Aecom Technical Services Inc vs Income-Tax Officer & Ors

ID: F2J-C-2343 **Court:** Delhi High Court
Case: W.P.(C) 10850/2024 **Date:** 2025-05-20

[Cites 11, Cited by 0]

Delhi High Court Aecom Technical Services Inc vs Income-Tax Officer & Ors on 20 May, 2025 Author: Vibhu Bakhru Bench: Vibhu Bakhru $~54 * IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Decision: 20.05.2025 + W.P.(C) 10850/2024 & CM APPL. 44661/2024 AECOM TECHNICAL SERVICES INC. .....Petitioner Through: Mr. Manuj Sabharwal, Mr. Devvrat Tiwari & Mr. Drona Negi, Advocates. Versus INCOME-TAX OFFICER WARD INT TAX 1(1)(1), DELHI & ORS. .....Respondents Through: Mr. Sunil Agarwal, Sr. Standing Counsel with Mr. Viplav Acharya, Jr.SC, Mr. Shivansh B. Pandya, Jr.SC, Mr. Priya Sarkar, Jr.SC & Mr. Utkarsh Tiwari, Advocate. CORAM: HON'BLE MR. JUSTICE VIBHU BAKHRU HON'BLE MR. JUSTICE TEJAS KARIA

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition, inter alia, impugning an order dated 26.07.2024 [impugned order] passed by the Assessing Officer [AO] under Section 197 of the Income Tax Act, 1961 [Act], whereby the petitioner's application for 'NIL' withholding tax, was rejected. However, the AO had held that the deductors are authorised to withhold tax at the rate of 15% (including surcharge and cess) on the payment of ■114,90,00,000/-.

2. The petitioner is a company incorporated in the United States of America and is also a tax resident of that country. The petitioner had entered into an agreement dated 01.04.2021 with its Associate Enterprise [AE] - AECOM India Private Limited [AIPL] and the agreement dated Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 1 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 01.04.2023 with its AE - AECOM India Global Services Private Limited [AIGSPL].

3. The petitioner states that it is engaged in the business of design and consultancy services, construction management and infrastructure development. In terms of the agreements with the AEs, the petitioner provided management and governance supports functions in the area of legal, tax, treasury, finance, information technology, human resources, enterprise risk management, etc.

4. The description of the corporate services agreed to be rendered by the petitioner in terms of the aforementioned agreements with AIPL and AIGSPL are set out in the Annexures to the respective agreements. The same indicate that the petitioner had agreed to provide overall management services in the field of finance, accounting and tax; human resources; legal and compliance; real estate; management and operations; marketing and communications; risk and safety management; information technology and digital solutions; quality, and procurement.

5. The petitioner filed the application dated 08.05.2024 under Section 197 of the Act seeking the 'nil' withholding tax certificate. The petitioner in its application, inter alia, explained the cost cross charges as under:-

"1. Brief Facts 1.1 to 1.4 *** *** *** 1.5. The costs cross-charged are purely on cost-to- cost basis and are broadly categorized in two types i.e., Direct and Indirect costs, and Reimbursable costs. Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 2 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35

1.6.Direct and Indirect Costs means costs attributable to the services and associated governance support provided by the Applicant to AIPL and AIGSPL. It includes the direct labor costs, applied fringe and applied overhead and governance costs etc. 1.7.Reimbursable costs mean all fees and costs owing or paid by ATS Inc. or AE's to unrelated parties to the extent they are incurred for the performance of services to AIPL and AIGSPL. 1.8.In consideration for the direct and indirect costs attributable to the services as mentioned in para 1.6 above, ATS Inc, cross charges the amount to AIPL and AIGSPL on cost-to-cost basis as 'Services Fees'. The Services fees is based on the arm's length principles and transfer pricing policies adopted by the AECOM Group which shall be consistent with the governing laws of the jurisdiction of the parties and in the absence of such law, the OECD transfer pricing guidelines. 1.9. In addition to the above, AIPL and AIGSPL shall reimburse ATS Inc. for all fees and costs owing / paid to affiliates and unrelated parties for the performance of services.

1.10 The costs incurred by the Applicant for performing these services are allocated to AIPL and AIGSPL on the basis of various allocation keys such as actual usage, headcount or Net Service Revenue ('NSR') of design and consultancy services rendered by AIPL and AIGSPL.

1.11. For the purpose of cross charging costs, the Applicant has also entered into corporate services agreement with Indian associated enterprises (Copy of agreement with AIPL is enclosed as Annexure-2)." Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 3 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35

6. The petitioner states that costs cross charges are reimbursement of costs on cost-to-cost basis and contends the same are not chargeable to tax under the Act. The petitioner also set out in detail its explanation as to why cost cross charged in terms of the aforesaid agreements are not fees for technical services [FTS] within the meaning of Section 9(1)(vii) of the Act or 'fees for included services' [FIS] under Article 12(4) of the India USA Double Taxation Avoidance Agreement [India-US DTAA].

7. The petitioner has annexed sample invoices for the cross charges, which are receivables during the year. According to the petitioner, the projected receipts from AIPL are ■41,00,00,000/-, and from AIGSPL are ■73,90,00,000/- [aggregate amount of ■1,14,90,00,000/-].

8. The AO rejected the aforesaid application by the impugned order. The AO noted the services rendered by the petitioner as well as the submissions made by the petitioner and observed "services are highly technical, managerial as well as consultancy in nature which require special skills and technical qualifications". The AO also concluded that "the services rendered by the assessee do make available knowledge, experience, know-how to the recipient and this is clearly visible when one examines the nature of the services rendered and the consequential benefits obtained by the recipient".

9. On the aforesaid basis, the AO concluded that the charges paid to the petitioner by its AEs are taxable as FTS and FIS.Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 4 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35

10. We note that the AO had called upon the petitioner to explain the services as mentioned in the agreement with AIPL. The petitioner responded to the said query by a letter dated 10.06.2024. The relevant extract of the said letter is set out below: -

"The Applicant submits the process of certain services rendered to AIPI. and AIGSPL as under:

1. Human Resources ("HR") ATS Inc, has a IIR team at the corporate level that performs administrative functions, such as processing new employees, preparing offer letters, onboard training and reference requests. The HR team also provide support functions to manage the personnel of AECOM affiliates on a day-to-day basis. This includes the utilization of AECOM benefit programs, compensation planning, training methods, global mobility, recruiting teams, and the development and implementation of HR Information Systems ("HRIS"). Specifically, ATS Inc, provides the following support at the corporate level to the AIPL and AIGSPL:

(a) HRIS ATS Inc.'s corporate HRIS department delivers enterprise wide human capital management systems and support services. This includes designing, developing, deploying and sustaining integrated HR applications which support learning, succession, performance management, talent acquisition, compensation, data analytics, employee profile, and social collaboration. The HRIS department's role is to provide new capabilities and daily support for all HR and HR-related applications, including but not limited to Workday Human Capital Management system, IBM Cognos BL, SAP Successfactors, IBM Kenexa Brassring, Skillsoft Sum Total, etc.

(b) Benefits and Shared Services ATS Inc. develops and maintains a database which aggregates HR information relating to global markets. The information managed in the database allows employees of Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 5 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 the AIPL and AIGSPL to obtain information about their headcount, turnover rates and other statistics that can be used to identify areas for improvement within them and for compensation planning purposes.

ATS Inc. develops and maintains a compensation and performance management system that includes various local language versions for use by AIPL and AIGSPL. The system is used for recording and reviewing performance of employees and determining their compensation levels. ATS Inc. manages the global programs for employee benefits such as life insurance, retirement plans and other benefit plans. These benefit plans are offered to employees of the AIPL and AIGSPL as part of their compensation package. ATS Inc. also assist to develop, set up and manage the plans for employees of the AIPL and AIGSPL, including answering questions and supporting use of the plans (c) Talent Acquisition ATS Inc. licenses and maintains the talent acquisition system, BrassRing Software, for which recruiting reports and data are generated and utilized by AIPL and AIGSPL reflecting the gender, turnover, assessment of personnel and other data that is utilized in the recruiting process (d) Problem Resolution Where there is a human resources issue arising in the day- to-day operations of AIPL. and AIGSPL, such as an underperforming employee that requires action or termination, ATS Inc. provides support to manage and resolve the issue, including assessment of appropriate actions based on AECOM policies and liaise with the employees to resolve the issue. The above services of the HR department provide the following deliverables and benefits to AIPL and AIGSPL Deliverables - System applications, such as Workday, Cognos BI, SAP Learning Management System and Successfactors, IBM Kenexa Brassring, Skillsoft Sum Total, onboarding Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 6 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 solutions, and integration of Salesforce HR case management system. - Advisory on developing life insurance, retirement plans, and other benefit plans - Data and reports on headcount, turnover, and other statistics on a global and country specific basis - Recruitment data on gender and diversity - Local vendor information - Advisory on employees' compensation and bonus planning - Global benefits initiatives Benefits - Improve personnel management and consequently, improve quality of services and financial efficiency of the business operations - Analysis and review of performance of employees and advisory on the results to ensure high quality pool of talent is retained at AIPL/AIGSPL - Integrated systems and applications for the enterprise - Reduced agency costs

2. Information Technology & Digital Solutions ATS Inc. implements and supports information technology that is used by AIPL and AIGSPL. This includes several global initiatives that are set up at the various AECOM affiliates including the Oracle enterprise system. The information technology function also includes the costs telecommunications line access fees and equipment license fees to support the WAN (wide area network) through which AECOM and its affiliates communicate and conduct business. The software has been centrally procured by the applicant for joint use by it and its group entities and cross-charges to AIPL and AIGSPL as reimbursements of actual costs on Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 7 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 the basis of actual usage. Specifically, ATS Inc., provides the following services to AIPL, and AIGSPL:

(a) Field Service Support ATS Inc. provides support for ad hoc IT issues that arise from employees of AIPL. and AIGSPL. Where there is an issue, employees of AIPL and AIGSPL call the IT help desk to request assistance. The first line of support is provided by ATS Inc. for immediate resolution or referral.

In many cases, initial trouble shooting of an incident can be resolved during the call or first contact with helpdesk, such as password reset, patch updates, etc. To the extent immediate resolution is not available, the ticket may get escalated Escalation could be to either ATS Inc.'s specialists, third party vendors, or to local support based in overseas countries. As the AECOM Group has limited IT resources, it does not have the capacity to deal with all tickets raised by the AECOM Group. Instead, IT staff focus only on the resolution of the limited cases referred to by the AECOM helpdesk that require in person support. Examples of Field Service Support are enclosed as Annexure 4 for your reference. (b) Oracle AIPL and AIGSPL. utilizes Oracle to maintain and prepare its financial statements. Oracle is maintained by employees of ATS Inc. and is hosted out of its data center. In addition, ATS Inc. provides user support with questions and issues arising from the use of Oracle, as well as incurring the costs of implementing, upgrading and providing patches to update the Oracle system. (c) IT Infrastructure ATS Inc. maintains network connectivity that ensures the AECOM Group network is being maintained and running at optimal effectiveness and maximum security. This includes applications and software that are used by the professionals of AIPL and AIGSPL. All of the mailboxes for the AIPL and AIGSPL personnel, including those used in Outlook or via hand held devices, are maintained by ATS Inc. who will back them up and Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 8 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 archive them on servers maintained by it, with all the AIPL and AIGSPL's emails being routed via the data center being maintained by ATS Inc. Specific examples of support provided by ATS Inc. is enclosed as Annexure 5 of this section. (d) Software Development ATS Inc. provides software development services with respect to various software applications used in the AIPL and AIGSPL's business, including the Oracle system noted above. These services include research and development of bespoke IT systems, maintenance of web-based applications and incurring license fees for various enterprise software that is used. The above services in relation to IT function provides the following deliverables and benefits to AIPL and AIGSPL Deliverables - Global operations and support for global network, database, Internet email, hosting services, directories, etc. - Telecommunications line access and equipment to support the WAN (wide area network) through which the AECOM group communicates and conducts business - Email correspondence supporting local IT team - Tickets issued to the AECOM Group employees, including a summary of the issue, actions taken and resolution - Local language websites and computer systems - Software systems used in the business Benefits - Access to latest technology tools in its business - Access to highly qualified personnel to resolve issues and develop software - Create cost efficiencies by utilizing global terms on IT Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 9 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 spend negotiated by AECOM - Increased efficiency through increased IT performance and faster issue resolution - Greater security through security systems and data back up and storage

3. Management and Operations The International Chief Operating Officer ('COO') and team works on the payroll of ATS Ins. It assists AIPL and AIGSPL with management and oversight of key functional areas for international operations including IT, real estate, procurement and in developing AECOM's global strategy. Specifically, the following services are provided:

- The International COO and team work in conjunction with Regional Chief Operating Officers on operational and strategic initiatives and has oversight of operational and financial performance of the international geography.

- The International COO is a member of the International Risk Committee to review requests for approval (RF A's) and review opportunities with a specific risk profile to be reviewed to obtain a go/no go decision to proceed with the bid.

- The International COO and team lead on project reviews to assess the historic and future financial performance and help identify any risks or opportunities which need to be managed. Also, help advise on any change in strategy to deliver the project successfully.

4. Finance and Accounting: Tax & Treasury This function of ATS Inc. assists AIPL and AIGSPL in the overall management oversight of Finance, Accounting and Tax services coordinating key tasks and activities as well as providing strategic advice. A description for certain services provided by this function are explained as under:

(a) Tax ATS Inc. provides support with respect to the identification and resolution of tax issues that impact the AIPL and Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 10 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 AIGSPL. This involves liaising with local advisors supporting completion of tax returns and financial statement support, resolving any issues identified by advisors, assisting with liaisons with the Internal Revenue Service ("IRS") and collecting data to provide to the IRS, and other tax advice that may arise as a result of business operations in the local countries.

The tax function review and oversee the tax operations of the ATS Inc. and AIPL/AIGSPL. The tax function team of AIS Inc. coordinates the AIPL and AIGSPL to troubleshoot any tax issues that may arise and monitors all major issues relating to tax including foreign tax audits, mergers and acquisitions, and internal restructuring. For example, when AIPL is engaged as a bid process, the tax function of ATS Iac. will identify the appropriate taxes that can arise on a project and work with the AIPL, to build the potential cost into the bid process to ensure it can continue to be profitable. Given the experience of ATS Inc. in supporting similar tax initiatives globally and the familiarity with tax rules, this allows an efficient resolution of issues and ensure that AIPL is strategically placed to manage its tax position and timely comply with local tax laws and regulations. The tax function provides the following deliverables and benefits to AIPL and AIGSPL:

Deliverables

- Above mentioned advisory & support services

- Email correspondence with local tax advisors and internally to discuss tax issues and proposed resolutions or actions suggested Benefits

- Increase tax efficiency of its operations, which allows a reduction in costs, both relating to internal time spent and advisors fees, arising from inefficiently managing the tax compliance process

- Increase profitability on projects by more effectively Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 11 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 determining tax costs and building that into a bid price

- Reduce tax costs arising from more effective retention of documents to support tax position taken on tax returns.

(b) Treasury ATS Inc provides two main treasury services to AIPL and AIGSPL, as follows:

(i) Negotiations with local banks to establish local banking facilities, including obtaining local overdraft protection and issuance of bid bonds to provide cash to support investments by AlPI associated with bids and project funding.

(ii) Expertise and support when AIPL bids for local contracts to ensure all financial risks associated with the potential project have been appropriately identified and factored into the bid process. These include the following:

-Advice on foreign exchange and balance sheet risks when contracts are in currencies other than local currencies; and

-Assistance with the review of commercial terms in contracts to ensure sufficient risk management is built in around items such as contingent liabilities and disclosures.

The treasury function negotiates with local banks to establish banking facilities, including obtaining overdraft protection and issuance of bid bonds to provide cash to support investments in bids and project funding. Cash support on bids for potential new local contracts to ensure all financial risks associated with potential projects have been appropriately identified and factored into the bid process, including foreign exchange and balance sheet risks and contingent liabilities.

The services of treasury function provide following deliverables and benefits to AIPL and AIGSPL Deliverables

- Above mentioned advisory services

- Bank facilities and bid bonds obtained from local banks Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 12 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35

- Email correspondence on bid support Benefits

- Allows terms of banking arrangements and funding of business operations on commercially favorable terms, taking into account the global banking relationships held by ATS Inc. and the financial wherewithal of the global group.

- Effectively manage risks related to accepting new local contracts and building appropriate risk factors into its bidding process to ensure AIPL. bids on projects in a manner that is both competitive and profitable taking into account all risks

(c) Financial Planning & Business Analytics

- ATS Inc.'s business analytics team performs the following key functions on behalf of AIPL and AIGSPL:

- Prepares and delivers AIPL/AIGSPL's management and operational financial reporting globally;

- Prepares and delivers global financial planning and forecasting needs;

- Manages and continuously develops AECOM's enterprise level data warehouse;

- Manages and continuously develops data for the global organization which spans organizational hierarchies, client projects, opportunities, and management reporting metrics; and

-Responds to company wide data requests supporting executive leadership, functional leadership, contract bid and proposal support, etc. The above services provide the following benefits to AIPL and AIGSPL:

- Above mentioned advisory services

- Financial analysis to enable and support decision making with respect to investments

- Data and financial analysis to support winning projects

Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 13 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 and producing bids

- Increased financial efficiency of projects through the provision of analysis and support

5. Legal and Compliance

ATS Inc. oversees compliance and monitors AIPL and AIGSPL to ensure compliance with risk management initiatives. It provides support on local operational issues, which includes issues arising with respect to disputes with employees, including solving complaints of unethical behavior via hotlines maintained, or third-party consultants in India. This can also include clients that may be disputing or taking legal action against AIPL/AIGSPL. Where this occurs, ATS Inc. liaises with local legal counsel to obtain advice on appropriate dispute resolution or mitigation measures. Based on this advice, ATS Inc. laises with employees of AIPL and AIGSPL, or consultants or clients, where necessary, on how to handle and resolve a situation. Where there is legal action involved, ATS Inc. will have day-to-day involvement to ensure the best global resources are deployed to manage the financial and reputational risk to AIPL and AIGSPL.

ATS Inc. also reviews all bids for new projects to be entered into by AIPL and advises on contract negotiations with clients where a bid is accepted. The advice provided by ATS Inc. assists AIPL in structuring bids and contracts in a strategically favorable manner to maximize profits while minimizing risks.

The above function provides the following deliverables and benefits to AIPL and AIGSPL:

Deliverables

- Above mentioned advisory services

- Email correspondence

Benefits

- Enable effective management of financial risks on contracts with customer and vendors, as well as bidding contracts, resulting in increased profitability. Financial Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 14 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 analysis to enable and support decision making with respect to investments

-Effectively resolves employees' and third-party legal issues in a cost-effective manner with minimal impact to the business operations

6. Procurement and Travel The corporate procurement team of ATS Inc., manages, maintains, and monitors the global margin improvement programs for the company including serving as the primary vendor contact; negotiating contracts, pricing, policies and procedures, and program management; measuring progress to goals; and verifying the results of the margin improvement program. The Corporate Travel team delivers travel, meetings and events and payment solutions, supporting many aspects of project lifecycles as well as business development opportunities. The team is responsible for procuring and overseeing enterprise hotel, business travel, and corporate card programs.

7. Risk, Safety and Security Management ATS Inc. provides coordination of general safety and security measures for AIPL and AIGSPL and their personnel and monitors compliance as well as directly provides security support where needed."

11. The petitioner disputes that the aforementioned services rendered are technical services and, therefore, contends that the cross charges cannot be considered as FTS. More importantly, the petitioner also claims that it does not make available any technical knowledge, experience, skill, know how or processes to its AEs; therefore, in terms of Article 12 of the India-US DTAA, services rendered cannot be considered as FIS.

12. We do not consider it necessary to examine the question whether the costs cross charged by the petitioner to its AEs, AIPL and AIGSPL, in terms of the respective agreements constitute FTS under Section 9(1)(vii) of the Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 15 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 Act. This is because it is apparent that the said charges do not fall within the definition of FIS, as set out in paragraph no.4 of the Article 12 of the India-

US DTAA. The relevant paragraphs of Article 12 of the India-US DTAA are set out below:-

"Article 12 - Royalties and fees for included services -

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

(a) in the case of royalties referred to in sub-paragraph

(a) of paragraph 3 and fees for included services as defined in this Article [other than services described in sub-paragraph (b) of this paragraph] :

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

(a) 15 per cent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that Contracting State, a political sub-division or a public sector company ; and

(b) 20 per cent of the gross amount of the royalties or fees for included services in all other cases ; and

(ii) during the subsequent years, 15 per cent of the gross amount of royalties or fees for included services ; and Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 16 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35

(b) in the case of royalties referred to in sub-paragraph

(b) of paragraph 3 and fees for included services as defined in this Article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 3(b) of this Article, 10 per cent of the gross amount of the royalties or fees for included services.

3. The term "royalties" as used in this Article 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 cinematograph films or work on film, 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, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; 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 payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

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 Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 17 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 (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 amounts 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 3(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 payments; 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 15 (Independent Personal Services)..."

13. As noted above, the AO had briefly noted the services rendered by the petitioner and had concluded the same would be falling within the definition of 'included services' however, the said view is unsustainable. The AO's conclusion is based on the assumption that since the IT infrastructure is used by AIPL and AIGSPL, the same would constitute making available the technical knowledge and skills to AIPL and AIGSPL. The AO had also reasoned that since the petitioner provided software development services with respect to the petitioner's software application used by AIPL and AIGSPL's business, including the Oracle system; the Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 18 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 same would also constitute making available the technical knowledge to AIPL and AIGSPL. The said conclusions are unsustainable given the description of the services rendered by the petitioner.

14. As noted above, the petitioner renders wide range of services to AEs. None of the services can be considered as 'included services' within the meaning of paragraph no.4 of Article 12 of the India-US DTAA as the same is not ancillary and subsidiary to the application or enjoyment of the right, property or information for which the petitioner receives royalty as covered under Article 12(3) of the India-US DTAA. The services rendered by the petitioner also do not make available technical knowledge, experience, skill, know-how, or processes to AIPL and AIGSPL. The expression 'make available' must be understood to mean transfer of technical knowledge, experience, skill or know-how, or process, which enables the recipient to absorb and utilise the same. If the service provided does confer any right in favour of the recipient in respect of the knowledge, experience, skill or know-how; the condition that the services 'make available' such technical knowledge, know-how, skill, or process so as to fall with the sweep of FIS are not satisfied.

15. In CIT v. Relx Inc.: (2024) 470 ITR 611, a Coordinate Bench of this court had considered the meaning of "make available" and had held 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 Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 19 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 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. Bio-Rad Laborataries (Singapore) Pte. Ltd. [CIT v. Bio-Rad Laborataries (Singapore) Pte. Ltd., (2023) 459 ITR 5 : 2023 SCC OnLine Del 6770] 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 [33 ITR (Trib)-OL p. 463]:

'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 Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 20 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 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."

17. As we examine the nature of the transaction between an Indian subscriber and the assessee, it becomes manifest and apparent that it neither comprises of a transfer of copyright nor does it include a transfer of a right to apply technology and other related aspects which are spoken of in Article 12(4)(b) of the Double Taxation Avoidance Agreement."

16. In CIT v. De Beers India Minerals P. Ltd.: (2012) 346 ITR 467 a Division Bench of the Karnataka High Court held as under:Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 21 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35

"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."

17. In so far as the IT infrastructure and software development is concerned, the petitioner had explained it maintains the network connectivity and ensures that the business of AIPL and AIGSPL is being maintained and run at optimum effectiveness and maximum security. The same would include the applications and software, which are used by the professionals of AIPL and AIGSPL. However, the assumption that there is any transfer of right in relation to the said software or applications to AIPL Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 22 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35 and AIGSPL is not supported by any material on record.

18. Although the petitioner has also stated that it provided the software development services with respect to the various software applications, which are used by AIPL and AIGSPL in their businesses. However, there is nothing on record to indicate that the AEs acquired any rights in relation to these software and applications developed by the petitioner.

19. The AO also observed that part of the charges was taxable as royalties. The said information was premised on the basis that the petitioner centrally procured software / tools for joint use by its AE. The AO reasoned that cross charges would thus, be the reimbursement of the actual cost of such software / tools and, therefore, taxed as royalty.

20. Given the fact that AIPL and AIGSPL did not acquire any copyright in the software, the cross charges paid by them could not be construed as royalties within the scope of Article 12(3) of the India-US DTAA. This issue is covered by the decision of the Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited v. CIT & Anr.: (2021) 432 ITR 471.

21. It is relevant to note that the AO had not controverted that the said view was not in consonance with the decision of the Supreme Court in Engineering Analysis Centre of Excellence Private Limited v. CIT & Anr.:

(supra) but merely observed that the Revenue's review petition is pending before the Supreme Court. Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 23 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35

22. The decision of the Supreme Court is binding under Article 141 of the Constitution of India and could not have been disregarded on the ground that a review petition is pending. In Milestone Systems A/S v. Dy. CIT: (2023) 453 ITR 250, - a case where the AO had not followed the decision of Engineering Analysis Centre of Excellence Private Limited v. CIT & Anr. (supra) on the ground that a petition to review the said decision was pending - a Coordinate Bench of this court had observed: "10. According to us, as long as the judgment of the Supreme Court is in force, the concerned authority could not have side stepped the judgment, based on the fact that the review petition had been preferred. It would have been another matter, if the concerned officer had, on facts, distinguished the judgment of the Supreme Court in Engineering Analysis Centre of Excellence P. Ltd. v. CIT."

23. In view of the above, the impugned order is not sustainable and therefore, is, set aside. We, accordingly, direct the AO to issue the necessary certificate or 'NIL' withholding Tax Certificate in respect of the cross-cost charges as received by the petitioner from AIPL and AIGSPL.

24. We clarify that this order would not preclude the Revenue from examining the taxability of the receipts in normal course of assessment under the Act and the present order is confined to the issuance of the certificate under Section 197 of the Act based on the description of the services as provided and furnished by the petitioner.Signature Not Verified Digitally Signed W.P. (C) 10850/2024 Page 24 of 25 By:TARUN RANA Signing Date:27.05.2025 19:05:35

25. The petition is allowed in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

TEJAS KARIA, J MAY 20, 2025 M Click here to check corrigendum, if any

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