IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU "C" BENCH, BENGALURU

Before Shri George George K., Judicial Member
and
Ms. Padmavathy S., Accountant Member

IT(IT)A No. 167/Bang/2021 - AY : 2010-11) **IT(IT)A No. 688/Bang/2022 - AY** : 2012-13)		
M/s. Google LLC *(formerly Google Inc.)* 1600, Amphitheatre Parkway Mountain View CA US 94043 PAN – AADCG7673B	vs	JCIT (OSD) (IT)/DCIT (IT) Circle 1(1), Bangalore BMTC Building, 80ft Road 6th Block, Koramangala Bangalore 560095
(Appellant)		(Respondent)

Assessee by:	Shri Percy Pardiwala, Sr. Advocate Shri Anmol Anand, Ms. Priya Tandon Mr. Mithal Reddy, Advocates
Revenue by:	Ms. Neera Malhotra, CIT-DR

Date of hearing:	17.02.2023
Date of pronouncement:	20.02.2023

O R D E R

Per: George George K., J.M.

These appeals at the instance of the assessee are directed against the two final assessment orders passed under Section 143(3) r.w.s. 147, r.w.s. 144C of the Income Tax Act, 1961 (the Act). The relevant assessment years are 2010-11 and 2012-13. Common issues are raised in these appeals, hence they were heard together and are being disposed off by this consolidated order.

2. The assessee in both the appeals had raised several grounds. However, the solitary issue argued by the learned Sr. Counsel is that the AO/DRP erred in taxing the reimbursements of salaries of expat employees made by Google India Pvt. Ltd. (GPIL) to the assessee by characterising such reimbursements

as fees for "technical services" (FTS) as per Explanation 2 to Section 9(1)(vii) of the Act as well as "Fees for Included services" (FIS) as per Article 12(4) of the DTAA between India and USA (India-US Tax Treaty).

3. The brief facts of the case are as follows: –

The assessee, Google LLC (hereinafter referred as "the assessee") is a foreign company incorporated in USA. For the assessment years 2010-11 and 2012-13 the AO issued notices under Section 148 of the Act. The reason for issue of notice under Section 148 of the Act was the assessee had received certain payments from GIPL and returns of income were not filed. During the course of reassessment proceedings the matter was referred to the Transfer Pricing Officer (TPO) to determine the arm's length price (ALP) of the payments received by the assessee. The TPO held that the international transactions with the Associated Enterprises (AE) were at ALP and hence no adjustment is required. However, the AO observed that the assessee company received payments from GIPL for seconding its employees to GIPL. The AO after analysing the arrangements between GIPL and the assessee, observed that *"when the transaction is analyzed in its totality, the arrangement between* ***Google India Private Limited (GIPL)*** *and the assessee is such that GIPL has required technical services from the assessee, which were to be provided through certain employees of the assessee, who were technical/managerial experts in their respective domains at a sufficiently higher level in the assessee' employee hierarchy. In a normal course of action this would amounted to be a service/contractual agreement between GIPL and the assessee. In such an arrangement, the assessee would have provided professional services to the GIPL against which GIPL would have made payments to the assessee.* ***Since, these services are technical and managerial in nature and also, they provide and impart a skill set to the concerned manpower of GIPL for execution of technical and managerial jobs, such an arrangement would have fallen under Indo-USA DTAA and covered as Fees***

for Included Services". The AO passed draft assessment order by bringing to tax a sum of Rs.20,63,50,635/- and a sum of Rs.39,48,22,872/- for assessment years 2010-11 and 2012-13, respectively. The AO strongly relied on the Hon'ble Delhi Court judgement in the case of Centrica India Offshore Pvt. Ltd. reported in (2014) 348 ITR 45. The conclusion of the AO in the draft assessment order (AY 10-11) reads as follow: -

> *"16.1 In the preceding paragraphs, the need for secondment, nature of services provided by seconded employees, employer-employee relationship and the taxability of the payments have been discussed elaborately and the following has been established;*
>
> 1. *There is no employer-employee relationship between GIPL and secondees seconded by assessee, rather the same continues to exists between Google LLC and such employees;*
> 2. *The services rendered/provided by the seconded employees are in the nature of technical, managerial, consultancy services.*
> 3. *The sums received by the assessee company for the previous year relevant to A.Y. 2010-11 are in the nature of Fees for Technical services under the section 9(1)(vii) of the Income Tax Act read with the article 12 of the Indi-USA DTAA."*

4. Aggrieved by the draft assessment order the assessee filed objections before the DRP. The objections of the assessee were disposed off on 16.03.2021 & 190.06.2022 for assessment years 2010-11 and 2012-13, respectively by rejecting all the contentions raised. Pursuant to the DRP directions the impugned final assessment orders were passed on 23.03.2021 and 08.07.2022 for assessment years 2010-11 and 2012-13, respectively.

5. Aggrieved by the final assessment orders the assessee has filed these appeals before the Tribunal. The assessee has filed two sets of paper books (serially numbered comprising of 776 pages) enclosing therein the contentions raised before the AO and the DRP, sample copies of the assignment letters issued by the assessee to its seconded employees, sample copies of Form 16 demonstrating tax has been deducted at source under Section 192 of the Act by GIPL on salaries of the seconded employees, etc. The learned Sr. Counsel

submitted that the issues raised are covered by the judgement of the Hon'ble Jurisdictional High Court in the case of Flipkart Internet (P.) Ltd. vs. DCIT reported in 488 ITE 268/139 taxmann.com 595/288 Taxman 699. The learned Sr. Counsel submitted that the above judgment has been followed by the coordinate bench of the Bangalore Tribunal in the case of Biesse Manufacturing Company (P.) Ltd. vs. ACIT reported in (2023) 146 taxmann.com 242 (Bang. Trib.) and Goldman Sachs Services (P.) Ltd. vs. DCIT reported in (2022) 138 taxmanann.com 162 (Bang. Trib.).

6. The learned D.R. supported the orders of the DO and the DRP.

7. We have heard the rival contentions and perused the material on record. The undisputed facts are that certain employees of the assessee were seconded to GIPL. For the purpose of secondment of employees, assessee had issued assignment letters to the seconded employees. Sample copies of the assignment letter between the assessee and the seconded employees are placed on record from pages 201 to 248 of the paper book (Vol. 1). The relevant portion of the above mentioned assignment letter is reproduced below for ready reference :

> *"Duties of Google India: You shall faithfully and diligently perform your duties in the capacities to which they are seconded and shall devote substantially all of your business time and attention to the business of India."*
>
> *"Standard o f Conduct:*
>
> *Google shall not be responsible for your work during your international secondment^ assignment or assume any risk for the results produced from your work while under secondment to Google India. During the period of your secondment, you will comply with the direction and control of Google India, including Google India's rules, procedures, working practices and policies except that the terms of this letter continue to govern your assignment with Google India. You will be subject to the day-to-day management and control of Prasad Ram of Google India, from whom you will take instructions.*

You are also expected to act at all times with appropriate respect for India and abide by the laws and regulations of India. Accordingly, you are required to maintain a standard of conduct that does not bring discredit upon yourself, your supervisions or upon Google India.

During the period of secondment, for administrative convenience, Google shall make payment towards your salary, bonus and all other eligible benefits as per terms agreed with you (on behalf of Google India) at the time of secondment.

Once you are seconded to Google India, Google shall not have the right to recall in the absence of Google India's request or consent."

"Termination of Secondment / Job upon return:

You should understand that nothing contained herein or in the Relocation Policy shall be considered to be a guarantee of employment for the estimated duration of this Assignment and/or upon return from the Assignment. Your employment at all times remains "at will" and may be terminated at any time by either you or Google as is set forth in your Offer Letter."

8. From the above clauses of the assignment letter following conclusions can be drawn:

"- The seconded employees should work only for Google India and not for Google LLC in any manner. Hence, the services provided by the seconded employees are solely for the benefit of Google India.

- *The employees were required to report to Google India and given that the seconded employees were working under the supervision and control solely of Google India being an employer, salary of such employees was ultimately incurred by Google India.*
- *From an administrative convenience standpoint, Google LLC had agreed to make payment for the salaries of such seconded employees in their overseas bank accounts on behalf of Google India and getting reimbursement of the same from Google India on a cost-to-cost basis.*
- *Google LLC shall not be responsible and shall not assume any risk for the work undertaken by the seconded employees for GIPL.*
- *Once seconded employees moved out of the US on secondment, he/she does not have employment guarantee upon return back to the US after the secondment period."*

9. Further the GIPL had duly deducted tax at source under Section 192 of the Act against salary and other allowances paid/payable to such seconded employees and deposited the same with the Government of India. This is evident from Form No. 16 issued by GIPL to its employees, which are placed on record (refer pages 102 to 107 and 113 to 121 of DPP paper book for AY 2010-11). Moreover, GIPL had obtained necessary registration for the said employees with Provident Fund and Foreigners Regional Registration Office and also made appropriate contributions towards social security benefits in India which forms part of their salary cost (evident from Form 16 of the employees that are placed on record). The assessee has also produced the visa stamped by the authorities concerned in the case of seconded employees wherein it is clearly shown as 'employment visa'. For the family members it is mere entry visa. In most of the cases the families of the seconded employees were in USA and due to convenience, salary of such employees were deposited in bank account of the employees in USA. When the salaries of such seconded employees are deposited in their bank accounts in USA, GIPL reimbursed the same to the assessee on cost to cost basis. The assessee has produced reconciliation of the amount payable in respect of expat employees vis-a-vis the salary and other perquisites, etc. paid to such employees (refer pages 180 & 181 of PB for AY 2010-11). But for a marginal difference on account of foreign exchange there is one to one reconciliation. Therefore in the real sense the payment made by GIPL to the assessee is nothing but reimbursement of cost relating to remuneration on certain employees who were seconded to GIPL from the assessee.

10. The AO in the draft assessment order has assumed that service agreement exist between assessee and GIPL for provision of services by assessee to GIPL. There is nothing on record to suggest that assumption of AO is correct. Moreover, the assessee has strongly denied the same. Based on factual background, it is clear that the seconded employees were working

solely under control and supervision of Google India (GIPL) and not on behalf of assessee during the period of secondment. The assessee's role was merely to facilitate payment of salary on behalf of Google India (GIPL), which was reimbursed by GIPL on actual. On identical facts, the Bangalore Bench of the Tribunal in the case of Biesse Manufacturing Company (P.) Ltd. by following the judgement of the Hon'ble Jurisdictional High Court in the case of Flipkart Internet (P.) Ltd. (supra) and the Bangalore Bench of the Tribunal in the case Goldman Sachs Services (P.) Ltd. (supra) had decided the issue in favour of the assessee. The contentions raised and the findings of the Tribunal in the assessee of Biesse Manufacturing Company (P.) Ltd. (supra) reads as follows: -

> *"17. During the course of assessment proceedings, the AO noticed that the assessee has made payment to M/s. Biesse Spa, Italy towards secondment of employees deputed to India during the year under consideration for an amount of Rs.1,39,07,427. The AO also noticed that no tax was deducted at source on these amounts paid to the AE and issued a show cause notice to the assessee as to why the amount should not be disallowed u/s. 40(a)(i). The assessee submitted that these were salaries paid to Italian employees working in India. The payment was made to the employees in Italy and the same was reimbursed by the assessee. The assessee also submitted that the seconded employees was under the payroll of the assessee and part of salary was paid in Italy for which the AE periodically raised invoice for reimbursement. The assessee also submitted that tax has been duly deducted u/s. 192B on the salary paid in India and in Italy and therefore no tax was liable to be deducted on the reimbursements made to the AE. The AO rejected the submissions of the assessee and proceeded to treat the payment as fees for technical services and held that the same was liable to be deducted at source u/s. 195 since the assessee has not deducted the tax, the AO disallowed the same.*
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> *18. With regard to reimbursement of expenses, the assessee submitted that expenditure on insurance expenses, travelling expenses which are reimbursed to AE in relation to the personnel who visited India for providing technical services. The AO disallowed an amount of Rs.55,33,442 paid as reimbursement to the AE for the reason that tax was not deducted at source. The DRP confirmed the addition.*
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> *19. Before us, the ld. AR submitted that the payments to AE are purely reimbursements and taxes u/s. 192B is duly deducted. In this regard, the ld. AR drew our attention to Form 16 of the seconded employee (pages 669 to 671 of PB) and the return of income of the seconded employee (pg. 676 to 691 of PB) to substantiate that the amount paid as salary to seconded employee has already suffered tax. The ld. AR further submitted that the amount paid is only reimbursement and therefore not liable to deduct tax at source. The ld. AR submitted that the Hon'ble Karnataka High Court in the case of Flipkart Internet Pvt. Ltd. v. DCIT (WP No.3619/2021) has considered the issue of TDS on reimbursement of salary cost of seconded employees in the context of issue of*

NIL TDS and directed that the certificate for NIL TDS be issued. It is therefore submitted that the issue under consideration being the applicability of TDS provisions on the reimbursement of salary cost of seconded employees is covered by the above decision of the jurisdictional High Court. The ld AR further relied on the decision of the coordinate bench of the Tribunal in the case of Goldman Sachs Services Pvt. Ltd. vs. DCIT [2022] 138 taxmann.com 162 (bang. – Trib.).

20. The ld DR relied on the order of the lower authorities.

21. We have heard the rival submissions and perused the material on record. We notice that the Hon'ble Karnataka High Court in the case of Flipkart Internet Pvt. Ltd (supra) while considering the issue of NIL TDS certificate towards reimbursement of salary cost held as follows:-

> *"33. In the present case, the stand taken on the material available is on the construction of legal position. As pointed out in the discussion earlier that the understanding of the legal position being erroneous, the only conclusion that could be arrived at is to allow the application.*
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> *34. Though the Revenue has raised numerous contentions that further information is required to record a detailed finding, such stand is taken up for the first time in the present proceedings A perusal of the file of the Department does not make out any instance where the Department had sought for further information which was not furnished On the contrary, the petitioner has made out detailed representation on the legal position and record does not reflect any requisition for further information remaining unanswered In fact, the Apex Court in GE India Technology Centre (P.) Ltd. (supra) has rightly observed at para-16 as follows:*
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> *"16. The fact that the Revenue has not obtained any information per se cannot be a ground to construe section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all..."*
>
> *35. Further, it must be noticed that the finding as regards deduction of tax at source under section 195 of the IT Act is tentative insofar as the Revenue is concerned Even if the Revenue orders that there was no obligation to make deduction under section 195, the question of liability of the recipient still remains to be decided subsequently Accordingly, the question of prejudice to the Revenue at the stage of section 195 order is unavailable to it*
>
> *36. Curiously, the file contains a note by the same DCIT who has eventually passed the impugned order, which note dated 10.03.2020 addressed to the CIT seeks for granting approval for granting deduction of TDS at the rate of zero per cent on cost-to-cost reimbursement However, the opinion was directed to be reconsidered as per the endorsement found in the file and eventually an order was passed by DCIT contrary to the earlier view and has rejected the application*
>
> *37. Accordingly, the findings in the impugned order and the conclusion regarding the employer-employee relationship is based on a wrong premise and is liable to be set aside As observed by this Court in DIT (International Taxation) v. Abbey Business Services India (P.) Ltd. [2020] 122 taxmann.com 174 (Kar.), "it is also pertinent to note that the Secondment Agreement constitutes an independent contract of services in respect of*

employment with assessee" Hence, the DCIT in the impugned order has missed this aspect of the matter and has proceeded to consider the aspect of rendering of service as to whether it was 'FIS'

38. In light of setting aside of the impugned order in the context of legal position as noticed, the only order that can now be passed is of one granting 'nil tax deduction at source'.

39. Accordingly, in light of the above discussion, the impugned order at Annexure-A dated 1-5-2020 is set aside and the respondent No.1 is directed to issue a Certificate under section 195(2) of IT. Act to the effect of 'Nil Tax education at Source' as regards the petitioner's application dated 15-1-2020."

22. We also notice that the coordinate bench of the Tribunal in the case Goldman Sachs Services Pvt. Ltd.(supra) has considered a similar issued and held that –

"26.9. Admittedly, the assessee deducted tax at source u/s.192 of the Act, on the 100% salary paid to the seconded employees, and paid the same to the credit of the Central Government. The assessee only reimbursed part of the salary cost of the seconded employee to overseas entity that has already subjected to TDS under section 192 of the Act. And therefore, at the time of making such reimbursement, to overseas entity, no taxes were deducted at source by the assessee in respect of reimbursements made as, according to the assessee, it was in the nature of cost-to-cost reimbursement, and, no element of income was involved.

26.10. The assessee in India does the TDS on 100% salaries u/s 192 and pay the same to the credit of the Central Government. Form 16 at page 228- 230 issued to Christopher Roberts of PB Vol I, by the assessee in Indian, Certificate under section 203 of TDS having deducted at source and further indicates the following –

• Employee has a PAN number in India

• Total taxable salary is Rs 9,761,581 (this corresponds to the US$ 130,000 as total compensation indicated in the local employment contract at para 4

• The Indian company does full TDS on 100% of the salaries, although 25% is paid in India and balance 75% outside India

• TDS done is Rs 2,834,300/-, which translates to 30.8% of Rs 9,761,58

• Employee also contributes to Indian provident fund Rs.2,57,885/-

26.11. From conjoint reading of Article 15 of the OECD Model Convention and the articled referred to herein above, there is no doubt in our minds that the assessee in India is the economic and de facto employer of the seconded employees. It is an admitted fact that all the seconded employees are in India for more that 183 days in a 12 month period. Further all the seconded employees have PAN card as well as file their returns in India in respect of the 100 % salary, though the assessee pays only part of the salary in India.

26.12. The definition of FTS under the Act is given in Explanation 2 to Sec.9(1)(vii) of the Act that reads as follows:-

"Income deemed to accrue or arise in India.

9.(1) The following incomes shall be deemed to accrue or arise in India:-

*(i) to (vi) ***

(vii) income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

***Provided** that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.*

Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

26.13. The definition of FTS under the Act excludes "consideration which would be income of the recipient chargeable under the head salaries." If the seconded employee is regarded as employee of the assessee in India, then the reimbursement to overseas entity, by the assessee in India would not be in the nature of FTS, but would be in the nature of 'salary', and therefore, the reimbursements cannot be chargeable to tax in the hands of overseas entity, and therefore there would be no obligation to deduct tax at source at the time of making payment u/s.195 of the Act.

26.14. Article 12(4)-(5) of India USA, DTAA deals with "Fees for technical services', as under:

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

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

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

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

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

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

(c) for teaching in or by educational institutions;

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

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

27. Rendering of managerial, technical and consultancy services is governed by Article 12 on 'Fees for included services' of the Double Tax Avoidance Agreement, between India and US. Payments made to 'individual or firm of individuals for service rendered by them in independent professional capacity are specifically excluded since they are covered by Article 15 on Independent Personal Services. Likewise, Article 12 specifically excludes payments made towards services rendered by an 'employee' of the enterprise since services rendered under employment are covered by Article 16 on Dependent Personal Services.

28. The relevant portion of para 5(e) of Article 12 of the DTAA between India and US reads as follows: -

"Fees for included services does not include payments made - to an 'employee' of the person making the payment or - to any individual or firm of individuals (other than a company) for professional services as defined in article 15 (Independent Personal Services).

The payments made by the Indian entity to the overseas entity is towards reimbursement of salary paid by the overseas entity to the seconded personnel. As discussed in para 14.2 to 14.7 above, for the purpose of Article 15 of the OECD Model Commentary (corresponding to Article 16 of the DTAA between India and US), the seconded personnel are employees of the Indian entity, being the economic employer. It is to be noted that the understanding as to who is the 'employee' in order to be excluded from, "fees for technical services", cannot be inconsistent with the understanding of employee for the purpose of Article 15 on income from employment, especially when Article 15 is an anti-abuse provision.

29. The Ld. DCIT placed reliance on the decision of the Hon'ble Delhi High Court in the case of Centrica India Offshore Pvt. Ltd. reported (2014) 44 taxmann.com 300 concluded that the reimbursement was FTS and that services provided make available technical skill or knowledge for use by the assessee.

29.1. In case of the decision of Hon'ble Delhi High Court in the case of Centrica India Offshore Pvt.Ltd vs. CIT(supra) dealt with identical case of reimbursement of salaries paid to expatriate employees. The Hon'ble Court held that, overseas entities had, through seconded employees, undoubtedly provided 'technical' services to Centrica India and that, the expression rendering technical services expressly includes provision of services of personnel. The Hon'ble Court held that the Seconded employees, were provided by overseas entities and work conducted by them thus, i.e., assistance in conducting business of assessee of quality control and management was through overseas entities. The Hon'ble Court also held that, mere fact that secondment agreement, phrases payment made by Centrica India to overseas entity as 'reimbursement' could not be determinative. It was also held that, the fact that overseas entity did not charge mark-up over and above costs of maintaining secondee could not negate nature of transaction.

29.2 Hon'ble Pune Tribunal in case of M/s.Faurecia Automative Holding (supra) has observed as under:

"4.10. We have gone through the facts of the case obtaining in Centrica India (supra). The assessee therein contended that payment to foreign party towards seconded employees was only reimbursement and hence, no income was chargeable to tax in its hands. The Authority for Advance Ruling (AAR) held that payment made by the petitioner to the overseas entity was in the nature of income in view of the existence of Service Permanent establishment (PE) in India and hence liable for tax withholding. Overturning the view of the AAR that Service PE was constituted, the Hon'ble High Court held that the payment to AE was in the nature of `fees for technical services' and not reimbursement of expenses and further laid down that the nomenclature of reimbursement was not decisive. It noted that: 'Money paid by assessee to overseas entity accrues to overseas entity, which may or may not apply it for payment to secondees, based on its contractual relationship with them.' It is perceptible that in that case money paid by the Indian entity accrued to overseas entities only, which could or could not have been paid to the secondees depending upon the terms of contract. Per contra, we are confronted with a situation wherein the money never accrued to the assessee. It initially paid money to Mr. Franck in advance and then M/s.Faurecia Automotive Holding recovered the same from the Indian entity without any mark-up. There can be no question of the assessee receiving money in its own independent right. Rather, it is a case of discharge by the Indian entity of its own liability towards salary payable to Mr. Franck. It is thus manifest that this decision has no application to the facts of the instant case."

29.3 We also note that, reliance is placed on the decision of Hon'ble Madras High Court in case of Verizon Data Services India (P) Ltd. v. AAR and Ors(supra), wherein it is held that, the reimbursement of salary of expatriates to foreign co by Indian company results in taxable income in the hands of the foreign company. Hon'ble High Court also upheld the observations of AAR, wherein it characterized the secondment of personnel as provision of managerial services. However, the Hon'be Court set aside the ruling of Hon'ble AAR, wherein it held that, the reimbursement of salary of expatriates constitutes fees for included services in terms of Article 12(4)

of India USA DTAA. Therefore, reliance placed on this decision is of no assistance to revenue.

29.4 There is another decision of Hon'ble Supreme Court in case of DIT v. Morgan Stanley reported in (2007) 162 Taxman 165, wherein, it is held that, in case of deputation, the entity to whom the employees have been deputed cannot be regarded as employer of such employees as the employees continue to have lien on his employment with the entity which deputes him. Entity seconding the employee is the employer as it retained the right over seconded employee is also held by Hon'ble AAR in case of AT & S India Pvt Ltd., reported in 287 ITR 421.

29.5 The observations of the Hon'ble Supreme Court in the case of Morgan Stanley (supra) were in the context of existence of service PE. This is clear from a reading of the relevant portion of the judgment of the Hon'ble Supreme Court, which is as follows:-

"As regards the question of deputation, an employee of MSCo when deputed to MSAS does not become an employee of MSAS. IT(TP)A No.338/Bang/2021 Page 22 of 32 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. The concept of a service PE finds place in the UN Convention. It is constituted if the multinational enterprise renders services through its employees in India provided the services are rendered for a specified period. In this case, it extends to two years on the request of MSAS. It is important to note that where the activities of the multinational enterprise entail 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. Applying the above tests to the facts of this case, it is found that on request/requisition from MSAS the applicant deputes its staff. The request comes from MSAS depending upon its requirement. Generally, occasions do arise when MSAS needs the expertise of the staff of MSCo. In such circumstances, generally, MSAS makes a request to MSCo. A 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 art 5(2)(l). There is no infirmity in the ruling of the AAR 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)."

29.6 Per contra, in the present facts of the case there is no finding, of their existing PE, in any form by the revenue and therefore is of no assistance to the revenue.

29.7 As far as the decision of Hon'ble AAR in the case of AT & S (supra) is concerned, the facts of the said case were that AT&S, a company incorporated in Austria, offered services of technical experts to applicant, a IT(TP)A No.338/Bang/2021 Page 23 of 32 resident company, pursuant to a foreign collaboration agreement on the terms and conditions contained in

secondment agreement. Under the secondment agreement the applicant is required to compensate AT&S for all costs directly or indirectly arising from the secondment of the personnel, and the compensation is not limited to salary, bonus, benefits, personal travel, etc. but also includes other items. On the above facts, Hon'ble AAR ruled that the Contention that the payments are only in the nature of reimbursement of actual expenditure is not supported by any evidence and there is no material to show what actual expenditure was incurred by AT&S and what was claimed as reimbursement. A part of the salary of seconded personnel is paid by the applicant in Indian rupees and the remaining part is paid by the applicant to AT&S in Euro. While working with the applicant, the seconded personnel are required to comply with the regulations of the applicant, but they would go back to the AT&S on the expiry of assignment. Aforesaid terms and conditions show that the seconded personnel in effect continue to be employees of AT&S. Recipient of the compensation is AT&S and not the seconded employees. Further contention was that AT&S is not engaged in the business of providing technical services in the ordinary course of its business is also not tenable. Therefore, payments made to AT&S by the applicant are for rendering "services of technical or other personnel" and are in the nature of fees for technical services within the meaning of Explanation 2 to sub clause (vii) of section 9(1) and Article 12(4) of the relevant DTAA and are subject to deduction of tax at source under section195.

30.1 The ruling of Hon'ble AAR is on the factual finding that payments were not only reimbursement of actual salary, bonus etc., but was also included other sums.

30.2 Per contra in the present facts of the case, it is not at all the contention of the revenue that, something over and above what was paid as salary, bonus etc.

30.3 Liability under section 195 to deduct tax at source when making payment to a non-resident arises, only if, sum paid is chargeable to tax in India. Payment of salaries is not covered under section 195. Thus, it is necessary to take into consideration following aspect to determine Payments to enterprise seconding employees, the Indian entity has an obligation to deduct tax source u/s 195:

(i) Payment of fees by an enterprise (Indian entity) to foreign entity for seconding employees;

(ii) Reimbursement of salaries to the entity seconding the employees (foreign entity) from the entity to whom employees have been seconded (Indian entity).

31. Payment for supplying skilled manpower cannot be regarded as payment towards managerial, technical and consultancy services as per dictionary meanings of these terms. Hon'ble AAR in Cholamandalam MS General Insurance Co. Ltd., reported in 309 ITR 356, took the view that, merely supplying technical, managerial or personnel with managerial skills cannot be regarded as rendering technical services by the person supply such personnel. The following were the relevant observations of Hon'ble AAR:-

"It is debatable whether the bracketted words - "including provision of services of technical or other personnel" is independent of preceding

terminology - "managerial, technical or consultancy services" or whether the bracketted words are to be regarded as integral part of managerial, technical or consultancy services undertaken by the payee of fee. In other words, is the bracketted clause a stand alone provision or is it inextricably connected with the said services? HMFICL itself does not render any service of the nature of managerial, technical or consultancy to the applicant and it has not deputed its employee to carry out such services on its behalf. There is no agreement for rendering such services. In this factual situation, it is possible to contend that merely providing the service of a technical person for a specified period in mutual business interest not as a part of technical or consultancy service package but independent of it, does not fall within the ambit of S.9(1)(vii)."

32. Hon'ble Bombay High Court in case of Marks & Spencer Reliance India Pvt.Ltd. VS. DIT reported in (2013) 38 taxmann.cm 190, upheld the view of Hon'ble Mumbai Tribunal which held that, payment towards reimbursement of salary expenditure without any element of profit, would not be taxable under the provisions of the Act. Hon'ble Court also held that, when the entire salary has been subjected to tax in India at the highest average tax rate, the assessee could not held to be in default for not without tax under the provisions of the Act.

33. Hon'ble Delhi High Court in the case of DIT Vs. HCL Infosystems Ltd. reported in (2005) 144 Taxmann 492 (Delhi) upheld the order of Hon'ble Delhi Tribunal which held that, when an Indian company had already deducted and remitted taxes under Sec.192 of the Act on salaries paid abroad to the technical personnel and when such salary is reimbursed on a cost to cost basis without any profit element, the provisions of Sec.195 of the Act cannot be applied to reimbursement of salaries made to foreign company, once again.

34. Coordinate bench of this Tribunal in case of IDS Software Solutions v. ITO reported in (2009) 32 SOT 25, Abbey Business Services (P.) Ltd v. DCIT reported in (2012) 23 taxmann.com 346, took the view that expats are deputed to work under the control and supervision of the Indian company and that the oversees entity is not responsible for the actions of the expatriate employees. Thus, oversees entity does not render any technical service to the Indian company, since such payment are towards reimbursement of salary cost borne by oversees entity, and that, no income can be said to accrue to oversees entity in India. The decision of this Tribunal in case of Abbey(supra) has been upheld by Hon'ble Karnataka High Court in DIT vs. Abbey Business Services India (P.)Ltd., reported in (2020) 122 taxmann.com 174.

35. Hon'ble Ahmedabad Tribunal in the case of Burt Hill Designs (P) Ltd. vs. DDIT(IT) (2017) 79 taxmann.com 459, on identical facts, as in the case of the present assessee before us, took the view that, there was no liability to deduct tax at source u/s.195 when payments were made by way of reimbursement.

Based on the above detailed analysis of various contrary decisions on the issue, we are of the view that the decisions relied by revenue are distinguishable with the present facts of the case.

Further, in the present facts we note that, the concept of make-available is not satisfied in the instant case. As per para 4(b) of Article 12 of the India-US DTAA on 'Royalties and fees for included services':

"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 & 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."

Thus, even if, the rendering of service by the seconded personnel constitutes a contract for service, in the absence of making available any technical knowledge or skill to the Indian entity, the same shall not constitute fees for technical services.

In support we refer to the decision of Hon'ble Karnataka High Court in the case of CIT vs. De Beers India Minerals Pvt. Ltd. reported in (2012) 21 taxmann.com 214, on the concept of 'make available', observed and held as under:

"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.

36. The Ld.AR has placed before this Tribunal a decision rendered by Hon'ble CESTAT, Bangalore, wherein the Hon'ble CESTAT was deciding, whether the assessee in India, was required to pay service tax demand (on reverse charge basis) on the secondment reimbursements, on the basis that the same amounts to "manpower recruitment & supply agency services",

placed at page 66-86. The Hon'ble CESTAT, Bangalore, held that employer-employee relationship exist between the seconded employee and the assessee in India in para 14 of the order passed by Hon'ble CESTAT, Bangalore. The Hon'ble CESTAT, Bangalore, further held that, there is no manpower supply services since assessee in India is the real employer by reason of the employment contract. Service tax demand was deleted.

The relevant extracts are below –

6. Submitting on the demand of Service Tax under the category "Manpower Recruitment & Supply Agency Service", the learned counsel states that the employer-employee relationship exists between the Appellant and Seconded Personnel who have been sent on secondment to the Appellant; the Appellant has entered into separate employment contract with the Seconded Personnel. The seconded Personnel, during the period of secondment, work under the control and supervision of the Appellant; In terms of the employment contract, the appellant is under obligation to pay salary (including other entitlements) to the Seconded Personnel during the period of secondment in foreign exchange in his home country; for administrative convenience, the Appellant remits the salary payable to the Seconded Personnel in his home country in Foreign Exchange through the Seconder Company; the Seconded Personnel, as required under the Income Tax Act, 1961, files their respective returns under Section 139 of Income Tax Act, 1961 and shows the entire salary paid by the Appellant (including part of the salary paid in Foreign Exchange) as his/her income as salaries and pays the income tax thereon…..

14. Coming to the third issue of payment of salary, allowances and expenses of the personnel drawn from different global entities to work with the appellant, we find that learned Counsel submits that the employer-employee relationship exists between the Appellant and Seconded Personnel who have been sent on secondment to the Appellant; the Appellant has entered into separate employment contract with the Seconded Personnel. The seconded Personnel, during the period of secondment, work under the control and supervision of the Appellant; In terms of the employment contract, the appellant is under obligation to pay salary (including other entitlements) to the Seconded Personnel during the period of secondment in foreign exchange in his home country; for administrative convenience, the Appellant remits the salary payable to the Seconded Personnel in his home country in Foreign Exchange through the Seconder Company; the Seconded Personnel, as required under the Income Tax Act, 1961. We find that the issue is no longer res integra and is covered by decision of Volkswagen India Pvt. Ltd. Vs CCE, Pune-I, 2014 (34) STR 135 (Tri. Mumbai) [maintained by Apex Court in 2016 (42) S.T.R. J145 (S.C.)] wherein it was held that:

5.1 In view of the clauses of agreements noticed herein above and other facts, we hold that the global employees working under the appellant are working as their employees and having employee employer relationship. It is further held that there is no supply of manpower service rendered to the appellant by the foreign/holding company. The method of disbursement of salary cannot determine the nature of transaction.

15. The learned Counsel for the appellants submits that the Department was fully aware of the facts when the SCN dated 27.10.2009 was issued and therefore no suppression of facts with an intent to evade payment of duty can be alleged in the subsequent SCN dated 15.04.2013. He relies upon Nizam Sugar Factory case (supra). We find that the argument is acceptable and for this reason, the second SCN is liable to be set aside ab initio…..

16. In view of the above, Appeal No. ST/25566/2013 & Appeal No. ST/21705/2016 are allowed.

Thus, the above decision of Hon'ble CESTST Tribunal further strengthens assessee's case. We therefore, hold that, the amount reimbursed by the assessee to the overseas entity cannot be subjected to tax in India as there does not involve any element of income embedded in it.

37. Respectfully following the above views expressed by Hon'ble Karnataka High Court in DIT vs. Abbey Business Services India (P.)Ltd.(supra), Hon'ble AAR in Cholamandalam MS General Insurance Co. Ltd. (supra), Hon'ble Bombay High Court in case of Marks & Spencer Reliance India Pvt. Ltd. vs. DIT (supra), Hon'ble Delhi High Court in the case of DIT Vs. HCL Infosystems Ltd. (supra), Coordinate bench of this Tribunal in case of IDS Software Solutions vs. ITO (supra), Hon'ble Pune Tribunal in case of M/s.Faurecia Automative Holding(supra), Hon'ble Ahmedabad Tribunal in the case of Burt Hill Designs (P) Ltd. vs. DDIT(IT) (supra), we are of the view that the reimbursement made by the assessee in India to overseas entity, towards the seconded employees cannot be regarded as "Fee For technical Services"

Once there is no violation of provision of section 195, assessee cannot be held to be an assessee in default under section 201(1) of the Act for all the years under consideration. We therefore direct the Ld.AO to delete the interest levied under section 201(1A) of the Act for all the years under consideration."

23. In assessee's case on perusal of records it is noticed that the seconded employee is in the payroll of the assessee and tax has duly been deducted on the salary paid to the employee including what is paid in Italy. It is also noticed that the reimbursement has also been taken into account for the purpose of TDS u/s.192B. We further notice that the reimbursement of expenses towards insurance, travelling expenses of the visiting employees is a cost to cost reimbursement with no element of income. Therefore, respectfully following the ratio laid down by the Hon'ble Karnataka High Court and also the decision of the coordinate bench of the Tribunal we hold that the reimbursement towards secondment charges and reimbursement of expenses are not liable for tax deduction u/s. 195 and therefore the disallowance made u/s. 40(a)(i) is not warranted on this count."

11. In light of the judgement of Hon'ble Jurisdictional High Court in the case Flipkart Internet (P.) Ltd. which was followed by the coordinate bench order of Bangalore Tribunal in the case Biesse Manufacturing Company (P.) Ltd. (supra) we hold that the amounts paid by GIPL to the assessee with

reference to seconded employees does not come within the 'FTS' or 'FIS' under the Act or under DTAA. It is ordered accordingly.

12. In the result, the appeals filed by the assessee are partly allowed.

Dictated and pronounced in the open Court on 20th February, 2023.

Sd/-	Sd/-
(Padmavathy S.)	**(George George K.)**
Accountant Member	**Judicial Member**

Bengaluru, Dated: 20th February, 2023

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2. *The Respondent*
3. *The CIT(A) -DRP*
4. *The CIT -*
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By Order

//True Copy//

Assistant Registrar
ITAT, Bengaluru

n.p.