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

% *Date of Decision: 23.05.2025*

\+ **ITA 173/2025, CM APPL. 31921/2025 & CM APPL. 31922/2025**

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

Through: Mr Puneet Rai, SSC, Mr Ashvini Kumar and Mr Rishabh Nangia, JSCs and Mr Nikhil Jain, Advocate.

versus

GOODRICH CORPORATION .....Respondent

Through: None.

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

VIBHU BAKHRU, J. (*ORAL*)

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 [**Act**] impugning an order dated 22.08.2024 [**impugned order**] passed by the learned Income Tax Appellate Tribunal [**ITAT**] in ITA No.988/Del/2024 for Assessment Year [**AY**] 2018-19 captioned *Goodrich Corporation v. ACIT*.

2. The Assessee had preferred the aforementioned appeal before the learned ITAT assailing the order dated 05.01.2024 passed by the Assessing Officer [**AO**] under Section 147 read with Section 144C(13) of the Act.

3. The Assessee is a company, which is tax resident of the United States of America [**USA**]. The Assessee has also furnished a Tax Residency Certificate [**TRC**] from the concerned authorities of the said country.

During the previous year relevant to the AY 2018-19, the Assessee had received certain amounts for the services rendered by it from resident entities. According to the AO, the said receipts were chargeable to tax as fees for technical services [**FTS**] under the Act as well as "Convention between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation and Prevention of Fiscal evasion with respect to taxes on income" [**India-US DTAA**]. The learned ITAT rejected the said view and allowed the Assessee's appeal as it did not concur with the AO's view that the services rendered entail any transfer of technology, knowhow or skill and therefore the receipts were not taxable as fees for included services [**FIS**] under Article 12(4) of the India-US DTAA.

4. The Revenue has projected the following questions for consideration of this court in the present appeal:

> "A. Whether on the facts and in the circumstances of the case, and in law, the Hon'ble ITAT erred in holding that the receipts of the assessee from Indian customers is not taxable as Fee for Technical Services as per India -USA DTAA as well as Section 9(1)(vii) of the Act?
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> B. Whether on the facts and in the circumstances of the case, and in law, the Hon'ble ITAT erred in holding that the payments received by the assessee from Indian customers does not satisfy the criterion of "Make Available" as per Article 12(4) of India-USA DTAA?
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> C. Whether on the facts and in the circumstances of the case, and in law, the Hon'ble ITAT failed to consider that the payments received by the assessee from Indian customers does not satisfy the criterion of "Make Available" as the case of the assessee involves development and transfer of technical plan or technical design within the meaning of Article 12(4) of

India-USA DTAA?”

5. As noted above, the Assessee is a tax resident of USA and is engaged in the business of providing services which are in the nature of repair and maintenance of aircraft equipment. During the previous year relevant to AY 2018-19, the Assessee received an amount of ₹51,50,28,965/- towards repairs and maintenance services. Additionally, it also received an amount of ₹1,28,46,717/- on account of corporate allocation charges which it claimed were in the nature of reimbursement of costs incurred by it such as IT expenses, legal charges, back office support on behalf of M/s Goodrich Aerospace Services Pvt. Ltd. [**GASPL**]

6. According to the Assessee, the receipts were not chargeable to tax and therefore it did not file its return of income for AY 2018-19. The AO on the basis of information flagged by risk management strategy, issued a notice on 30.03.2022.

7. In response to the same, the Assessee filed its return of income on 02.07.2022 declaring an income of ₹52,78,75,682/-, which according to it was not taxable. The AO confirmed that during the previous year, the Assessee’s customers (six in numbers), which included five airline operators had paid an aggregate amount of ₹51,50,28,965/- on account of repair and maintenance services of aircrafts. Additionally, the Assessee had received an amount of ₹1,28,46,717/-. As noted above, the Assessee claimed that the said amount was in the nature of reimbursement of charges incurred on behalf of GASPL.

8. The AO examined the services and observed that the Assessee is rendering services of the nature such as advise/support, which the AO concluded were in the nature of imparting knowledge to recipient. It also observed that any support provided by the Assessee would not be required in future course. Additionally, the AO noted that its agreement with GASPL also require it to impart training and accordingly passed a draft assessment order dated 31.03.2023 under Section 144C(1) of the Act.

9. The Assessee filed its objections to the draft assessment order before the Dispute Resolution Panel [**DRP**] which were rejected by an order dated 27.12.2023. During the proceedings before the DRP, the Assessee also furnished additional evidence including with regard to allocation of corporate charges and repair and maintenance services. However, the DRP upheld the draft assessment order.

10. On the aforesaid basis, the AO passed the final assessment order, which is essentially on the same lines as the draft assessment order.

11. The Assessee states repair services provided by it follows two types of arrangements. The explanation regarding the said arrangements, as noted by the DRP in its order, is reproduced below:

> "Firstly, the Indian customer intimates the assessee about faulty aircraft equipment and sends the aircraft equipment to the designated facility (repair workshop) of the assessee in USA for repair services. On receipt of equipment from customer, the assessee sends the estimate of the proposed service work for the approval of the customer. Once the repair charges are approved the assessee performs the required repair services and sends back the equipment to the Indian customer. The assessee had also email correspondences in relation to

workorder/ repair orders executed during the year on sample basis as Annexure7 (copy of submission dated 13 March 2023 along with the relevant annexures is enclosed as Item 3 of Paper-book 1) Further, no activity has been performed by assessee in India.

Secondly, the assessee enters into a comprehensive agreement with the customer wherein all terms and conditions are pre-determined. Further, the pricing is agreed upfront basis the number of landings during a particular period of time. As and when repairs are required, the customer sends the equipment to the repair facility. The assessee will either provide the customer with a fully refurbished replacement unit in exchange for the customer's equipment or assessee will repair the customer's equipment and send that back to the Indian customer."

12. The DRP did not accept the said contention. The reasons for rejecting the said contention as articulated by the DRP and as noted by the learned ITAT in its order reads as under:

> "5. The ld. DRP held that *"repair and maintenance services of aircraft parts is a very specialized field requiring technical expertise skill and experience at every stage. They are specific and customer based. Customer of the assessee are airlines which operate passenger and goods carrier. They are not equipped in handling the issues related to break down of aircraft. It is a complete and separate science and art in itself. The services provided by way of repair and maintenance are technical in nature and fall under ambit of services under Fee for Technical Services. As discussed above, once it is established that the services which have been provided are specialized customer-based services, what remains to s ee is whether they pass the test of make available or not under India USA D TAA. Interpretation of make available clause will differ with specific areas of the services under consideration. For instance, interpretation of make available for a concern providing services for the agricultural sector vis-à-vis education sector would be vastly different from each other. In the same way interpretation of make available is different for a*

concern engaged in providing services revolving around a highly specialized sector such as Aircraft industry. The make available clause deals with not only making available technical knowledge or know-how or processes or consist of the development and transfer of a technical plan or technical design but also deals with imparting experience and skill. Within the make available clause itself the enduring benefit would be different for all the items mentioned in it for example the enduring benefit of a technical design or know-how cannot be same as enduring benefit coming from imparting of skill or experience. In the former case enduring benefit will outlive the enduring benefit brought in by the latter. In case of assessee company, the enduring benefit and make available fall under skill/experience which is shared by assessee company with its customers. Both the parties in these service transactions are engaged in highly specialized work which can be rendered and availed by them only and once the skill/experience is rendered, it continues to give benefit until required again. When it comes to services rendered as skill and experience, the make available and enduring benefit, will almost always have a comparatively short shelf life in this context. This being the case, it cannot be ignored that the make available clause and enduring benefits are satisfied and the service is not of the nature which is so highly technical and specialized that it should be taxed as Fee for Technical Services."

13. The learned ITAT found the aforesaid reasons unsustainable and held that the charges for such services could not be construed as fees for included services[FIS] within the scope of Article 12(4) of the India-USA DTAA. The relevant extract of the India-USA DTAA is set out below:

"ARTICLE 12

Royalties and Fees for Included Services

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

2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and

according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) in the case of royalties referred to in subparagraph (a) of paragraph 3 and fees for included services as defined in this Article (other than services described in subparagraph (b) of this paragraph):

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

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

(B) 20 percent of the gross amount of the royalties or fees for included services in all other cases, and (ii) during the subsequent years, 15 percent of the gross amount of royalties or fees for included services; and

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

3. The term “royalties” as used in this Article means:

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity,

use, or disposition thereof, and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

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

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

5. Notwithstanding paragraph 4, "fees for included services" does not include amounts paid:

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a);

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals making the payment;

or

(e) to an employee of the person making the payments or to any individual or firm of individuals (other

than a company) for professional services as defined in Article 15 (Independent Personal Services).

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for included services, being a resident of a Contracting State, carries on business in the other Contracting States, in which the royalties or fees for included 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 royalties or fees for included services are attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be, shall apply.

7. (a) Royalties and fees for included services shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, a local authority, or a resident of that State. Where, however, the person paying the royalties or fees for included 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 liability to pay the royalties or fees for included services was incurred, and such royalties or fees for included services are borne by such permanent establishment or fixed base, then such royalties or fees or included services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

(b) Where under subparagraph (a) royalties or fees for included services do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State.

8. Where, by reason of 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 included services paid exceeds 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 such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of the Convention."

14. In ***CIT v. De Beers India Minerals P. Ltd.: (2012) 346 ITR 467***, the Karnataka High Court had explained the import and meaning of 'make available' as used in Article 12(4) of the India-USA DTAA 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."

15. This court in a recent decision in ***CIT v. Relx Inc.: (2024) 470 ITR 611*** had concurred with the view of this court in ***CIT* v. *Bio-Rad Laboratories (Singapore) Pte. Ltd.: (2023) 459 ITR 5*** and observed 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.
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> **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. 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)
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> "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.
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> 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:
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> '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.

18. We thus find no justification to interfere with the view as expressed by the Tribunal. The appeal fails and shall consequently stand dismissed on the aforesaid terms."

16. The issue involved in the present case is covered by the several

decisions of this court including ***CIT v. Relx Inc***. We find no infirmity with the view of the learned ITAT in regard to taxability of repair and maintenance charges as FIS.

17. Insofar as the corporate allocation charges are concerned, the learned ITAT had accepted the Assessee's case that it was not rendering any services, which absolved the recipients from availing similar services in future. The learned ITAT also unequivocally stated that none of its employees had visited India for rendering any training. On examining the facts on record, the learned ITAT returned the following findings:

> "11. From the facts on record, we find that the amounts have been received by the assessee as reimbursement from Goodrich Aerospace Services Pvt. Ltd. an Indian company and it collected the aforesaid charges on the basis of actual expenses incurred. The assessee was not engaged in providing any kind of 'technical' or 'consultancy services' or training which would enable the Indian customer to perform the services independently in future. It was merely customer based information and guidance to the recipient. There was no problem solving skill or operations or knowledge or technology which has been made available to the client. Hence, we hold that the provisions of FTS as per the Article of India-USA DTA are not attracted on the services."

18. The findings as returned by the learned ITAT in respect of allocation of charges are essentially fact centric. We also do not find any material to indicate that the Assessee had received any amount for transfer of skill, knowledge, knowhow or process to its associate entity in India which could be construed as FIS within the meaning of Article 12(4) of the India-USA DTAA.

19. In view of the above, no substantial question of law arises for

consideration of this court in the present appeal. The appeal is accordingly dismissed. Pending applications are also dismissed.

VIBHU BAKHRU, J

TEJAS KARIA, J

MAY 23, 2025
'gsr' *Click here to check corrigendum, if any*