entered into SOWs with GIPL to provide an exclusive e-license portal, which enables generation of e-invoices for its customer (GSK) and its group entities, which are located overseas. It is the Assessee's claim – which is not controverted – that it generates invoices for its customer for the GSK's European Operations, which have no link with India. It is also not disputed that the services provided by the Assessee are within the framework of what



are described as OB10 services under the MPA.

25. It is apparent from the nature of services rendered by the Assessee that neither GIL nor GIPL acquired any right, title or interest in the platform operated by the Assessee for generating and transmitting electronic invoices for the End Users. It is also apparent from the above that GIPL does not acquire any technology or any right in the electronic platform for exploiting the same on its own. The role of GIPL is limited to ensuring provision of the Assessee's services to the End User by onboarding customers – in the instant case GSK – on the platform operated by the Assessee.

26. In the given circumstances, the principal question to be addressed is whether the same would constitute technical services within the scope of Article 13 of the India-UK DTAA. Article 13 of the India-UK DTAA is set out below:

“ARTICLE 13

ROYALTIES AND FEES FOR TECHNICAL SERVICES

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

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) in the case of royalties within paragraph 3(a) of this Articles, and fees for technical services within paragraphs 4(a) and (c) of this Article,—

(i) during the first five years for which this Convention has effect ;

(aa) 15 per cent of the gross amount of such royalties or fees



for technical services when the payer of the royalties or fees for technical services is the Government of the first-mentioned Contracting State or a political sub-division of that State, and

- (bb) 20 per cent of the gross amount of such royalties or fees for technical services in all other cases; and
- (ii) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and
- (b) in the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article, 10 per cent of the gross amount of such royalties and fees for technical services.

3. For the purposes of this Article, the term “royalties” means :

- (a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and
- (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term “fees for technical services” means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which :

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



of this Article is received ; or

- (c) 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. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid :

- (a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(a) of this Article;
- (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 private 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 partnership for professional services as defined in Article 15 (Independent personal services) of this Convention.

6. The provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business profits) or Article 15 (Independent personal services) of this Convention, as the case may be, shall apply.

7. Royalties and fees for technical services shall be deemed to arise in a Contracting State where the payer is that State itself, apolitical sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has



in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to make payments was incurred and the payments are borne by that permanent establishment or fixed base then the royalties or fees for technical services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

8. Where, owing to a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services paid exceeds for whatever reason the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

9. The provisions of this Article shall not apply if it was the main purposes or one of the main purposes of any person concerned with the creation or assignment of the rights in respect of which the royalties or fees for technical services are paid to take advantage of this Article by means of that creation or assignment.”

27. According to the Revenue, the consideration received by the Assessee for rendering services in question would qualify as ‘FTS’ within the scope of Clause (c) of Paragraph 4 of Article 13 of the India-UK DTAA.

28. Explanation 2 to Clause (vii) of Sub-section (1) of Section 9 of the Act defines the expression “Fees for Technical Services” to mean any consideration for rendering of any managerial, technical or consultancy services. However, the said definition would not be applicable for determining the scope of FTS under Double Taxation Avoidance Treaties [DTAA] if the same is inconsistent with the meaning of the said expression in the said treaty. The definition of FTS under Article 13 of the India-UK DTAA is considerably narrower. Thus, the question whether the consideration received by the Assessee for rendering the services fall within



the meaning of FTS under Article 13 of the India-UK DTAA, would necessarily have to be construed in accordance with the meaning of FTS under the India-UK DTAA and not with reference to FTS as defined in Explanation 2 to Section 9(1)(vii) of the Act.

29. We may refer to the decision of the Supreme Court in *Engineering Analysis Centre of Excellence (P) Ltd v. Commissioner of Income Tax*³, wherein the Supreme Court authoritatively explained as under: -

“30. Importantly, under section 5(2) of the Income Tax Act, the total income of a person who is a non-resident, includes all income from whatever source derived, which accrues or arises or is deemed to accrue or arise to such person in India during such year. This, however, is subject to the provisions of the Income Tax Act. Certain income is deemed to arise or accrue in India, under section 9 of the Income Tax Act, notwithstanding the fact that such income may accrue or arise to a non-resident outside India. One such income is income by way of royalty, which, under section 9(1)(vi) of the Income Tax Act, means the transfer of all or any rights, including the granting of a licence, in respect of any copyright in a literary work.

31. That such transaction may be governed by a DTAA is then recognized by section 5(2) read with section 90 of the Income Tax Act, making it clear that the Central Government may enter into any such agreement with the government of another country so as to grant relief in respect of income tax chargeable under the Income Tax Act or under any corresponding law in force in that foreign country, or for the avoidance of double taxation of income under the Income Tax Act and under the corresponding law in force in that country. What is of importance is that once a DTAA applies, the provisions of the Income

³ (2022) 3 SCC 321.



Tax Act can only apply to the extent that they are more beneficial to the assessee and not otherwise. Further, by explanation 4 to section 90 of the Income Tax Act, it has been clarified by the Parliament that where any term is defined in a DTAA, the definition contained in the DTAA is to be looked at. It is only where there is no such definition that the definition in the Income Tax Act can then be applied. This position has been recognised by this Court in *Union of India v. Azadi Bachao Andolan* : (2004) 10 SCC 1(supra), which held:

“21. The provisions of Sections 4 and 5 of the Act are expressly made “subject to the provisions of this Act”, which would include Section 90 of the Act. As to what would happen in the event of a conflict between the provision of the Income Tax Act and a notification issued under Section 90, is no longer *res integra*.

28. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making



those sections “subject to the provisions of the Act”. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of DTACs which would automatically override the provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAC.” (emphasis supplied)

30. The Supreme Court had proceeded to hold as under :-

“111. Also, any ruling on the more expansive language contained in the explanations to section 9(1)(vi) of the Income Tax Act would have to be ignored if it is wider and less beneficial to the assessee than the definition contained in the DTAA, as per section 90(2) of the Income Tax Act read with explanation 4 thereof, and Article 3(2) of the DTAA. Further, the expression “copyright” has to be understood in the context of the statute which deals with it, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA. For all these reasons, the determination of the AAR in Citrix Systems (AAR) (supra) does not state the law correctly and is thus set aside.”

31. Undisputedly, for the receipts in question to be construed as FTS under Article 13 of the India-UK DTAA, the services must be such that *“make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.”*



32. The Revenue contends that the consideration received by the Assessee for rendering the services in question would qualify as FTS within the scope of Clause (c) of Paragraph 4 of Article 13 of the India-UK DTAA. According to the Revenue, payments made by GIPL to the Assessee for services rendered are consideration for rendering technical services ‘which make available technical knowledge, experience, skill, know-how or process’ to GIPL and therefore, satisfy the requirement of Clause (c) of Paragraph 4 of Article 13 of the India-UK DTAA.

33. This brings us to the central controversy – whether the services rendered by the Assessee ‘make available’ any technical knowledge, experience, skill or know-how to GIPL and / or its customers.

34. The import of the expression ‘make available’ was examined by the Karnataka High Court in *Commissioner of Income Tax, Central Circle v. De Beers India Minerals (P.) Ltd.*⁴ in the context of Article 12 of India-Netherlands DTAA. Paragraph 5 of Article 12 of the DTAA between India and Netherland defines the expression ‘Fees for Technical Services’ as used in the said treaty. The same is set out below:

- “5. For purposes of this Article, “fees for technical services” means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:
- (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received; or

⁴ [2012] 346 ITR 467



- (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.”

35. As is apparent from the above, Clause (b) of Paragraph 5 of Article 12 of the said India -Netherlands DTAA is materially similar to Clause (c) of Paragraph 4 of Article 13 of the India-UK DTAA. In the aforesaid context, the Karnataka High Court had held as under:

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

36. One of the tests as expounded by the Division Bench of the Karnataka



High Court for determining whether the technical or consultancy services qualify the ‘make available criteria’ is whether the rendering of services results in technical knowledge or skill being imparted to the recipient in order for the recipient to deploy the same technology or techniques in future on its own without any recourse to the service provider. The fact that the services rendered by the service provider requires high degree of technical knowledge or skill is not sufficient to qualify the services rendered as services that ‘make available technical knowledge, experience, skill or know-how and / or process or development or transfer of any technical plan or technical design’ if the same do not result in the service recipient absorbing the same and enables it to use the same on its own. The services rendered must entail, the service recipient acquiring the right to use the technical knowledge, experience, skill and the know-how involved in rendering the services.

37. It is also relevant to consider the meaning of ‘Fees for Technical Services’ as included in Agreement of Double Taxation and Prevention of Fiscal Evasion entered into between India and Singapore. Paragraph 4 of Article 12 of the said Agreement reads as under:

“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.

For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.”

38. Clauses (b) and (c) of Paragraph 4 of Article 12 of the said treaty makes the meaning of “make available” explicitly clear that the consideration for services would be construed FTS only if it enables the service recipient to apply the technology contained in the services.

39. In *Director of Income-tax v. Guy Carpenter & Co. Ltd.*⁵, this court considered the question whether the consideration for services rendered by Guy Carpenter & Co. Ltd. – a tax resident of UK – to Indian insurance company in the process of reinsurance of risk would amount to FTS under the India-UK DTAA. According to the Revenue, the reinsurance brokerage / commission paid by the insurance companies operating in India to the Assessee was chargeable to tax as FTS within the meaning of Section 9(1)(vii) of the Act. However, the learned Tribunal found that reinsurance brokerage and commission were not chargeable as FTS as it did not qualify the condition as stipulated under of Clause (c) of Paragraph 4 of Article 13 of the India-UK DTAA. In this context, the Court concurred with the interpretation of Clause (c) of Paragraph 4 of Article 13 of the India-UK

⁵ [2012] 20 taxmann.com 807 (Delhi).



DTAA and found that no substantial question of law arose for consideration of this Court. The relevant extract of the said decision is set out below:

“9. A plain reading of Article 13(4)(c) of the DTAA indicates that 'fees for technical services' would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which, inter alia, “makes available” technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. According to the Tribunal this “make available” condition has not been satisfied inasmuch as no technical knowledge, experience, skill, know-how, processes, have been made available by the assessee to the insurance companies operating in India. It also does not consist of the development and transfer of any technical plan or technical design.

12. Based on this manner of transacting, the Tribunal came to a conclusion that the payment received by the assessee could not be regarded as ‘fees for technical services’. Further, more, the Tribunal also held that such receipts would not amount to fees for technical services as the "make available" clause contained in article 13(4)(c) had not been satisfied in the facts and circumstances of the present case.

13. In our view, the Tribunal has arrived at these conclusions purely on assessing the factual matrix of the case at hand. The findings are in the nature of factual findings and, therefore, according to us, no substantial question of law arises for our consideration, particularly, because the learned counsel for the Revenue was unable to point out any perversity in the recording of such findings. As such no substantial question of law arises for our consideration. The appeal is dismissed. There shall be no order as to costs.”

40. It is also relevant to refer to the decision of this Court in ***Commissioner of Income-tax (International Taxation)-1 v. Bio-Rad***



Laboratories (Singapore) Pte. Ltd.⁶. In the said decision, this Court concurred with the decision of the Tribunal to the effect that technical knowledge and skill would necessarily have to remain with the person receiving the services even after the contract for the said services had come to an end if the consideration for services were to qualify as FTS. The ‘make available’ condition would be satisfied only if the receiver can deploy the similar technology and techniques in the future without depending upon the provider. The relevant extract of the said decision is set out below:

“13. The Tribunal, in concluding that services offered by the respondent/assessee to its Indian affiliates did not come within the purview of FTS, as reflected in Article 12(4)(b) of the Indo-Singapore DTAA, concluded that they did not fulfil the criteria of ‘make available’ principle.

14. According to the Tribunal, the agreement between the respondent/assessee and its Indian affiliate had been effective from 01.01.2010, 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 paragraphs 17 to 23 of the impugned order. For convenience, the relevant paragraphs are extracted hereafter:

“17. A perusal of the aforementioned provision shows that in order to qualify as FTS, 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 FTS under the India-Singapore DTAA, 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.

18. As mentioned elsewhere, the agreement is effective

⁶ (2023) 459 ITR 5



from 01.01.2010 and we are in Assessment Years 2018-19 and 2019-20 [sic...20]. 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 2010?

19. This undisputed fact in itself demolishes the action of the Assessing Officer/DRP. 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.

20. In our humble opinion, mere incidental advantage to the recipient of services is not enough. The real test is the transfer of technology and on the given facts of the case, there is no transfer of technology and what has been appreciated by the Assessing Officer/Id. CIT(A) is the incidental benefit to the assessee which has been considered to be of enduring advantage.

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

15. We tend to agree with the analysis and conclusion arrived at by the Tribunal.”

41. The aforesaid view also resonated with the Coordinate Bench of this Court in ***Commissioner of Income-tax, International Taxation v. RELX Inc.***⁷. This court referred to the decision in the case of ***Commissioner of Income-tax (International Taxation)-1 v. Bio-Rad Laboratories (Singapore) Pte. Ltd. (supra)*** and held as under:

⁷ [2024] 160 taxmann.com 109 (Delhi).



“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.”

42. In *International Management Group (UK) Ltd. v. Commissioner of Income Tax (International Taxation)*⁸, the Coordinate Bench of this Court had the occasion to consider the scope of expression ‘make available’ as used in of Clause (c) of Paragraph 4 of Article 13 of the India-UK DTAA in the context of services rendered by the International Management Group (UK Limited) [IMG] to the Board of Control of Cricket in India [BCCI]. In terms of the memorandum of understanding, the BCCI had appointed IMG to provide certain services in connection with the establishment, commercialization and operation of India Premier League [IPL] of cricket matches. In the context of Clause (c) of Paragraph 4 of Article 13 of India-UK DTAA, the Coordinate Bench observed as under:-

“93. As we read article 13(4)(c) of the Double Taxation Avoidance Agreement, it becomes manifest that the mere furnishing of service would not suffice and a liability of tax would be triggered only if the technical or consultancy service were coupled with a transfer of the expertise itself. The expression “make available” must be construed as an enablement,

⁸ (2024) 466 ITR 514.



conferral of knowledge and which would lead to the payer becoming skilled to perform those functions independently. The make available condition would be satisfied if the services rendered entails equipping the recipient with skill and evidencing an apparent conferment, alienation or transfer of skill, knowledge or know-how. This transfer of knowledge or skill is a pivotal factor in determining whether the consideration received can be classified as fees for technical services. The “make available” stipulation ensures that only those services that impart lasting technical benefits are classifiable as fees for technical services. It was on a consideration of the aforesaid that this court in *CIT (International Taxation) v. Bio-Rad Laboratories (Singapore) Pte. Ltd.*, (2023) 459 ITR 5 (Delhi) had held that the real test would be the transfer of technical knowledge, the knowledge and skills and expertise of the provider being absorbed by the payer and who would then have the capability to deploy that knowledge or skill without reference to the original provider. This reinforces our view that the make available condition would be satisfied only if the rendering of service involves a clear and demonstrable transfer of technical skills, expertise or know-how to the recipient. It must involve a transfer of capabilities and not just the temporary use of the provider's knowledge, expertise or skill.

94. This leads us to the definitive conclusion that the rendering of technical and consultancy services has to be read alongside and in conjunction with “make available” as that phrase appears in the aforesaid paragraph. On a plain textual reading of article 13 it becomes apparent that both the rendering of service and the skill, knowledge and expertise being made available are conditions which must be concurrently and cumulatively satisfied. What we seek to emphasize is that article 13 in unambiguous terms creates an enduring, unfading and imperishable link between the furnishing of service and a transmission or conferment of technical expertise, knowledge and skill.



95. It is also important to bear in mind that the mere usage or utilisation of technical or consultative material in aid of business would not be sufficient to attract article 13 of the Double Taxation Avoidance Agreement. If we were to accept the submission that handing over of research or advisory work were sufficient for the purposes of article 13, it would render the “make available” condition comprised in para 4(c) wholly redundant and otiose since the mere rendering of service would have sufficed. As *CIT v. De Beers India Minerals P. Ltd.*, (2012) 346 ITR 467 (Karn) correctly holds “The tax is not dependent on the use of technology by the recipient”. The make available prescription bids us to make a conscious distinction between a mere service provision and the impartation of lasting expertise. The offer of service or advise does not fundamentally alter the recipient's capabilities. These services, while potentially valuable, do not endow the recipient with new skills or knowledge which could be independently deployed in the future. The kernel of “make available” must therefore be recognised to be a transfer of technology or skills rather than a temporary reliance on external support.

96. It is this aspect which convinces us to hold that the mere utilisation of the service in connection with business would not meet the test of article 13. This we observe in the light of the submission to the contrary as urged by Mr. Hossain who had contended that the handing over of research material, processes relating to the league structure and other services performed by IMG enabled Board of Control for Cricket in India to proceed independently in the future. We find ourselves unable to sustain that submission firstly since the respondents proceed on the incorrect assumption that know-how relating to commercial rights exploitation or that pertaining to structuring, organising and management of a sports league stood transferred. No provision of the memorandum of understanding or the services agreement would warrant such an assumption being made or conclusion drawn. Equally fallacious



was the submission that by virtue of the services furnished by IMG, the Board of Control for Cricket in India was made available “experience in conducting and organizing a large-scale sports league”. The contentions noticed above are neither borne out from the evidence which exists on the record, they are additionally rendered wholly unsustainable when one views the various contractual stipulations forming part of the memorandum of understanding and the services agreement.

97. The submissions addressed on this score also fail to bear in mind that IMG came to be engaged by the Board of Control for Cricket in India principally in the light of its expertise, special abilities, experience and capabilities of conceptualising sporting leagues. IMG was tasked with creating the IPL based on the special knowledge, skill and experience that it possessed in the curation of sporting leagues. A reading of the various obligations that were placed upon IMG clearly establish that all facets of the IPL and the entire gamut of activities connected with the proposed league were not only to be created by it, IMG was also tasked with managing and administering all commercial and media rights of the Board of Control for Cricket in India. As is evident from a reading of clause 4.2 of the services agreement, IMG was called upon to prepare and execute marketing strategies, management of future tendering processes, craft the league handbook and discharge various other functions enumerated therein. The enumeration of functions in clause 4.2(a) was merely illustrative as that clause used the expression “including, without limitation:”.

*** *** ***

99. On an overall consideration of all of the above, we come to the firm conclusion that there was no expertise, skill or know-how which could be said to have been made available to the Board of Control for Cricket in India. The various functions which IMG was called upon to discharge was to be aided by the appellant drawing upon its expertise and special



knowledge in the creation and conduct of leagues of the stature of the IPL. There was no discernible intent on the part of the Board of Control for Cricket in India to absorb or internalise IMG's unique skills and knowledge in the curation of sporting leagues. No part of that knowledge or skill stood transferred to the Board of Control for Cricket in India. Merely because research material would have been shared with the Board of Control for Cricket in India or the service rendered by it been put to use and utilised cannot possibly lead one to conclude that the payer stood enabled or equipped with the special knowledge underlying the technical and consultancy service which was extended.

100. The fact that IMG was retained to perform all of the aforementioned functions for a period of ten years is yet another indicator of the Board of Control for Cricket in India having not been enabled or made available the special knowledge and skill possessed by IMG. The continued provisioning and rendering of service over a substantial period of time were factors which were duly recognised by the court in *CIT (International Taxation) v. Bio-Rad Laboratories (Singapore) Pte. Ltd.*, (2023) 459 ITR 5 (Delhi) as well when it observed that the same would clearly detract from an assumption that technical or consultancy services had been made available. We also bear in consideration the undisputable fact that the contractual arrangement contemplated a continued engagement and ongoing reliance on IMG's expertise without any transfer of know-how or skills to the Board of Control for Cricket in India.”

43. Merely availing of services that may require technical expertise, technical inventions or technology would not qualify the consideration paid for such services as FTS under Article 13 of the India-UK DTAA. First of all, the services, rendered must fall within the broad rubric of technical and consultancy services. Additionally, the said services must also satisfy either



of the three clauses as are specified under Paragraph 4 of Article 13 of the India-UK DTAA, that is, (i) the same are ancillary or subsidiary to the application or enjoyment of the right, property or information for which royalty within the definition of Clause (a) of Paragraph 3 of Article 13 of the India-UK DTAA, is received; or (ii) the services are ancillary or subsidiary application to the enjoyment of the property for which royalty within the meaning of Paragraph 3(b) are received; or (iii) the services rendered make available technical knowledge, experience, skill, know how, or process or consist of development and transfer of technical plan or technical design.

44. If the services rendered do not qualify any of the three clauses of Paragraph 4 of Article 13 of the India-UK DTAA, the consideration received would not qualify as FTS for the purposes of India-UK DTAA. Notwithstanding, such consideration may fall within the definition of FTS under Explanation 2 to Section 9(1) (vii) of the Act.

45. Additionally, under Paragraph 4 of Article 13 of the India-UK DTAA, FTS would also exclude the amounts paid for services that are referred to in Paragraph 5 of the India-UK DTAA.

46. The expression ‘make available’ entails service recipient acquiring technical knowledge, expertise, skills, know how or the process as involved in rendering the services. It must entitle the service recipient to use the technology, technical skills or experience as involved in rendering of the technical services on its own. The ability of the service recipient to perform the services or use the technical knowledge as involved in rendering of the services on its own in future, is vital and the ‘make available’ condition is



sine qua non for FTS under the India-UK DTAA. The consideration paid for development and transfer of technical plan or technical design should also transfer the right to use the technical plans or design, which is provided by service provider, to the recipient.

47. Clause (c) of Paragraph 4 of Article 13 of the India-UK DTAA is similarly worded as the Clause (b) of Article 12 of the India-USA DTAA⁹ which *inter alia*, entitles the contracting State to tax ‘fees for included services’ arising in a contracting state and paid to the other contracting state, to be taxed in the other State. The expression ‘fees for included services’ as used in Paragraph 4 of Article 12 of the India-USA DTAA reads as under:-

“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.”

48. As is apparent, Clause (b) of Paragraph 4 of Article 12 of the India - USA DTAA is identically worded as Clause (c) of Paragraph 4 of the Article 13 of the India-UK DTAA. The import of the expression ‘make available’ as used in Paragraph 4 of Article 12 of the India-USA DTAA is synonymous

⁹ Convention between the Government of United States of America and Republic of India for avoiding double taxation and Prevention of Fiscal Evasion with respect to Taxes on Income.



to the expression ‘make available’ as used in Clause (c) of Paragraph 4 of Article 13 of the India-UK DTAA for construing the FTS under the India-USA DTAA.

49. The meaning of the expression ‘make available’ as used in Clause (b) of Paragraph 4 of Article 12 of the India-US DTAA was also considered by the Division Bench of the Kerala High Court in ***US Technology Resources (Pvt.) Limited v. CIT***¹⁰. The Kerala High Court concurred with the view of the Karnataka High Court in ***CIT v. De Beers India Minerals (P.) Limited*** (*supra*) and found that the subject payments could not be considered as fees for included services as there was no transfer of technical knowhow. The relevant extract of the said decision is set out below:-

“12. The specific services availed of by the assessee-appellant from the US company is covered under clause 4 of article 12 of the DTAA is the finding of the lower authorities. In the context of a definition for “fees for included services” not being available under the Income-tax Act, we have to necessarily look at the definition as available under the DTAA. The “fees for included services” as defined under the DTAA would take in payment of any kind in consideration for the rendering of any technical or consultancy services, which services are quite distinctly defined under sub-clauses (a) and (b) of paragraph 4 of article 12 of the DTAA. This is different from the “technical and consultancy services” as defined under section 9(1)(vii) of the Income-tax Act. At the risk of reiteration it is to be observed that the services which come under the “included services”, meaning a technical and consultancy service as understood by the DTAA, have further been elaborated in sub-clauses (a) and (b) of paragraph 4 under article 12. We are

¹⁰ (2018) 407 ITR 327.



concerned with sub-clause (b) of article 12(4), which speaks of technical knowledge, experience, skill, know-how, or processes, or consist of development and transfer of a technical plan or technical design. The same has to be read along with the MOU which has been entered into on May 15, 1989 and is a part of the notified DTAA.

13. In the MOU, paragraph 4(a) (hereinafter termed clause) of DTAA was clarified and agreed to be understood in order for a service fee to be considered “ancillary and subsidiary” to the application or enjoyment of the right, property, or information; only with respect to a service related directly to such application or enjoyment. The predominant nature of the arrangement should be the application or enjoyment of the right, property or information described in paragraph 3. It was also agreed that the question as to whether such services is related to the application or enjoyment would be determined by reference to the facts and circumstances of each case. Paragraph 4(b) was agreed to be narrower than the category described in paragraph 4(a), since it excludes any service that does not make technology available to the person acquiring this service. Technology would be considered to be “made available” only when the person acquiring the service is enabled to apply the technology. So there should clearly be a transfer of technology with the transferee applying it to its business. The mere fact that the provision of a service may require technical input by the service provider does not per se mean that the technical knowledge, skills, etc. are made available to the person availing of such services.

14. The typical category of services were also specifically referred to as:

1. engineering services (including the sub-categories of bio-engineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical, metallurgical, and industrial engineering);



2. architectural services; and
3. computer software development.

Under paragraph 4(b), technical and consultancy services could make technology available in a variety of settings, activities and industries. Such services may, for example, relate to any of the following areas:

1. bio-technical services;
2. food processing;
3. environmental and ecological services;
4. communication through satellite or otherwise;
5. energy conservation;
6. exploration or exploitation of mineral oil or gas;
7. geological surveys;
8. scientific services; and
9. technical training.

The MOU and the narrow definition given to “included services” takes the services availed of by the appellant herein, out of the “included services” as per the DTAA.

15. We would also refer to certain examples provided in the MOU to further substantiate the view taken by us. The facts in one of the examples refer to an Indian vegetable oil manufacturing company desiring to produce cholesterol-free oil with the know-how for refining cholesterol out of the oil as available with an American company. The Indian company thus contracts with the US company for the purpose of transfer of know-how by which the cholesterol in the oil would be eliminated and to train the Indian company in applying the new formula. This was held to be an “included service” and remuneration received by the American company coming within the ambit of “fees for included services”, since technical know-how



is made available to the Indian company, based on which the Indian company carries out the manufacturing activity. However, when a vegetable oil manufacturing firm having mastered the process of manufacturing cholesterol-free oil, hired an American marketing company to advice it on marketing strategies, the same would be taken out of the “included services” and any remuneration received would have to be relieved of taxation under the Income-tax Act.

16. We have to look at the Andhra Pradesh and Karnataka decisions with the above understanding of the DTAA and MOU in our mind. GVK Industries Ltd. v. ITO (2015) 371 ITR 453 (SC) was a case in which the Indian company, formed for generation and sale of electricity, entered into an agreement with a company at Zurich, Switzerland for help in raising finance. On the basis of the non-resident company's advice regarding processing of loans, the Indian company obtained finances, both from India and from a foreign institution. The question was whether the "success fee" paid to the non-resident company on the finances being successfully obtained as per the advice of the non-resident company was taxable in India. The Division Bench of the Andhra Pradesh High Court, looking at the various decisions of the Hon'ble Supreme Court interpreting the definition of “technical services” as available in section 9(1)(vii) of the Income- tax Act, found such services availed of by the Indian company to fall within the ambit and scope of technical services as understood by the Income-tax Act. The aforesaid decision has also been upheld by the Hon'ble Supreme Court in GVK Industries Ltd. v. ITO (2015) 371 ITR 453 (SC). We do not think that the said decision interpreting the definition under the Income- tax Act would be applicable here, specifically because the DTAA between the Governments of USA and India was never a relevant factor in considering the aspect of exemption to tax claimed by the Indian company therein. Here the DTAA having defined “included services”, which is technical and



consultancy services ; but specifically having defined it quite distinctly from the all inclusive definition in the Income-tax Act, even by section 90(3) the definition in the DTAA is to be adopted to decide taxation or its avoidance.

17. The decision of the Karnataka High Court referred to by the Tribunal is reported in CIT v. De Beers India Minerals (P.) Ltd. (2012) 346 ITR 467 (Karn) ; (2012) 208 Taxman 406 (Karn). Therein the Indian company had sought for assistance of a Netherlands company to conduct air borne survey for providing high quality, high resolution, geophysical data to identify probable kimberlite targets. The non-resident company did not transfer any technological know-how to the Indian company and merely carried out the survey by equipment brought by them into India and supplied the necessary details to the Indian company. The Division Bench of the Karnataka High Court found that there was no transfer of technology and the foreign company merely carried out a survey, collected data and processed it to identify the probable mining sites. The mere transfer of such data, including maps and photographs, cannot be considered as a transfer of technology was the finding.

18. We are conscious of the fact that the DTAA as relevant in the present case, is not applicable even in the case of De Beers India Minerals (P.) Ltd. where the non-resident hailed from Netherlands. However, on facts we are of the opinion that when the definition clause in DTAA read along with the MOU specifically refers to transfer of technologies, the facts as available in the Karnataka decision are more similar to the present facts. Herein also there is no technology transfer; nor is there a plan or strategy relating to management, finance, legal, public relations or risk management transferred to the appellant. The services promised by the non-resident company is only to advice on such aspects as are specifically referred to in the agreement. The non-resident company only assists the Indian company in making the correct decisions on such aspects as is specifically referred to in the



agreement, as and when such advice is required. There is no transfer of technology or know-how, even on managerial, financial, legal or risk management aspects; which would be available for the Indian company to be applied without the hands-on advice offered by the US company. The advice offered on such aspects would have to be on a factual basis with respect to the problems arising at various points of time and there cannot be found any transfer of technical or other know-how to the Indian company.

19. Particularly under the DTAA, we are of the opinion that none of these aspects on which the US company has promised advice to the Indian company would fall under the “included services” and the “fees for included services” would not be taxable in India as per the DTAA. As we noticed, the business profits of a US company would be taxable in the US. However, a portion of such business profits relating to royalty and fees for included services have been carved out to enable taxation within India also, but at a reduced rate as per article 12 of the DTAA itself. Even before the DTAA was notified by the Central Government, a MOU was entered into between the two Governments further clarifying as to the specific services qualifying for taxation within India. A further carving out was made out of the technical and consultancy services permitting taxation only in so far as the transfer of technical know-how, which, a reading of the MOU would indicate, is clearly scientific technology not including a managerial or financial strategy.

20. On the above interpretation of the provisions of the DTAA, we have to find that the services availed of by the Indian company, the appellant herein, from the US company are not technical and consultancy services as defined under the DTAA, clarified by the MOU, which forms part of the notification issued by the Central Government on the double taxation avoidance agreement between the Governments of United States and India. The remuneration received by the US company for the services offered to the Indian company being not a technical or consultancy service



as defined under the DTAA, would also not be a fee for included services. The remuneration so obtained by the US company definitely being an income accruing within India would not, hence, be taxable in India under the DTAA. We do not agree with the argument advanced by the learned standing counsel that the best evidence available for avoiding taxation within India is the tax paid within the United States of America. The non- payment of tax in the U.S cannot automatically enable taxation in India. As we noticed, with respect to fees for included services, the same being business profits, would be taxable in the US and also in India ; however, in India at a reduced rate than as available under the Income-tax Act. The said reduced rate also would not be applicable to the appellant herein with respect to the amounts paid as remuneration to the US company for the specific services as is seen from the agreement, for it being not an included service as per the DTAA. The tax having been exempted fully, there is no obligation on the assessee-appellant to deduct it at source and the non- compliance of the provisions of section 195(1) of the Income-tax Act cannot be alleged against the appellant for reason of such obligation not existing in law. The questions of law raised as (i) and (ii) are answered against the Revenue and in favour of the assessee.”

50. In the present case, the Assessee is the proprietor of an e-invoicing software and provides the services of generating electronic invoices compliant with local laws through its secure platform. The services entail automatically generating the e- invoices instead of creating and printing the same manually. The Assessee has provided the license for using its e-portal to GIPL in connection with the services rendered to GSK, which is a non-resident company. The invoices generated pertained to GSK’s European operations. The license granted to GIPL is a non-exclusive license for the use of the e-portal/software. It was explained that the data for generating



the e-invoices is received from GIPL, either as files of data or through its portal. The Assessee claims that the data is formatted and translated so that it is consistent with the portal of GIPL. It also augments the data with the standing data available as per GIPL's profile. The data which was transmitted, includes the data files of the invoices, which have been prepared including the images of the said invoices in HTML, TIFF and/or PDF format. The data is also encrypted. The Assessee claims that it also implements reasonable and industry standard protection to eliminate harmful quotes from its data files/data images.

51. Neither GIPL nor GIL acquires any right in the source code of the software operated by the Assessee. The licence granted to GIL/GIPL to use the Assessee's platform or its services, is limited to the term of the license. Neither GIPL nor GIL are granted any right to technology or source code of the software which would enable them to absorb the technology and independently exploit the same. Thus, whilst the Assessee renders services and grants access to its e-platform as part of its services, it does not make available any technical experience, skill, knowhow or process to GIPL or its client GSK. Thus, the services rendered by the Assessee do not satisfy the Clause (c) of Paragraph 4 of Article 13 of the India-USA DTAA.

52. Mr Aggarwal, learned counsel for the Revenue referred to Paragraph 2.3, Articles 5A and 5B of the MPA in support of the stand that the services rendered by the Assessee makes available the technical skill and knowhow to GIPL. He contended that Paragraph 2.3 of the MPA expressly grants right to the 'Partner (GIPL)' and, therefore, there is a transfer of rights.



53. We find no merit in the said contention. A plain reading of Paragraph 2.3 of the MPA indicates that the license granted by the Assessee is to use “OB-10 services”. The Paragraph 2.3 does not indicate any transfer of intellectual property right or technology, but only a license to use the services rendered by the Assessee.

54. Mr Aggarwal’s contention that in terms of Articles 5B and 5A, the Assessee provides training to the employees of GIPL and the same would amount to making available technical skill and knowhow to GIPL, is also unmerited.

55. In terms Paragraph 5.6 of the MPA, OB10 is obligated to “*provide training to full time employee of the Partner to enable them to promote and use the OB10 Services*”. The training contemplated is only for the purpose of using the platform and software in terms of the license granted by the Assessee. The training is not for imparting technical knowhow or knowledge which is involved in rendering the services. As noted above, the Assessee provides the access of its e-portal and uses the software for generating the e-invoices. The training as contemplated in Paragraph 5.6 is for using the software and e-platform, and not for the transfer of any technology, knowhow or source code of the software, which would enable the service recipient (GIPL) or its employees, who had received training to use the software, to continue rendering the services of generating of e-invoices after its license is terminated. There is neither the transfer of knowhow nor any training that makes available the technical knowledge, skill, knowhow or process used or involved in rendering the technical services.



56. Mr Aggarwal, also relied upon the decision of this Court in ***Centrica India Offshore P. Limited v. CIT***¹¹ and on the strength of the said decision, contended that since the Assessee is obliged to provide the training to the employees of GIPL, the same would satisfy the ‘make available’ criterion.

57. In our view, the reliance placed on the decision in ***Centrica India Offshore P. Limited v. CIT*** (*supra*) is misplaced. In the said case, the service provider had seconded employees to the service recipient. The said employees were involved in rendering of the services to the service recipient. In the facts of that case, the Court found:

“32. The activity of the secondees is thus to transfer their technical ability to ensure quality control vis-a-vis the Indian vendors, or in other words, “make available” their know-how of the field to CIOP for future consumption. The secondment, if viewed from this angle, actually leads to a benefit that transmits the knowledge possessed by the secondees to the regular employees. Indeed, any other reading would unduly restrict article 12 of the DTAA, which contemplates not only a formal transfer of intellectual property but also other techniques and skills (“soft” intellectual property, if it can be called as such) required for the operation of a business. The skills and knowledge required to ensure that the task entrusted to CIOP – quality control – is carried on diligently certainly falls within the broad ambit of article 12.”

58. In ***SFDC Ireland Limited v. Commissioner of Income Tax & Another***¹², this Court had considered a similar contention with regard to the training imparted to the Indian entity in connection with the sale of certain products referred to in the relevant agreement and the said decision as

¹¹ (2014) 364 ITR 336.

¹² (2024) 465 ITR 471.



‘SFDC products’. This Court had rejected that the training imparted in the context of the said products would render the remittance made by the Indian entity chargeable to tax as FTS. In the given facts, the Court had observed:

“41. The technical assistance and training imparted to SFDC India staff appears to be aimed at enabling them to understand the various attributes and capabilities of SFDC Products so as to be informed when interacting with prospective customers in the territory. The technical assistance and training which is spoken of in Section 4.3 of the Reseller Agreement does not appear to bear the characteristics of a conferral of specialised or exclusive technical service. In any case, the training and assistance proffered by SFDC was a concomitant to the sale of its principal products in the territory and fundamentally aimed at readying SFDC India to undertake the marketing of those products. The technical assistance and training did not constitute either the core or the foundational basis of the consideration which was received by SFDC Ireland.

42. Insofar as the products for SFDC India’s internal use were concerned, they stood restricted to those which would enable SFDC India to demonstrate the functionality of SFDC products in trade shows and exhibitions, to train its customers and employees on the use of those products and products to administer and manage customer accounts. None of these aspects would appear to be imbued with a technical hue. Imparting training or educating a person with respect to the functionality and attributes of a software or application would clearly not amount to the rendering of technical service under the DTAA. More importantly, the technical assistance and training which the petitioner proposed to provide was confined to marketing, distribution, support and sale of SFDC products. The assistance and training which Section 4.3 of the Reseller Agreement speaks of was concerned with fields wholly unrelated to providing technical service.”



59. It is equally relevant to refer to the decision of this Court in *Commissioner of Income Tax International Tax-1 New Delhi v. Expeditors International of Washington Inc.*¹³, wherein the Court has observed:

“9. Similarly, under the head of “Training and Personnel Management”, the assessee has spoken of Expeditors Ltd attempting to develop a “global culture” of ongoing development of key personnel. Neither of the above would in our considered opinion qualify the “make available” condition which permeates FTS and as would become clearer from the discussion which ensues.”

60. Merely because the training is imparted by the service provider does not necessarily satisfy the ‘make available’ condition. It is important to bear in mind the purpose for which the training is imparted to the employees and the resource so developed. Undisputedly, if the training imparted results in the service recipient absorbing technology that enables the trainees to use the technical knowhow and the skill, which is central to the technical services that are rendered, on their own; the ‘make available’ condition would stand satisfied. This is because such training would result in the transfer of the technical skill, knowhow and the technical knowledge. However, if the training does not entail transfer of the technology or the technical skill or knowhow involved in rendering the services, the same would not qualify the ‘make available’ condition, which as noted above, is essential for the consideration to be construed as FTS under Clause (c) of Paragraph 4 of Article 13 of the India-UK DTAA.

61. In the facts of the present case, the training imparted to GIPL’s

¹³ Neutral Citation : 2025 : DHC: 967-DB.



employees for using the software or e-platform, does not transmit the technical knowhow or the process for rendering the services of generating electronic invoicing. The said service is performed by the Assessee by the use of its proprietary software and the e-platform operated by it. The training to use the said platform does not transfer the knowledge or transfer the technology, which would enable GIPL to absorb the technology to generate e-invoices and render the subject services on its own. GIPL does not acquire any rights in the Assessee's proprietary software.

62. In view of the above, the question whether the payments received by the Assessee for rendering the services constitute FTS within the meaning of Paragraph 4 of Article 13 of the India-UK DTAA, is answered in the negative. Thus, the said receipts are not chargeable to tax under the Act. In this view, it is not necessary to examine whether such receipts constitute FTS within the meaning of Explanation 2 to Section 9(1)(vii) of the Act.

63. The appeals are, accordingly, allowed. The impugned order dated 18.12.2024 as well as the assessment orders dated 12.03.2024 in respect of AY 2016-17 and AY 2017-18, are set aside. The pending application(s), if any, also stands disposed of.

VIBHU BAKHRU, J

TEJAS KARIA, J

JULY 14, 2025
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