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

Judgment delivered on: 13.02.2025

\+ ITA 202/2022

COMMISSIONER OF INCOME TAX INTERNATIONAL TAX- 1 NEW DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kr., Mr. Rishabh Nangia, JSCs, Mr. Nikhil Jain and Ms. Srishti Sharma, Advs.

versus

M/S EXPEDITORS INTERNATIONAL OF WASHINGTON INC .....Respondent

Through: Mr. Deepak Chopra, Mr. Rohan Khare and Mr. Priyam Bhatnagar, Advs.

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\+ ITA 205/2022

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION-1), NEW DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kr., Mr. Rishabh Nangia, JSCs, Mr. Nikhil Jain and Ms. Srishti Sharma, Advs.

versus

M/S EXPEDITORS INTERNATIONAL OF WASHINGTON INC .....Respondent

Through: Mr. Deepak Chopra, Mr. Rohan Khare and Mr. Priyam Bhatnagar, Advs.

32

\+ ITA 246/2022

THE COMMISSIONER OF INCOME TAX (INTERNATIONAL TAX)-1 NEW DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kr., Mr. Rishabh

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Nangia, JSCs, Mr. Nikhil Jain and Ms. Srishti Sharma, Advs.

versus

M/S EXPEDITORS INTERNATIONAL OF WASHINGTON INC .....Respondent

Through: Mr. Deepak Chopra, Mr. Rohan Khare and Mr. Priyam Bhatnagar, Advs.

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\+ ITA 247/2022

THE COMMISSIONER OF INCOME TAX (INTERNATIONAL TAX)-1 NEW DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kr., Mr. Rishabh Nangia, JSCs, Mr. Nikhil Jain and Ms. Srishti Sharma, Advs.

versus

M/S EXPEDITORS INTERNATIONAL OF WASHINGTON INC .....Respondent

Through: Mr. Deepak Chopra, Mr. Rohan Khare and Mr. Priyam Bhatnagar, Advs.

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\+ ITA 248/2022

THE COMMISSIONER OF INCOME TAX (INTERNATIONAL TAX)-1 NEW DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kr., Mr. Rishabh Nangia, JSCs, Mr. Nikhil Jain and Ms. Srishti Sharma, Advs.

versus

M/S EXPEDITORS INTERNATIONAL OF WASHINGTON INC .....Respondent

Through: Mr. Deepak Chopra, Mr. Rohan Khare and Mr. Priyam Bhatnagar, Advs.

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\+ ITA 249/2022

THE COMMISSIONER OF INCOME TAX (INTERNATIONAL TAX)-1 NEW DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kr., Mr. Rishabh Nangia, JSCs, Mr. Nikhil Jain and Ms. Srishti Sharma, Advs.

versus

M/S EXPEDITORS INTERNATIONAL OF WASHINGTON INC .....Respondent

Through: Mr. Deepak Chopra, Mr. Rohan Khare and Mr. Priyam Bhatnagar, Advs.

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\+ ITA 263/2022

THE COMMISSIONER OF INCOME TAX (INTERNATIONAL TAX)-1 NEW DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kr., Mr. Rishabh Nangia, JSCs, Mr. Nikhil Jain and Ms. Srishti Sharma, Advs.

versus

M/S EXPEDITORS INTERNATIONAL OF WASHINGTON INC .....Respondent

Through: Mr. Deepak Chopra, Mr. Rohan Khare and Mr. Priyam Bhatnagar, Advs.

37

\+ ITA 220/2023

THE COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-1, NEW DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kr., Mr. Rishabh Nangia, JSCs, Mr. Nikhil Jain

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and Ms. Srishti Sharma, Advs.

versus

EXPEDITORS INTERNATIONAL OF WASHINGTON INC
.....Respondent

Through: Mr. Deepak Chopra, Mr. Rohan Khare and Mr. Priyam Bhatnagar, Advs.

38

\+ ITA 563/2023

THE COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-1, NEW DELHI
.....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kr., Mr. Rishabh Nangia, JSCs, Mr. Nikhil Jain and Ms. Srishti Sharma, Advs.

versus

M/S EXPEDITORS INTERNATIONAL OF WASHINGTON INC
.....Respondent

Through: Mr. Deepak Chopra, Mr. Rohan Khare and Mr. Priyam Bhatnagar, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. We had taken note of the principal issues which were sought to be canvassed on these appeals and which we had an occasion to notice in some detail in our order of 06 August 2024 and 11 September 2024. The following three principal questions were posited by the appellant for our consideration: -

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> "A. Whether Freight Logistic Support services provided by the assessee is in the nature of **Fee for Technical Services/Fee for Included Services** as per Section 9(1)(vii) of the **Income Tax Act, 1961** and Article 12(5) of the **India-US Double Taxation Avoidance Treaty**?
>
> B. Whether reimbursement of Global Account Management charges received by assessee is taxable as FTS/FIS?
>
> C. Whether reimbursement of Leaseline charges received by assessee is taxable as Royalty under Section 9(l)(vi) of the Act?"

2. Insofar as questions 'B' and 'C' are concerned, it could not be disputed before us that those also formed the subject matter of ITA 475/2009 and the decision on which came to be followed in ITA 751/2010. While dealing with those questions, the Court while dismissing ITA 475/2009 had observed as follows: -

> "Learned counsel for the appellant could not dispute that question of law proposed to be raised is covered by the judgment in CIT vs. Woodward Governor India Pvt. Ltd. 312 ITR 254 and judgment of this Court in Skycell Communications Ltd. and Anr. vs. DCIT and Ors. 251 ITR 53 which has been followed in appeal Commissioner of Income Tax vs. Bharti Celluar Ltd. I.T.A. No. 1120/2007. The appeal is accordingly dismissed. It could not be disputed that the question covered there is a pure question of fact. No question of law has arisen. Dismissed."

3. The fact that questions 'B' and **'**C' stand conclusively settled and answered against the appellant is also evident from a reading of Para 6 of the order passed in ITA 1088/2011: -.

> "6. Prima facie, we find force in the argument of learned counsel for the assessee. In any case, this is the view already taken by this Court in the case of this very assessee affirming the earlier decision of the Tribunal in ITA Nos.475/2009 and 751/2010 and we see no reason to deviate from the same. Therefore, in our opinion, no substantial question of law arises and the appeal is dismissed."

In view of the aforesaid, we do not find any justification to entertain these appeals on questions 'B' and 'C'.

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4. That only leaves us to examine question 'A' with the appellant contending that the Freight Logistic Support Services provided by the assessee is in the nature of **Fee for Technical Services**[1]**/Fee for Included Services**[2] and thus falling within the ambit of Section 9(1)(vii) of the **Income Tax Act, 1961**[3] read along with Article 12 of the India-USA **Double Taxation Avoidance Agreement**[4].

5. The aforesaid question has been duly examined and answered by the **Income Tax Appellate Tribunal**[5] in ITA 205/2022 as under: -

> "28. Thus, on going through the provisions of the Act, facts of the case, business operations of the assessee, we hold that the services rendered by the assessee do not fall within the purview of managerial, consultancy or technical services. The payment for freight and logistics cannot be treated as technical services. Similarly, the provisions of Section 9(1)(i) are not attracted in this case as no income has accrued or arisen from the business connection abroad in India. The explanation states that only that part of income from business operations can be said to be accruing or arising in India only if it is relatable to the carrying of operations in India. Thus, the payment received by the assessee neither falls under Section 9(1)(i) or Section 9(1)(vii). Hence, we hereby decline to interfere with the directions of the Dispute Resolution Panel in this case."

6. Before us Mr. Rai, learned counsel for the appellant, however, would submit that as per the disclosures which were made by the assessee in the Transfer Pricing Study itself, the transaction relating to Freight Logistic Support Services would clearly qualify the requirements of Article 12 of the DTAA. He specifically drew our attention to the following parts of the Transfer Pricing Study: -

---

[1] FTS
[2] FIS
[3] Act
[4] DTAA
[5] Tribunal

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"*d)* ***<u>Technical Knowledge:</u>*** *<u>Customs brokerage and other services involves providing services at destination, such as helping customers clear shipments through customs by preparing required documentation, calculating and providing for payment of duties and taxes</u> on behalf of customers as well as arranging for any required inspections by government agencies, and arranging for delivery. <u>This is a complicated function requiring technical knowledge of customs rules and regulations</u> in multitude of countries which Expeditors Inc. assists in providing.*

e) ***<u>Training and Personnel Management:</u>*** *As the Group is a service organisation, it has laid down a focus on recruitment, training and retention of personnel. Expeditors Inc. has attempted at developing a global culture of ongoing development of key personnel and management personnel via formal and informal means; creation of unlimited advancement opportunities for employees, mentoring of successors for every key position."*

7. As we view the aforesaid extracts, we find that under the head of "Technical Knowledge", the assessee is only stated to have assisted the Indian entity in dealing with customs brokerage and other services to be provided at destinations including assisting customers in clearance of shipments through customs and preparation of required documentation.

8. The appellant, however, would seek to draw sustenance from the usage of the expression "*complicated function*" as appearing under that head to sustain their submission that the Freight Logistic Support would qualify FTS. In our considered opinion, the submission is clearly misconceived since the "*complicated function*" which is spoken of is restricted to apprising persons of the various rules and regulations prevalent in a multitude of countries and concerned with clearance of goods.

9. Similarly, under the head of "Training and Personnel Management", the assessee has spoken of Expeditors Ltd attempting

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to develop a "global culture" of ongoing development of key personnel. Neither of the above would in our considered opinion qualify the *"make available"* condition which permeates FTS and as would become clearer from the discussion which ensues.

10. We had an occasion to examine the scope of FTS in some detail while rendering judgment in **International Management Group (UK) Ltd. v. Commissioner of Income Tax**[6] and where we had held as follows: -

> "**86.** It is therefore apparent that the mere rendition of technical or consultancy service would not lead to revenue, income or profits being placed under the broad head of "Fees for technical services" unless the taxing authority additionally finds that technical knowledge, skill, know-how or processes were made available. What we seek to emphasize is the imperative of the "make available " condition being met and the imperative of the knowledge, skill, know-how being made available to the payer.
>
> **87.** The authoritative Commentary on the UN Model Convention while explaining the ambit of article 12A carries the following instructive exposition on the meaning to be ascribed to the words "technical" and "consultancy":
>
> Paragraph 3
>
> "61. This paragraph specifies the meaning of the phrase 'fees for technical services' for purposes of article 12A. The definition of 'fees for technical services' in paragraph 3 is exhaustive. 'Fees for technical services' are limited to the payments described in paragraph 3; other payments for services are not included in the definition and are not dealt with in article 12A (see the examples in paragraphs 87 to 103 below).
>
> 62. Article 12A applies only to fees for technical services, and not to all payments for services. Paragraph 3 defines 'fees for technical services' as payments for managerial, technical or consultancy services. Given the ordinary meanings of the terms 'managerial', 'technical' and 'consultancy' the fundamental concept underlying the definition of fees for technical services is that the services

[6] 2024 SCC OnLine Del 4558

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must involve the application by the service provider of specialized knowledge, skill or expertise on behalf of a client or the transfer of knowledge, skill or expertise to the client, other than a transfer of information covered by the definition of 'royalties' in paragraph 3 of article 12. Services of a routine nature that do not involve the application of such specialized knowledge, skill or expertise are not within the scope of article 12A.

63. The ordinary meaning of the term 'management' involves the application of knowledge, skill or expertise in the control or administration of the conduct of a commercial enterprise or organization. Thus, if the management of all or a significant part of an enterprise is contracted out to persons other than the directors, officers or employees of the enterprise, payments made by the enterprise for those management services would be fees for technical services within the meaning of paragraph 3. Similarly, payments made to a consultant for advice related to the management of an enterprise (or of the business of an enterprise) would be fees for technical services.

64. The ordinary meaning of the term 'technical' involves the application of specialized knowledge, skill or expertise with respect to a particular art, science, profession or occupation, therefore, fees received for services provided by regulated professions such as law, accounting, architecture, medicine, engineering and dentistry would be fees for technical services within the meaning of paragraph 3. Thus, if an individual receives payments for professional services referred to in paragraph 2 of article 14 from a resident of a Contracting State, those payments would be fees for technical services. If the payments arise in that Contracting State because they are made by a resident of that State or borne by a permanent establishment or fixed base in that State, the payments would be subject to tax by that State in accordance with paragraph 2 irrespective of the fact that the services are not performed in that State through a fixed base in that State.

65. Technical services are not limited to the professional services referred to in paragraph 2 of article 14. Services performed by other professionals, such as pharmacists, and other occupations, such as scientists, academics, etc., may also constitute technical services if those services involve the provision of specialized knowledge, skill and expertise.

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66. The ordinary meaning of 'consultancy' involves the provision of advice or services of a specialized nature. Professionals usually provide advice or services that fit within the general meaning of consultancy services although, as noted in paragraphs 63 and 64 above, they may also constitute management or technical services.

67. The terms 'management', 'technical' and 'consultancy' do not have precise meanings and may overlap. Thus, for example, services of a technical nature may also be services of a consultancy nature and management services may also be considered to be services of a consultancy nature."

88. Vogel explains the concept of technical services in the following terms (at page 1184):

"IV. Article 12A(3) UN Model Convention

1. The Model

a. Rule

The term 'fees for technical services' is defined as:

— any payment in consideration for

— any service of managerial, technical, or consultancy nature,

— unless the payment is made:

a. to an employee of the person making the payment;

b. for teaching in an educational institution or for teaching by an educational institution; or

c. by an individual for services for the personal use of an individual.

Article 12A(3) of the UN Model Convention contains the definition of 'fees for technical services'. In so far that the UN Model Convention itself provides an autonomous definition of 'fees for technical services', national law cannot be used for its interpretation (cf. article 3(2) of the UN Model Convention, see supra m.No. 71). In contrast to article 12(2) of the OECD Model Convention which refers to the national law for the interpretation of the different terms in the catalogue of the paragraph, the terms 'management', 'technical', and 'consultancy' of article 12A(3) of the UN Model Convention have an autonomous meaning in the UN Model Convention.

b. Any payment

The term 'payment' has a broad meaning that is comparable to 'paid to' in articles 10, 11, and 12 of the UN Model Convention. It is defined as 'fulfilment of the

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obligation to put funds at the disposal of the service provider in the manner required by contract or custom' (No. 40 of UN Model Convention Comm. on article 12A referring to No. 3 of UN Model Convention Comm. on article 10 and No. 6 of UN Model Convention Comm. on article 11 quoting No. 7 of OECD Model Convention on article 10 and No. 5 of OECD Model Convention on article 11). For detailed information, see supra m.No. 252.

c. In consideration for

The payments must be made in consideration for any service of a managerial, technical, or consultancy nature. Comparable to article 12 of UN Model Convention, any economic exchange connection is sufficient including, i.e., payments for damages (see supra m.No. 89)…

d. Any service (managerial, technical or consultancy nature)

Article 12A of UN Model Convention is not applicable to every payment in consideration for services. The services have to be of a managerial, technical, or consultancy nature as the services qualify as 'technical services' only in these cases. The attribute 'technical' is used twice : once in a wider sense to describe all of the services covered by article 12A and once in a narrow sense in a 'technical nature' as opposed to 'managerial' or 'consultancy nature'.

aa. Different definitions of technical service in the divergent country practice of article 12 of Model Conventions. While article 12A of UN Model Convention is a standalone article, it has been developed from the divergent country practice of including fees for technical services in article 12 of Model Convention. This historic development leads to a contextual bond between article 12 of UN Model Convention and article 12A of UN Model Convention that explains some of the peculiarities of the definition of article 12A of UN Model Convention and aids in its interpretation. Further context is scarce : The term 'service' can also be found in other provisions dealing with different types of services like articles 5(3)(1), 14, and 19 of UN Model Convention. Article 14(2) suggests that any activity suffices, but there is no general definition. The General Agreement on Trade in Services also does not contain a definition (No. 83 of UN Model Convention Comm. on article 12A).

The category of technical services has developed from the problematic delimitation between Intellectual Property licensing and service contracts. While the protected

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information that constitutes Intellectual Property has to be divulged to the licensee as part of the licensing contract, there is often the need for further training of the licensee and the employees; this constitutes a service. Similar problems arise with consulting : The service provider does not transmit its special knowledge, skill, and expertise as such but uses them to make statements on customers' issues.

These services are dubbed as 'technical' because they relate to the application of Intellectual Property and not to fundamental research. Furthermore, in the context of article 12 of OECD and UN Model Conventions and their catalogue of Intellectual Property, the term 'technical' must initially be understood in a traditional way such as 'applied and industrial science' or 'engineering sciences'. It excludes social sciences, the arts and humanities, and arts and crafts as well as commercial managerial or professional services such as managers, intermediators, lawyers, and doctors.

This narrow understanding of a technical nature was not in every country's interest and, therefore, some Double Taxation Conventions explicitly add managerial services, general consulting, or cover services of all kinds. Article 12A of UN Model Convention follows this tradition in including services of managerial and consulting services.

This raises the issue of whether these additions form a separate category that does not need a link to the traditional technical nature in the context of article 12. In that wide understanding, any 'applied science' in whatever field or, even further, any 'professional service imbued with expertise' qualifies for a 'technical service' under article 12A of the UN Model Convention. From this perspective, almost every consulting service would be deemed as 'technical'.

Yet, if this was the intention, the contracting States should have chosen 'consulting' or another more general term instead of 'technical service'. Furthermore, the context of article 12 strongly suggests that technical assistance refers to industrial intellectual property rights and industrial secrets and know-how that dominate the catalogue of article 12 of OECD and UN Model Conventions. Therefore, to take the title of 'technical services' seriously, all 'technical services', even those of a 'managerial nature' or 'consultancy nature, need a link to the traditional field of technique to 'applied and industrial science' or 'engineering sciences'. The combination of

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technical with managerial and consultancy services leads to an increased importance of the 'human element' in an Indian court decision, excluding almost fully automatized standard procedures.

bb. The definition of article 12A of UN Model Convention. While the headline of article 12A of UN Model Convention still reads 'technical services', its structure shows that it follows a wide understanding and, in principle, covers every professional service that is imbued with expertise. The introduction of the category of 'technical services of a consultancy nature' besides the 'technical services of technical nature' shows that consulting that is not related to the traditional field of technique should also be covered. The UN Model Commentary confirms this wide understanding by defining services as activities carried out by one person for the benefit of another person in consideration for a payment whereas the manner of providing services was not decisive (No. 84 of UN Model Convention Comm. on article 12A). Examples in the commentary also follow the wide understanding by, e.g., including a heart surgeon (No. 89 of UN Model Convention Comm. on article 12A).

Traditionally, technical services have been defined by the provisions of special knowledge, skill, and expertise to make statements on the special issues of the customer. The UN Model Convention apparently draws on this understanding as it excludes services of a routine nature (No. 62 of UN Model Convention Comm. on article 12A). Technical services have to be discerned from routine services with a case-by-case analysis.

One important aspect is whether the service is individually customized to the specific needs of the customer. A standard scope of services under a standard contract is a strong argument for routine services. Yet, if a service provider determines the need of a customer in-depth and then chooses from several standardized services in order to offer the one that fits best, they cannot qualify as being of a routine nature. Thus, it is not possible to avoid a qualification as a technical service by simply drafting the contract in a standard manner or using standard service elements.

The UN Model Commentary provides some examples. The access to a database will, in most cases, be of a routine nature while the creation of a customized database qualifies as technical services (Nos. 90, 91 UN Model Convention Comm. on article 12A). Yet, the selective

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access to some databases according to the established needs of clients is equivalent to the creation of a custom database and can thus also be qualified as a technical service. Financial services such as payment and transmission services, banker's drafts, foreign exchange, debit and credit card services, and negotiable instruments are general products that are routinely made available to clients by financial institutions (No. 95 of UN Model Convention Comm. on article 12A). Payments for services rendered to a specific customer upon request in addition to transaction processing services such as warning bulletin fees for listing invalid or fraudulent accounts, cardholder service fees, fees for programme management services, account and transaction enhancement services fees, hologram and publication fees, and fees for advisory services are not a standard facility and constitute fees for technical services. If the financial institution provides, e.g., advice to a company that is resident in the other Contracting State with respect to a potential merger or acquisition involving this company, then article 12A of the UN Model Convention is applicable (No. 96 UN Model Convention Comm. on article 12A)…

cc. Services of managerial nature. The ordinary meaning of the term 'management' refers to the application of knowledge, skill, or expertise in the control or administration of the conduct of a commercial enterprise or organization (No. 63 UN Model Convention Comm. on article 12A). The UN Model Convention Comm. on article 12A provides two examples : firstly, payments by an enterprise for management services in cases when the management of all or significant parts of the enterprise are contracted out to other persons, and these persons are not related to the enterprise (not directors, officers, employees) and, secondly, payments in consideration for advice of consultants related to the management or business of an enterprise.

dd. Services of technical nature. 'Technical services involve the application of specialized knowledge, skill, or expertise with respect to a particular art, science, profession, or occupation (No. 64 of UN Model Convention Comm. on article 12A). The UN Comm. further refers to regulated professions such as law, accounting, architecture, medicine, engineering, and dentistry as examples covered by article 12A(3) of UN Model Convention. These examples are not exhaustive'."

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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 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 in so far as these appeals are concerned, there appears to be no contestation on 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* [*CIT* v. *De Beers India Minerals P. Ltd.*, (2012) 346 ITR 467 (Karn); 2012 SCC OnLine Kar 8858.] and where the High Court had held (page 480 of 346 ITR):

> "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

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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 Double Taxation Avoidance Agreement the liability to tax is not attracted.

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); 2011 SCC OnLine AAR-IT 30.] 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 know-how 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

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into effect and adopted under the service agreement on its expiry.'…

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….

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."

91. Of equal significance are the observations of the Kerala High Court in *US Technology Resources* [*US Technology Resources (Pvt.) Ltd.* v. *CIT*, (2018) 407 ITR 327 (Ker); 2018 SCC OnLine Ker 3113.] when their Lordships laid emphasis on the transfer of

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technology or know-how being a necessary ingredient of the "make available " condition which stands indelibly attached to fees for technical services. To recall, the Kerala High Court in the aforenoted decision had held (page 338 of 407 ITR):

> "We are conscious of the fact that the Double Taxation Avoidance Agreement as relevant in the present case, is not applicable even in the case of *CIT* v. *De Beers India Minerals P. Ltd.* [(2012) 346 ITR 467 (Karn); 2012 SCC OnLine Kar 8858.] where the non-resident hailed from Netherlands. However, on facts we are of the opinion that when the definition clause in Double Taxation Avoidance Agreement read along with the memorandum of understanding specifically refers to transfer of technologies, the facts as available in the Karnataka decision are more similar to the present facts. Herein also there is no technology transfer; nor is there a plan or strategy relating to management, finance, legal, public relations or risk management transferred to the appellant. The services promised by the non-resident company is only to advice on such aspects as are specifically referred to in the agreement. The non-resident company only assists the Indian company in making the correct decisions on such aspects as is specifically referred to in the agreement, as and when such advice is required. There is no transfer of technology or know-how, even on managerial, financial, legal or risk management aspects; which would be available for the Indian company to be applied without the hands-on advice offered by the US company. The advice offered on such aspects would have to be on a factual basis with respect to the problems arising at various points of time and there cannot be found any transfer of technical or other know-how to the Indian company."

92. While on the subject of make available, it would be beneficial to refer to Vogel's explanation of contract types and the expression "use or right to use" as it appears in article 12 of the OECD and UN Model Conventions. The treatise firstly refers to three perceivable contractual scenarios of which one could involve the transfer of know-how. Emphasis is yet again laid upon a transfer of ownership or alienation being the primary criterion for answering the question of whether a right to use had been conferred.

However, of significance is the caveat which is entered with respect to contracts where the property or the know-how is not transferred to the payer who merely receives the goods or services

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created by a utilisation of the property. This becomes evident from the following extracts forming part of that work (page 1140):

> "4. The contract type/scope of transfer (use/information/alienation)
>
> Article 12 of the OECD and UN Model Conventions contain up to three contract types. They distinguish themselves by the different extent to which all or part of the property rights are transferred to the royalty payer.
>
> The main type are contracts that transfer 'the use or the right to use' to the payer. The payer himself can use the property, but does not get the full ownership rights of it. As the case may be, the owner might grant the use to different persons at the same time. The intellectual property is 'lent' (No. 1 of OECD Model Convention Comm. on article 12) or 'rented out'.
>
> A special type are contracts in which the payment is for information concerning experience. This special case of property is also known as a 'know-how' contract. Its specific attribute is the lack of legal protection as an absolute right. When know-how is shared, it cannot be taken back and its use cannot be prohibited (at least to third persons, the receiver of know-how might be bound by contractual injunctive reliefs). Therefore, the transfer of the use cannot be distinguished from a transfer of full ownership.
>
> A third type of contracts contains the full transfer of ownership, alienation. Alienation is not included in the OECD and UN Model Conventions, and thus is covered by article 13 of OECD and UN Model Conventions (supra m.No. 20 et seq.).
>
> In all types of contracts the payer receives the property for his own use or ownership. Hence, they have to be distinguished from contracts where the property is not transferred to the payer but is used by the beneficial owner for producing goods for or rendering services to the payer. The payer then does not receive the property itself, but a good or service that was created by utilizing the property (infra m. No. 105 et seq.)."

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

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functions independently. The make available condition would be satisfied if the services rendered entails equipping the recipient with skill and evidencing an apparent conferment, alienation or transfer of skill, knowledge or know-how. This transfer of knowledge or skill is a pivotal factor in determining whether the consideration received can be classified as fees for technical services. The "make available " stipulation ensures that only those services that impart lasting technical benefits are classifiable as fees for technical services. It was on a consideration of the aforesaid that this court in *Bio-Rad* [*CIT (International Taxation)* v. *Bio-Rad Laboratories (Singapore) Pte. Ltd.*, (2023) 459 ITR 5 (Delhi); 2023 SCC OnLine Del 6770.] had held that the real test would be the transfer of technical knowledge, the knowledge and skills and expertise of the provider being absorbed by the payer and who would then have the capability to deploy that knowledge or skill without reference to the original provider. This reinforces our view that the make available condition would be satisfied only if the rendering of service involves a clear and demonstrable transfer of technical skills, expertise or know-how to the recipient. It must involve a transfer of capabilities and not just the temporary use of the provider's knowledge, expertise or skill.

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

95. It is also important to bear in mind that the mere usage or utilisation of technical or consultative material in aid of business would not be sufficient to attract article 13 of the Double Taxation Avoidance Agreement. If we were to accept the submission that handing over of research or advisory work were sufficient for the purposes of article 13, it would render the "make available " condition comprised in para 4(c) wholly redundant and otiose since the mere rendering of service would have sufficed. As *De Beers* [*CIT* v. *De Beers India Minerals P. Ltd.*, (2012) 346 ITR 467 (Karn); 2012 SCC OnLine Kar 8858.] 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

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> 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."

11. As we had explained in *International Management Group*, FTS is firstly concerned with rendition of specialized knowledge, skill, expertise and know-how. It is principally concerned with a transfer of knowledge, skill and expertise. Those three attributes must be those which are possessed by the service provider and are distinctive and special qualities that it possesses.

12. The second facet of FTS is the *"make available"* condition and which envisions an enablement or transfer of specialized knowledge and skill. As was explained in *International Management Group*, the mere furnishing of service would not be sufficient to categorise the service as FTS. It would have to be necessarily accompanied by a transfer of expertise and which would consequently enable the recipient of service becoming skilled in its own right and empowered to perform those functions independently.

13. When tested on those precepts we firstly find that rules and regulations pertaining to clearance of customs frontiers was clearly not specialized skill or knowledge acquired or possessed by the assessee. These rules are in the public domain and have been framed by competent authorities operating in different jurisdictions. A fortiori, imparting instructions in respect of those statutory regulations would also not qualify FTS. Similarly, we fail to appreciate how the creation

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of a global ethos or a workforce which is expected to follow a common code could be said to constitute FTS.

14. Insofar as the question of the development of software is concerned, we need not render any independent observations except to remind the appellant of the principles which the Supreme Court had come to authoritatively lay down in **Engineering Analysis Centre of Excellence (P) Ltd. v. Commissioner of Income Tax**[7].

15. In view of the aforesaid, we do not find any ground to interfere with the view as expressed by the Tribunal. The appeals fail and shall stand dismissed.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

FEBRUARY 13, 2025/DR

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