[2022] 141 taxmann.com 137 (Mumbai - Trib.)/[2022] 196 ITD 591 (Mumbai - Trib.)[04-07-2022]

INTERNATIONAL TAXATION : Where assessee, a Singapore based company, provided business support services to its Indian AE, and there was no transfer of skill or technology as a result of rendition of these services to Indian AE, mere incidental benefit or enrichment which may add to capabilities of service recipient would not be sufficient to trigger make available clause and receipts from said services would not be treated as FTS as per section 9(1)(vii) and article 12(4) on India-Singapore DTAA

[2022] 141 taxmann.com 137 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'I'

NTT Asia Pacific Holdings Pte Ltd.

v.

Assistant Commissioner of Income-tax, International Taxation*

PRAMOD KUMAR, VICE PRESIDENT
AND SANDEEP S. KARHAIL, JUDICIAL MEMBER
IT APPEAL NO. 1212 (MUM.) OF 2021
[ASSESSMENT YEAR 2017-18]
JULY 4, 2022

Section 9 of the Income-tax Act, 1961, read with article 12 of DTAA between India and Singapore - Income - Deemed to accrue or arise in India (Royalties/Fee for technical services - Make available) - Assessment year 2017-18 - Assessee was a company incorporated in Singapore - During relevant assessment year, assessee rendered business support services to its Indian AE and claimed that amount received for said services would not be taxable in India - Assessing Officer opined that assessee provided training which enabled service recipient to make use of technical knowledge, experience, skills, know-how etc. on its own without depending on assessee - He, thus, held that make available clause was satisfied and receipts were to be treated as FTS as per section 9(1)(vii) and article 12(4) of DTAA - DRP confirmed order of Assessing Officer by holding that services provided by assessee enriched service recipient, by making him wiser to face

similar challenges in future on his own and acquiring skills to deal with issues - It was noted that as a result of rendition of these services to Indian AE, there was no transfer of skill or technology - Whether unless recipient of services, by virtue of rendition of services by assessee, was enabled to provide same services without recourse to service provider, said services could not be said to have invoked make available clause - Held, yes - Whether thus, mere incidental benefit or enrichment which might add to capabilities of service recipient would not be sufficient to satisfy make available clause when critical factor of transfer of skills or technology was not satisfied - Held, yes - Whether, therefore, Assessing Officer was to be directed to exclude amount received from assessee's taxable income - Held, yes [Para 9] [In favour of assessee]

CASES REFERRED TO

Shell Global Solutions International BV v. *ITO* [2015] 64 taxmann.com 3/[2016] 157 ITD 24 (Ahd. - Trib.) (para 8) and *CIT* v. *De Beers India Minerals (P.) Ltd.* [2012] 21 taxmann.com 214/208 Taxman 406/346 ITR 467 (Kar.) (para 9).

Dr. Sunil M. Lala *for the Appellant.* **Milind Chavan** *for the Respondent.*

ORDER

Pramod Kumar, Vice President. - By way of this appeal, the assessee-appellant has challenged the correctness of the order dated 21st April 2021, passed by the Assessing Officer under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961, for the assessment year 2017-18.

2. Grievances of the assessee-appellant, as set out in the memorandum of appeal, are as follows:

> "1. Ground No. 1- Income earned by Appellant by way of management fee- Not FTS- Not Taxable.
>
> 1.1 On the facts and in the circumstances of the case and in law, the learned Assessing Officer and the Hon'ble DRP, without appreciating the evidence and submissions filed, erred in holding that the management fee received by the Appellant is taxable as fees for technical services (FTS) under Income-tax Act, 1961 (the Act) as well as under India - Singapore Double Taxation Avoidance Agreement (DTAA). The Learned Assessing Officer and the Hon'ble DRP failed to appreciate that as the Appellant did not make available any technical knowledge etc to Dimension Data India (P.) Ltd. (DD India') the management fee received by the Appellant could not be taxed as FTS under article 12 of the DTAA.
>
> 1.2 On the facts and in the circumstances of the case and in law, learned Assessing Officer and the Hon'ble DRP erred in not following the order of the Hon'ble Mumbai Bench of Income-tax Appellate Tribunal in Appellant's own case for AY 2014-15 wherein after relying on its orders for earlier years, it was held that the management fee was not in the nature of fees for technical services but business profits which could not be taxed in the absence of a permanent establishment.

2. Ground No. 2- Inadequate opportunity

On the facts and in the circumstances of the case and in law, the Hon'ble DRP & learned Assessing Officer erred in passing impugned orders in breach of the principles of natural justice without providing the Appellant with sufficient and adequate opportunity and in arriving at conclusions therein based on incorrect factual averments/judicial decisions which are distinguishable and not applicable to the case of the Appellant and therefore, the said impugned orders, being bad in law are liable to be quashed or alternatively set aside.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal, so as to enable the Honorable Members to decide this appeal according to law."

3. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before us is a company incorporated in, and fiscally domiciled in, the Republic of Singapore. The assessee is entitled to the benefits of the India Singapore Double Taxation Avoidance Agreement [(1994) 209 ITR (Statute)1; Indo-Singapore tax treaty, in short]. During the relevant previous year, the assessee received Rs. 121,94,85,623, from its Indian associated enterprise by the name of Dimensions Data India (P.) Ltd., for rendering certain business support services, and recovered certain expenses said to be on the cost-to-cost basis. The nature of services so rendered are said to be as follows:

(*i*) Inputs on company policy related matters

(*ii*) Services related to human resource functions

(*iii*) Assistance with corporate communications and brand management.

(*iv*) Services related to business development and business operations

(*v*) Legal Support for corporate and compliance matters

(*vi*) Services related to corporate and compliance matters

(*vii*) Services related to development of solutions

(*viii*) Services related to project management and consulting services.

(*ix*) Information Technology related assistance

(*x*) Support with sales activities.

4. The claim of the assessee was in view of the make available clause in the Indo Singapore tax treaty, and in view of the fact that the said clause was not satisfied on the facts of the present case, no part of the amount so received by the assessee was taxable in India on the facts of the present case. The assessee did not offer the fees so received from the Indian entity to tax, on the short ground that as the services rendered by the assessee to the Indian entity, does not amount to 'making available' the services so rendered, in terms of article 12 of the Indo Singapore tax treaty, it cannot be taxed in India. The Assessing Officer was not impressed with this claim of the

assessee, and the Assessing Officer required the assessee to show cause as to why this income not be taxed as fees for technical services under section 9(1) of the Income-tax Act, 1961, as also under article 12 of the Indo Singapore tax treaty. Elaborate submissions were made by the assessee in support of the contention that as long as the provisions of the Indo-Singapore tax treaty are more favourable to the assessee, the provisions of the Income-tax Act cannot be invoked at all, and that, in terms of the requirements of article 12(4) of the Indo Singapore tax treaty, the fees for technical services can only be taxed in the source jurisdiction only when, *inter alia*, these services 'make available technical knowledge, experience, skill, know-how or process'. It was then submitted that the connotations of the expression 'make available' are well established in our jurisprudence, and unless the services enable the Indian entity, to undertake these activities without recourse to the service provider, *i.e.* the assessee. The nature of services was explained in detail, and it was highlighted that there is no transfer of technology or skill, in the process of rendition of these services, which is a sine *qua* non for its taxability in India. References were also made to judicial precedents in this regard. None of these submissions, however, impressed the Assessing Officer, and, while doing so, he, *inter alia*, observed as follows:

> '4.9 What is "make available"? Whether Input technology or output technology:
>
> A pertinent question that arises out of the above analysis of various court decisions is what type of technology is made available to the recipient. Whether it is the input technology or output technology?
>
> As per Memorandum of Understanding concerning Fees for Included Services in article 12 entered between US and India, dated 15 May, 1989, various examples have been given. Let us see Example 12 as described in the MoU.
>
> "Example(12)
>
> Facts:
>
> An Indian wish to install a computerized system in his home to control lighting, heating and air-conditioning, a stereo sound system and a burglar and fire alarm system. He hires an American electrical engineering firm to design the necessary wiring system, adapt standard software, and provide instructions for installations. Are the fees paid to the American firm by the Indian individual fees for included services?
>
> Analysis:
>
> The services in respect of which the fees are paid are of the type which would generally be treated as fees for included services under paragraph 4(*b*). However, the services are for the personal use of the individual making the payment, under paragraph 5(*d*), the payments would not be fees for included services."
>
> In the above example, it is seen that such services are to be treated as Fees for Included Services under article 12(4)(*b*) but they are not only due to the fact that the services are for personal use of the recipient. If we look at what is being made available here to the recipient is not the input technology (the expertise which remains with the American firm) but the output technology (design for the necessary wiring system, adaptation of the standard

software, and instructions for installations). This aspect has not been dealt with by most of the courts in their decisions on this issue. It may also be stated that had the input technology (information concerning technical industrial, commercial or scientific knowledge, experience or skill) been made available or transferred to the recipient, the transaction will take the character of royalty and not Fees for Included Services. What has been made available or transferred by the US firm to the recipient is the output technology by rendering services using its technical knowhow and expertise.

4.10. Technical knowledge, experience, skill, know how or processes is said to be made available to the recipient when it can apply the technical knowledge, experience, skill, know how or processes independently by itself without the aid of the service provider.

5.1. In this case, what has been offered to tax by the DD India Limited is not the question herein. The group policy is of rendering the services for the benefit of the group as a whole. It in no ways substitutes the issue of whether the services rendered should be taxed in India or not. The agreement between the assessee and the DD India Limited clearly shows that a lot of managerial, technical and consultancy services is provided by the assessee. What remains to be seen is as to whether the same gets excluded due to the make available clause in the tax treaty.

5.2 The assessee has only brought on record the explanation for the nature of services provided by it to the AE. Nothing is brought on record shows that the make available clause is squarely applicable to the facts of the case. As noted in an earlier para, what is made available depends on what one considers as input or output. If we look at what is being made available here to the recipient is not the input technology (the expertise which remains with the Assessee) but the output technology (analysis of the raw data, adaptation of the standard software, and instructions for installations). And this enables the user to use the services.

5.3 On perusal of the details, bills and vouchers filed shows that the assessee has incurred expenditure for the purpose of training and recovered the costs from the participants. Some of the training has been for the purpose of leadership development, employee communication training, some has been for train the trainer (leading fundamental workshops) and likes. This training definitely enables the participant to apply the learning and hence make available clause is satisfied.

5.4 Further, the agreement signed on 1-4-2014 with the AE DD India Ltd. is more comprehensive then the agreement signed in the earlier years with the AE. Therefore, the plea of the assessee that it is not business income as it does not have a PE is not tenable. In the submissions also the assessee has contested and discussed in detail that the nature of services provided to the AE are not taxable as FTS, as the same is not covered by the provisions of article 12(4) of the India-Singapore tax treaty as the assessee has not make available the technical knowledge, experience, skill, know-how or processes etc.

5.5 In this case, the services/technology have been made available as the recipient is competent and authorized to apply the same independently as an owner without depending upon the assessee. The recipient of technology is able to make use of technical knowledge,

experience, skill, knowhow or processes by himself in his business or for his own benefit and without recourse to the service provider in future as such services are not issue bases or case based, but permanent in nature. In other words, the technical knowledge, experience, skill, knowhow or processes, remains with the service recipient even after rendering of the services has come to an end. The service recipient is at liberty to use the technical knowledge, experience, skill, knowhow or processes in his own right. Further, in this case, none of the services are in the nature, where for every client or deal, the recipient has to depend on the assessee to finalize the deal or execute the work, but is able to enter into contracts and execute such contracts with the available technical knowledge, experience, skill, knowhow or processes by himself.

5.6 It is also noted from the records, that the DD India Limited has deducted TDS at the rate of 10% on the amount it has paid to the assessee under consideration. The assessee has also claimed the tax credit and refund of the same in the return of income without offering the same in income during the year under consideration. This clearly shows that the AE also regarded the same as income the assessee, and had as such deducted the TDS without applying for lower/Nil deduction certificates. Further, the assessee has reported in the return of income that the Rs. 122,20,27,452/- as income chargeable to tax at special rate and claimed refund of Rs. 12,49,36,260/-.

6. In view of the above discussions, the receipts of the amount of Rs. 122,20,27,452/- received from DDIL is to be taxed as FTS for the year under consideration. As the Assessee has under-reported the income, penalty proceedings under section 270A(2) of the Income-tax Act, 1961 are hereby initiated.'

5. When the stand of the assessee, as noted above, was stated in the draft assessment order, the assessee raised grievances before the Dispute Resolution Panel, but without any success. The Dispute Resolution Panel confirmed the action of the Assessing Officer, and declined to interfere in the matter. Learned Dispute Resolution Panel, *inter alia*, observed as follows:

"3.1 We have considered the facts of the case and assessee's submissions. A perusal of the scope of services to be rendered by the assessee company to its group company, *vide* agreement dated 1-4-2014, shows that following services are covered:

I. Inputs on company policy related matters: Provide assistance to the teams of the Service Recipient in managing annual strategy planning process, monthly strategy process and partnership with key vendors: Provide insights on key trends in the market and competitors' strategy, so as to assist the Service Recipient in identifying potential options to address market trends and competition for each Line of Business. Provide guidance in identifying the challenges in a specific area of the business as determined by the Chief Executive Officer/Chief Operating Officer of the Service Recipient and provide recommendations to address the challenges.

II. Services related to Human Resource functions: Provide guidance with respect to talent management, recruitment activities, compensation and benefits issues and other Operational matters of the Service Recipient like qualifications of personnel to be considered for

recruitment purposes, best practices on employee retention, career progression plans, guidance on competitive compensation for employees etc.

III. Assistance with corporate communications and brand management: Provide inputs to the Service Recipient in the Service Recipient's efforts of developing and implementing the brand strategy in order to deliver the brand promise that will enhance total client experience and brand equity.

IV. Services related to business development and business operation: Provide assistance and support in managing partner/vendor/client relationships: a. Assistance in managing rebates with vendors. Providing inputs on the Service Provider's service delivery considering the best practices followed by the group companies; Provide suggested inputs on costing, pricing and commercial terms in relation to Service Recipient's partners and vendors, for the Service Recipient's consideration.

V. Legal support for corporate and compliance matters: Provide guidance to the teams of the Service Recipient in their efforts with new client contracts, reseller contracts/agreements etc; Guidance on handling legal matters including legal compliance, managing intellectual property, managing litigation, general corporate legal matters including but not limited to mergers and acquisition work, dispute resolution (*e.g.* for HR matters) formulating policies to comply with local laws and ethics training.

VI. Services related to finance and accounting: Provide assistance and support in the areas of accounting and finance activities to support corporate operations; Provide inputs in relation to foreign exchange hedging requirements, handling treasury, credit and cash management related activities, regular monitoring of receivables, cash- flow and key cash conversion cycle metrics, and provision of monthly receivables reports for business reviews.

VII. Services related to development of solutions: Provide assistance in defining the strategy, scope and initiatives to be undertaken by each LOB; Provide inputs on the solutions proposed to be offered by the Service Recipient through collaboration with global counterparts; Provide guidance to the teams of the Service Recipient in their efforts to get the required infrastructure, capabilities and resources in place to be able to deliver the solutions to be offered.

VIII. Services related to project management and consulting services: Assist in creating further sales opportunities through provision of strategic consultancy services; Advice the Service Recipient in two new services namely, "Architect" and "Enterprise Architect" which essentially involve advice related to IT infrastructure facilities, applications and networks and alignment of IT strategy with the operations and processes of business.

IX. Information Technology related assistance: Provide guidance-elated to maintenance of IT infrastructure, including timely resolution of issues of the Service Recipient to minimize downtime.

X. Support with sales activities: Cloud Sales- Advice on implementation and technical aspects of specialist cloud services provide inputs on business strategies for new cloud

service business offerings by the Service Recipient to its clients; Provide guidance to ITO sales teams in developing sales strategy and facilitating the sales process for TO solutions.

3.2 During the proceedings before us, the assessee has contended that none of these services fall in the category of "managerial, technical or consultancy in nature". It is not understood that if the services listed above, or at least most of them, are not managerial services then which type of services would actually fit the description. The assessee company, as per the agreement, is providing assistance in respect of each and every aspect of corporate governance: from policy related matters to corporate communication and brand management, from managing human resources to providing support to manage finances, assisting in respect of legal/corporate compliances and business development, development of solutions, and IT related matters etc.

3.3 A plain reading of the above extract could actually be misconstrued as a description of complete corporate activities and training therein- it is so comprehensive. It is also difficult to comprehend that which of these services do not enrich the service recipient, makes him wiser to face similar challenges in future on his own and acquiring skills to deal with the issues.

3.4 It cannot be the case of the assessee that services rendered by it are in the form of providing a sort of FAQ only. If it was so, no client, in a third party situation, would have agreed to pay such a significant amount (More than Rs. 122 core) to it. Similarly, by same logic, it cannot also be the argument of the assessee that problems of similar nature, requiring homogenous solutions alone, would only be referred to it as again that would not warrant such high compensation.

3.5 Consequently, it is clear that the assessee is providing managerial, technical and consultancy services to its AE in India, spanning the entire gamut of corporate management, enriching it with the knowledge of enduring nature, The recipient of technology and managerial services is able to make use of technical knowledge, experience, skill, knowhow or processes by itself as such services are not issue bases or case based, but permanent in nature.

3.6 Based on the facts of the case, and the reasons cited by the A.O. in the draft assessment order, we hold that the receipt in question certainly fall in the category which qualifies to be FTS under the Act and also under article 12(4) of India-Singapore DTAA. The Hon'ble Supreme Court in the case of *National Cement Mines Industries Ltd.* v. *CIT* [1961] 42 ITR 69 had observed that, "the name which the parties give to the transaction which is the source of receipt and characterization of the receipt by them are of little moment and the true nature and character of the transaction have to be ascertained from the covenants of the contract in the light of the surrounding circumstances". Hence, the Assessing Officer has rightly concluded that the payments could not be exempted from tax merely because they are termed as 'management fee'. Briefly put, the true nature and character of the transaction are relevant in deciding the taxability.

3.7 Reliance in this regard is placed on the AAR decision in the case of *Intertek Testing Services India (P.) Ltd.* In re [2008] 307 ITR 418, wherein the AAR has laid down broad

principles for a receipt to be treated as FTS, and has sought to dispel the notion that technical services can only be construed in a strict, narrow sense. Further, in the cases of *Continental Construction Ltd.* v. *CIT* [1992] 195 ITR 81 at 117 (SC) and *CBDT* v. *Oberoi Hotels (India) (P.) Ltd.* [1998] 231 ITR 148 (SC), the Supreme Court has held that the term "technical services' included professional services. In the present case, a host of professional and management services, including technological and consultation inputs through training to guide the executives for taking decisions were provided by the assessee to its AE, and as rightly pointed out by the A.O., the services leading to transfer of knowledge and experience qualify to be treated as technical services as per section 9(1)(*vii*) of the Act and article 12(4) of the DTAA."

6. The Assessing Officer thus proceeded to frame the impugned order, and bring to tax the receipts of Rs. 121,14,85,623 as fees for technical services under article 12(4) of the Indo Singapore tax treaty. The assessee is aggrieved and is in appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

8. While on this issue, it will be useful to refer to the following observations made by a coordinate bench, in the case of *Shell Global Solutions International BV* v. *ITO* [2015] 64 taxmann.com 3/[2016] 157 ITD 24 (Ahd - Trib.), as follows:

"17. As for the connotations of 'make available' clause in the treaty, this issue is no longer *res integra*. There are at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi High Court in the case of *DIT* v. *Guy Carpenter & Co Ltd.* [2012] 346 ITR 504 and Hon'ble Karnataka High Court in the case of *CIT* v. *De Beers India Minerals (P.) Ltd.* [2012] 21 taxmann.com 214/208 Taxman 406/346 ITR 467 in favour of the assessee, and there is no contrary decision by Hon'ble jurisdictional High Court or by Hon'ble Supreme Court. In *De Beers India (P.) Ltd.* case (*supra*), their Lordships posed the question, as to "what is meaning of 'make available'", to themselves, and proceeded to deal with it as follows:

'……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, 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 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.'

18. …….. In the case of *Boston Consulting Group* (*supra*), it was stated that "advising on "marketing strategies" is held to be outside the scope of technical services" and that as for the "business of rendering strategy consulting services, such as business strategy, marketing and sales strategy, portfolio strategy" carried on by the assessee "the nature of these services is materially similar". All these services were held to be outside the scope of fees for technical services taxable under the Indo-US tax treaty. In the case of *Bharat Petroleum Corpn. Ltd.* v. *Jt. DIT* [2007] 14 SOT 307 (Mum.), another coordinate bench of this Tribunal, *inter alia*, held that market study covering study of supply and demand analysis, domestic refining capacity, price forecast etc did not constitute fees for technical services as it did not transmit the technical knowledge. In the case of *Ernst & Young (P.) Ltd.*, In re [2010] 189 Taxman 409/323 ITR 184 (AAR), the Authority for Advance Ruling, *inter alia*, observed that "some of the services enumerated have the flavor of managerial services" but "services of managerial nature are not included in Article 13 (of Indo-UK tax treaty, which is in *pari materia* with the treaty provision before us) unlike many other treaties". We are in considered agreement with the views so expressed by the Authority for Advance Ruling. On the same lines are various decisions of this Tribunal in the cases of *ICICI Bank Ltd.* v. *Dy. CIT* [2008] 20 SOT 453 (Mum.) and *McKinsey & Co. Inc* v. *Asstt. DIT* [2006] 99 ITD 549 (Mum.). What essentially follows, therefore, is that as long as the services rendered by the assessee are managerial or consultancy services in nature, which do not involve or transmit the technology, the same cannot be brought to tax as fees for technical services."

9. Clearly, therefore, unless the recipient of the services, by virtue of rendition of services by the assessee, is enabled to provide the same services without recourse to the service provider, the services cannot be said to have made available the recipient of services. A mere incidental advantage to the recipient of service is not enough. The test is the transfer of technology, but then it is not even the case of the revenue that there is a transfer of technology, and what is highlighted is the incidental benefit to the assessee, which is treated as an enduring advantage. As observed in the binding judicial precedents referred to above, in order to invoke 'make available' clause, "to fit into the terminology "making available", the technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end" and "the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider". Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. In our considered view, that condition is not satisfied on the facts of the present case. We, therefore, hold that that 'make available' clause in the Indo-Singapore tax treaty cannot be invoked on the facts of the present case- as no case is even made out by the revenue that as a result of rendition of these services to the Indian entity, there is any transfer of skill or technology. It is not a question of, as the learned DRP put it, enriching "the service recipient, making him wiser to face similar challenges in future on his own and acquiring

the skills to deal with these issues", but the test is whether the rendition of these services per se enables the recipient to provide the similar services, without recourse to the service provider, in future. An incidental benefit or enrichment which may add to the capabilities is not sufficient; the critical factor triggering the taxability in the source jurisdiction is the transfer of skills. That is what the Hon'ble Karnataka High Court has held in the case of *CIT* v. *De Beers India Minerals (P.) Ltd.* [2012] 21 taxmann.com 214/208 Taxman 406/346 ITR 467, and this judicial precedent, in the absence of anything to the contrary having been held by Hon'ble jurisdictional High Court, is binding on this forum. That condition about the transfer of skills and absorption of kill by the recipient of service, in our humble understanding, is not satisfied. Once the taxability fails in terms of the treaty provisions, there is no occasion to refer to the provisions of the Income-tax Act, 1961, as in terms of section 90(2), "where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee". The taxability of impugned receipts, under section 9, is thus wholly academic. We leave it at that.

10. In view of the above discussions, as also bearing in mind the entirety of the case, we uphold the plea of the assessee, and direct the Assessing Officer to exclude the sum of Rs. 121,14,85,623 from his taxable income as fees for technical services. The assessee thus gets the relief accordingly.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 4th day of July 2022.

SANIYA

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*In favour of assessee.