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

\+ ITA 366/2024

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-2 .....Appellant

Through: Mr. Sanjay Kumar, SC

versus

INTER CONTINENTAL HOTELS GROUP (ASIA PACIFIC) PTE. LTD. .....Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

<u>O R D E R</u>

% **22.07.2024**

<u>CM APPL. 40751/2024 (264 Days Delay in Re-filing)</u>

Bearing in the mind the disclosures made, the delay of 264 days in re-filing the appeal are condoned.

This application shall stand disposed of.

<u>ITA 366/2024</u>

1. The Commissioner of Income Tax impugns the order of the **Income Tax Appellate Tribunal**[1] dated 05 April 2023 and has framed the following questions of law for our consideration:-

> "A. Whether on the facts and circumstances of the case, the Ld. ITAT erred in holding that Management Support Services charges received by the assessee from Inter-Continental Hotel Group (India) Pvt. Ltd. (IHG) do not fall within the purview of FTS as per Article 12(4) of India-Singapore DTAA?
> B. 'Whether on the facts and circumstances of the case, the Ld. ITAT erred in not appreciating the fact that Management Support Services rendered by the assessee to IHG India are ancillary and subsidiary to the license agreement and taxable

[1] Tribunal

as FTS?
C. Whether on the facts and circumstances of the case, the Ld. ITAT erred in not appreciating the fact that Management support services rendered by the assessee are making available technical knowledge, know-how, skill, experience etc. as per India-Singapore DTAA?"

2. The principal issue pertains to the Business Management and Consultancy Service Agreement and whether the same would qualify under Article 12(4) of the India-Singapore **Double Tax Avoidance Agreement**[2].

3. On hearing Mr. Kumar, learned counsel for the appellant, we have no doubt that the agreement was concerned with providing services which could at best be placed in the category of consultancy. However, we find that the findings on fact as returned would clearly not qualify the *"make available"* condition which forms part of Article 12(4)(b) of the India-Singapore DTAA.

4. While explaining the expression "make available" and the meaning liable to be assigned thereto, we had in a recent decision in **International Management Group (UK) Limited vs. Commissioner of Income Tax-2, International Taxation, New Delhi**[3] observed as follows:-

> "**89.** It becomes apparent upon a consideration of the views expressed above that the word "technical" is no longer liable to be understood in its archaic sense as being confined to the traditional sciences. What authorities commend for consideration is an ascertainment of whether the services rendered involved the application of a specialised skill, knowledge or expertise. It is this shift in understanding which has led to the application of specialised knowledge, skill or expertise with respect to any art, science, profession or occupation being recognised as falling within the ambit of the expression "technical" services. Similarly, the word "consultancy" would entail the provision of advice or service of a specialised nature. There could also be the possibility

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[2] DTAA
[3] 2024 SCC OnLine Del 4558

where technical and consultancy services may also overlap or where the nature of service furnished may be discerned as falling under both those heads. We thus broadly concur with the views expressed and noticed above. However, we note that insofar as these appeals are concerned, there appears to be no contestation of the nature of activities which were rendered by IMG and the respondents have not questioned those services falling within the scope of the expression "technical and consultancy services". The principal issue of disputation was whether the "make available" test was satisfied.

90. We find that the most lucid enunciation of the meaning to be assigned to the phrase "make available" appears in the decision of the Karnataka High Court in *De Beers* and where the High Court had held:-

> "**13.** Therefore, the clause in the Singapore agreement which explicitly makes it clear the meaning of the words "make available", the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical in nature, but it should be made available to the person receiving the technical services. The technology will be considered made available when the person, who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know-how or processes. To attract the tax liability, that technical knowledge, experience, skill, know-how or process which is used by the service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know-how or processes so as to render such technical services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When the technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the

technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know-how or process to the recipient of the technical service, in view of the clauses in the DTAA the liability to tax is not attracted.

14. The learned Additional Solicitor General relied on three judgments to point out that was the earlier view. Now, there is a departure supporting the Department. The first judgment on which reliance is placed is the judgment of the Advance Rulings Authority in the case of Perfetti Van Melle Holding B. V., *In re*, (2012) 342 ITR 200 (AAR) where it was held as under (page 212):

> "The expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or knowhow in future on his own. 'By making available the technical skills or know-how, the recipient of the same will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. .. So when the expertise in running the industry run by the group is provided to the Indian entity in the group to be applied in running the business, the employees of the Indian entity get equipped to carry on that business model or service model on their own without reference to the service provider, when the service agreement comes to an end. It is not as if for making available, the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the service agreement on its expiry."

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17. From the aforesaid statement of law it is clear the test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available.

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21. <u>What is the meaning of "make available". The technical or consultancy service rendered should be of</u>

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."

91. Of equal significance are the observations of the Kerala High Court in *US Technology Resources* when their Lordships laid emphasis on the transfer of technology or know-how being a necessary ingredient of the "make available" condition which stands indelibly attached to FTS. To recall, the Kerala High Court in the aforenoted decision had held:—

"**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 knowhow to the Indian company."

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93. As we read Article 13(4)(c) of the DTAA, 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, 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 FTS. The "make available" stipulation ensures that only those services that impart lasting technical benefits are classifiable as FTS. It was on a consideration of the aforesaid that this Court in *Bio-Rad* 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 DTAA. 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 *De Beers* 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."

5. In view of the aforesaid, we find ourselves unable to discern any substantial question of law which may be said to arise.

6. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 22, 2024/tp