



2025:DHC:4118-DB



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

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Date of Decision : 20.05.2025

+ **W.P.(C) 10843/2024**

AECOM INTERCONTINENTAL HOLDINGS UK LTD.

.....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 27.06.2024 [**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 ₹16,45,00,000/-.

2. The petitioner is a company incorporated in the United Kingdom and is also a tax resident of that country. The petitioner had entered into an



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agreement dated 01.04.2023 with its Associate Enterprise [AE] - AECOM India Private Limited [AIPL].

3. The petitioner states that it is engaged in the business of providing corporate and management services. In terms of the agreements with the AE, 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 agreement with AIPL are set out in the Annexure to the said agreement. 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 1.3

1.4 The Applicant incurs costs associated with these support functions and cross charges the costs to AIPL. The costs cross-charged are purely on cost-on-cost basis.

1.5 The Applicant cross-charges the Direct and Indirect Costs i.e. costs attributable to the services and associated governance support provided by the



Applicant to AIPL. It includes the direct labor costs, applied fringe and applied overhead and governance costs etc.

1.6 It is submitted that AECOM is a multinational group having global presence at various locations including US, UK and India. Its business is operated through an internal matrix consisting of corporate functions, geographical regions and business lines. AECOM has management at the Corporate, Regional, and Sub-regional level. Accordingly, services are provided to group companies by Corporate, International Region and Europe & India Subregion management staff and shared service providers.

1.7 The Sub- regional level consists of Regional geographies, including Europe & India, Middle East & Africa, ANZ, and Asia ('EIMEA'). These staff are regionally based and work across their respective region only. **The costs in relation to services provided by these staff are initially booked by the Applicant. Therefore, the Applicant cross-charges the staff costs in relation to international support and Europe & India (EIMEA) region only.**

1.8 In consideration for the direct and indirect costs attributable to the services as mentioned in above para, the Applicant cross charges the amount to AIPL on cost-to-cost basis as 'Services Fees'. The Service 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 The costs incurred by the Applicant for performing these services are allocated to AIPL 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.

1.10 For the purpose of cross charging costs, the Applicant has also entered into a Corporate Services Agreement with AIPL (Copy of the agreement is enclosed as Annexure-2)."



6. The petitioner claims that costs cross charges are reimbursement of costs on cost-to-cost basis and 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 FTS under Article 13 of the India UK Double Taxation Avoidance Agreement [India-UK DTAA].

7. The petitioner also furnished sample invoices for the cross charges, which are receivables during the year. According to the petitioner, the projected its receipts from AIPL at ₹143,196,171.00.

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 services rendered by the petitioner to its AE are technical services and the charges paid are taxable as FTS.

10. We note that the AO had called upon the petitioner to explain as to how the services as mentioned in the agreement with AIPL are rendered.



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The petitioner responded to the said query by a letter dated 10.06.2024. The relevant extract of the said letter are set out below: -

“2.1. The Applicant only provides corporate services to AIPL with respect to overall review, oversight and governance of various functions such as Finance, accounting & tax, human resources, legal & compliance etc. through senior management teams. These services are provided by International and Europe Management staff and shared service providers and represent time spent by them for review, oversight and governance.

2.2. At the outset, it is submitted before your goodself that AECOM is a multinational group having global presence at various locations including US, UK and India. Its business is operated through an internal matrix consisting of corporate functions, geographical regions and business lines.

AECOM's geographical regions are organised and managed as follows:

1. Americas, which comprises the USA, Canada and Latin America; and
2. International, which comprises four sub-regions:
 - i. Europe & India.
 - ii. Middle East & Africa.
 - iii. ANZ
 - iv. Asia

AECOM has management at the Corporate, Regional, and Sub-regional level. Accordingly, services are provided to AIPL by Corporate, International Region and Europe & India Sub-region Management staff and shared services providers. The staff time costs at different levels are allocated to AIPL in the following manner:

(i) **Corporate Management** - Senior executives based in US who direct and co-ordinate AIPL globally, provide strategic advice and assistance in setting global policies. In relation to services provided by



these executives, cost is cross-charged by ATS Inc. only.

(ii) **Regional:**

- Americas - The regional staff working on US entities only. Their costs are not allocated outside the US, thus not allocated to AIPL.

- International - Senior management working on global entities, excluding the US entities. **These staff are based in various countries and costs in relation to services provided by them are initially booked in AECOM UK and cross-charged to AIPL basis planned Net Services Revenue ('NSR').**

(iii) **Sub regional-** Regional geographies, including Europe & India, Middle East & Africa, ANZ, and Asia ('EIMEA'). These staff are regionally based and work across their respective region only. **The costs in relation to services provide by these staff are initially booked by AECOM UK and cross-charged to AIPL basis planned NSR.**

2.3. In view of the above, it is submitted that ATS Inc. only cross-charges the costs to AIPL in relation to corporate management and AECOM UK cross-charges the staff costs in relation to international support and Europe & India (EIMEA) region. **The details of costs cross-charged by AECOM UK to AIPL are explained as under:**

(i) **Europe & India Corporate Region**

These allocations refer to senior management and support services within the Europe and India region who are based in various locations, mainly in AECOM UK and who direct and co-ordinate AIPL's resources. They support the business of AIPL in strategy setting, cross border co-operation and winning work. **The costs in this regard are initially booked in AECOM UK and are then allocated and invoiced to AIPL on cost-to-cost basis, wherever possible or using the**



NSR allocation methodology.

(ii) International Support

These allocations refer to International senior management and support services within the International region who are based in various locations, mainly in AECOM UK and who also direct and co-ordinate AIPL's resources. They support the whole business in strategy setting, cross border co-operation and whining work. International staff provide project guidance around risks and pricing to AIPL as well as generally using their experience to provide support. **The costs in this regard are initially booked in AECOM UK and are then allocated and invoiced to AIPL on cost-to-cost basis or based on NSR allocation methodology.**

The Applicant further provides an example of cost cross charged by ATS Inc. and AECOM UK for the tax function to differentiate the services provided by them:

(i) The US Corporate tax team includes:

- Global Head of Tax (Senior Vice President)
- Corporate Vice President, Tax Planning
- Corporate Vice President, Tax Operations
- Global Transfer Pricing Director
- Global Transfer Pricing Manager

The above staff are responsible for establishing and maintaining the global tax strategy, governance and risk for AIPL and providing tax input on the global legal ownership structure to maximise efficiencies and enhance shareholder value. They also ensure global tax policies, processes and procedures are in place to deal with all tax related governance matters, including timely submission of tax returns and timely settlement of tax liabilities. **Their costs are incurred and recharged by ATS Inc. only.**

(ii) The International tax team include:

- EIMEA Tax Director



- Employee Taxes Manager
- EIMEA Transfer pricing Manager

The above senior management staff manage all tax matters in their region and ensure the adherence to the tax policies and procedures, as set by the US Corporate tax team, are complied with and reporting standards are met. Importantly, they would also enable the business by providing tax analyses on project bids and operating contracts, especially cross border projects, giving input on pricing, structuring and governance. Tax advice and support related to the movement of AECOM staff between India and the UK is also provided. They would also assist on transfer pricing matters, including input on the Indian Advance Pricing Agreement. Their costs are incurred from UK and allocated by AECOM UK to AIPL based on the methodology described above.

(iii) Europe & India Management tax team includes:

- Tax Managers

The above staff are responsible for the sub-regional taxes and would report into the International tax team's Tax Director. Sub-regions would include Europe & India and Middle East & Africa.

For AIPL, the tax manager would help with local India support for taxes, manage the US reporting and help to ensure tax compliances are met and provide ongoing support to the local finance team where appropriate. They would also assist the International Team with cross border tax analysis for bids. Their costs are allocated from AECOM UK to AIPL based on the methodology described above.

Therefore, in view of the above, it is humbly submitted that costs proposed to be cross-charged by the Applicant to AIPL are different and mutually exclusive as compared to the costs cross-charged by ATS Inc. to AIPL in relation to the below services:



1. Finance and Accounting: Tax & Treasury

This function of the Applicant assists AIPL 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

The tax function assist in review and oversee the tax operations of AIPL. **The tax function team of AECOM UK coordinates the AIPL 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.** They would provide AIPL with tax analyses on project bids, especially cross border projects, giving input on pricing, structuring and governance. They would also assist on transfer pricing matters, including input on the Indian Advance Pricing Agreement. They also assist AIPL with local India support for taxes, manage the US reporting and help to ensure tax compliances are met and provide ongoing support to the local finance team where appropriate.

(b) Treasury

AECOM UK provides expertise and support when AIPL bids for potential new 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.



2. Commercial Bid Support

AECOM UK provides support to Operations with Commercial Pricing of large complex bids and proposals for any Region within International or for projects which span across multiple Regions or Business Lines

3. Financial Planning & Business Analytics

AECOM UK's business analytics team performs the following key functions on behalf of AIPL:

- Prepares and delivers AIPL'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:

- Above mentioned advisory services
- Financial analysis to enable and support decision making with respect to investments Data and financial analysis to support winning projects and producing bids
- Increased financial efficiency of projects through the



provision of analysis and support

4. **Controllership**

International Controller i.e. on the payroll of AECOM UK holds key relationship with external auditors and manages overall audit schedule and program. It also provides following services to AIPL:

- Management and oversight of International Regions to ensure books and records of the company and subsidiaries are maintained including the effectiveness of internal controls over financial reporting.
- Review, redesign and maintain accounting policies to align with authoritative guidelines.
- Provide strategic advice and guidance to International Leadership, Management and Operations and support M&A and due diligence activities when required.
- Management and oversight of Tax and Treasury functional areas.

5. **Management and Operations**

The Chief Operating Officer ('COO') of Europe and India and team works on the payroll of AECOM UK. It assists AIPL 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 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 COO is a member of the Europe Risk Committee to review requests for approval (RFA'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 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.

6. Legal and Compliance

The Applicant oversees compliance and monitors AIPL to ensure compliance with risk management initiatives. It provides support on local operational issues, which includes issues arising with respect to disputes with employees, or third-party consultants in India. This can also include clients that may be disputing or taking legal action against AIPL. The Applicant 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 the Applicant assists AIPL in structuring bids and contracts in a strategically favorable manner to maximize profits while minimizing risks.”

11. The petitioner disputes that the aforementioned services rendered are technical services and, therefore, 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 the processes to its AE, therefore, in terms of Article 13 of the India-UK DTAA, services rendered cannot be considered as FTS.

12. We do not consider it necessary to examine the question whether the cross charges are FTS (Fees for Technical Services) under the Act. This is because it is apparent that the said charges do not fall within the definition of FTS under paragraph 4 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, a political 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.”

13. The AO after taking note of the services rendered by the petitioner had referred to the source rule and observed that “*receipts have a source base in India on which tax is required to be deducted by the Indian payers*”. The AO also referred to the decision of the Supreme Court in ***M/s. Continental Construction Ltd. v. Commissioner of Income Tax, Central-1: (1992) 195 ITR 81*** and ***CBDT & Ors. v. Oberoi Hotels (India) Pvt. Ltd.: (1998) 231 ITR 148*** and observed that the services that may be rendered by a lawyer or by a hotel consultants and specialists have been found to be “technical services”. Insofar as the question whether the ‘make available’ clause was satisfied, the AO referred to the decision of the Authority for



Advance Ruling in the case of **Shell India markets Pvt. Ltd.** (order dated 12.1.2012 in AAR No. 833 of 2009) and made observations to the effect that general business support services would satisfy the requirement of 'make available' clause.

14. The AO also referred to the ruling in the case of **Areva T&D Ltd.** (Order dated 07.02.2012 in AAR No.876/2010) and observed that even IT sharing services 'made available' technical knowledge/experience to the assessee resulting in such services being characterised as FTS. The AO, *inter alia*, concluded as under:

"7.11 In the light of the above discussion and analysis, it is inferred as under:

- a) The services cannot be categorized to be provided in the ordinary course but requires a professional methodology to cater to such services
- b) The nature of work involves complex arrangements with various other consultants etc. for providing a deliverable / service to the recipient and can only be provided by specialized personnel having requisite experience.
- c) With passage of time, the Indian AE's will get empowered since the assessee in the garb of highlighting simple aspects of services, is providing very technical, sophisticated services, which include workflow automation, various technical deliverables etc. as well
- d) The services to be performed do not merely require skill set at the front level of execution but is equally supported by constant level of back end services that enable the front end team to execute the work accordingly.
- e) The services rendered cannot be completed unless supported by proper planning and management by the assessee.
- f) Such services involve a lot of planning and technical aspects involving skilled personnel to deal with the technicalities of the services performed.



g) The services are technical and consultancy in nature and also make available technical knowledge, experience, skill know-how or processes to AIPL. The services are capable of being put to use by the AIPL on its own (make-available clause) in the future. Further, the recipient of services, i.e. AIPL is getting benefitted by the services and is becoming capable to use them in its business activities.

Hence, it is inferred that the sums to be received by the applicant from Indian AE is taxable in its hands as per the provisions of the Income Tax Act, 1961 as well as the provisions of India UK DTAA. Accordingly, the amount is taxable as FTS under the Act as well as under the India UK DTAA.”

15. We find no material on record which would suggest that the petitioner makes available any technical knowhow, knowledge, skill or process to its associated enterprises which could be construed as FTS under Article 13(4) of the India-UK DTAA. The assumption that over a period of time, the petitioner’s Indian AE will get empowered as the petitioner is providing very technical or sophisticated services which includes workflow automation and certain technical deliverables is speculative. However, the question is not whether over a period of time the AIPL would gain experience, the point to be addressed is whether the petitioner transferred any technical knowhow, skill or knowledge which could be exploited by AIPL on its own. There is no material to indicate that any proprietary, IPR, technical knowhow, skill of process was transferred or alienated to the AIPL.

16. As noted above, the petitioner renders wide range of services to AEs. None of the services can be considered as ‘technical services’ within the meaning of paragraph no.4 of Article 13 of the India-UK 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 13(3) of the India-UK DTAA. The services rendered by the petitioner also do not make available technical knowledge, experience, skill, know-how, or processes to AIPL. 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 to ‘make available’ such technical knowledge, know-how, skill, or process so as to fall with the sweep of FTS would not be satisfied.

17. The AO has also observed that it could not be ruled out that the petitioner has a PE in India. However, there is no material on record to sustain this conclusion as well.

18. 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 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 Laboratories (Singapore) Pte. Ltd.*** [*CIT v. Bio-Rad Laboratories*



(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 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."

19. In ***CIT v. De Beers India Minerals Pvt. Ltd.: (2012) 346 ITR 467***, a Division Bench of the Karnataka High Court held as under:

"21. What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skills, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy



similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied"

20. Insofar as the IT infrastructure and software development is concerned, the petitioner had explained that it maintains the network connectivity and ensures that the business of AIPL 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. However, the assumption that there is any transfer of right in relation to the said software or applications to AIPL is not supported by any material on record.

21. 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's business. However, there is nothing on record to indicate that the AE acquired any rights in relation to these software and applications developed by the petitioner.

22. 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



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such software / tools and, therefore, taxed as royalty.

23. Given the fact that AIPL 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 13(3) of the India-UK DTAA. This question 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.

24. 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.

25. 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*** where the decision in the case of ***Engineering Analysis Centre of Excellence Private Limited v. CIT & Anr.*** (*supra*) was not followed by the AO on the ground that a review 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.***”

26. In view of the above, the impugned order is not sustainable and



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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.

27. 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.

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

VIBHU BAKHRU, J

TEJAS KARIA, J

MAY 20, 2025

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[Click here to check corrigendum, if any](#)