2024:BHC-AS:10000-DB
Digitally
SHAMI
NILESI
SHIVG

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10788 OF 2012

Shell India Markets Private Limited,
a company incorporated under the
provisions of the Companies Act, 1956
and having its registered office at
2nd Floor, Campus 4A
RMZ Millenia Business Park, 143,
Dr. MGR Road,
Perungudi, Chennai-600 096
and its principal place of business at
Powai Plaza, 401-403, 4th Floor,
Hiranandani Business Park, Powai,
Mumbai-400 076 **…Petitioner**

Versus

1. **The Union of India,**
Through Ministry of Finance
North Block, New Delhi – 110 001.

2. **The Authority for Advance Ruling,**
having its office at
5th Floor, NMDC Building
Yashwant Place,
Satya Marg, Chanakyapuri
New Delhi-110 021.

3. **The Commissioner of Income Tax,**
(Large Tax Payer Unit)
having his office at 29th Floor,
Centre 1, World Trade Centre,
Cuffe Parade, Mumbai – 400005.

4. **The Assistant Director of Income Tax,**
(International Taxation)-2(1)
having his office at
1st Floor, R No.120, Scindia House,
Ballard Estate, N.M.Road,
Mumbai-400 038

5. **The Deputy Director of Income Tax,**
(International Taxation)-2(1)
having his office at
1st Floor, R.No.120, Scindia House,

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

Ballard Estate, N.M.Road,
Mumbai-400 038 **...Respondents**

Mr. Jehangir D. Mistri, Senior Advocate, with Mr. Madhur Agrawal with Ms. Sheeja John, Ms. Vaishnavi Malasure i/by M.P. Savla & Co., for Petitioner.
Mr. Suresh Kumar, for Respondents.

CORAM : K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
RESERVED ON : 16th February, 2024
PRONOUNCED ON : 1st March, 2024

JUDGMENT: (*Per Dr. Neela Gokhale, J.)*

1. This Petition visits the question pertaining to determination of tax liability of the payments made by Petitioner to its non resident group company, Shell International Petroleum Company Limited ("**SIPCL**") for availing General Business Support Services ("**BSS**") under a Cost Contribution Arrangement ("**CCA**") between Petitioner and SIPCL.

2. On an application made by Petitioner seeking such determination, the Authority for Advance Rulings (Income Tax), New Delhi ("**AAR**"), by its Order dated 17th January 2012 held that payments made by Petitioner to SIPCL towards BSS under the CCA constitutes income in the hands of SIPCL being in the nature of fees for technical services within the meaning of Article 13.4 (c) of the Double Tax Avoidance Agreement ("**DTAA**") between India and UK and is chargeable to tax in India. Consequently, AAR held that

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

Petitioner is under obligation to withhold tax under section 195 of the Income Tax Act, 1961 (**"the Act"**).

3. Aggrieved by this Order, Petitioner, by way of the present petition, challenges the validity and legality of the said Order passed by the AAR.

4. Petitioner is a company registered in India under the Companies Act, 1956 and engaged, inter alia, in the business of operating chain of retail fuel stations in India. Respondent No.1 is the Union of India, Respondent No. 2 is the AAR and the other Respondents are the various officials concerned of the Income Tax department.

5. By way of a CCA dated 1st April 2009 executed between Petitioner and SIPCL, Petitioner avails of BSS provided by SIPCL to all operating companies in its group across the world. The arrangement is that SIPCL manages for consideration its group entities, either directly or through own employees or through its third party affiliates/vendors. The costs incurred are then allocated to Shell entities including SIPCL on a cost to cost basis.

6. It is the case of Petitioner that services availed by it are managerial services only and specifically exclude technical services. Petitioner makes payment for the availed services on the basis of share determined using cost allocation keys specified in the CCA.

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

With a view to attain clarity in respect of its obligation to deduct tax at source, in case the payments made by it to SIPCL represents income taxable in India, Petitioner made an application under Section 245R of the Income Tax Act, 1961 ("**the Act**") to the AAR raising various related questions. The questions were:

> *"i. Whether the payments made by the Applicant to Shell International Petroleum Company Limited ("SIPCL") for availing General Business Support Services ("General BSS") under the terms of the Cost Contribution Agreement ("CCA"), would constitute "income" in the hands of SIPCL within the meaning of the term in Section 2(24) of the Act?*
>
> *ii. If the answer to Question 1 is in the affirmative, whether ther payments made by the Applicant to SIPCL for availing General BSS under the terms of the CCA would be in the nature of Fees for Technical Services ("FTS") within the meaning of the term in Article 13 of 'Convention between the Government of the Republic of India and the Government of the Republic of India and the Government of United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains' ("the India-UK Tax Treaty")?*
>
> *iii. Whether the payments made by the Applicant to SIPCL for availing General BSS under the terms of the CCA would be in the nature of "royalty" within the meaning of the term in Explanation 2 to clause (vi) of Section 9(1) of the Act?*
>
> *iv. Whether the payments made by the Applicant to SIPCL for availing General BSS under the terms of the CCA would be in the nature of "royalty" within the meaning of the terms in Article 13 of the India-UK Tax Treaty?*
>
> *v. Based on the answers to Questions (1) to (4) above, and in view of the facts as stated in Attachment III, and also in light of the declaration provided by SIPCL that it does not have a permanent establishment in India in terms of Article 5 of the India-UK Tax Treaty, whether the payments received by SIPCL would be chargeable to tax in India? If the answer is in the affirmative, would the payments made by the Applicant to SIPCL suffer withholding tax under section 195 of the Act and at what rate?"*

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

7. Although none representing the Revenue Department appeared before the AAR, a notice dated 2nd December 2009 was received by Petitioner from the Assistant Director of Income Tax, (International Taxation)-2(1) Mumbai seeking certain clarification including details of the nature of services availed by it. Petitioner provided the required details vide its reply dated 23rd December 2009. Further details were sought by another notice dated 21st January 2010 issued by the Deputy Director of Income Tax, (International Taxation)-2(1), Mumbai. Petitioner provided additional details as well by letter dated 27th January 2010, which included following information:

i. Details regarding nature of services covered by CCA.

ii. The costs of certain services availed by SIPLC from its third party vendors in relation to corporate activities/costs were not directly attributable to Petitioner.

iii. Petitioner had not deducted tax at source since SIPCL has not made available any technical services to petitioner.

iv. Petitioner had not availed any BSS from SIPCL prior to 1st April 2008 and hence no amount was payable prior to that date.

v. Documents including audited financial statements of Petitioner from FYs 2005-06 to 2008-09, copy of Form 3CEB for financial year 2006-07 etc., were provided. Petitioner also filed additional submissions before the AAR which were not rebutted by the Department.

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

8. AAR, by the impugned order dated 17th January 2012 held as under:

> *" We therefore rule on Que.No.(i) & (ii) that the payment made by the applicant to SIPCL for availing the General BSS under the CCA would constitute income in the hands of SIPCL and is in the nature of fees for technical services within the meaning of Article 13.4 (c) of the DTAC between India and UK; and not in the nature of royalty within the meaning of the term in Explanation 2 to Clause (vi) of Section 9(1) of the Act and under Article 13 of DTAC, while we rule on Que. No. (iii) & (iv). Based on answer to Que. No. (i) & (ii) that the payment received by SIPCL is chargeable to tax in India and the declaration provided by SIPCL that it does not have a Permanent Establishment (PE) in India in terms of Article 5 of DTAC, we rule that the applicant is under obligation to withhold tax under section 195 of the Act. "*

9. Petitioner assailed this order in the Supreme Court of India by filing a Special leave Petition No. 31543/2012. The Supreme Court after observing that the AAR being a quasi judicial authority at par as a 'tribunal', a challenge to its order is assailable not only in the Supreme Court but also in the High Court, permitted Petitioner to withdraw the SLP with liberty to move the High Court invoking its writ jurisdiction of Article 226 of the Constitution of India. Petitioner is thus before us seeking relief as prayed.

10. By an order dated 30th June 2014, Rule was issued and the petition was admitted.

11. Submissions of Mr. Mistry are as follows:

i. AAR has erred in concluding that transactions contemplated under the CCA involve rendering technical

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

and consultancy services and thus fall within the scope and ambit of Article 13 of the India-UK DTAA. The AAR has failed to appreciate that the CCA is only an approach adopted by the group entities as part of their group business strategy at standardizing and carrying out global quality business in a cost effective manner.

ii. Services availed by Petitioner are neither intended nor result in placing Petitioner in a position where it could independently carry on services without SIPCL.

iii. Services that make available technical knowledge, skill, know how etc., are distinct from services shared under the CCA which may involve technology/industry expertise but neither can be construed as technical services nor satisfy the requirement of making available technical knowledge as commonly understood.

iv. The CCA represents sharing of cost amongst the cost sharers pursuant to which Petitioner becomes co-owner of any expertise arising out of the arrangement.

v. The AAR has totally disregarded the authentic technical commentary-protocol in India-USA DTAA which is similarly worded and involves determination of similar technical aspects relating to the 'make available' condition.

vi. The AAR has interpreted the requirements to be satisfied for 'make available' requirement based on its own general notion of the said term and thereby reached an erroneous conclusion that the services availed are technical services. Thus the impugned order is inconsistent, arbitrary, and unlawful which deserves to be set aside.

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

vii. The AAR has failed to appreciate that the services under the CCA do not necessarily make available technical knowledge, skill, experience etc merely because the service is technical and involves industry expertise.

viii. AAR further erred in ignoring its own observation that provision of services did not involve element of profit and therefore, in holding that the payments received by SIPCL would be in the nature of income chargeable to tax in India in the hands of SIPCL.

(ix) What will be covered in Article 13 is only fees for technical services arising in a contracting state in India and paid to a resident of the other contracting state. Such fees may be taxed in the other contracting state, i.e., UK. However, fees for technical services may also be taxed in India according to the law of India but if the beneficial owner of the fees for technical services is a resident of UK the tax so charged shall not exceed the rate prescribed in clause 2.

(x) Under paragraph 4 of Article 13 for the purposes of para 2, fees for technical services means payments of any kind to any person in consideration for the rendering of any technical or consultancy services which (under sub-clause (c)) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

Therefore, it only covers fees for any technical or consultancy services which make available technical knowledge etc. Even if it is fees for consultancy services, it can be only where technical knowledge, experience is made

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

available. If either of these ingredients are missing, it cannot come under Article 13(4).

12. Mr. Mistry stated that since passing of the impugned order, Petitioner is deducting tax at source in respect of SIPCL. However, he urges the court to allow the Petition as that was/is done only by way of abundant caution.

Mr. Mistry relied on the following decisions of various High Courts to buttress his arguments relating to the interpretation of the term 'technical' and 'consultancy' services as well as the meaning of the term 'make available' as they appear in the DTAA.

a. ***Commissioner of Income Tax, Central Circle v. De Beers India Minerals (P) Ltd*** [1]

b. ***Director of Income Tax v. Guy Carpenter & Co. Ltd***[2]

c. ***US Technology Resources (P) Ltd. v. Commissioner of Income Tax Thiruvanthapuram***[3]

d. ***Commissioner of Income Tax (International Taxation and Transfer Pricing v. Timken Company.***[4]

e. ***Commissioner of Income Tax (International Taxation)-1 Delhi v. M/s Bio-rad Laboratories (Singapore) Pte. Ltd.***[5]

f. ***Director of Income Tax (IT)-1 v. A.P. Moller Maersk-AS*** [6]

g. ***Director of Income Tax, (IT)-1 v. WNS Global Services (UK) Ltd***[7]

1 (2012) 21 taxmann.com 214 (Karnataka)
2 (2012) 20 taxman.com 807 (Delhi)
3 (2018) 97 taxmann.com 642 (Kerala)
4 (2023) 149 taxman.com 251 (Calcutta)
5 ITA 564 of 2023 (Delhi High Court) decided on 3.10.2023
6 Supreme Court Civil Appeal No.8040 of 2015 decided on 17.2.2017
7 (2013) 32 taxmann.com 54 (Bombay)

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

13. Mr. Suresh Kumar submitted as follows:

(I) The AAR has dealt with in detail the submissions of Petitioner regarding the definition of the term 'Fees for Technical Services' and has rightly concluded that the transactions contemplated under CCA involve rendering services of technical nature which fall within the scope of Article 13 of the India-UK DTAA.

(II) Petitioner is able to use the know-how/intellectual property generated from the General BSS independent of the service provider and hence, the services have been 'made available' to Petitioner.

(III) The CCA does not contain any exhaustive description of services covered under the General BSS to be availed by Petitioner and the Appendix 2 of CCA only gives broad headings not specifying any information regarding the type of service being provided to Petitioner. In the absence of this information, AAR has rightly inferred the nature of services to be 'consultancy services'/ 'technical services'.

(IV) Petitioner cannot rely on the Protocol annexed to the India-USA DTAA specifying the meaning of the phrases/words 'make available' because the contents of a DTAA with one country cannot be imported in the DTAA of another country unless the DTAA itself is modified or amended to that extent. Since the India-UK DTAA is not amended to include any content or explanation regarding interpretation of the words 'make available' to read in consonance with the India-USA DTAA, the same has to be read independently and a parallel cannot be drawn in that regard.

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

(V) The AAR has correctly interpreted the phrase 'make available' as the ownership of Petitioner to the expertise shared by SPCIL arises from sharing of costs and Petitioner owns the results of the expertise only when such expertise is transferred to it. Thus, the view of the AAR that General BSS is made available to Petitioner is correct.

(VI) The AAR has taken a view in respect of the interpretation of the words and phrases of the DTAA and since there is no perversity in the said view, this Court may not substitute that view with its own view under its Article 226 writ jurisdiction.

(VII) It is true that the AAR has not dealt with the aspect as to whether the transaction falls within the scope and ambit of Article 7 of the DTAA and the question pertaining to 'permanent establishment' of SIPCL remains unanswered. In this context, the proceedings be remanded to the AAR to give a ruling on this aspect also. In the event the Court opines in favour of Petitioner and holds the services not to be 'technical/consultation', the Department may be permitted to take necessary steps against Petitioner as permitted in law and the time spent during the pendency of this Petition be excluded for the purpose of limitation.

ANALYSIS AND FINDINGS:

14. By the impugned order, the AAR has determined that the payment made by Petitioner to SIPCL for availing the General BSS under the CCA is in the nature of fees for 'technical services' within the meaning of Article 13.4(c) of the DTAA and hence, constitutes income in the hands of SIPCL. It has thus ruled that Petitioner is

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

under obligation to deduct tax at source under Section 195 of the Act. The AAR has not gone into but prima facie has accepted the declaration provided by SIPCL that it does not have permanent establishment in India and in any case that was not the issue before AAR. There is no discussion or finding pertaining to the status of SIPCL as having permanent establishment in India in terms of Article 5 of the DTAA. Hence, determination by the AAR on this issue remains inconclusive.

15. Be that as it may, the crux of the matter lies in ascertaining whether the finding of the AAR that services availed by Petitioner from SIPCL or payments made by Petitioner to SIPCL are of/for 'technical/'consultation' services and secondly, whether such services are 'made available' to Petitioner. Article 13 of DTAA reads as under:

> *"ARTICLE 13*
> ***ROYALTIES AND FEES FOR TECHNICAL SERVICES***
>
> ***1.*** *Royalties and fees for technical 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 technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed:*
>
> > *(a) in the case of royalties within paragraph (3)(a) of this Article, and fees for technical services within paragraph (4)(a) and (c) of this Article;*
> >
> > > *(i) during the first five years for which this Convention has effect;*
> >
> > *(aa) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first-mentioned Contracting State or*

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

a political subdivision of that State, and

(bb) 20 per cent of the gross amount of such royalties or fees for technical services in all other cases; and

(ii) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and

(b) in the case of royalties within paragraph (3)(b) of this Article and fees for technical services defined in paragraph (4)(b) of this Article, 10 per cent of the gross amount of such royalties and fees for technical services.

3. *For the purposes of this Article, the term "royalties" means:*

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematograph films or work on films, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; 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 income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic

4. *For the purposes of paragraph (2) of this Article, and subject to paragraph (5), of this Article, the term "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provisions of services of technical or other personnel) which:*

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

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph (3)(b) of this Article is received; or

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

16. From the bare words of the Article, it is clear that income of

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

SIPCL will be chargeable to tax in India only if the payment by Petitioner is towards fees for 'technical services'. Under Article 13(4), the term 'fees for technical services' means payments of any kind in consideration for the rendering of any **technical or consultancy services.** Sub-para (c) to Article 13(4) further restricts the meaning of the term to only that which **makes available** technical knowledge, experience, skill, know-how or processes, or consists of the development or transfer of a technical plan or technical design.

17. The principle of *noscitur a sociis* mandates that the meaning of a word is to be judged by the company of other words which it keeps. The word 'consultancy' services follows 'technical' which is further followed by the phrase "which make available technical knowledge, experience, skill, know-how or processes, or consist of development and transfer of a technical plan or technical design." A clear reading indicates that even if consultancy services is 'stand alone', the bunch of words indicate that the said 'consultancy' necessarily relates to consultancy which makes available technical or any other knowledge, experience, skill, know-how or processes and does not relate to consultancy on managerial issues.

18. The Appendix 2 of CCA contains the General BSS. The list of services availed are as follows:

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

EXAMPLES OF GENERAL BUSINESS SUPPORT SERVICES:

- Management Support
- Development and Provisions of Support and Business Tools
- Provision of Marketing Support.
- Development, Communication and Audit of Standards of Performance
- Promotion of Professional Competence
- Information Technology Advice and Services
- General Financial Advice and Services
- Taxation Advice and Services
- Legal Services
- Employee Relations and Public Affairs/Media Advice and Services
- HR Advice and Services
- Contracting and Procurement Services
- Other Business Support Services

A perusal of the list of services relate to managerial services not involving anything of a technical nature. The AAR has discussed the services appearing in the CCA and has concluded that these activities in a retail business are at the core of retail marketing and hence advice tendered in taking a decision of commercial nature is a consultancy service. The AAR has further considered the definition of the word 'Consultancy' as defined in the Oxford English dictionary and has observed that a consultant is a person who gives professional advice or services in a specialized field. However, the AAR failed to appreciate that the word 'Consultancy' appearing in the Article is to be interpreted in the context of consultancy which

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

makes available technical knowledge, etc. and not of managerial nature. The reading of the Article clearly indicates that the consultancy service must be which makes available technical knowledge, etc. Sub-para (c) to Article 13(4) restricts such services to those which make available technical knowledge or consist of development and transfer of a technical plan or technical design. Thus, a harmonious reading of the provision of Article 13 in its entirety, clearly establishes the intent of the DTAA in making income chargeable to tax only if the services availed pertain to technical services or consultancy services. Technical services in this context mean services requiring expertise in a technology. By Consultancy Services, in this context, would mean advisory services. The categories of technical and consultancy services are to some extent, overlapping. Under paragraph 4, technical and consultancy services are considered included services only to the following extent: (1) as described in paragraph 4(a), if they are ancillary and subsidiary to the application or enjoyment of a right, property or information for which a payment described in paragraph (3)(a) of Article 13 is received; (2) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph (3)(b) of Article 13 is received; or (3) as described in paragraph 4(c), if they make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

plan or technical design. Thus, under paragraph 4(c), consultancy services which are not of a technical nature cannot be included services.

Thus, the services availed by Petitioner cannot be said to be technical services and Article 13 is wholly inapplicable in the facts and circumstances of the present case.

19. It will be useful to refer to a decision of the Madras High Court in the case of ***Skycell Communications Ltd and Anr. v. Deputy Commissioner of Income-Tax and Ors.***[8] which held as follows:

> *"8. Thus while stating that "technical service" would include managerial and consultancy service, the Legislature has not set out with precision as to what would constitute "technical" service to render it "technical service". The meaning of the word "technical" as given in the New Oxford Dictionary is adjective 1. of or relating to a particular subject, art or craft or its techniques : technical terms (especially of a book or article) requiring special knowledge to be understood : a technical report. 2. of involving, or concerned with applied and industrial sciences : an important technical achievement. 3. resulting from mechanical failure : a technical fault. 4. according to a strict application or interpretation of the law or the rules : the arrest was a technical violation of the treaty.*
>
> *9. Having regard to the fact that the term is required to be understood in the context in which it is used, "fee for technical services" could only be meant to cover such things technical as are capable of being provided by way of service for a fee. The popular meaning associated with "technical" is "involving or concerning applied and industrial science".*
>
> *10. In the modern day world, almost every facet of one's life is linked to science and technology inasmuch as numerous things used or relied upon in every day life is the result of scientific and technological development. Every instrument or gadget that is used to make life easier is the result of scientific invention or development and involves the use of technology. On that score, every provider of every instrument or facility used by a person cannot be regarded as providing technical service.*
>
> *11.When a person hires a taxi to move from one place to another, he uses a product of science and technology, viz., an automobile. It cannot on that ground be said that the taxi driver*

8 (2001) 251 ITR 53

Shivgan

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

> *who controls the vehicle, and monitors its movement is rendering a technical service to the person who uses the automobile. Similarly, when a person travels by train or in an aeroplane, it cannot be said that the railways or airlines is rendering a technical service to the passenger and, therefore, the passenger is under an obligation to deduct tax at source on the payments made to the railway or the airline for having used it for travelling from one destination to another. When a person travels by bus, it cannot be said that the undertaking which owns the bus service is rendering technical service to the passenger and, therefore, the passenger must deduct tax at source on the payment made to the bus service provider, for having used the bus. The electricity supplied to a consumer cannot, on the ground that generators are used to generate electricity, transmission lines to carry the power, transformers to regulate the flow of current, meters to measure the consumption, be regarded as amounting to provision of technical services to the consumer resulting in the consumer having to deduct tax at source on the payment made for the power consumed and remit the same to the Revenue.*
>
> *15.The use of the internet and the world wide web is increasing by leaps and bounds, and there are hundreds of thousands, if not millions, of subscribers to that facility. The internet is very much a product of technology, and without the sophisticated equipment installed by the internet service providers and the use of the telephone fixed or mobile through which the connection is established, the service cannot be provided. However, on that score, every subscriber of the internet service provider cannot be regarded as having entered into a contract for availing of technical services from the provider of the internet service, and such subscriber regarded as being obliged to deduct tax at source on the payment made to the internet service provider.*

20. Thus, it is clear from the said decision that any service is construable as technical but one has to see the true import of the service actually rendered and the determination must be made in this context. There is no such discussion in the Impugned order and the finding is based on a generic reference to the meaning of the word 'consultancy' as given in the Oxford English Dictionary. The AAR further holds that the list of services mentioned in the CCA is not an exhaustive list and may include other technical services. Thus Petitioner is correct in contending that the AAR has proceeded on

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

conjectures and surmises to render the finding in the impugned order.

21. The AAR has further held that the services are made available to Petitioner since while providing General BSS, SIPCL works closely with the employees of the applicant and supports/advises them. It is held that Petitioner is able to use the know how/intellectual property generated from the General BSS independent of the service provider and hence the services under the agreement are clearly made available to Petitioner.

In order to understand the import of the words 'made available' as used in the context of Article 13(4)(c), it will be useful to refer to a decision of the Karnataka High Court in *CIT, Central Circle v. De Beers (Supra).* Paragraph 22 reads as follows:

> *"22. 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 "make available", the technical knowledge, skill?, 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*

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

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)

22. Similarly, the Delhi High Court in the *CIT (International Taxation)-1, Delhi v. M/s Bio-rad (Supra)* has discussed the said concept accordingly. Paragraphs 14 and 15 read as under:

> *14. According to the Tribunal, the agreement between the respondent/assessee and its Indian affiliate had been effective from 01.01.2010, and if, as contended by the appellant/revenue, technical knowledge, experience, skill, and other processes had been made available to the Indian affiliate, the agreement would not have run its course for such a long period.*
>
> *14.1 Notably, this aspect is adverted to in paragraphs 17 to 23 of the impugned order. For convenience, the relevant paragraphs are extracted hereafter:*
>
> > *"17. A perusal of the aforementioned provision shows that in order to qualify as FTS, the services rendered ought to satisfy the 'make available' test. Therefore, in our considered opinion, in order to bring the alleged managerial services within the ambit of FTS under the India-Singapore DTAA, the services would have to satisfy the 'make available' test and such services should enable the person acquiring the services to apply the technology contained therein.*
> >
> > *"18. As mentioned elsewhere, **the agreement is effective from 01.01.2010 and we are in Assessment Years 2018-19 and 2019-120.[sic.....20]. In our considered opinion, if the assessee had enabled the service recipient to apply the technology on its own, then why would the service recipient require such service year after year every year since 2010?***
> >
> > *19. This undisputed fact in itself demolishes the action of the Assessing Officer/DRP. Facts on record show that the recipient of the services is not enabled to provide the same service without recourse to the service provider, i.e, the assessee.*
> >
> > *20. In our humble opinion, mere incidental advantage to the recipient of services is not enough. The real test is the transfer of technology and on the given facts of the case, there is no transfer of technology and what has been appreciated by the Assessing Officer/ld. CIT(A) is the incidental benefit to the assessee which has been considered to be of enduring advantage.*
> >
> > *21. In our understanding, in order to invoke make available clauses, technical knowledge and skill must remain with the person receiving the services even after the particular*

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

> *contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider.*" [Emphasis is ours]
>
> *15. We tend to agree with the analysis and conclusion arrived at by the Tribunal."* (emphasis supplied)

23. Therefore, even if it is fees for technical or consultancy services, it can be only where fees are paid in consideration for making available technical knowledge, experience etc. Thus the view of the AAR that SIPCL works closely and advises the employees of Petitioner and hence makes available the services is not correct. This view in fact suffers from fallacy since the agreement continues to operate till date. If the view of AAR is to be held as correct then the contract must stand concluded as once the services and the know how, skill etc is transferred to Petitioner, the need of continuing to render said services must end. This is factually not so as the CCA is in effect till date.

24. Considering the above discussion it is clear that the AAR has interpreted the requirements to be satisfied for 'make available' based on its own general notion of the said term without appreciating the applicable law on the subject and also reached an erroneous conclusion that the services availed are technical services.

25. Moreover, the AAR has not dealt with the issue relating to the 'Permanent Establishment' of SIPCL and there is no

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

determination on the same. Of course, that was not a subject of reference before AAR.

26. Thus, we have no hesitation in holding that the impugned order dated 17th January 2012 of AAR suffers from legal infirmity and is quashed and set aside.

27. During the course of the arguments, Mr. Mistry stated that Petitioner only seeks relief prayed in clauses (a) and (b) of the petition and does not press the other prayers. Rule is thus made absolute in terms of prayer clauses (a) and (b) which read as follows -

> "*a) That this Hon'ble Court be pleased to declare that the transactions under CCA do not amount to being technical in nature per Article 13 of DTAA between India and UK and therefore, would not be taxable in India;*
>
> *b) That this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari and/or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records and papers of the Petitioner's case and after examining the legality and validity thereof quash and set aside the impugned order dated 17.01.2012 passed by the Authority in AAR No. 833/2009, in the case of the Petitioner and further."*

28. It is made clear that that the Department is at liberty to take necessary steps as available to it in law including as to whether the subject will be covered under Article 7 of the DTAA. We express no opinion. In such proceedings, if taken, the time taken in the present proceedings will stand excluded for the purpose of limitation.

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::

29. There will be no orders as to costs.

(DR. NEELA GOKHALE, J.) **(K. R. SHRIRAM, J.)**

Shivgan

::: Uploaded on - 01/03/2024 ::: Downloaded on - 04/03/2024 11:37:40 :::