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

% Judgment reserved in ITA 423-424/2025 on*: 27.11.2025*
Judgment reserved in ITA 715/2025 on*: 12.12.2025*
Judgment reserved in ITA 753/2025 on*: 17.12.2025*
Judgment reserved in ITA 760/2025 on*: 18.12.2025*
Judgment delivered on*: 18.06.2026*
Judgment uploaded on*: As per Digital Signature~*

\+ **ITA 423/2025**
\+ **ITA 424/2025**
\+ **ITA 715/2025**
\+ **ITA 753/2025**
\+ **ITA 760/2025**

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

versus

ERNST AND YOUNG U.S. LLP .....Respondent

Advocates who appeared in this case

For the Appellant : Mr. Puneet Rai, SSC with Mr. Ashvini Kr., Mr. Rishabh Nangia, Mr. Gibran, JSC.

For the Respondent : Mr. S. Ganesh, Sr. Advocate with Ms. Ananya Kapoor, Advocate.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT

V. KAMESWAR RAO, J.

CM APPL No.75760/2025(condonation of delay) in ITA 715/2025

1. For the reasons stated in the application, the delay of 21 days in filing

the appeal stands condoned.

2. The application stands disposed of.

ITA 423/2025; ITA 424/2025; ITA 715/2025; ITA 753/2025; & ITA 760/2025

3. These appeals filed by the Revenue under Section 260A of the Income Tax Act, 1961 (the Act) relate to different Assessment Years (AY) from 2018-19 upto 2022-23.

4. We must state here that these appeals involve identical questions of law however they diverge on facts. ITA 424/2025 pertains to AY 2021-22 wherein the assessee filed its return of income on 22.12.2021 declaring a total income of Rs.67,74,750/- and claimed the refund of TDS amount of Rs.3,01,41,850/- as exempt income and offered its income to tax as per Section 115A of the Act. The Assessing Officer (AO) passed a Draft Assessment Order (DAO) proposing to make an addition of Rs.18,28,95,723/- to the income of the assessee on account of payment received by the assessee with respect to seconded employees in India and Rs.30,73,50,907/- on account of receipts from professional services. The AO in the DAO had bifurcated the amounts under different heads; (i) first being the amount calculated to be reimbursed as costs with respect to seconded employees being Rs.18,28,95,723/-; and (ii) the amounts which were receipts from India based clients for services performed in and from the USA amounting to Rs.65,20,12,778/-, which services were examined and the amount of Rs.30,73,50,907/- was found to be not falling under the exemption clause, under Article 12(5) (e) of the India-USA Double Taxation Avoidance Agreement (DTAA).

5. The assessee had filed objections to the DAO before the Dispute Resolution Panel (DRP), and the DRP vide order dated 10.08.2023 rejected the contentions of the assessee and upheld the additions made by the AO in the DAO. Consequently, the final assessment order was passed, as per the directions of the DRP. The Income Tax Appellate Tribunal (ITAT) allowed the appeal filed by the assessee and set aside the assessment order. The issue which arises in this appeal is whether the payment received by the assessee on account of secondment of employees would be taxable as Fees for Technical Services (FTS) under Article 12 of the DTAA and whether the receipts for services rendered in and from the USA fall under the exemption of Article 12(5)(e) of the DTAA.

6. The challenge in ITA 423/2025 pertains to the AY 2019-20 for which the ITAT has held that the sum of Rs.50,99,38,561/- to be cost to cost reimbursement on account of secondment of employees as FTS under Section 9(1) (vii) of the Act as well as Article 12 of the DTAA. During the AY 2019-20 the assessee filed its return of income on 30.08.2019 declaring a total income of Rs.32,73,620/- and claiming Rs.1,06,40,79,637/- as exempt income and offered its income to tax as per Section 115A of the Act. The AO passed a DAO proposing to make addition of Rs.50,99,38,561/- to the income of the assessee on account of payments received by the assessee with regard to its seconded employees in India. The assessee filed objections to the DAO before the DRP. The DRP vide order dated 24.05.2022 rejected the contention of the assessee and upheld the addition made by the AO in the DAO.

7. The next set of appeals being ITA 715/2025, 760/2025 and 753/2025,

have been heard separately, after we reserved the orders in ITA 423/2025 and 424/2025. This Court had framed questions of law *vide* order dated 17.12.2025 in ITA No.753/2025 and order dated 18.12.2025 in ITA 760/2025. The ITA No.715/2025 pertains to the AY 2020-21 wherein the assessee filed its return of income on 22.03.2021 declaring a total income Rs.67,19,060/- and claiming refund of TDS amounting to Rs.8,15,73,480/- as exempt income and offered its income to tax as per Section 115A of the Act read with provisions of Article 12 of the DTAA. The AO added Rs.68,02,25,664/- as taxable income on account of payments received by the assessee with regard to seconded employees. Furthermore, the AO has also made addition of Rs.29,89,50,386/- on account of receipts for services held to be taxable as FTS.

8. ITA 760/2025 relates to AY 2022-23 wherein the AO has made addition of Rs.13,94,26,424/- as cost to cost reimbursement on account of seconded employees and also an amount of Rs.97,78,94,279/- on account of receipts for the services rendered in and from the USA.

9. ITA 753/2025 pertains to AY 2018-19 wherein the AO has made addition of Rs.24,05,12,955/- on account of cost to cost reimbursement in respect of seconded employees and Rs.3,82,22,932/- for receipts from professional services rendered from the USA held to be taxable as FTS.

10. In ITA No.715/2025 this Court had not framed any questions of law, however, based on the arguments advanced by the learned counsel for the parties, this Court admits the appeal and frames following questions of law for consideration:-

A. Whether on the facts and in the circumstances of the case and in law, the ITAT is erred in holding that sum of Rs.68,02,25,664/- as cost to cost reimbursement on account of secondment of employees should not be treated as FTS as per the provisions of section 9(1)(vii) as well as under Article 12 of the India-USA Double Taxation Avoidance Agreement (DTAA)?

B. Whether on the facts and in the circumstances of the case and in law, the ITAT has erred in appreciating the application of "Make available" clause, in the case of assessee, which is necessary for holding Rs. 29,89,50,386/-as FTS as per Article 12 of India-USA DTAA?

C. Whether on the facts and in circumstances of the case and in law, the ITAT was justified in holding that the assessee falls within the meaning of Article 12(5)(e) of the India-USA DTAA?

11. A summary of the prayers and questions of law framed in these appeals are tabulated as under for convenience:

Particulars	AY	Prayers	Questions of law framed along with date of order
ITA 753/2025 arising from ITAT ITA No.1254/Del/ 2025 against Assessment Order dated 18.12.2024	2018-19	(a) To formulate the Substantial Questions of Law mentioned in Para 3 of the Memo of Appeal; (b) To formulate any other Substantial Questions of Law which may arise from the impugned order dated 31.07.2025; (c) To set aside the impugned order dated 31.07.2025 of the ITAT in ITA No.1254/Del/2025.	*Vide* order dated 17.12.2025 (A) Whether on the facts and in the circumstances of the case and in law, the ITAT is erred in holding that sum of Rs.24,05,12,955/- as cost to cost reimbursement on account of secondment of employees should not be treated as FTS as per the provisions of section 9(l)(vii) of the Income Tax Act, 1961 as well as under Article 12 of the India-USA Double Taxation Avoidance Agreement

			(DTAA)? (B) Whether in the facts of this case, the amount of Rs.3,72,22,932/- received by the assessee shall fall within the provisions of the Article 12(4) (b) or 12(5)(e) read Article 15 of the India-USA DTAA?
ITA 423/2024 arising from ITAT ITA No.2332/Del/ 2022 against Assessment Order dated 27.07.2022	2019-20	(a) To formulate the Substantial Questions of Law mentioned in Para 3 of the Memo of Appeal; (b) To frame any other Substantial Questions of Law which may arise from the impugned order dated 20.06.2023; (c) To set aside the impugned order dated 20.06.2023 of the Hon'ble ITAT in ITA No. 2332/DEL/2022;	*Vide* order dated 29.10.2025 A. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is erred in holding that sum of Rs.50,99,38,561/- as cost to cost reimbursement on account of secondment of employees should not be treated as FTS as per the provisions of section 9(1)(vii) as well as under Article 12 of the India-USA Double Taxation Avoidance Agreement(DTAA) ? B. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in appreciating the application of "Make available" clause, in the case of assessee, which is necessary for holding Rs.50,99,38,561/- as FTS as per Article 12 of India-USA DTAA?
ITA 715/2025 arising from ITAT ITA No.2168/Del/ 2023 against Assessment Order dated 30.05.2023	2020-21	(a) To frame the Substantial Questions of Law mentioned in Para 3 of the Memo of Appeal; (b) To frame any other Substantial Questions of Law which may arise from the impugned order dated 19.05.2025;	A. Whether on the facts and in the circumstances of the case and in law, the ITAT is erred in holding that sum of Rs.68,02,25,664/- as cost to cost reimbursement on account of secondment of employees should not be treated as FTS as per the provisions of section

		(c) To set aside the impugned order dated 19.05.2025 of the ITAT in ITA No.2168/Del/2023.	9(1)(vii) as well as under Article 12 of the India-USA Double Taxation Avoidance Agreement (DTAA)? B. Whether on the facts and in the circumstances of the case and in law, the ITAT has erred in appreciating the application of "Make available" clause, in the case of assessee, which is necessary for holding Rs. 29,89,50,386/-as FTS as per Article 12 of India-USA DTAA? C. Whether on the facts and in circumstances of the case and in law, the ITAT was justified in holding that the assessee falls within the meaning of Article 12(5)(e) of the India-USA DTAA?
ITA 424/2024 arising from ITAT ITA No.3253/Del/ 2023 against Assessment Order dated 19.09.2023	2021-22	(a) To formulate the Substantial Questions of Law mentioned in Para 3 of the Memo of Appeal; (b) To frame any other Substantial Questions of Law which may arise from the impugned order dated 07.08.2024; (c) To set aside the impugned order dated 07.08.2024 of the Hon'ble ITAT in ITA No.3253/DEL/2023;	*Vide* order dated 30.10.2025 A. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is erred in holding that sum of Rs.49,02,46,630/- as cost to cost reimbursement on account of secondment of employees should not be treated as FTS as per the provisions of section 9(1)(vii) as well as under Article 12 of the India-USA Double Taxation Avoidance Agreement(DTAA) ? B. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in appreciating the application of "Make available" clause, in the

			case of Assessee, which is necessary for holding Rs.30,73,50,907/-as FTS as per Article12 of India-USA DTAA?
ITA 760/2025 arising from ITAT ITA No.1243/Del/ 2025 against Assessment Order dated 12.12.2024	2022-23	(a) To formulate the Substantial Questions of Law mentioned in Para 3 of the Memo of Appeal; (b) To formulate any other Substantial Questions of Law which may arise from the impugned order dated 31.07.2025; (c) To set aside the impugned order dated 31.07.2025 of the ITAT in ITA No. 1243/Del/2025.	*Vide* order dated 18.12.2025 (A) Whether on the facts and in the circumstances of the case and in law, the ITAT is erred in holding that sum of Rs.13,94,26,424/- as cost to cost reimbursement on account of secondment of employees should not be treated as FTS as per the provisions of section 9(1)(vii) of the Income Tax Act, 1961 as well as under Article 12 of the India-USA Double Taxation Avoidance Agreement (DTAA)? (B) Whether in the facts of this case, the amount of Rs.97,78,94,279/- received by the assessee shall fall within the provisions of the Article 12(4) (b) or 12(5)(e) read Article 15 of the India-USA DTAA?

12. Before delving into the merits of the controversy, it is pertinent to give a brief factual background surrounding these appeals. The respondent assessee which in this case is Ernst & Young U.S. L.L.P. ('EY US' hereinafter) is based in the United States of America and is a member of the Ernst & Young (EY) network. As per the appellant there are three EY entities which operate in India (EY India entities), they are as under:-

(i) EY GBS (India) Pvt Ltd.;

(ii) EY Global Delivery Services India LLP (EYGDS) and;

(iii) Ernst &Young LLP.

SUBMISSIONS ON BEHALF OF THE APPELLANT/REVENUE

13. It is the case of the appellant/Revenue and contended by Mr. Puneet Rai, learned Senior Standing Counsel that the assessee is a limited liability partnership firm, incorporated under the laws of the USA and is engaged in the business of providing professional services in the field of assurance, tax, transaction and business advisory services etc., to its clients across the globe including India.

14. It is the case of Mr. Rai that the primary issue in these appeals is whether the payments received by the assessee company on account of secondment of its employees would be taxable as FTS under Article 12 of the India-USA DTAA.

15. As per Mr. Rai, the AO had rightly made additions in respect of payments received by the assessee from the EY India entities since the services rendered by the assessee to the EY India entities was with regard to technical knowledge, experience, skill, know-how or the processes which come within the meaning of Article 12(4)(b) of the DTAA and therefore should be taxable as FTS under Article 12 of the DTAA. He stated that the ITAT had erroneously held that the seconded personnel are to be treated as employees of EY India entities; payment received by the assessee company is a cost to cost reimbursement on account of secondment of employees and thus cannot be treated as FTS under Article 12 of the India-USA DTAA.

16. Mr. Rai in respect of issue of receipts for service rendered in and from

the USA (as per questions of law framed as B and C in all the appeals with an exception of the issues involved in ITA 423/2025) fall under the exemption of Article 12(5) (e) of the DTAA has argued that unlike the services which are termed to be "*professional services*" under Article 15 of the DTAA the services which are offered by the seconded employees are in the nature of technical services and as such they are not covered under the exemption carved out in Article 12(5) (e) of the DTAA. The exemption pertains to independent scientific, literary, artistic, educational or teaching activities as well as the independent services rendered by physicians, surgeons, dentists, lawyers, engineers, architects and accountants. According to Mr. Rai the exemption for professional services as defined under Article 15 of the DTAA is only applicable if such services were rendered in India and not from outside India. The assessee belongs to the latter category and thus, the protection under Article 12(5) (e) of the DTAA is not available to the assessee.

17. On the first issue, it is his case that the ITAT has erred in returning a finding that "*make available*" in terms of Article 12(4)(b) of the DTAA is not satisfied. He states that the AO and DRP on this issue have given concurrent findings and this Court ought to refer to these findings and uphold the same.

18. In other words, the submission of Mr. Rai, is that the AO had rightly made additions on account of payments received by the assessee from the EY India entities since the services rendered by the assessee to the EY India entities is covered by Article 12(4)(b) of the DTAA and therefore, should be deemed to be taxable as FTS.

19. According to him, the AO as well as the DRP have given concurrent findings of fact that the employment offered by the EY India entities is for a limited period of time of 2-3 years, and on completion of their tenure, the said employees were repatriated back to the assessee company. He has reinforced his argument that the employment with EY India entities comes with a lien marked on the employment with the parent company which is the assessee in the present case. The seconded employees are not free to move anywhere but they must go back to the parent company i.e., back to the assessee, on the expiry of the said tenure, which means that the seconded employees never ceased to be the employees of the assessee, i.e., EY US. According to him, this factum is further corroborated by the fact that the employees working in India still contribute to the social security benefits in the USA through the assessee. Therefore, the employer-employee relationship between the assessee and the employees continued to exist even though they were working in India. Accordingly, the seconded employees also cannot opt out from contributing to the social security benefits in USA. The employees who were working outside USA with the assessee company are the only ones eligible for the social security scheme and, thus, by making these contributions it is clear that the employees are still working for the US entity being the assessee. In this regard, he has referred to the extracts of the Internal Revenue Services, USA (IRS) website on social security contribution of the employees.

20. As per Mr. Rai, the seconded employees of EY US came to India to provide professional services in the field of assurance, tax, transaction and business advisory services etc., to ensure the application of EY Group

policies / processes and other quality standards in the EY India entities. This would demonstrate that the processes and policies are retained by the EY India entities and they do not require the services of the seconded employees of the assessee in future. In this regard, Mr. Rai has relied upon a judgment of a coordinate Bench of this Court in the case of ***Centrica India Offshore (P) Limited v. CIT, 2014:DHC:2172-DB,*** wherein according to him, this Court has held that amounts reimbursed by Indian entities to an overseas company in terms of a secondment agreement amounted to FTS and are liable to tax in India. The submission that the payments made by the assessee to overseas entities therein was a cost to cost reimbursement was rejected. According to him, the Court has observed that the fact the overseas entity does not charge a markup over and above the cost for maintaining the secondee is irrelevant in itself, since the absence of markup subject to an independent transfer pricing exercise, cannot negate the nature of the transaction. He stated in that case, the salaries of the seconded employees were paid by the overseas companies and the same was paid back by the Indian entity to the overseas companies. It was in this background that according to Mr. Rai, this Court had held that the overseas entities were providing technical services to the Indian entity which would make the case fall within the scope of Article 12 of the India-Canada DTAA.

21. He would also contend that the decision in ***Centrica India Offshore (P) Limited (supra)*** has attained finality since the Special Leave Petition against the said decision has been dismissed by the Supreme Court.

22. According to Mr. Rai, since there is a concurrence of facts in ***Centrica India Offshore (P) Limited (supra)*** and the present case, the ITAT erred in

holding that the amount received by the assessee is not taxable in India solely on the basis that the seconded employees have offered tax on the amount received by them. The tax paid by the seconded employee cannot decide the taxability of the assessee in India, if the services provided by them through their employees in India is covered under the scope of FTS within the meaning of Article 12 of the DTAA.

23. On the issue of professional receipts added as FTS, he has stated that the AO had rightly treated the amounts received by the assessee on account of services as fees for inclusive services as per Article 12(4)(b) of the DTAA because the said services do not qualify within the definition of independent personal services as per Article 15 of the DTAA, which has described "*Professional Services*". According to him, only those services, which are related to activities mentioned in the said Article qualify as "*Professional Services*" and thereby exempted as per the DTAA. He stated that the ITAT ought not have held that the case of the assessee falls within the meaning of Article 15(2) of the DTAA and entitling them to the benefits under Article 12(5) (e) of the DTAA. Mr. Rai has stated that ITAT has erred in confining the definition of "*Professional Services*" to persons who are governed by professional organizations. According to him the ITAT has wrongly drawn a parallel on the scope of "*Professional Services*" with Section 194J and Section 44AA of the Act. The scope of tax relief based on certain terminology provided by the provisions of the Act cannot be used to interpret the provision of DTAA which in itself separate specific document arrived at after deliberations between two sovereign nations and hence, these analogies made by the ITAT are misplaced.

24. It is also his submission that the Article is only applicable if the services were rendered in India. In this case, the services have been rendered from outside India, making these transactions fall outside of Article 15 of the DTAA.

25. He has challenged the finding of the ITAT, by stating that "*make available*" in terms of Article 12(4) (b) of the DTAA is fully satisfied as the seconded employees have transferred skill, knowledge and experience to the EY India entities.

26. He contended that as these appeals cover identical questions of law for different assessment years, he shall adopt the arguments advanced in ITA 423/2025 and ITA 424/2025 in the other appeals numbered as ITA 715/2025, ITA 753/2025 & ITA 760/2025. He has sought the prayer(s) made in the appeals.

SUBMISSIONS ON BEHALF OF THE RESPONDENT/ASSESSEE

27. Mr. S. Ganesh, learned Senior Advocate appearing with Ms. Ananya Kapoor, Advocate on behalf of the respondent/assessee stated that since the issues involved in the present appeals are identical he wishes to adopt the arguments advanced in ITA 423/2025 and ITA 424/2025 across the other appeals being ITA 715/2025, ITA 753/2025 and ITA 760/2025.

28. He further stated that EY US had entered into a deputation agreement with the EY India entities under which certain personnel of EY US were seconded to the three EY India entities. In this regard he has referred to certain clauses of the Deputation Agreement which we reproduce as under:-

"*AND WHEREAS EY US has personnel who possess the requisite qualification and experience and who are agreeable to be assigned to EYGDSINDIA and who were selected by EY GDS India to be acceptable to it.*

AND WHEREAS EYUS has agreed to relieve such personnel (hereinafter EYGDS India Employee) so that he can work in employment with EYGDS INDIA on the terms and conditions as agreed between EYGDS INDIA and Employee;

AND WHEREAS the personnel shall be released from their work at EYUS and shall be integrated in EYGDS INDIA for the period of employment with EYGDS INDIA.

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"Assign" shall mean employment by EYGDS INDIA of an International Assignee released by EYUS (and "Assigned" shall be construed accordingly).

"Assignment" shall mean release of personnel of EY US to and who is to be in employment by EYGDS India for period of employment under the terms and conditions agreed by EYGDS India and employee.

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(iii) Clause 2:

(2) Engagement of International Assignees

EYUS shall release the employee to EYGDS INDIA and EYGDS INDIA shall engage employ him in its own business and as its own employee……

(iv) Clause 3

"3.General terms and conditions of Assignment

1. During the Period of Assignment, the International Assignees shall function solely under the control, direction and supervision of EYGDS INDIA and in accordance with all rules, regulations, policies, guidelines and other practices, generally applicable to the employees of EYGDS INDIA. International Assignees shall work exclusively for EYGDS INDIA and shall be solely responsible to EYGDS INDIA for their work during the period of Assignment. EYGDS INDIA shall decide the nature of work of the International Assignee and EYGDS INDIA shall be solely responsible for the work of International Assignees during the period of Assignment.

3.2 EYUS shall not be responsible for the work of the International Assigner, or assure any risk for results produced from the work performed by the International Assignees during the period the International Assignees shall not be regarded as an employee or EYUS and shall not in any way be subject to any kind of instructions or control of EYUS during the Period of Assignment.

3.3 EYUS shall not have any obligation towards EYGDS INDIA with regard to the performance of International Assignees. The privity and lien of EYUS would cease during the period of employment with EYGDS INDIA on entering of Employment Contract by International Assignee with EYGDS INDIA.

3.4 EYGDS INDIA shall be solely responsible to pay salary and other costs of International-Assignees during the Period of Assignment as provided in Section 4 of the Agreement, EYGDS INDIA also undertakes to:

(i) bear all reasonable expenses relating to boarding & lodging, food & beverage, travel and other miscellaneous expenses associated with the performance of work by the International Assignees;

(ii) pay any terminal payments or any special allowances to International Assignees in accordance with the terms of Employment Contract.

3.5 The tools, equipment, infrastructure and information necessary for the International Assignees to carry out their duties of employment during the Period of Assignment would be provided by EYGDS INDIA. EYGDS INDIA shall also undertake necessary steps for the International Assignees to comply with regulatory formalities like procuring visas, work permits meet any other regulatory requirements.

3.6 During the Period of Assignment, EYGDS INDIA shall have a right to undertake performance appraisal of the International Assignees in accordance with policy of EYGDS INDIA.

3.7 EY LLP shall have a right to terminate the Assignment of an International Assignee.

3.8 During the Period of Assignment, EYUS shall not save a right to recall any International Assignee without the approval of EYGDS INDIA, EYUS will also not be under any obligation

to replace any of the Assigned personnel in the event where employment of any personnel is terminated with EYGDS INDIA for any reason.

3.9 During the Period of Assignment, International Assignees shall not act tor and on behalf of EVUS nor make any representations or warranties on behalf of EVUS. Likewise, International Assignees shall not assume any obligations in the name of or on account of EYUS nor has authority to create any obligations in favor or on third parties with regard to EVUS.

3.10 During the Period of assignment, EYGDS INDIA shall have the exclusive right to undertake any legal or disciplinary action against any misconduct, fraud, willful negligence or any other illegal action of any International Assignee. EYGDS INDIA can terminate the employment prior to the agreed period and relieve him from EYGDS INDIA in the event of any misconduct or fraud or willful negligence of any other illegal action. EYGDS INDIA shall be solely obligated to address any conflicts with the International Assignees in relation to the Assignment under this Agreement, International Assignees shall not have any legal recourse to EYUS for any conflicts arising in relation to his/her Assignment.

3.11 In addition to above, Assignment under this Agreement shall be subject to other specific terms and conditions as laid down in the Employment Contract of each International Assignee. The terms of Employment Contract shall specifically include details with regard to term of employment with EYGDS INDIA like Period of Assignment, nature of work, details of salary and other costs and such other terms as are customary.

4. Remuneration to International Assignee

4.1 During the Period of secondment, EYGDS INDIA alone shall be solely responsible to bear and pay salary and other costs of international Assignees. However, for administrative convenience, EYUS may make payment (on behalf of EYGDS INDIA) towards salary and other costs to the International Assignees as agreed between international Assignees and EYGDS INDIA and as recorded in Employment-Contract of International Assignees EYUS shall intimate EYGDS INDIA and EYGDS INDIA shall reimburse EYUS for such payments

made towards salary and other costs in relation to the period of secondment of the International Assignees on an actual basis subject to tax being withheld as per the applicable provisions of the India tax laws. For this purpose, EYUS would produce the necessary documentary evidence supporting the payment towards salary and other costs to the International Assignees, to EYGUS INDIA, to enable the latter to reimburse the cost so defrayed on behalf of EYGDS INDIA EYUS agrees not to charge any additional amount or mark up over and above the reimbursement of actual payments made by it on behalf of EYGDS INDIA.

4.2 All other costs and expenses in India relating to the International Assignees, including without limitation, reasonable expenses relating to boarding & lodging, food & beverage, travel and other miscellaneous expenses associated with the performance of work by the International Assignees shall be borne by EYGDS INDIA. In addition EYGDS INDIA may also make an additional payment by way of a special allowance to the International Assignees as agreed in the Employment contracts.

5. Taxation

EYGDS INDIA shall alone be responsible for complying with the complying of withholding tax under the Indian tax laws, salary and other costs paid to the International Assignees."

29. According to Mr. Ganesh the above results in the following:-

a) The secondees cease to be employees of EY US during the period of deputation and become employees of the EY India entities.

b) The EY India entities discharge their obligations in respect of deduction of tax at source under Section 192 of the Act to pay taxes to the Indian Authorities, resulting in the issuance of the requisite TDS certificate to the employees.

c) The money which is paid by EY US to its employees in USA is on behalf of the EY India entities. The same is only for the sake of administrative convenience. Salary and other costs remain the liability of the EY India entities.

d) EY US raises an invoice to the EY India entities for reimbursement of the exact amount which is paid by EY US to the secondees without any addition or subtraction.

e) This reimbursed amount is now sought to be taxed by the Indian Authorities. This addition made to the taxable income of EY US has been rightly set aside by the ITAT.

30. Mr. Ganesh stated that the ITAT has elaborately dealt with the issue of cost to cost reimbursement within the provisions of Section 9(1)(vii) of the Act and Article 12 of the DTAA. In this regard, he has placed reliance on the judgment of a coordinate Bench of this Court in the case of ***P.C.I.T. v. Boeing Limited, 2022:DHC:4188-DB*** which according to him, has distinguished the judgment in ***Centrica India Offshore (P) Limited (supra)*** wherein the foreign company was rendering services to the Indian entity through its own employees who never became employees of the Indian entity, but remained employees of the foreign employer at all times. It is therefore, held in ***Centrica India Offshore (P) Limited (supra)*** that the payment made by the Indian entity is nothing but compensation or service charges paid to the foreign entity. This position, he contended is entirely different from that in the present case, given the unequivocal findings of fact by the ITAT to the effect that the payment made by the assessee to EY India entities is nothing but a cost to cost reimbursement. In this regard, he has

relied upon the judgment the of ITAT in ***Pr. Commissioner of Income Tax-1 v. AT & T Communication Services India Pvt Limited, ITA No.354/Del/2017*** dated 31.10.2018which according to him, has distinguished the decision in ***Centrica India Offshore (P) Limited (supra).*** He has also buttressed his submissions by relying on the findings of the Supreme Court and this Court in the cases of ***DIT (International Taxation) v. AP Moller Maersk AS, (2017) 392 ITR 186 (SC)*** and ***CIT v. Industrial Engineering Projects (P) Ltd, [1993] 202 ITR 1014 (Delhi)***.

31. It is his case that since the ITAT is an authority which may determine questions of fact, the same cannot be challenged at this stage before this Court. Reference in this regard has been made to ***K. Ravindranathan Nair v. CIT, (2001) 247 ITR 178***.

32. The ITAT has clearly held that the seconded personnel are employees of the EY India entities. The ITAT has also held that the amounts paid by the EY India entities to EY US have been taxed as salary at the hands of the seconded employees and further the amounts paid by EY India entities to EY US is a cost to cost reimbursement of the amount paid by EY US for and on behalf of EY India entities. The amounts having already been taxed at the hands of their seconded employees employed in India, the same cannot be subject to double taxation again through the assessee company i.e., EY US. He stated that the Supreme Court has clearly laid down two conditions which have to be fulfilled in order to make a tenable challenge to a finding of fact given by the ITAT. Firstly, raising a specific question of law which records an express issue of perversity of a finding of fact; and secondly, establishing the perversity by showing that such a finding is not based on

any evidence or material on record or rather the same is inconsistent with the material or evidence on record. In this present case, the appellant has not challenged the said findings in the manner which has been laid down by the Supreme Court in ***K. Ravindranathan Nair (supra)*** and that this Court is bound by the findings of the ITAT.

33. Mr. Ganesh stated that this appeal is identical in terms of the question of law which arises ITA No. 423/2025, for the AY 2019-2020. He submitted that the order of the ITAT should also be upheld in so far as this appeal is concerned.

34. According to Mr. Ganesh, the Revenue now seeks to place reliance for the very first time, at this juncture on a document titled "Social security tax consequences of working abroad". According to him, the said document is only a general statement and a highly simplified version with regard to the employees who are sent abroad on deputation. The said document does not cover a situation where specific agreements are entered between two independent entities i.e., EY US and EY India entities, which contain specific and unequivocal clauses, as per which the secondees shall be the exclusive employees of EY India entities, which ultimately exercises the administrative and disciplinary control over them. According to him, EY India entities have been discharging all the above said functions and the same has not been questioned by the Indian Revenue authorities, hence the extracts from IRS website are not applicable in the present case whatsoever. Further, this document was not placed before the ITAT and the Tribunal could not comment or consider the same let alone giving any finding on that document. According to him, it is a well settled principle of law that in an

appeal under Section 260A of the Act only those questions can be raised which are substantial questions of law and arise out of the order of the ITAT, which means that these questions ought to have been first raised before the ITAT and the ITAT ought to have also decided them. Since, none of these fundamental requirements are fulfilled in these cases, the extract from the IRS website cannot now be relied upon given the findings of the ITAT in respect of AY 2019-20.

35. The Revenue also cannot argue to the contrary to the indisputable position that EY India entities have been accepted as employers and the secondees as their employees and the TDS certificate issued by the EY India entities to the secondees have not been questioned or disputed by the Revenue.

36. He stated that another distinct aspect of this issue is that the Supreme Court in ***AP Moller Maersk AS (supra)***had clearly laid down the law on cost to cost reimbursement. This principle is not in any way dependent on the object or the purpose of the payment or even the person to whom the payment is made and whether this payment was obligatory or mandatory. Even if the payment is partly or wholly towards social security dues, it does not in any way detract from the fact that it is a cost to cost reimbursement, which by itself is conclusive that the matter does not give rise to any taxable income.

37. In this regard, he has relied upon the order of the ITAT for the AY 2020-21 which followed the order for AY 2021-22 in which the ITAT has categorically found that the services rendered by the assessee do not fulfill

the '*make available*' requirement under Article 12(4)(b) of the DTAA.

38. The second question of law which has been raised in these appeals are in respect of the fees received by EY US from various Indian establishments for the professional services which have been rendered by EY US. It is his case that the contention of the Revenue that these amounts are taxable in India as the fees for Included Services which are FTS under Article 12 of the India-USA DTAA, is unmerited. The provisions under Article 12(5)(e) provide that payments made for professional services as defined in Article 15 are not covered by Article 12 of the DTAA. He stated that the ITAT has rightly upheld the contention of the assessee and given a finding that the services are not covered under Article 12(4)(b) of the DTAA which clearly provides that if the conditions of "*make available*" are not fulfilled this Article would not be applicable. In this regard he has cited the following judgments in support of his argument:-

i. ***C.I.T v. Bio-Rad Laboratories (Singapore) Pte Ltd, (2023) 459 ITR 5 (Del)***
ii. ***C.I.T v. RELX Inc, 160 taxmann.com 1090***
iii. ***Aecom Techinal Services Inc. ITO, 174 taxmann.com 1173***

39. Mr. Ganesh has relied upon the reasoning of the ITAT to state that the issue of professional services rendered by EY US to the Indian establishments has been examined in great detail and the ITAT has given a categorical and unequivocal finding in paragraph 27 of the impugned order to hold that the services rendered by EY US do not fulfill the requirements of Article 12(4)(b) of the DTAA. He has relied upon the judgment of the

Supreme Court in ***K. Ravindranathan Nair (Supra)*** to state that this Court ought not look into a finding of fact which has been returned by the ITAT.

40. Mr. Ganesh has contested the arguments advanced by the appellant in reference to Article 12(4)(b) read with Article 12(5)(e) and Article 15 of the DTAA to state that EY US has rendered services to the Indian establishments which were "*professional services*" within the meaning of Article 15(2) of the DTAA and therefore such payments are in fact covered under Article (12)(5)(e) and not taxable in India. The only argument advanced on behalf of the appellant regarding this issue is that the people rendering these services where engineers, economists, technical experts, and computer and software experts who are not members of a statutory professional body such as the Bar Council of India or the Medical Council of India and therefore according to the appellant even though these persons were recognised experts in their respective fields, they could not be considered to be "*professionals*" within the meaning of Article 15 of the DTAA. He stated that this ground was already set out in the show cause notice by the AO and also in the DAO based on which adverse directions were given by the DRP. He stated that a plain reading of Article 15 along with Article 12(5)(e) would show that such an interpretation is wrongful in law. Article 15(2) of the DTAA reads as under:-

> *"(2). The term "professional services includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.*

41. Section 194J of the Act, which has been referred to by Mr. Ganesh reads as under:-

"(a) "Professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44A or of this section."

42. Mr. Ganesh further stated that Section 44AA of the Act also treats the same activities as professional services and authorises the Central Board of Direct Taxes to notify other professionals. The Board has issued notifications and has declared, artists, actors, directors, editors and computer experts as professionals, even though none of these persons belong to any professional body. He stated that this Court ought to follow the findings of the ITAT in the impugned order to hold that the contentions as advanced by the Revenue are erroneous and therefore must be rejected.

43. He stated that the ITAT has rightly accepted the contentions of the assessee and held that under Article 12(5) (e) read with Article 15(2) of the DTAA, the said professional fees received by the assessee cannot be taxed in India at all.

44. In light of the above arguments, he prayed that these appeals be dismissed.

ANALYSIS AND CONCLUSION

45. Having heard the learned counsel for the parties and perused the records, the issues involved in this batch of appeals can be summarised as follows:-

ITA No.	AY	Issue involved	Amounts involved (INR)
753/2025	2018-19	Cost to cost reimbursements added as FTS	24,05,12,955
		Professional receipts added as FTS	3,72,22,932
423/2025	2019-20	Cost to cost reimbursements added as FTS	50,99,38,561
715/2025	2020-21	Cost to cost reimbursements added as FTS	68,02,25,664
		Professional receipts added as FTS	29,89,50,386
		Assessee falls within the meaning of Article 12(5)(e) of the India – USA DTAA	--
424/2025	2021-22	Cost to cost reimbursements added as FTS	49,02,46,630
		Professional receipts added as FTS	30,73,50,907
760/2025	2022-23	Cost to cost reimbursements added as FTS	13,94,26,424
		Professional receipts added as FTS	97,78,94,279

46. As these connected appeals are in respect of same assessee relating to different AYs with different amounts, but on identical facts, we deem it appropriate not to repeat the facts more particularly those that are overlapping. Moreover, since the questions of law are interconnected, we deem it appropriate to answer them with our analysis below.

47. The challenge in these five appeals by the Revenue is to the orders passed in the appeals filed by the assessee / respondent before the ITAT. We have already reproduced the substantial questions of law framed in these appeals. The records reveal that EY US is engaged in the field of assurance, tax, transaction and business advisory services etc., to its client across the globe, including India. The assessee received the payments on account of secondment of its employees and for services rendered to Indian

establishments in and from USA. The employees were posted in EY India entities in terms of the deputation agreement executed between the assessee and the EY India entities. One of the questions is whether the payment received by the assessee company on account of secondment of its employees in the EY India entities would be taxable as FTS.

48. It may be stated here that the first appeal which was decided by the Tribunal was ITA No.2332/Del/2022 pertaining to AY 2019-20, which has been challenged in ITA No.423/2025. The assessment order dated 27.07.2022, which was subject matter of the appeal before the Tribunal was preceded by the DRP order dated 24.05.2022. In the assessment order dated 27.07.2022, the AO has *inter alia,* stated as under: -

> *"8. The arguments of the assessee have been considered but are found to be untenable due to the following reasons:*
> *• The case of employment with EY Indian entities is, unlike an independent employment comes with a lien marked on the employment with the parent and the employee is not at a free will to move anywhere but only to go back to the parent on expiry of their tenure;*
> *• The employees never ceased to be the employees of overseas entities, which is evident from the fact that EY US is making payment to the employees of Indian entities. Hence the salary paid to the employees of EY US LLP has borne out of the inherent obligation in the EY US LLP as the employer;*
> *• EY US LLP on request / requisition from EY India entities (hereinafter refer as 'EY India') deputes its / group entities staff based on Indian company's requirement. On completion of their tenure, the personnel are repatriated to the assessee. The personnel retain their lien when they come to India. They lend their experience as an employee of EY US LLP only in providing the consultancy services and not otherwise as the groups/processes standards are sought to*

be implemented;

• The deputed personnel have come to India, to imbibe the culture of the group and ensure the application of the EY group policies / processes and other quality standard sin EY India. This clearly demonstrates once the processes and policies are imbibed/retained, there is no need for the personnel again and EY India entities can apply the same by itself. Hence the services have also made available the technical knowledge/skill and experience;

• The cost to cost reimbursement of the expenses is not an argument as the fee for technical services/ Independent Personal Services do not mandatorily require to have a mark-up.

xxxx xxxx xxxx

It was also held in this ruling that consultancy services could also be technical in nature. These two expressions are not to be treated as watertight compartments. However, advisory services which merely involve discussion and advice of routine nature or exchange of information cannot appropriately be classified as consultancy service. An element of expertise or special knowledge on the part of consultant is implicit in the consultancy services.

1. This clearly establishes that the employees seconded to India make available technical knowledge, experience and skill to the Indian entities and hence is a fee for technical service. As per the discussion above the amount of Rs.50,99,38,561/ is proposed to be taxed as Fees for technical services as per Section 115A of the Act or treaty whichever is beneficial.

1.In view of the above discussion, the assessee's total income is computed asunder: -

		Amount (INR)
Return income declared in ITR	-	*32,73,620/-*
Secondment cost taxable as FTS Under the provision of DTAA	-	*50,99,38,561*
Total Income	-	*51,32,12,181/-*

11. Proposed to be Assessed at Rs.51,32,12,181/-. Necessary forms are being issued with this order. Credit for all pre-paid taxes are to be given after due verification. Charge interest u/s234A,234B,234Cand 234D of the Income Tax Act. Penalty proceedings u/s 270A of the IT Act are to be initiated separately for mis-reporting of income. Necessary forms are being issued with this order. Credit for all pre-paid taxes are to be given after due verification. Charge interest u/s234A,234B, 234C and234 D of the Income Tax Act.
12.Penalty proceedings u/s 270A of the IT Act are to be initiated separately for under-reporting of income."

49. The question of law (A) that requires examination is concerned with the terms agreed by the assessee and EY India entities which have a bearing on the nature of services undertaken by the secondees. Some of the stipulations in the deputation agreement dated 04.10.2017 have already been quoted in the submissions advanced on behalf of the assessee.

50. We may at this stage refer to the findings of the AO in the assessment order dated 30.05.2023 for AY 2020-21 as available in ITA No.715/2025, concerning services rendered in and from the USA as under:-

"Addition for Receipts from Indian based clients taxable as FTS

xxxx xxxx xxxx

5.15Engagement letter of such services was examined. It was found that services are clearly in technical as well as consultancy in nature. Scope of such services as mentioned in the agreement is reproduced below:

1. Statement of Work
This Statement of Work, dated May 1, 2019 to December 31,2019 (this "SOW") is made by Ernst & Young LLP ("we" or "EY") and Infosys Limited ("you" or "Infosys"), to contribute to Infosys implementation of Oracle Utilities Customer Care and

Billing("CC&B") for Consolidated Edison ("ConEd" or "Client" or ' The Company"). EY will provide these services pursuant to the SUBCONTRACTING AGREEMENT , dated April, 30 2019 (the "Agreement"), between EY and Infosys.
Infosys is the prime contractor for Client's Oracle CIS project("Project"). Client has evaluated alternative systems and selected an approach for meeting its business requirements. Client has selected the Software. EY will contribute with the implementation of the Software as set forth herein.
Except as otherwise specifically set forth in this SOW, this SOW incorporates by reference, and is deemed to be a part of, the Agreement. The additional terms and conditions of this SOW shall apply only to the services covered by this SOW ("Services") and not to services covered under any other SOW pursuant to the Agreement.

2. Scope of Services
EY will have responsibility for the oversight and delivery of OCM and training services, in collaboration with the Company designated OCM and Training resources, defined in this scope of work.
For non OCM and training services to be performed by EY, EY will be assigned specific tasks and will work under Infosys direction. EY will provide resources for the following terms;

a. *Project Management*
b. *Organizational Change Management &Training*
c. *Business Workstream focusing on Credit and Collections - Deposits, Cancel/Rebill, Exceptions and Design Workshop Preparation*
d. *Technical Infrastructure*
e. *Data Conversion*

EY will provide input and feedback on the Infosys-developed Project Plan for the performance of the Services. The Project Plan may be amended by the parties in writing. The Project Plan, once effective, will supersede all prior Project Plans for this SOW.

5.16 Further, scope of such service also include provision for training to be rendered by EY to the customer. Relevant

part of same is reproduced below:

2.Scope of Services

EY will have responsibility for the oversight and delivery of OCM and training services, in collaboration with the Company designated OCM and Training resources, defined in this scope of work. *For non OCM and training services to be performed by EY, EY will be assigned specific tasks and will work under Infosys direction. EY will provide resources for the following terms;*

Similar clause for training to be rendered by EY employees to end customer is also mentioned in clause 6 of said agreement where clearly role played by EY with regard to same service is elaborated. Relevant part of said agreement is reproduced below:

EY Personnel	*EY Role*	*Responsibilities*
Scott Brown	*Engagement Partner*	*-Provide Project with senior leadership and guidance where needed* *-Resolve any escalated risks and issues with Infosys stakeholders* *-Actively participate in project Executive Steering Committee meetings* *-Escalate relevant program issues and risks to the Executive Steering Committee* *-Define and communicate overall program vision, plan, dependencies and critical path*
Prince Schwenck	*Data Architect*	*-Prepare the data conversion plan and strategy in accordance with the Infosys Data conversion methodology and framework*
Umer Malik	*Conversion /ODI SMR*	*-Ensure that all data required by the Product will be available and accurate* *-Work on the Data Mapping specifications document, and approach* *-Work on the data mapping template from source to template and from template to target system* *-Analyze the existing data structures*
Bhumit Patel	*Data Architect*	*-Assist with the technical approach for extracting, transforming, and populating data in the target database* *-Assist with set up of conversion tools for improving data conversion efficiency i.e. Oracle Data Integrator (ODI)* *-Assist with the mock conversions to test the conversion process* *-Assist with go-live data conversion*
Andrew Hobaugh	*Credit and Collections – Deposits Cancel/*	*-Lead the Functional Workstream for the functional areas assigned by Infosys*

	Rebill *Exceptions* *Design Workshop Preparation*	*-Report workstream progress to Infosys Functional Architect and PMO Lead* *-Confirm that the Client's operational strategy is supported by the solution design* *-Support resolution of functional gaps when mapping business requirements to CC&B* *-Represent the project with business area executive and first-line stakeholders* *-Confirm that the process design supports benefits enablement* *-Manage execution of unit integration and user acceptance testing* *-Signoff the design, then approve and release the software for implementation*
Steve Verlander	*Technical Architect*	*- Work with the Client to define application and technical requirements* *- Assist with the review and integration of all application requirements, including functional, security, integration, performance, quality, and operations requirements* *- Review and integrate the technical architecture for the development, execution, and production environments* *- Assist with all decision regarding hardware, network products, system software, and security* *- Assist with hardware sizing and capacity planning*
Shwetha Ramakrishnan	*Engagement & Readiness Lead*	*- Responsible for oversight of stakeholder engagement activities* *- Conduct and coordinate change impact analysis / plans* *- Develop Business Readiness Strategy* *- Develop Change Advisory Council Materials and Deployment* *- Collaborate with identified business process owners to develop Change Management Metrics Dashboard*

5.17 Thus, it is clear that scope of above said service includes training also. It is well established that rendering training basically provides enduring benefits to recipient and thereby it qualifies Make Available Test. Moreover, scope of above said service clearly is of nature of technical in nature as well as involves consultancy elements also."

51. The AO came to the conclusion that the scope of the above services includes training and rendering training shall mean providing enduring

benefits to the recipient to qualify 'make available' test, and as such the payments made are FTS as stipulated in Article 12of the DTAA. We reproduce Article 12 and 15 of the DTAA as under:-

> *"ARTICLE 12 - Royalties and fees for included services –*
> *1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
> *2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed :*
> *(a) in the case of royalties referred to in sub-paragraph (a) of paragraph 3 and fees for included services as defined in this Article [other than services described in subparagraph (b) of this paragraph] :*
> *(i) during the first five taxable years for which this Convention has effect,*
> *(a) 15 per cent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that Contracting State, a political sub-division or a public sector company ; and*
> *(b) 20 per cent of the gross amount of the royalties or fees for included services in all other cases; and*
> *(ii) during the subsequent years, 15 per cent of the gross amount of royalties or fees for included services ; and*
> *(b) in the case of royalties referred to in sub-paragraph (b) of paragraph 3 and fees for included services as defined in this Article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 3(b) of this Article, 10 per cent of the gross amount of the royalties or fees for included services.*
> *3. The term "royalties" as used in this Article means :*
> *(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright or a literary,*

artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; and

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

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

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

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

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

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

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

(c) for teaching in or by educational institutions;

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

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15(Independent Personal Services).

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 State, 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 sub-division, 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 for included services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

(b) Where under sub-paragraph (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.

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ARTICLE 15 - INDEPENDENT PERSONAL SERVICES

1. Income derived by a person who is an individual or firm of individuals (other than a company) who is a resident of a Contracting State from the performance in the other Contracting State of professional services or other independent activities of a similar character shall be taxable only in the first mentioned State except in the following circumstances when such income may also be taxed in the other Contracting State :

(a) if such person has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or

(b) if the person's stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 90 days in the relevant taxable year.

2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants."

52. The arguments of Mr. Ganesh can be summed up to mean that the secondees are the employees of the EY India entities; the services offered are neither in the nature of technical nor consultancy; tax has been deducted

by the EY India entities on the salary paid to the secondees; and as such the 'make available' test is not applicable.

53. The above submissions have been contested by Mr. Rai by drawing our attention to the assessment order as well as the directions of the DRP. As we have already reproduced part of the assessment order, in paragraphs 48 and 50; the relevant portions of the DRP directions dated 19.11.2024 pertaining to AY 2018-19 are reproduced as under:-

> *"E) In the light of the above judgments and tests laid out by the courts- the facts of the instant case are analyzed.*
> *i) That in addition to the findings of the AO in para 4.2.3 of the DAO, the Panel adds to the facts delineated from the deputation agreement which will establish that the EY US is the de facto controller and employer of the seconded personnel to the EY India.*
> *ii) That the EY US has a right to terminate the assignment of the international assignee (clause 3.7)*
> *iii) During the period of secondment, EY GDS India would be responsible to bear and pay salary and other costs of international assignee but for administrative convenience EY US will make payment towards salary and other cost to international assignee, (clause 4.1)*
> *iv) EY India will reimburse EY US for such payments made towards salary and other cost in relation to the period of secondment (clause 4.1)*
> *v) Pension contribution/approvals, social security contribution and similar payments and related compliance shall be done by EY US. EY India shall reimburse such contributions or accruals to the EY US as part of other cost of international assignee, (clause 6)*
> *vi) EY US is merely releasing its personnel for assignment with EY India and EY US is not acting as provider of manpower supply to EY India (clause 9.2)*
> *vii) EY US agreed not to charge any fees from EY India for*

assignment of its personnel (clause 9.3)
viii) EY India shall neither solicit nor hire any international assignee for the period of 6 months after the period of assignment without obtaining the prior written consent of EY US (clause 14)
5.5 From the above agreement, read in entirety it transpires that the assessee company EY US is the actual employer of the secondees as not only the alleged salary payment and other costs are paid by it but also the secondees returned to the assessee company after completion of the period of secondment. Further, secondees are always on the roll of the assessee company and for that matter even if they are on a secondment tenure then also they are paid by the assessee company. So, there is no employee employer relationship between the EY India and the secondees. Further, as it is categorically mentioned in the deputation agreement that EY India is engaged in the business of providing consultancy service and needs personnel for facilitating its operations in India for limited period of time and that as the assessee company has those personnel who possess the requisite qualification and experience and who were also agreeable to be assigned to the EY India and that the assessee company EY US had agreed to relieve such personnel for the limited period, it clearly establishes that the assessee's AE (EY India) wanted those personnels for their technical skills/professional skills to be utilized for their operations. This entails that the EY US has a service PE in India which is engaged in the activity of providing manpower services and the reimbursement is nothing but fee for technical services as rightly held by the AO in the DAO.
5.6 Further, the insertion of clause 9.2, 9.3 which defines the relationship between parties as the assessee company not acting as provider of manpower supply and not charging any fees for assignment of its personnel and has been introduced as an abundant precaution so that the tax incidence on account of provisioning of manpower service and fee for technical service is not invoked in the case. Here

it is imperative to state that the language of the contract has been worded by the assessee company to suit its requirement.

5.7 So, this logically entails examining another aspect which is the 'Doctrine of Substance and Form ' which has long guided the tax authorities for interpretation of agreements and forms an important element of jurisprudence. The intent of the terms of Deputation Agreement is crystal clear which is basically to second the employees of the assessee company to its AE in India with a careful usage in the terms of the contract that it should not be treated as manpower supply contract and would not cast any obligation on the AE to pay any technical fees on the same. Here the Panel examines the agreement under the substance over form doctrine. Tax authorities ought to examine the true nature of a transaction, even if it is worded to imply a non-taxable service or FTS payment. It is imperative that tax laws should not be allowed to be circumvented by superficially crafted agreements. The courts have also emphasized that while tax payer's right to structure their affairs to minimize taxes, they cannot do so in a way that distorts the transaction's reality. So, putting the pieces of the jigsaw puzzle together and reading the clauses of contract in totality in important. Substance over form is a fundamental concept in tax law, aimed at ensuring that tax liability is based on the actual economic substance of transactions rather than merely their legal or contractual form. Courts and tax authorities have used this principle to prevent tax avoidance schemes structured solely to exploit tax benefits, treating transactions according to their real purpose and substance rather than their labels. Assessee cannot escape the consequences of law merely by describing an agreement in a particular form though in essence and in substance, it may be a different transaction. It is imperative to disregard the labels used in contracts and instead focus on the true economic purpose of the transaction. Here it is abundantly clear that the structure of a transaction was not designed to achieve genuine business purposes but merely

to avoid taxes through contractual language.

5.8 Hon'ble SC in the decision of M/s Northern Operating System Pvt Ltd (NOSPL) [2022- TIOL-48-SC-ST-LB] also intends to drive home the same point. Further, It has been laid out by the Hon'ble Supreme Court in the case of CIT Vs. Panipat Woollen & General Mills Co. Ltd. (SC) 103 ITR 66 that a party cannot escape the consequences of law merely by describing an agreement in a particular form though in essence and in substance, it may be a different transaction. Also, in the case of India - Vodafone International Holdings B.V . v. Union of India (2012) the Hon'ble Supreme Court's ruling in Vodafone dealt with the application of the substance over form doctrine to cross-border transactions. The Court although ruled in the favour of the assessee but nonetheless emphasized that tax should be levied based on the form in this case because the transaction was between two non-Indian entities. However, it clarified that transactions structured with the sole purpose of tax avoidance could still be subject to taxation if the economic substance indicated an intention to dodge tax.

Directions of DRP:

5.9 The Panel after careful examination of the contention of the AO in the DAO, submission of the assessee and arguments extended during the course of hearing before the Panel holds that as legacy issue is involved in the instant case and legal and factual matrix being same as the earlier years. There is no reason to deviate from directions given in earlier years and finds no infirmity in the order of the AO and confirms the same. The DRP reiterates the directions of the earlier and reproduces them as under

xxxx xxxx xxxx

5.10 Further, the AO is directed to incorporate the discussion of the DRP in the body of the order. The DRP in its considered opinion observes that the secondees who were employed by the EY US were sent on secondment tenure to the AE of the assessee company wherein they rendered service by making use of the technical knowledge, professional knowledge, skills, expertise. Hence the

arrangement between the assessee and Indian entities for provision of services through seconded employees thereby making available technical knowledge and skills and experience make the alleged reimbursements on account of secondment of employees to the tune of Rs.24,05,12,955 be considered as FTS."

(emphasis supplied)

54. In substance, the findings of the AO and the DRP (which we have already referred to above) are – (i) the employment offered by EY India entities is for a limited period of upto 2-3 years; (ii) at the end of the secondment agreement either by completion of their tenure or when the same is ended by either of the contracting parties, the seconded employees join back the assessee company; (iii) the employees never cease to be employees of the overseas entity; (iv) the secondees have come to India to imbibe the culture of the group and ensure the application of EY group policies /processes and other quality standards in EY India entities.

55. In effect, the AO's conclusion is that the services rendered by the secondees satisfied the "*make available*" test in terms of Article 12(4) (b) of the DTAA read with the judgment of the Karnataka High Court in the case of ***CIT v. De Beers India Minerals Pvt Limited : (2012) 346 ITR 467 (Karn.)*** which has 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."

(emphasis supplied)

56. The AO, in the assessment order dated 30.05.2023 for AY 2020-21, has elaborately examined the scope of services provided by EYUS, in paragraphs 5.15 to 5.17 to hold that the secondee personnel had come to India to imbibe the culture of EY Group and implement its policies/standards on the Indian EY entities. Once the process and policies are imbibed / retained, there is no need for the secondees personnel to work again with the EY India entities, as the employees of the EY India entities can apply the same by themselves. Mr. Rai had heavily relied upon this observation of the AO. Notably, the said submission has not been

challenged / opposed by the assessee before us. In that sense, the services of the secondees have made available some technical knowledge/ skill and experience.

57. Though Mr. Ganesh has argued that there is no transfer of any technical know-how or expertise, the arguments is negated by the terms of the scope of service, which demonstrate that certain training is also imparted by the seconded employees of EY US. If that be so, there is an element of transfer of technical knowledge, experience, skill, or know-how. In view of the scope of work set out in the agreement, which was reproduced and analysed in detail by the AO in the assessment order, we fail to see how the ITAT could have reached a conclusion that the 'make available' test is not satisfied.

58. Further, as noted by the AO, even the authority to terminate such employees is not with the EY India entities in as much as EY India entities only can terminate the secondment prior to the agreed period by relieving the secondees from EY India entities to enable the secondees to join back the assessee company. EY India entities have no power whatsoever to sever the relationship between the seconded employees and EY US, which would resume at the end of the deputation agreement. This makes it adequately clear that EY US has a lien on those employees or conversely, the employees have the lien on their employment with EY US.

59. Having said that, we shall now deal with the judgments referred to by Mr. Ganesh in the case of ***Bio-Rad Laboratories (Singapore) Pte Ltd (supra)***the facts were that the Revenue assailed the order of the ITAT which

had concluded that the services rendered by the assessee to its Indian affiliates did not come within the purview of FTS as per Article 12 (4) (b) of the India-Singapore DTAA and as such the condition of 'make available' is not fulfilled. The findings of the AO/DRP in that case were that the services provided by the respondent amounted to FTS since the same was held to be in the nature of management support services. According to the ITAT, if technical knowledge, experience and skill had been made available to the Indian affiliates, then the agreement would not have run its course for such a long period. This Court had agreed with the conclusion drawn by the ITAT to hold that the clause does not satisfy the 'make available' test. Suffice to state that the service therein was primarily management support services. This judgment is distinguishable on facts since the duration of the deputation agreement only for 2-3 years, and is not for an inexplicable long period, so as to be interpreted to mean that 'make available' test is not satisfied. The services provided by the assessee in the present case are not merely management support services, as in the case of above. As already held by us, the services rendered by the assessee herein includes technical services which would satisfy the "*make available*" test, for the reason that there is a transfer of skill/knowledge.

60. In so far as the judgment relied upon by Mr. Ganesh in the case of ***RELX Inc. (supra)*** is concerned, the issue in the said appeal was primarily in respect of the use of the software "*LexisNexis*" by the Indian subscribers. The case of the assessee was that the income earned from the subscription fee is in the nature of business income and in the absence of having any Permanent Establishment (PE) in India, would not be subject to tax as per

Article 7 of the DTAA therein. It was also the case of the assessee that the said aspect would not fall within the scope of Royalty in terms of Article 12(4) (b) of the DTAA. The case of the Revenue was that the said income was in the nature of technical consultancy and would fall within the scope and ambit of the Article 12 (4) of the DTAA as 'fee for included services'. This Court held that the assessee has provided only access to the data base and not any managerial, technical or consultancy services to the subscribers, and as such the same cannot be construed as income accrued or arisen in India as per Section 9 of the Act. The Court held that similar is the position in respect of Article 12 of the DTAA wherein the difference must be noted between a transfer of a copyright and the mere grant of the right to use and take advantage of copyrighted material. The Court after perusing the subscription agreement, was of the view that neither the subscription agreement nor the advantages accorded to a subscriber can possibly be considered in law to be a transfer of a copyright since the copyright remains with the assessee at all times. The judgment has no applicability to the facts of this case, since the issue involved in ***RELX Inc. (supra)*** did not concern seconded employees but the services provided were merely a license to use the software and not a transfer of any rights in it, which is not an issue here.

61. In so far as the judgment in the case of ***Aecom Technical Services Inc. (supra)*** is concerned, the challenge in the writ petition was to an order passed by the AO whereby the petitioner's application for 'nil' withholding tax was rejected. The petitioner company being a tax resident of the USA entered into an agreement with its two associated enterprises in India for its business of consultancy services, construction, management and

infrastructure development services. The case of the petitioner therein was that the charges were reimbursed on a cost to cost basis. This argument was rejected by the AO on the basis that the services which were rendered were highly technical, managerial and in the nature of consultancy, which requires special skills and knowledge of the services to make available the knowledge, experience and know-how upon examination of the services rendered and consequential benefits received thereafter. The coordinate Bench of this Court disagreed with the findings of the AO on the grounds that although the petitioner therein offered software development services with respect to various software applications, there was nothing on record to show that the associated enterprises acquired any right in the software and hence the application of Article 12(3) of the DTAA would not come into question. This judgment does not help the case of Mr. Ganesh as the associated enterprises did not acquire any right in the software that was developed. The coordinate Bench in the above case has held that this was not a case of 'make available', whereas the secondees herein are involved in training, ensuring application on EY Group policies and maintenance of quality standards which surely falls within the purview of 'make available'.

62. Mr. Ganesh has also relied upon the judgment of the Supreme Court in the case of ***AP Moller Maersk AS (supra)*** to contend that once the character of payment is found to be in the nature of reimbursement of the expenses, it cannot become chargeable to tax. That apart, he submitted that the element of profit in the payment received by the assessee from the EY India entities would be a relevant consideration, which is missing in so far as the reimbursement made in the case at hand is concerned. In other words,

the reimbursement made is of the total cost incurred by EY India entities on the secondees and it is not the case of the Revenue that the reimbursements were not at arm's length. He has also relied upon the judgment in the case of ***K. Ravindranathan Nair (supra)*** to contend that the Tribunal being the fact finding authority, the conclusions drawn by it cannot be disturbed by this Court, unless the findings are found to be perverse.

63. Now, we shall refer to the judgment relied upon by Mr. Rai, in the case of ***Centrica India Offshore Pvt. Ltd. (supra)*** wherein this Court was concerned with the following facts:-

> A. Centrica India Offshore Private Limited (CIOP) is a wholly owned subsidiary of Centrica Plc., a company incorporated in the United Kingdom (UK). CIOP was incorporated in India. British Gas Trading Ltd. (BSTL) and Director Energy Marketing Limited, Canada (DEML) were the subsidiaries of Centrica Plc. These three entities were in the business of supplying gas and electricity to consumers across the UK and Canada. The overseas entities outsourced their back office support functions, for instance, debt collections/consumers' billings/monthly jobs to third party vendors in countries including India. To ensure that the Indian vendors comply with quality guidelines, CIOP was established in India on 11.03.2008. It was also to act as service provider to these three entities. CIOP entered into service agreements with overseas entities to provide interface between those overseas entities and Indian vendors. The scope and range of services so provided in terms of those agreements/understanding are: (a) management assistance for outsourced supplies in India and facilitating

efficient interface back to U.S. business of Centrica Plc; (b) ensure that outsourced suppliers adhered to best practices and share them on e-2-e on optimal basis; (c) expert advice on widening scope of potential services in India to target work force through greater control and such other services as may be requested by Centrica Plc from time to time.

B. The petitioner is an income tax assessee and has been filing returns and paying income tax on the income earned out of the service agreement. To seek support during initial year of its operation, CIOP sought some employees on 'secondment' from the overseas entities and for this purpose, it entered into an agreement with the overseas entities in which the latter seconded some employees for a fixed tenure. It was also stated that in terms of the secondment agreement, the employees so seconded worked under the direct control and supervision of the CIOP. Conversely, the overseas entities are not responsible for any error or omission of the work of such employees. CIOP bears all risks and rewards associated with the work performed by such employees. It was also stated that the agreements fully require the petitioner to enter into a further individual agreement with each such employee (secondee) in terms of a pre-determined format.

C. CIOP highlighted that terms of these secondment agreements establish that the employees would work directly under the supervision and direction of its board and management. It was stated that the seconded employees came to India on deputation for a short period. However, their family and financial matters remained in their home countries where they intended to ultimately return to after completion of the assignment. It was convenient for them, therefore, to receive

salary overseas. An option was also available to such employees to receive their salaries in India and later transfer the same overseas. However, to avoid this, the employees continued to remain on the payroll of the overseas entities who used to pay and disburse the salaries. The petitioner, thereafter reimbursed salary costs to the overseas employers. It is also stated that this arrangement/ reimbursement was purely on a cost to cost basis.

D. It was also stated that the petitioner offered to tax the salary paid to the seconded employees in India. In other words it withheld taxes under Section 192 of the Act with respect to the salary paid or payable to the seconded employees. Likewise, service income received by the petitioner from overseas entities in terms of the service agreement was offered by it to tax under the Act. As the challenge in the said petition was to the decision of the Authority for Advance Ruling (AAR), two questions were framed by the AAR in the following manner:-

> *"(i) Whether on the facts and in the circumstances of the case, the reimbursements made by the Petitioner to overseas entities of the actual costs of expenses incurred under Secondment Agreement is in nature of income accruing to the overseas entities?*
> *(ii) If the answer to question No. 1 above is affirmative, whether tax is liable to be deducted at source by the petitioner under the provisions of Section 195 of the Income-tax Act, 1961?"*

E. The CIOP urged before the AAR that in tune with the recognized international principles, it is the real and economic employer of the seconded employees, even though their legal employer

was the overseas entities. It was also urged that in terms of the secondment agreement, the overseas entities were not providing any service to the petitioner. It was also stated that the payment to the seconded employees by the overseas entities was purely out of convenience which was in turn reimbursed on a cost to cost basis. The reimbursement made to such overseas entities was not taxable as income in India because the taxes were already paid in respect of the seconded employees in India. It was urged that the reimbursement to the overseas entities could not be considered as income under the time-tested doctrine of "diversion of income by overriding title". Thus, it was stated that the presence of the seconded employees did not create a permanent establishment of such overseas entities under the DTAA.

F. On the other hand, the case of the respondent therein was that the seconded employees were rendering monthly services to CIOP and reimbursement to the overseas entities was in the nature of FTS and covered under Section 9(1)(vii) of the Act as well as under the DTAA applicable to UK and Canada. It was, therefore, contended that the overseas entities would have PE under the DTAA. The Revenue argued that CIOP could only terminate the secondment agreement but could not terminate the contract of those seconded employees. This proved that it was not the real employer and that the overseas entities were the real and legal employers. Consequently, there was no charge on the CIOP through the overseas entities in respect of the obligation of payment of remuneration to the seconded employees. This, according to the Revenue amounted to application of income and not diversion of

income by the overriding title.

G. The AAR ruled against the CIOP wherein it was held that (a) reimbursement of salary cost paid/payable by the CIOP to overseas entities under the terms of the secondment agreement is in the nature of income accrued to the overseas entities; (b) services rendered by seconded employees are managerial in nature but such services will not come within the purview of Article 13.4 of the India–UK DTAA or Article 12.4 of India–Canada DTAA. Therefore, consideration paid by the CIOP to the overseas entities cannot be held to be FTS; (c) overseas entities constitute service PE under the relevant DTAA on account of employees seconded by overseas entities to the petitioner under the terms of the secondment agreement; and (d) Tax is liable to be deducted at source under Section 195 of the Act on amount paid/payable by the assessee to the overseas entities under the secondment agreement.

H. The issue which fell for consideration before this Court in ***Centrica India Offshore Pvt. Ltd. (supra)*** was whether the secondment of the employees by BSTL and DEML, the overseas entities, falls within Article 12 of the India-Canada and Article 13 of the India-UK DTAAs, which embody the concept of a service permanent establishment. In terms of those articles, the Court must bear whether the overseas entities rendered "*technical services*" under Article 13 of the India-UK DTAA and "*included services*" under Article 12 of the India-Canada DTAA. In essence, the inquiry is whether any tax liability of the overseas entities arises for the provision of services to

CIOP in India, such that the rigours in the DTAAs come into play.

64. This Court in paragraphs 30 to 40 held as under:-

> *"30. The India-UK DTAA defines 'fees for technical services' as "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)". In this case, the overseas entities have, through the seconded employees, undoubtedly provided 'technical' services to CIOP, especially since that expression expressly includes the provision of the services of personnel. The seconded employees, who work, so to say, for CIOP are provided by the overseas entities and the work conducted by them thus,* ***i.e. assistance in conducting the business of CIOP of quality control and management is through the overseas entities. The nature of the services-cast as "business support services" by CIOP-as also clearly within the hold "technical or consultancy"****. These services envisage the provision of quality service by vendors to the overseas entities, which CIOP, and the secondees, are to oversee. This requires the secondees to draw from their technical knowledge, and falls within the scope of the term. This reading of 'technical services does not limit itself only to technological services, but rather, extends to know-how, techniques and technical knowledge. This is supported by clause 4 of Article 12 itself, which lists these various sub-categories. Indeed, the term 'technical has not been defined in the DTAA, and must be accorded its broader dictionary meaning, unless limited by the parties to the instrument. The AAR in Intertek Testing Services India Pvt. Ltd. CIT X. (2008) 220 CTR (AAR) 540, considered this question in detail, and rightly held that*
>
> > *"What is meant by the expression 'technical Should it be confined only to technology relating to engineering. manufacturing or other applied sciences? We do not think so. The expression technical' ought not to be construed in a narrow*

sense."

This reading was supported by the Supreme Court, in the context of Section 9(1)(iv) of the Act in Continental Construction Lid. v. CIT,195 ITR 117. Further, the Court notes that the distinction to be drawn by CIOP between the provision of services by the overseas entities themselves and the 'mere' secondment of employee does not make a an instance difference, since the services provided the overseas entities is the provision of technical services through the secondees envisaged under Article 13 itself.

31. The issue of Article 12 of the India-Canada treaty involves a more nuanced inquiry. Article 12 also incorporates fees for "included services". Whilst this includes technical services or consultancy service" under clause 4, it states that 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 make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design." This second qualification for the technical knowledge etc to be 'made available' is an essential, and additional, requirement under the India-Canada DTAA. This phrasing also finds mention in Article 13 of the India-UK DTAA, this requirement is disjunctive from the rest of the provision, unlike in the India-Canada DTAA. The India-UK DTAA states that '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 or make available technical knowledge experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design." In order for the amounts paid to the overseas entities in the transaction covered by the India-Canada DTAA, thus, it must not only best that technical services were performed, but that such

knowledge etc. was 'made available'.

32. The mere rendition of service is not an "included service" that triggers tax liability. Instead, the enterprise must make available' the skill behind that service to the other party, i.e the Indian recipient. The definition, as it appears, is more restricted that in the India-UK DTAA. The question is whether the higher threshold, is met in this case. The service provided by the secondees is to be viewed in the context in which their secondment or deputation was necessitated. The overseas entities required the Indian subsidiary, CIOP, to ensure quality control and management of their vendors of outsourced activity. For this activity to be carried out, CIOP required personnel with the necessary technical knowledge and expertise in the field, and thus, the secondment agreement was signed since CIOP as a newly formed company did not have the necessary human resource. The secondees are not only providing services to CIOP, but rather tiding CIOP through the initial period, and ensuring that going forward, the skill set of CIOP's other employees is built and these services may be continued by them without assistance. In essence, the secondees are imparting their technical expertise and know-how onto the other regular employees of CIOP. Indeed, it is admitted by CIOP that the reason for the secondment agreement was to provide support for the initial years of operation, till the necessary skill-set is acquired by the resident employee group. The activity of the secondees is thus to transfer their technical ability to ensure quality control vis-à-vis the Indian vendors, or in other words, 'make available' their know-how of the field to CIOP for future consumption. The secondment, if viewed from this angle, actually leads to a benefit that transmits the knowledge possessed by the secondees to the regular employees. Indeed, any other reading would unduly restrict the Article 12 of the DTAA, which contemplates not only a formal transfer of intellectual property, but also other techniques and skills ('soft' intellectual property, if it can be called as such) such) required for the operation of a

business. The skills and knowledge required to ensure that the task entrusted to CIOP quality control is carried on diligently certainly falls within the broad ambit of Article 12.

33. This Court is also mindful of the broader context of a service PE in which this case operates. In that regard, COIP has advanced several arguments to negate any liability to deduct income tax under Section 195 of the Act. (1) there is no service PE, since CIOP is the Section 1995 of the Act there is no service, since for is the employers, (2) the payment made by CIOP to the overseas entities is only by way of reimbursement, which does not form part of the income of those entities, and in any case, (3) that payment is not the income of the overseas entities on account of the doctrine of "diversion of income by overriding title'. The Court will address these arguments in turn.

34. To determine the existence of a service PE, CIOP argues that the Court must look towards the substance of the employment relationship and not the form. This is correct. In the present case, the seconded employees are to be integrated into CIOP, for the agreed period and are subject to its supervision and control. The rules, regulations, policies and other practices of CIOP for its employees were applicable to these employees too. The seconded employee's duties and functions were dictated by the instructions and directions of the CIOP. He/she had to perform the duties assigned with due diligence in accordance with the applicable laws and regulations, standards and practices and control of CIOP. The overseas entities were not responsible for any errors or omissions of such seconded employees or for their work. CIOP bore all risks in relation to the work of seconded employees, and reaped the benefit from the output. CIOP also bare the cost of monthly remuneration and reimbursement of cost to seconded employees. However, crucially, these seconded employees retained their entitlement to participate in the overseas entities' retirement and social security plans and other benefits in terms of its applicable policies, and the

salary was properly payable by the overseas entitle, which claimed the money from CIOP. There no purported employment relationship between CIOP and the secondees. None of the documents, including the attachment to the secondment agreements placed on record (between the secondees and CIOP) reveal that the latter can terminate the secondment arrangement; there is no entitlement or obligation, clearly spelt out, whereby CIOP has to bear the salary cost of these employees. The secondees cannot in fact sue the CIOP for default in payment of their salary- no obligation is spelt out vis-à-vis the Petite. All direct costs of such seconded employee's basic salary and other compensation, cost of participation in overseas entities' retirement and social security plans and other benefits in accordance with its applicable policies and other costs were ultimately paid by the overseas entity. Whilst CIOP was given the right to terminate the secondment, (in its agreement with the overseas entities) the services of the secondee vis-à-vis the entities the original and subsisting employment relationship - could not be terminated. Rather, that employment relationship remained independent, and beyond the control of CIOP.

35. The concept of a legal and economic employer, as considered by Vogel (relied upon by CIOP), is when "a local employer wishing to employ foreign labour for one or more periods of less than 183 days recruits through an intermediary established abroad who purports to be the employer and hires the labour out to the employer." In this case, the temporal element of the three-way employment relationship is crucial. The secondees were originally employees of the overseas entities. They were not hired by that entity as a false façade. whose productivity is to be ultimately traced to CIOP. Rather, the secondees were regular employees of the overseas entities. There is no dispute with this fact. They have only been seconded or transferred for a limited period of time to another organization, CIOP, in order to utilize their technical expertise in the latter. The secondment agreement between

CIOP and the overseas entity, and the agreement between CIOP and the employees, envisages an end to this exception, and a return to the usual state of affairs, when the secondees return to the overseas entities. The employment relationship between the secondee and the overseas organization is at no point terminated, nor is CIOP given any authority to even modify that relationship. The attachment of the secondees to the overseas organization is not fraudulent or even fleeting, but rather, permanent, especially in comparison to CIOP, which is admittedly only their temporary home. Today, CIOP attempts to cast that employment relationship as a tentious link because for the duration of the secondment, CIOP pays the salary of these. Even here, the salary is ultimately paid through the overseas entity, which is not a mere conduit. Crucially, the social security, emoluments, additional benefits etc. provided by the overseas entity to the secondee, and more generally, its employees, still govern the secondee in its relationship with CIOP. It would be incongruous to wish away the employment relationship, as CIOP seeks to do today, in the face of such strong linkages. Whilst CIOP may have operational control over these persons in terms of the daily work, and may be responsible (in terms of the agreement) for their failures, these limited and sparse factors cannot displace the larger and established context of employment abroad.

36. In this context, the decision of the Supreme Court in Morgan Stanley (supra) offers support for the Authority's viewpoint, rather than the contrary stance. In that case, the Court considered various forms of PEs, agency, service etc, each of which contemplate different characteristic and link between the deputed employee/organization and the parent. In the context with which we are presently concerned, the following observations are critical:

> *"15. As regards the question of deputation, we are of the view that an employee of MSCO when deputed to MSAS does not become an employee of MSAS. A deputationist has a lien on his employment with*

MSCO. As long as the lien remains with the MSCO the said company retains control over the deputationist's terms and employment.... It is important to note that where the activities of the multinational enterprise entails it being responsible for the work of deputationists and the employees continue to be on the payroll of "the multinational enterprise or they continue to have their lien on their jobs with the multinational enterprise, a service PE can emerge. deputationist under such circumstances is expected to be experienced in banking and finance. On completion of his tenure he is repatriated to his parent job. He retains his lien when he comes to India. He lends his experience to MSAS in India as an employee of MSCO as he retains his lien and in that sense there is a service PE (MSAS) under Article 5(2)(1). We find no infirmity in the ruling of the ARR on this aspect. In the above situation, MSCO is rendering services through its employees to MSAS Therefore, the Department is right in its contention that under the above situation there exists a Service PE in India (MSAS) Accordingly, the civil appeal filed by the Department stands partly allowed.

In fact, even the OECD Commentary on Article 15 of the Model Convention, which learned counsel for CIOP has placed great reliance, interestingly notes that "[the situation is different if the employee works exclusively for the enterprise in the state of employment and was released for the period in question by the enterprise in his state of residence." This was clearly, and critically. not done in this case.

37. This brings the Court to the next issue, concerning reimbursement and the doctrine of diversion of income by overriding title. This Court notices that a case with almost identical circumstances, in In Re: AT and S India (P) Ltd., MANU/AR/0016/2006, also came up before the AAR. There, an agreement between AT&S India and its parent, AT& Austria was entered into, by which AT&S Austria undertook

to assign or cause its subsidiaries to assign its qualified employees to the AT&S India. These individuals were to work for AT&S India and receive compensation substantially similar to what ostantially similar to what they would have received as employees of AT&S Austria. They were engaged by AT&S India on a full time basis. The question before the AAR was identical to this case:

> *"Whether pursuant to the secondment agreement entered into by the applicant with AT&S Austria, the payment to be made by the applicant to AT&S Austria, towards reimbursement of salary cost incurved by AT&S Austria in respect of seconded personnel, would be subject to withholding fax under Section 195 of the IT Act in view of the facts that (1) the payments are only in the nature of reimbursement of actual expenditure incurred by AT&S Austria (2) AT&S Austria is not engaged in the business of providing technical services in the ordinary mary course of us business, (3) AT&S Austria is not charging the applicant any separate fee for the secondment and (4) the seconded personnel work under the direct control and supervision of the applicant?"*

In holding that the obligation under Section 195 would be triggered, the AAR held as follows:

> *"From the above analysis of both the agreements it is clear that pursuant to the obligation under the FCA, the AT&S Austria has offered the services of technical experts to the applicant on the latter's request and the terms and conditions for providing services of technical experts are contained in the secondment agreement which we have referred to above in great details. Though the term "reimbursement" is used in the agreements, the nature of payments under the secondment agreement has to satisfy the characteristic of reimbursement and that the term "reimbursement" in the agreement will not be determinative of nature of payments. The term "reimbursement" is not a technical word or a word of Article In Oxford English*

Dictionary, to reimburse means--to repay a person who has spent or lost money-and accordingly reimbursement means to make good the amount spent or lost. However, under the secondment agreement the applicant is required to compensate AT&S Austria for all costs directly or indirectly arisen from the secondment of personnel and that the compensation is not limited to salary, bonus, benefits, personal travel, etc. though salary, bonus, etc. and the amounts referred to in para 4.2 of the secondment agreement form part of compensation. The premise of the question that the payments are only in the nature of reimbursement of actual expenditure incurred by AT&S Austria is not tenable for reasons more than one, First it is not supported by any evidence as no material (except the debit notes of salaries of seconded personnel) is placed before us to show what actual expenditure was incurred by AT&S Austria and what is being claimed as reimbursement; secondly, assuming for the sake of argument that the debit notes represent the quantum of compensation as the actual expenditure, it would make no difference as the same is payable to the AT&S Austria under the secondment agreement for services provided by it. It would, therefore, be not only unrealistic but also contrary to the terms of the agreement to treat payments under the said agreement as mere reimbursement of salaries of the seconded employees who are said to be the employees of the applicant To show that the real employer of such employees is the applicant and not the AT&S Austria, Mr. Chaitanya invited our attention to various employment agreements entered into between the applicant and the seconded employees and also the certificate of deduction of tax at source on their global salary. All the employment agreements are similarly worded. We have carefully gone through the employment agreement between the applicant and Mr. Markus Stoinkellner. The duration of the employment

is from 1st Sept., 2005 till 30th Aug, 2008. In Article 3 thereof salary of the employee is noted as the remuneration, perquisites and other entitlements as detailed in Appendix-A. However, Appendix-A does not specify any amount. All that u says, is that the salary will be as fixed and agreed between the employee and the company from time to time and that such salary may be paid either in India or outside India but the total salary shall not exceed the salary fixed as above, but no fixed salary is mentioned in the employment agreement Other perquisites and entitlements are travel expenses, transport, boarding, lodging, and annual leave of 30 days per year; and home leave which the employee will be entitled to once. The applicant shall have to organize an economic class return flight tickets to go on home leave. The employment agreement also provides that the employee will be responsible for meeting all requirements under Indian tax laws including tax compliance and filing of returns and the applicant is authorized to deduct taxes from the compensation and benefits payable.

38. The mere fact that CIOP, and the secondment agreement, phrases the payment made from CIOP to the overseas entity "reimbursement cannot be determinative. Neither is the fact that the overseas does not charge a mark-up over and above the costs of maintaining the secondee relevant in itself, since the absence to mark-up (subject to an independent transfer pricing exercise) cannot negate the nature of the transaction. It would lead to an absurd conclusion if, all else constant, the fact that no payment is demanded negates accrual of income to the overseas entity. Instead, the various factors concerning the determination of the real employment link continue to operate, and the consequent finding that provision of employees to CIOP was the provision of services to CIOP by the overseas entities triggers the DTAAS. The nomenclature or lesser-than-expected amount charged for such services cannot change the nature of their services. Indeed, once it is established, as

in this case, that there was a provision of services, the payment made may indeed be payment for services which may be deducted in accordance with law reimbursement for costs incurred. This, however, cannot be used to claim that the entire amount is in the nature of reimbursement, for which the tax liability is not triggered in the first place. This would mean that in any circumstance where services are provided between related parties, the demand of only as much money as has been spent in providing the service would remove the tax liability altogether. This is clearly an incorrect reasoning that conflates liability to tax with subsequent deductions that may be claimed.

39. So far as the decision in M/s. E-Funds IT Solution, goes, the judgment notes the distinction between stewardship activities of employees and deputationists, which had been highlighted in Morgan Stanley. The Division Bench in E-Funds highlighted that the nature of activity undertaken by the employee is determinative of whether it constitutes a service. In the present case, the overseas entities outsource their back office support functions like debt collections/consumers billings/monthly jobs to third party vendors in India. The seconded employees in the present case, oversee quality k cannot be control of the work of such vendors. This characterized as mere stewardship. What could have been left to CIOP to do is in fact being done through the seconded employees, whose expertise and training lends quality and content to the Indian entity. Therefore, it is held that the real employer of these seconded employees continues to be the overseas entity concerned.

40. The final issue concerns the 'diversion of income by overriding title'. Here, CIOP argues that that the t payment made to the overseas entity is not income that accrues to the overseas entity, but rather, money that it is obligated to pass on to the secondees. In other words, this money is overridden by the obligation to pay the secondees, and thus, is not income. This is insubstantial for two reasons. One, in view of the above findings that: (a) the payment is not in the

nature of reimbursement, but rather, payment for services rendered, (b) the employment relationship between the overseas entities and CIOP from which the former's independent obligation to pay the secondees arises- continues to hold, no obligation to use money arising from the payment by CIOP to pay the secondees arises. The overseas entities" obligation to pay the secondees arises under a separate agreement, based on independent conditions, in relation to CIOP's obligation to pay the overseas entity. Assuming the agreement between CIOP and the overseas entity envisaged a certain payment for provision of services (and not styled as reimbursement). Surely no argument could be made that such payment is affected by the doctrine of diversion of income by overriding title. If that be the case, then, as held above, the fact that the payment under the secondment agreement is styled as reimbursement, and limited on facts to that, without any additional charge for the service, cannot be hit by that doctrine either. The money paid by CIOP to the overseas entity accrues to the overseas entity, which may or may not apply it for payment to the secondees, based on its contractual relationship with them. This, at the very least, is independent of the relationship and payment between CIOP and the overseas entity."

(emphasis supplied)

65. From the above, it is noted that in ***Centrica India Offshore Pvt. Ltd. (supra)*** the relevant stipulation in the agreement with the seconded employees meant;

> (i) the seconded employees retained their entitlement to participate in the overseas entities, retirement and social security plans and other benefits in terms of its applicable policies, and the salary was properly payable by the overseas entities, which claimed the money from CIOP;

(ii) The agreement did not reveal that CIOP can terminate the seconded agreement;

(iii) There is no entitlement or obligation, spelt out, whereby CIOP has to bear the salary / cost of these employees;

(iv) The secondees cannot in fact sue CIOP for default in payment of their salary;

(v) All direct costs of such seconded employee's basic salary and other compensation, cost of participation in overseas entities' retirement and social security plans and other benefits in accordance with its applicable policies and other costs were ultimately paid by the overseas entities;

(vi) CIOP was given the right to terminate the secondment. The services of the secondee *vis-à-vis* the overseas entities – the original and subsisting employment relationship – could not be terminated;

(vii) The employment relationship with the foreign entities remained independent and beyond the control of CIOP; and

(viii) Included service does not only mean formal transfer of intellectual property but also other techniques skills required for operation of a business in words of the Court *"soft intellectual property"*.

66. A perusal of the aforesaid judgment would also reveal that the Court had also referred to the findings of the AAR on the obligation under Section 195 of the Act to hold that the mere fact that CIOP and the secondment agreement phrases the payment made by CIOP to the overseas entity as

"*reimbursement*" cannot be determinative of the nature of the services. The Court also held that the fact the overseas entity does not charge a mark-up over and above the costs of maintaining the secondee relevant in itself, as the absence of markup cannot negate the nature of the transaction. Rather, various factors concerning the determination of the real employment link continues to operate. The Court went on to hold that the payments are not in the nature of reimbursement, but rather for services rendered. The employment relationship between the overseas entities and CIOP from which the former's independent obligation to pay the secondees arises – continues to hold, as there is no obligation to use money arising from the payment by CIOP to pay the secondees. It also held that overseas entities' obligation to pay the secondees arises under a separate agreement, based on independent conditions, in relation to CIOP's obligation to pay the overseas entity.

67. In the case in hand, we have already noted the terms of the deputation agreement in paragraph 28 above. It is clear that the secondees were working in EY India entities, during the period of assignment. On such assignment, the secondees continued to maintain their lien with the assessee. In fact the secondees are entitled to all available benefits including social security from their employer, that is, the assessee herein. This makes the assignment of the secondees, akin to a deputation from the assessee to EY India entities, to enable the secondees use their expertise of technical knowledge/ know how and make available the same to EY India entities, for the Indian entities to then use the same for their working in future. In fact, the agreement between the assessee and EY India entities is described as

deputation agreement as different from a letter of appointment or transfer. During deputation, the employee continues to maintain on their employment lien with the leading entity (assessee herein), unless a secondee is absorbed in the foreign entity (EY India entities).Additionally, EY India entities could not have terminated the services of the secondees, and they only have the right to undertake legal or disciplinary action against misconduct, fraud, willful negligence or any illegal action of any international assignee and terminate the secondment, prior to the agreed period and relieve them from EY India entities to enable them join EY US. This goes to show that the secondees never ceased to be the employees of EY US and that EY US retains an overarching control over them.

68. Suffice it to state, the facts in the case before us are similar to that in ***Centrica India Offshore Pvt. Ltd. (supra)***. As such, the findings of the coordinate Bench of this Court in the said case are squarely applicable to the case in hand. We have been informed that the judgment in ***Centrica India Offshore Pvt. Ltd. (supra)*** has been upheld by the Supreme Court in Special Leave to Appeal (C) No.22295/2014 *vide* order dated 10.10.2024.

69. Though the facts in ***Centrica India Offshore Pvt. Ltd. (supra)***, are considerably similar to that of the present case, the ITAT has made no reference to it in the impugned orders, while examining the nature of the services of the assessee. We find that as regards the nature of services, the ITAT in the impugned order passed in ITA No.424/2025, *inter alia,* held as under:-

> *"16. The statement of work, scope of services as per the agreement is examined. It refers to the assessee was*

approached by the client to contribute with the implementation of software for meeting the business requirements which has been evaluated by the party to the agreement for its client. While doing so, the assessee will have responsibility of oversight, delivery and training services pertaining to organizational change management. The assessee shall provide resources for project management, organizational change management and training, business work streaming, technical infrastructure and data conversion. The assessee was supposed to provide input and feedback to the clients with regard to the performance o f the services. As per the details given at paper book page 84 to 91 , the nature of the services rendered consists of expatriate tax services, TP documentation, tax services & advisory, talent management & leadership development, merger & amalgamation advisory services, HR performance improvement services, technology implementation support, valuation of tangibles for purpose of purchase consideration, payroll services, SAP implementation, customer relationship & billing.

xxxx xxxx xxxx

25. We have also examined the qualifications of the engagement partners and principal responsible for engagement, we find that these consultants are having qualifications in business management, business administration, masters of science and doctorate in economics or maths, commerce &finance.

xxxx xxxx xxxx

27. The assessee has given the party wise breakup of services rendered to India based clients from USA at page no.161 to 165 of the paper book which was to the tune of Rs.65.20 Cr. which includes E&Y LLP, SR Batliboi & Company LLP, Honeywell International Inc. The details of the services extended have already been discussed at length above. On going through the services, we find that they cannot be said to be meeting the requirement of "make available" technical knowledge, experience, skill, know-how, or processes, or consist of the development and

transfer of a technical plan or technical design" clause under Article 12(4)(b) of DTAA. Further, we have gone through the Article 12(5)(e) which states that the FIS does not include the amounts paid 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)."

(emphasis supplied)

70. Having examined the impugned orders of the ITAT, we find that apart from stating that, ongoing through the services, it was found that they do not meet the requirement of 'make-available', the ITAT has not given any cogent reasoning for it to deviate from the decision taken by the AO and the DRP. Applying the principles laid down in ***Centrica India Offshore Pvt. Ltd. (supra)***, we must uphold the findings of the DRP and the AO. It is important to note that the ITAT in the impugned orders, has made no reference to the binding precedent of this Court in ***Centrica India Offshore Pvt. Ltd. (supra)***, save for references made in other decisions which were cited by the ITAT. In that sense, the impugned orders of the ITAT are *per incuriam* and perverse.

71. We must also state that though Mr. Ganesh has referred to the decisions in the cases of ***Bio-Rad Laboratories (Singapore) Pte Ltd (supra) RELX Inc. (supra), Aecom Technical Services Inc. (supra),*** all these also do not refer to the judgment of this Court in ***Centrica India Offshore Pvt. Ltd. (supra)***.

72. Mr. Ganesh also relied upon the decision of this Court in the case of ***Boeing India Pvt Limited (supra)*** to contend that the reliance placed by Mr.

Rai on the judgment of ***Centrica India Offshore Pvt. Ltd. (supra)*** has been distinguished therein by stating that the ITAT therein had returned a finding that the real employer of the seconded employees continues to be the Indian entity and not the overseas entity. He has attempted to differentiate the judgment in the case of ***Centrica India Offshore Pvt. Ltd. (supra)*** by stating that the foreign entity therein was rendering services to the Indian entity and the payments made by the Indian entity therein is nothing but a compensation or service charge paid to the foreign entity by the Indian entity; whereas in the facts of the case at hand, it is clear from the findings of the Tribunal that the payments made to EY US by the EY India entities is nothing but a cost to cost reimbursement of the amount paid by EY US for and on behalf of EY India entities.

73. These judgments have no applicability in the case at hand, given our clear finding that the secondees in the present case continue to be employees of the overseas entity, i.e. EY US and satisfy the 'make available' test as they transfer techniques and skills required for the operation of business, i.e., soft intellectual property [Reference: ***Centrica India Offshore Pvt. Ltd. (supra)***].

74. Insofar as the reliance placed on the judgment in the case of ***AT & T Communication Services India Pvt Limited (supra)*** is concerned, the ITAT had held that the seconded employees therein were not taking forward the business of the overseas parent entity but were working under the control and supervision of the assessee company, which could not be interpreted to mean that the secondees therein were working on behalf of the overseas entity. The ITAT also noted that the total tax deducted by the assessee

therein was much higher than the withholding tax which is sought to be levied. Needless to state, this judgment does not help the case of the assessee herein, as the instant secondees work at the Indian establishments and are responsible for implementing EY group policies and maintaining quality standards, as different from ***AT & T Communication Services India Pvt Limited (supra)***. Further, the said judgment of the ITAT has been challenged as ITA 915/2019 before a coordinate Bench of this Court and the said appeal is pending adjudication.

75. The judgment in the case of ***Industrial Engineering Projects (P) Ltd (supra)*** relied upon by the learned Senior Counsel for the assessee to state that reimbursement of expenses does not amount to income, is not applicable to the facts at hand as the Court therein was not concerned with the issue of FTS, but reimbursement of entertainment and travelling expenses.

76. Now, to decide the issue relatable is question (B) in ITA 753/2025, ITA 715/2025, ITA 424/2025 and ITA 760/ 2025 and (C) in ITA 715/2025 whether the ITAT was justified in holding that the receipts of the assessee from Indian clients for services rendered by it in and from the USA, fall within the meaning of Article 12(5)(e) of the India-USDTAA is concerned, it is necessary to reproduce the conclusions of the authorities for AY 2020-21 in ITA 715/2025. The directions of the DRP are as under:-

> *"4.3.5 The panel has carefully considered the submissions of the assessee and has also gone through the analysis and the observations of the AO in the DAO. Article 15(2) of the India US DTAA defines the term 'professional services' to include independent scientific, literary, artistic, educational or*

teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants. Hence, only those services which are enumerated in Article 15(2) qualify as professional services and consequently exempt under DTAA. The mere fact that the word 'includes' has been mentioned in Article 15(2) does not imply that services by every conceivable kind of professionals or skill/qualification holder can be bracketed within the specified category of professional services. More particularly, as observed by the AO, the services rendered by functionaries such as economist, MBA graduates, diploma holders and other trained technical professional do not fulfill the criteria of being a professional within the meaning of the term "professional services" under Article 15(2) of India US DTAA. The panel, therefore, is in agreement with the AO's observation that the quantum of receipts from Indian clients for services rendered in India which do not strictly qualify as professional services, cannot be claimed as exempt in terms Article 15 of India US DTAA. In the instant case, after examining the breakup of all the services claimed as exempt under Article 15, the AO has found that a sum of Rs. 29,89,50,386/- does not pertain to professional services and therefore, the criteria of exemption under Article 15 is not satisfied.

4.3.6 Nevertheless as observed by the AO in para 5.9 as well as in para 5.15, the receipts for services, other than professional services, i.e. Rs. 29,89,50,386/- are in respect of the services which are technical as well as consultancy in nature. Since, the services provided through other professionals (not strictly qualifying to be 'professional services' within the meaning of Article 15(2)), are technical in nature, Article 12 of India US DTAA, is attracted in the instant case. Further as evidenced by the service agreement, these services also include rendering training to the customers of the assessee which provides enduring benefits to the recipients of the service. Consequently, the "make available" criteria as laid down in Article 12 of the DTAA stands satisfied. In view of the above, the panel finds no ground to interfere with the

conclusions of the AO, and accordingly, the objections raised in Ground Number 3 are rejected.

4.3.7 In the DAO, the AO has mentioned that of the total sum of Rs. 1,03,63,94,946/-claimed as exempt under Article 15 of the DTAA receipts amounting to Rs.29,89,50,386/- do not pertain to professional services but fall within FTS under Article12 of India US DTAA. The AO is directed to spell out the breakup of the receipts claimed as exempt from professional services in the final order, so as to clearly distinguish the receipts as professional services from those categorized as FTS. Ground number 3 along with all sub grounds are accordingly disposed of."

77. The AO has passed the assessment order complying with the directions of the DRP.

78. However, the ITAT disagreed with the AO and in paragraphs no. 15 to 19 of the order for AY 2020-21, by stating as under:-

"15. We further find that the reason alluded by the DRP and the A.O. for holding that these receipts are taxable as Fees for Included Services under Article 12(4) and not Professional Services covered by Article 15(2) is that economists, engineers, MBA graduates, diploma holders and other trained technical personnel do not belong to a professional body which governs the profession, such as the Medical Council of India, Bar Council of India and Institute of Chartered Accountants of India. 16. It is relevant therefore to analyse the provisions of the DTAA for adjudicating the issue. Article 15(2) of the DTAA defines "professional services" as under-

> *"15.2 The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants."*
>
> *12.5 Notwithstanding paragraph 4,"fees for included*

services" does not include amounts paid :
*(a) ****
*(b)****
*(c) ****
*(d)****
(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).

We are of the opinion that definition of professional service in Article 15(2) do not provide an exhaustive definition of "professional services" but an inclusive one. The definition encompasses several categories which pertain to services which neither belong to nor are governed by any professional organization with disciplinary power and control such as scientists, literary persons, artists, teachers, engineers. We are therefore inclined to agree with the assessee that confining Article 15(2) to persons who are governed by a professional organization, would mean re-writing Article 15(2), which is not permissible.

17. We further find that the coordinate bench of ITAT in assesse's own case in ITA 3253/Del/2023 for A.Y. 2021-22 vide order dated 07.08.2024 after discussing the various provisions of DTAA such as Article 12 and 15 and the provisions in Income Tax Act defining the 'professional services such as section 194J and 44AA, had held that the said amounts are not FIS because the "make available" requirement of Article 12(4)(b) of the DTAA is not satisfied. The ITAT held as follows:

> *"25. We have also examined the qualifications of the engagement partners and principal responsible for engagement, we find that these consultants are having qualifications in business management business administration, masters of science and doctorate in economics or maths, commerce & finance.*
>
> *** *** ***

27. The assessee has given the party wise breakup of services rendered to India based clients from USA at page no. 161 to 165 of the paper book which was to the tune of Rs.65.20 Cr. which includes E&Y LLP, SR Batliboi & Company LLP, Honeywell International Inc. The details of the services extended have already been discussed at length above. On going through the services, we find that they cannot be said to be meeting the requirement "make of available "technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design" clause under Article 12(4)(b) of DTAA. Further, we have gone through the Article 12(5)(e) which states that the FIS does not include the amounts paid 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).

28. To conclude, the case of the assessee has been covered by the benefits of provisions of Article 12(4) (b) of DTAA as the "make available" criteria is not satisfied. The appeal of the assessee on this ground is allowed.

29. In the result, the appeal of the assessee is allowed.

18. We are further of the view that the term 'professional services' as defined in Article 15(2) of the DTAA are supported by the definitions in the Explanation (a) to section 194J which specifically refers to "engineering profession' and also to "profession of technical, consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or section 194J. These activities are thus regarded by the statute as professions though they have no governing professional body. We also find that the ITAT drew assistance from the notification dated 12/01/1977 S.O 18(E) and also the notification no 385(E) dated 4/5/2001 which include in the description of "professionals" all kinds of film personalities such as actors, directors, editors and singers etc and all

persons in the profession of information technology including persons practicing data entry and rendering all kinds of computer software and hardware services. Further, the notification dated 21/8/2008 includes in the term "professionals all sports persons such as coaches, referees, commentators and sports columnists. This Hon'ble Tribunal has thus treated all these persons as 'professionals' though none of them belong to any governing professional body.

19. In view of the discussion above, we are inclined to agree with the assessee that 'professional service' as defined in Article 15(2) of the DTAA cannot be circumcised by putting them as belonging to any governing professional body. We are therefore of the considered view that the assessee falls within the meaning of 12(5)(e)of the DTTA and hence benefit of Article 15 of the DTAA cannot be denied to it. Accordingly, we direct the AO to delete the addition on this count. The ground no 3 and its sub-ground is allowed."

79. The AO, in the assessment order pertaining to AY 2020-21dated 30.05.2023, after examining the scope of the deputation agreement and the scope of the work, returned a finding of fact that the services of the assessee are technical and in the nature of consultancy. As seen from the above, the ITAT in the orders for AY 2020-21 and AY 2021-22, has set aside the conclusion of the AO by stating that the "*make available*" test is not satisfied and further that the definition of "*professional services*" given in Article 15(2) is inclusive and not exhaustive, and the same cannot be circumscribed by including only those people belonging to any governing professional body.

80. In effect, the conclusion of the ITAT is based on two aspects:

(i) The services provided by the assessee do not satisfy the "*make available*" test;

(ii) The services of the assessee would fall under the ambit of professional services as defined in Article 15(2) of the DTAA.

81. Insofar as the issue of "*make available*" test is concerned, we note that the AO, in the assessment order dated 30.05.2023 for AY 2020-21, relevant part of which we have already reproduced in paragraph 50 of this order, had examined in detail the engagement letter of the services and their scope of including the provision for training to be rendered by EY US to the customer. The AO had also noted that training is to be imparted by EY US employees to the end-customer. In paragraph 50 of this order, we have already held that in terms of engagement letter, there is a transfer of technical knowledge, skill and experience in the provision of services by EY US to EY India entities. Similar is the case for provision of services rendered by the employees of EY US, for Indian clients, in and from the USA. The AO having given a detailed finding of fact after due examination of the engagement letter and the scope of services, the ITAT could not have set aside the said finding without sufficient reason. No justification has been provided by the ITAT to demonstrate why the reasons given in the assessment order by the AO are perverse and warranted interference.

82. Insofar as the second aspect is concerned, the ITAT held that the definition of "*professional services*" is inclusive and contemplates services other than those specifically mentioned in Article 15(2). However, it is to be noted that the ITAT has not delineated the actual services provided by the assessee to its Indian clients or discussed whether such services could be included in the definition. It merely noted the qualifications of the employees of the assessee and held that they would come within the ambit

of the definition of professional services provided under Article 15(2). The merit and effect of the finding of fact by the AO that the services are in the nature of technical services and consultancy have neither been discussed nor distinguished by the ITAT.

83. More importantly, we find that a crucial aspect has been overlooked by the ITAT, inasmuch as, the AO, while calculating the receipts from the Indian clients taxable as FTS, has already given the benefit of Article 12(5)(e) to certain services provided by the assessee. In the assessment order for AY 2020-21, the assessee had claimed exemption for receipts from Indian clients for services performed in and from the USA amounted to Rs.103,63,94,946/-. However, in the DAO, the AO had made an addition of only Rs.29,89,50,386/- as receipts to be taxed as FTS. Therefore, the remaining amount was exempt from tax under Article 12 of the DTAA on account of professional services. The DRP noting this, (*vide paragraph 4.3.7 of the directions for AY 2020-21, reproduced in paragraph 75 above)* directed the AO to spell out the breakup of the receipts claimed as exempt from professional services in the final order, so as to clearly distinguish the receipts from professional services as against those categorised as FTS. The AO, in the final assessment order, in compliance of the said direction, gave the following break-up:

Particulars	Amount (INR)	Remarks
Total amount of services rendered by categories of personnel (Economists, Engineers, MBA Graduates, diploma holders and other trained technical personnel) mentioned by your good self	36,46,27,627	

Services of various trained personnel which are governed by various professional bodies, as specifically required by your good self to fall within the definition of professional services	5,62,07,006 **(Refer Annexure IV)**	Specifically covered by various professional bodies such as Uniform Standards of Professional Appraisal Practice, Public Company Accounting Oversight Board, AICPA Code of Conduct, Human Resources Standards Institute etc.
Services of Engineer/ Independent Scientific activities (Masters in Biochemical Engineering and Biotechnology) and BSc (Computer Science)	94,70,235 **(Refer Annexure V)**	Specifically included in the definition of "professional services" as 'Engineers/ Independent Scientific activities' provided in the treaty.
Balance services	**29,89,50,386**	

84. As seen from the above, out of a total amount of Rs. 36,46,27,627/- received from services rendered by different categories of personnel mentioned by the assessee itself, Rs. 5,62,07,006/- and Rs. 94,70,235/- have been deducted on account of the fact that they were carried out by professionals as defined under Article 15(2) of the DTAA. The remaining amount was found be in the nature of technical and consultancy services falling within Article 12(4) of the DTAA.

85. Presumably, this means that for the professional services carried out by the assessee, the benefit under Article 12(5)(e) was allowed by the AO. What remained were the services which squarely fell outside the definition of "*professional services*" as provided by Article 15(2). This aspect should have been considered by the ITAT, before returning a blanket finding that all services of the assessee fall within Article 12(5)(e) of the DTAA. Another issue which also ought to have been examined by the ITAT is the

nature and scope of services, which remained and were retained by the AO as chargeable after the deductions were made under Article 12 of the DTAA, e.g. the amount being Rs.29,89,50,386/-. The ITAT ought to have examined the key differences regarding the services which have been charged as FTS in contrast to the nature of services which were found to be exempted. Having not done so, the order of the ITAT needs to be set aside.

86. The above findings pertains to the assessment orders in ITA 715/2025 concerning AY 2020-21 and whereas in ITA 424/2025 concerning AY 2021-22 the assessee had claimed exemption for receipts from Indian clients for services performed in and from the USA amounted to Rs.65,20,12,778/- and after the AO in the DAO deducted the exemptions due under Article 12 of the DTAA on account of professional services retained profession receipts to the tune of Rs.30,73,50,907/-. This procedure was also followed by the AO in ITA 753/2025for AY 2018-19 wherein the initial amount for services performed in and from the USA was to be tune of Rs.37,07,07,697/- , however, after the eligible deductions as per Article 12 of the DTTA retained the amount of Rs.3,72,22,932/- as professional receipts which amounted to FTS; and in ITA 760/2025for AY 2022-23 the amount of Rs.1,56,04,97,674/- was computed for professional services rendered in and from the USA, which after the deductions under the DTAA were reduced to Rs.97,78,94,279/-.

87. The ITAT for AY 2021-22 (ITA 424/2025) has given similar reasoning as given by it in the order for AY 2020-21 (ITA 715/2025) as reproduced above. While passing the composite order for AY 2018-19 (ITA 753/2025) and AY 2022-23(ITA 760/2025), the ITAT has simply followed

the order for AY 2020-21. If that be so, all the orders need to follow the same fate.

88. Though the Mr. Ganesh has relied on the judgment in the case of ***K. Ravindranathan Nair (supra)***, in view of the questions of law framed and the discussion above, it has no applicability.

89. In view of the discussion above, we set aside the impugned orders of the ITAT in all the appeals.

90. Consequently, question of law (A) in all the appeals is answered in favour of the Revenue and against the assessee. Question of law (B) in ITA 423/2024 is also answered in favour of the Revenue and against the assessee. The appeal being ITA 423/2025 is allowed.

91. Insofar as the question of law (B) in ITA 753/2025, ITA 715/2025, ITA 424/2025 and ITA 760/2025 and also question of law (C) in ITA 715/2025 are concerned, in view of our conclusion in paragraphs 76 to 87 above, we deem it appropriate to remand the issues back to the ITAT for reconsideration. The ITAT shall examine the issue afresh after considering the entire records and pass a reasoned order in view of our said observations.

92. The appeals are disposed of in the above terms.

V. KAMESWAR RAO, J

VINOD KUMAR, J

JUNE 18, 2026
sr/rk