INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE
SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 7683/Del/2017
Asstt. Year: 2014-15
&
ITA No. 6007/Del/2018
Asstt. Year: 2015-16

Michael Graves Design Group Inc. 341, Nassau Street, Princeton, New Jersey – 08540 United States of America	Vs.	DCIT, Circle 2(2)(1) Delhi. (Intl. Tax)
(Appellant)		(Respondent)

Assessee by:	Shri Niraj Seth, Advocate & Ms. Bansi Patel, CA
Department by:	Shri Sanjay Kumar, Sr. DR
Date of Hearing:	25.04.2023
Date of pronouncement:	18.07.2023

O R D E R

PER ASTHA CHANDRA, JM

The appeals filed by the assessee are directed against the orders dated 11.10.2017 and 27.07.2018 of the Ld. Assessing Officer **("AO")** passed under section 143(3) r.w.s.144C(13) of the Income Tax Act, 1961 **(the "Act")** pertaining to Assessment Year **("AY")** 2014-15 and AY 2015-16 respectively. Since the issue involved in both the appeals is common, the same were heard together and are being disposed of by this common order.

2. The assessee has raised the following grounds of appeal:-

AY 2014-15

"1. The Assessing Officer ('AO')/Dispute Resolution Panel ('DRP') grossly erred in holding Rs. 4,67,60,000/- to be Fees for included services ('FIS') under Article 12(4)(b) of the India-US DTAA."

AY 2015-16

"1. The Assessing Officer ('AO')/Dispute Resolution Panel ('DRP') grossly erred in holding Rs. 57,12,000/- to be Fees for included services ('FIS') under Article 12(4)(b) of the India-US DTAA."

3. Assessee has also raised an additional ground vide its application for admission of additional ground dated 12th December, 2022 as under:-

"1. WITHOUT PREJUDICE TO THE OTHER GROUNDS OF APPEAL.

a. The Learned Deputy. Commr. of Income Tax (IT) 2 (2) (1), Delhi (AO) erred in computing tax on the assessed Income @ 20% including applicable surcharge and education cess.

b. The appellant respectfully submits that having regard to the provisions of section 115A, the tax rate on the income in the nature of 'fees for technical services shall be 10% as may be increased by the amount of surcharge and education cess.

C. The appellant respectfully submits that the amount of tax computed by the Learned DCIT should be rectified accordingly.

2. The assessee prays for appropriate relief.

3. The assessee craves leave to add, alter or amend the grounds of appeal at the time of hearing."

4. The Ld. AR submitted that the above additional ground is purely a legal ground and all necessary facts are already on record. The plea raised in the additional ground was raised before lower authorities. However, inadvertently the said ground was omitted to be taken in the original grounds of appeal filed before the Tribunal. The said omission was noticed

by the assessee while preparing for the appeal and hence it has now been raised. The Ld. DR had no objection to the admittance of additional ground.

5. We have heard the Ld. Representative of the parties and carefully considered their respective submissions. We are conscious that the judicial consensus is that the Tribunal has to exercise its power vested in it under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 by applying its judicial mind as the said power is given with a view to doing substantial justice between the parties. Hon'ble Bombay High Court in its Full Bench decision in Ashok Vardhan Birla vs. CWT 208 ITR 958 (Bom) (FB) has held that the powers of the Tribunal are similar to those of the assessee. The Tribunal can permit additional grounds to be raised. In National Thermal Power Co. Ltd. vs. CIT 229 ITR 383 (SC) the Hon'ble Supreme Court observed that a question of law arising out of facts found by the authorities and which goes at the root of the jurisdiction can be raised for the first time before the Tribunal. Following the principle of law enunciated in the decisions (supra) we have admitted the additional ground taken by the assessee before us.

6. Briefly stated, the facts are that the assessee is a privately held multi-faceted and multi-discipline firm headquartered in Princeton, New Jersey, USA. The firm provides design services for its clients all over the world including India. The assessee is a tax resident in USA. During AYs 2014-15 and 2015-16 the assessee provided certain specified services to one of its clients in India, AOP (formed by Turner Project Management India Pvt. Ltd., Meinhardt India Pvt. Ltd., Michael Graves & Associates Inc.) under an agreement executed on 19.08.2013. The assessee received Rs. 4,67,60,000/- in AY 2014-15 and Rs. 57,12,000/- in AY 2015-16 in consideration of rendering services to AOP. The scope of services contained in the agreement between the assessee and AOP is as under:-

NO.	*ACTIVITY*
A.	***PRE-DESIGN PHASE / ADMISTRATION***
A.l	Assist SVPRET in selecting Master Planner, upon request, and manage The Master Planner Consultant.
A.4	Assist in the preparation of the Project Management Plan (PMP)
A.7	Assist in the preparation of Monthly Executive Report . ^
B.	***CONCEPT DESIGN PHASE (Preceding Selection of EPC Contractor)***
B.l	***Prepare and finalize preliminary site planning & architectural designs,*** ***Prepare drawings & specifications to the concept stage, which will form the base for the detailed designs & engineering to be given, followed and further developed by the EPC contractor.***
B.3	Manage, Coordinate & Monitor progress of the Concept Designs, Including design progress meetings as required.

C.	***PROCUREMENT PHASE***
C.1	*Manage selection of EPC Contractor*
a .	*Assist in soliciting interest, Pre-Qualify and Short List of EPC Contractors from tender*
b .	*Assist in preparation of Scope of Works for EPC Contractors*

6.1 For the AY 2014-15 and AY 2015-16 the assessee filed its return of income on 31.03.2016 and 07.03.2017 respectively declaring total income at Rs. Nil. The assessee's case for both the AYs 2014-15 and 2015-16 were selected for scrutiny and statutory notices along with questionnaire were issued and served upon. In response thereto, the assessee filed the requisite information and explanation through e-mail which were examined and placed on record.

6.2 During assessment proceedings, the assessee was asked to show cause why in view of the Article 12(4) of the India-USA DTAA, the consideration received for services rendered by the assessee should not be treated as income from Fees from Included services in view of the fact that the agreement entered into by the assessee and the AOP with respect to the providing of services very clearly bring out the fact that the services provided by the assessee is of purely technical nature and that it makes available the technology, the skill, the experience to the parties i.e. the members of the AOP. The assessee filed its reply to the show cause notice contending that the 'make available' clause is not satisfied and therefore income of the assessee from the services rendered by the assessee to the AOP should not be treated as FIS in terms of Article 12(4)(b) of the India-USA DTAA as well as MOU between India and USA. The contentions of the assessee were considered but not found tenable by the Ld. Assessing Officer **("AO")** who concluded that the assistance provided by the assessee makes available the technology to the clients and thus consideration received by the assessee is to be treated as FIS for the reasons recorded by him in para 3.2 to 3.5 of his draft assessment order dated 26.12.2016 for AY 2014-15 and 07.12.2017 for AY 2015-16. For the sake of clarity, the findings of the Ld. AO are reproduced below:-

> *"3.2 The assessee has also relied on the Memorandum of Understanding signed between government of India and U.S.A to elaborate on the ^make available clause, which is reproduced as below:*
>
> > *"Attention is also invited to the Memorandum of Understanding signed between Government of India and United State of America wherein the concept of make available clause has been further elaborated. Relevant paragraphs as well as the example relevant to this matter are re-produced below:*
> >
> > ***Article 12: Royalties and Fees for Included Services***
> >
> > ***Paragraph 4(b)**: Paragraph 4(b) of Article 12 refers to technical or consultancy services that make available to the person acquiring the service technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design to such person. (For this purpose, the person acquiring*

the service shall be deemed to include an agent, nominee, or transferee of such person.) This category is narrower than the category described in paragraph 4(a) because it excludes any service that does not make technology available to the person acquiring the service. ***Generally speaking, 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 may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc. are 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 perse be considered to make the technology available.*
Typical categories of services that generally involve either the development and transfer of technical plans or technical designs, or making technology available as described in paragraph 4(b), include:

(1) engineering services (including the subcategories of bioengineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical, metallurgical, and industrial engineering);
(2) architectural services; and
(3) computer software development.

Under paragraph 4(b), technical and consultancy services could make technology available in a variety of settings, activities and industries. Such services may, for example, relate to any of the following areas:

(1) bio-technical services;
(2) food processing;
(3) environmental and ecological services;
(4) communication through satellite or otherwise;
(5) energy conservation;
(6) exploration or exploitation of mineral oil or natural gas;
(7) geological surveys;
(8) scientific services; and
(9) technical training ....."

3.3 The contention of the assessee that the services provided by it do not fall under the make available clause are not acceptable in view of the provisions of the treaty and also in view of further clarifications by way of Moll between India and US. The MoU very clearly states that the services which are in the nature of Architectural services are to be treated as included services as they make available the technology. The relevant portion of the MoU is as follows:

> *"Typical categories of services that generally involve either the development and transfer of technical plans or technical designs,*

or making technology available as described in paragraph 4(b), include:

(1) engineering services (including the subcategories of bioengineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical, metallurgical, and industrial engineering);
(2) ***architectural services:*** *and*
(3) computer software development."

3.4 The perusal of the agreement between the assessee and the AOP, clearly, shows that the assessee provides services in the form of drawings, designs, Master plans which are purely technical and architectural in nature. The agreement also mentions that the assessee has assisted in selecting the master planner, assisted in preparation of the project management plan (PMP), has also assisted in procurement phase by preparing documents participating in post tender meetings, and preparing architectural drawings and specification for EPC contract tender. These drawings, designs etc. cannot be made by a layman and requires specific technical knowledge and that is why they qualify as technical services. Further, these drawings and designs when passed on to the client for use by them in the specific project as agreed by the assessee and the client, may also be used in future by the clients in some other project of theirs which is of a similar nature and where a similar kind of designs and drawings etc. are required making it fully covered under the 'make available' clause.

3.5 The assistance provided by the assessee as mentioned above also "makes available" the technology to the clients. The agreement does not bar the clients to use the drawings, designs etc. in future in any other project. The clients who have obtained those drawings or designs are made available the technology required for making similar kind of statues as is being done by the clients in the agreement entered into by the assessee. There cannot be any argument regarding the nature of services provided by the assessee which are architectural in nature and thus squarely covered under the services, consideration from which is to be treated as 'Fees from Included Services'.

6.3 The assessee filed objections to the draft assessment order before the Ld. Dispute Resolution Panel **("DRP")**. The Ld. DRP after considering the submissions of the assessee and the relevant clauses of the agreement held that the Ld. AO was right in holding that the receipt of the assessee was taxable in India as FIS under India-USA DTAA and directed the Ld. AO to

complete the assessment accordingly vide its order dated 13.09.2017 for AY 2014-15 and 01.06.2018 for AY 2015-16.

6.4 As per the above directions of the Ld. DRP, the Ld. AO passed the final assessment order for AY 2014-15 on 11.10.2017 and for AY 2015-16 on 27.07.2018 under section 143 r. w. section 144C(13) of the Act assessing the income of the assessee at Rs.4,67,60,000/- and Rs. 57,12,000/- respectively to be taxed as FIS as per India-USA DTAA @ 20%.

7. Aggrieved, the assessee is in appeal before the Tribunal and the only ground of appeal raised in both the AYs relate thereto.

8. The Ld. AR submitted that common issues are involved in both the AYs under consideration and the order of the lower authorities are identical too for both the AYs. The Ld. AR reiterated the submissions made before the Ld. AO/DRP. He submitted that income of the assessee cannot be assessed as FIS in terms of Article 12(4)(b) of the India-USA DTAA since the 'make available' clause is not satisfied. He contended that the services rendered by the assessee are project specific which can never satisfy the requirements of the 'make available' clause as envisaged under Article 12(4)(b) of the India-USA DTAA. In rebuttal to the findings of the Ld. AO/DRP, the Ld. AR drew our attention to the scope of services provided under agreement between the assessee and the AOP and submitted that it is merely a conceptual design that is being provided by the assessee from USA and does not lead to transfer of any technical design/technology to AOP. There is no technical design contained within the drawings provided to AOP and that the technical designs are prepared by the EPC and not the assessee. The main job of the assessee was to provide architectural design and master plan for the entire project which was done from USA and hence the fee received for doing the work was not taxable in India in the absence of there being a Permanent Establishment **("PE")** of the assessee in India. The Ld. AR relied on the decisions of the Mumbai Bench of the Tribunal in the case of DCIT vs. Forum Homes (P) Ltd. (2022) 192 ITD 184 (Mum. Trib.) and Pune Bench

of the Tribunal in the case of Gera Developments P. Ltd. vs. DCIT (2016) 160 ITD 439 wherein the Tribunal on the similar fact pattern has held that the payment received in lieu of architectural design services does not qualify as FTS.

8.1. Without prejudice to the above, the Ld. AR submitted that the income from FTS should be taxed at the rate of 10% (plus applicable surcharge and education cess) as per the provisions of section 115A of the Act being more beneficial to the assessee as against the rate of tax at 20% under the India-USA DTAA applied by the Ld. AO. This plea has been raised by way of an additional ground before the Tribunal.

9. Ld. DR strongly relied on the findings of the Ld. AO/DRP and by drawing inference from the MOU between India and USA submitted that the services provided by the assessee are in the nature of architectural services which falls within the scope of Article 12(4)(b) as the said services 'make available' the technology to the AOP. The Ld. DR referred to the observation of the Ld. DRP with respect to the ownership of the designs, drawings etc. and submitted that since the ownership lies with the AOP, the AOP was free to use the designs and drawings provided by the assessee in whatever manner it desired. He distinguished the decisions relied upon by the assessee in the case of Forum Homes (P) Ltd. (supra) and Gera Development (P) Ltd. (supra) on the footing that in these decisions the IPR was with the service provider which is not so in the assessee's case.

9.1 In rebuttal to the above, the Ld. AR referred to clause 14.1 and 15.1 of the agreement and submitted that the know-how remain with the sub-consultant i.e. the service provider and that not every case of architectural service will fall within the purview of Article 12(4)(b) unless the make available clause is satisfied in respect of provision of such architectural services.

10. We have heard the rival submissions of the parties and perused the records. The fact of the case is that Sardar Vallabhbhai Patel Rashtriya Ekta

Trust was created by the Govt. of Gujarat to construct a statue of Sardar Patel. The AOP was appointed as a project manager by the Trust for the execution of the project. The AOP entered into an agreement with the assessee for providing project management services for construction of the "Statute of Unity" in Gujarat. The scope of work of the assessee mainly included the assessee to provide architectural design and drawings and master plan for the entire project which the assessee claimed to have done from USA. During the relevant AYs, the assessee undertook to perform as consultant for supply of architectural designs and drawings which required the use of special knowledge, skill and expertise possessed by the assessee. The drawings and specifications were required to be developed and concluded by EPC contractor. The drawings and designs such concluded by EPC contractor were to be utilised by Sardar Vallabhbhai Patel Rashtriya Ekta Trust for the purposes of construction of "Statue of Liberty". Perusal of the agreement outlining the scope of services (referred to in para 6 above) supported by the invoices raised by the assessee on AOP (placed at pages 21 to 24 of the Paper Book) reveals that the services provided by the assessee were only with regard to master planning, preliminary concept design, review of bidding documents etc. for the project. By doing so, according to the Ld. AO/DRP the assessee rendered technical and architectural design services which made available the technology, skill, experience etc. to AOP and thus fell within the ambit of FIS under Article 12(4)(b) of the India-USA DTAA.

11. We have considered the detailed submissions of the assessee before the lower authorities. The case of the assessee is that the project specific services rendered by the assessee do not 'make available' technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design. The submissions of the assessee as recorded by the Ld. DRP in its orders for the relevant AYs are as under:-

- "*The drawings are not construction documents that can be used to build the buildings because there is no technical design contained within the drawings and they do not contain details sufficient for execution of any construction works.*

- *The drawings were provided to AOP members, but AOP members cannot use/apply/execute design concepts of the assessee without technical processing by others because there was no rendition or any sort of technical service provided.*
- *The conceptual drawing did not make any technical knowledge available to AOP or the EPC Contractor. Any suggestion of architecture, structural and mechanical engineering, landscaping and interior design was indicative in nature to illustrate the idea of where elements could be located and what they might look like. They would need to be developed by technical experts in India (through the EPC Contractor) to be useful.*

III. After completion of the conceptual drawings, the assesses' role was limited solely to periodic reviews of the EPC Contractor's design relating to conceptual architectural design intent."

12. The facts on record and the explanation provided by the assessee makes it clear that the assessee rendered project specific services to the AOP. The services involved creating a conceptual, aesthetic design and description of scope that would give the EPC contractor and its technical team guidance for the design and execution of the project. The assessee provided only conceptual design services for the appearance of the project and it was the EPC contractor who was responsible for the final design and the technical development thereof. In doing so, the assessee did not develop a technical design or transferred a technical plan rather it only presented general conceptual designs and description to help others visualise the project. The assessee provided consultancy on aesthetic charactertics of the Statue which involved advising AOP on aesthetic design attributes without regard to technical design. The documents and designs produced by the assessee was only a concept not a design that could be executed. The EPC contractor designed the building the way they are going to be constructed including the aesthetic and the technical design.

13. The Revenue has raised an objection that the ownership of the drawings and designs etc. are passed on to the AOP. Hence the same could

be utilised by the AOP for the purposes of its business in future. The relevant clause of the agreement on 'Ownership' reads as under:-

"14.0 Ownership

14.1 Title to all written material, originated and prepared for the Consortium under this Agreement, shall belong to the Consortium. However, Sub-consultant's working papers shall belong to Sub consultant. The Consortium shall have the right to refer and access to the working papers/Calculation Sheets of Sub-consultant to verify and recommendations made."

13.1 In our humble opinion, the Revenue has missed an important fact that the designs, drawings, lay-outs etc. provided to AOP by the assessee are project specific which are specifically made for the construction of "Statue of Liberty" and therefore even if the ownership of such drawings etc. are transferred to the AOP the same could not be utilised for any other purpose by the AOP. Further, the said clause of ownership states that sub-consultants (i.e. the assessee) working papers shall belong to sub-consultant which means that the know-how shall remain with the assessee itself.

13.2 Similarly, the contention of the Revenue that architectural services are included within the scope of "FIS" as per the MOU between India and USA, in our view, does not have any legs to stand since here too the Revenue has missed an important fact that while providing architectural services neither any technical knowledge, skill, experience, know-how etc. was made available to AOP for utilising them in future independently nor any developed drawing or design have been provided by the assessee which could be applied by the AOP independently but these were only the conceptual design services which were provided for a specific project.

14. In the case of Forum Homes (P) Ltd. (supra), the Mumbai Bench of the Tribunal analysed the applicability of Article 12(4) of the India-Singapore DTAA involving similar issue on similar fact pattern as that of the assessee. In this case, the assessee, a resident company was developing a residential

project in India and had availed architectural services from three non-resident entities located at Singapore and paid fees to these non-resident entities in consideration thereof. The Tribunal held that conditions of Article 12(4) of the India-Singapore DTAA were not fulfilled and the said fee could not be qualified as FTS. The relevant observations and findings of the Tribunal is reproduced below:-

"9. A reading of article 12(4) of the tax treaty would make it clear that payment made to a resident of one of the contracting state can be regarded as FTS, if, in course of providing managerial/technical or consultancy services, technical knowledge, experience, skill, know-how or processes is made available which enables the person acquiring such services to apply the technology contained therein. It further provides, if the services consist of development and transfer of a technical plan or technical design, but excludes any services that does not enable the person acquiring the service to apply the technology ITA 5804/Mum/2018 contained therein would not qualify as FTS. In the facts of the present appeal, the payments made and the nature of services rendered are as under:-

Sr.No.	***Name of the party***	***Country***	***Amount (Rs.)***	***Nature of services***
1.	*Arc Studio Architecture + Urbanism Pte Ltd*	*Singapore*	*2,85,35,269/-*	*Architectural drawing/ design in relation to BKC project.*
2	*Web Structures Pte Ltd*	*Singapore*	*68,57,342/-*	*GFC drawing / design in relation to BKC project*
3	*RMR Engineers Pte Ltd*	*Singapore*	*12,24,464/-*	*MEP drawing / design in relation to BKC project*
	Total		*3,66,17,075/-*	

10. Thus, as could be seen, the scope of work is limited to various types of drawings and designs for the residential project being developed at BKC. On further verification of facts on record, it is evident that insofar as Arc Studio Architecture + Urbanism Pte Ltd is concerned, it will provide an illustrative site/roof plan showing all the components of the project, general landscape, recommendation and overall infrastructure elements, such as, entry driveways and service circulation, Diagram showing each of the major public at 1:200 scale, image board to describe the architectural character of the project etc. The scope of work also requires the entity to prepare schematic design drawings, approved by the client, in case of minor adjustment. The terms of the agreement make it clear that the design, drawing, rendering, model, specification, electronic files including database and spreadsheets and other derivation that are part of the ITA 5804/Mum/2018 project will remain the intellectual property of the service provider and are intended for use solely with

respect to the project. It further restrains the assessee from utilizing such intellectual property for any other project or for addition to the subject project or for completion of the project by any other entity. Similar is the scope of work and terms and conditions in respect of Web Structures Pte Ltd, another non-resident entity.

11. Thus, from the nature of services provided by the non-resident entities and the terms and conditions under which it was provided, it is clear that whatever services were provided are project specific and cannot be used for any other project by the assessee. Further, while providing such services neither any technical knowledge, skill, etc is made available to the assessee for utilizing them in future, independently nor any developed drawing or design have been provided to the assessee which can be applied by the assessee independently. Thus, it is very much clear, the conditions of article 12(4) of the tax treaty are not fulfilled.

12. Though, the Assessing Officer has generally observed that in course of providing services to the assessee, the non-resident entities have made available technical knowledge, know-how, processes to the assessee. However, no substantive material has been brought on record by him to back such conclusion. Even, before us, learned departmental representative has not brought any material to demonstrate that conditions of article 12(4) have been fulfilled in the facts of the present case. In view of the aforesaid we do not find any valid reasons to interfere with the decision of learned Commissioner (Appeals). Accordingly, we uphold the order of learned Commissioner (Appeals) on the issue by dismissing ground raised."

15. In Gera Development (P.) Ltd. (supra), the Pune Bench of the Tribunal considered the issue whether payments made by the assessee, an Indian company, engaged in the business of property development to US company for architectural design and drawings of different building and facilities in respect of its commercial project 'IQ Business Park' are taxable as FIS under Article 12(4)(b) of the India-USA DTAA. The Tribunal held that mere passing of project specific architectural drawings and design with measurement did not amount to 'make available' technical knowledge, know-how or process and that the assessee has not transferred any technical expertise, skill or knowledge along with the drawing and designs of the particular building to the assessee. The relevant findings of the Tribunal are reproduced below:-

"25. Further, the payments made by assessee do not fall within the scope of expression "fee for included services" as defined under Article 12(4) of the DTAA. There was no transfer of any technology or technical know-how, skill or process by Gensler. The AO in his order has categorically mentioned that the CD which was passed on to the assessee by Gensler contain drawings, designs and layouts of different buildings and facilities. It also contained the designs of interior buildings, walls, windows along with the measurements. The designs, drawings, layouts of buildings does not fall within the ambit of transfer of technical know-how or technical

designs. Mere passing of project specific architectural drawings & designs with measurements does not amount to 'making available' technical knowledge, know-how or process. Gensler has not transferred any technical expertise, skill or knowledge alongwith the drawings & designs of the particular building to the assessee. The assessee cannot independently use the drawings & designs in any manner whatsoever for commercial purpose. Since, the drawings & designs were project specific, the assessee could not have used these designs for any of its other projects.

A further perusal of terms and conditions of the Agreement between the assessee and Gensler show that- Article 5 of the agreement clearly indicate that the drawings, specification and other documents prepared by Gensler shall remain the property of Gensler. The relevant extract of Article 5 of International Terms and Conditions of the Agreement between the Client (assessee) and Gensler is reproduced hereinunder :*

> *'5.1 The Drawings, Specifications, and other documents (collectively "Documents") and any computer tapes, disks, electronic data, or CAD files (collectively "Data") prepared by Gensler are instruments of service and shall remain Gensler's property.*
>
> *5.2 Upon completion of the Services and payment of all amounts due Gensler, Client may retain copies or reproducible of the Documents and/or Data for information and reference in connection with Clients use and occupancy of the completed project.*
>
> *5.3 Client agrees to indemnify and hold Gensler harmless from and against any and all claims, liabilities suits, demands, losses, damages, costs, and expenses (including reasonable attorneys' fees and costs o defense) together with interest thereon, accruing or resulting to any persons, firms, or other legal entities, on account of any damages or losses to property or persons, including death of economic loss arising out of the unauthorized use, re-use, transfer or modification of the Documents and/or Data.*

26. The facts that have emerged from the analysis of material available on record and the submissions of the rival sides are:

(1) The assessee is not having any Permanent Establishment in India;

(2) The services were rendered by Gensler from its office in San Francisco, USA,

*(3) There was no transfer of any technology or technical know-how^*

(4) There is no transfer of any copyrighted scientific work

(5) The designs, drawings and layouts are project specific;

(6) The ownership on eth drawings, specifications and documents have not passed on to the assessee and are the property of Gensler;

28 The Bangalore Bench of the Tribunal in the case of Abishek Developers {supra) under similar circumstances where there was transfer of drawings and designs, held that it is not a case of rendering / technical services u/s.9(l)(vii). In the said case the assessee was engaged in real estate development. The assessee entered into agreement with one of the overseas company based at Singapore for the development and transfer of designs & drawings in connection with real estate development. As per the agreement entire designs and drawings were transferred at Singapore. The entire work was carried outside India. The assessee/ made payment to overseas company without deducting any tax at source. The AO issued notice u/s.201 of the Act on the premise that payments made by assessee to overseas company were 'fees for technical services and hence the income is chargeable to tax in India u/s.9(l)(vii) of the Act. The assessee carried the matter appeal to CIT(A). The C1T(A) upheld the order of AO. The matter travelled to Tribunal. The Tribunal appreciating the facts of case and by following the decision of Hon'ble Supreme Court of India in the case of Transmission Corpn. of A. P. Ltd. v. CIT [1999] 239 ITR 587/105 Taxman 742 and the Mumbai Bench of Tribunal in the case of Indian Hotels Co. Ltd. v. ITO [IT Appeal No. 553/Mum./2000, dated 14-2-2005] concluded:

> *"..... that the transaction in question is a transaction of sale and not a case of rendering technical services as contemplated under s.9(l)(vii) of the Act and even otherwise no part of the service is rendered in India and thus, the assessee cannot be held to be an assessee in default for non-deduction of tax at source. Thus, this ground the appeal of the assessee is allowed."*

30. Thus, from the facts and circumstances of the case and documents on record, we hold that the payment made by assessee to Gensler, USA are not in the nature of "Royalty" or "Fee for Technical Services". No technical know-how was made available to the assessee so as to bring the payments made by assessee within the meaning of "Fee for Included Services". The payments made by assessee to Gensler-USA were merely for project specific drawings & designs without transfer of technology or know-how or even title in drawing & designs. The impugned order is set aside and the appeal of the assessee is allowed."

16. In the light of the above factual matrix of the case and judicial precedents cited above, we are of the view that the consideration received by the assessee for services rendered to the AOP does not fall within the purview of FIS under Article 12(4)(b) of the India-USA DTAA as the same does not satisfy the 'make available' clause envisaged therein. Accordingly, we allow the ground of appeal raised by the assessee in both the AYs.

17. Since we have decided the original ground in both the appeals in favour of the assessee, the additional ground of appeal becomes infructuous and need not be adjudicated upon.

18. In the result, the appeals of the assessee for both the AYs i.e. 2014-15 and 2015-16 are allowed.

Order pronounced in the open court on 18th July, 2023.

sd/-	**sd/-**
(G.S. PANNU)	**(ASTHA CHANDRA)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 18/07/2023

Veena

Copy forwarded to -
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	