Advics Company Ltd. , Karnataka vs Acit Circle International ... on 12 April, 2024

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

SHRI G.S. PANNU, VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 1053/Del/2022
Asstt. Year 2017-18

Advics Co., Ltd., 2-1 Showa Cho, Kariya, Aichi, 448-8688, Japan. PAN AAICA7015J (Appellant)	Vs.	ACIT, Circle International Taxation- 1(1)(1), Delhi. (Respondent)

Assessee by:	Shri K.M. Gupta, Adv. Ms. Shuti Khemta, AR, Shri Anubhav Rastogi, Advocate
Department by:	Shri Vijay B. Vasanta, CIT-DR Shri Vivek K Upaedhayay, Sr. DR
Date of Hearing:	08.12.2023, 10.04.2024
Date of pronouncement:	12.04.2024

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the final assessment order dated 19.03.2022 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (the "Act") in pursuance to the directions of Ld. Dispute Resolution Panel ("DRP") pertaining to the Assessment Year ("AY") 2017-18.

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

"General Grounds

1. On the facts and circumstances of the ease, the assessment order passed by the Learned Assessing Officer ('Ld. AO') under section 143(3) r.w.s. 144C(13) of the income tax Act, 1965 ('the Act') pursuant ITA No.- 1053/Del/2022 Advics Co., Ltd.

to the directions of the Ld. Dispute Resolution Panel ('Ld. DRP') is bad in law, unlawful and unjust.

2. On the facts and circumstances of the case and in law, the Ld. AO has erred in determining the total income of the Appellant at INR 12.75.31,101 as against the returned income of INR 10,05,04,070 offered to tax by the Appellant.

Taxability of employee cost reimbursements as Fee for Technical Services ('FTS) amounting to INR 2,70,27,031

3. On the facts and circumstances of the case and in law, the Ld. AO/Ld. DRP was not justified in holding that the employee cost reimbursements amounting to INR 2,70,27,031 by the Indian companies to the Appellant is taxable as FTS as per the provisions of section 9(1)(vii) of the Act as well as Article 12 of the India-Japan Double Taxation Avoidance Agreement ('DTAA').

3.1. On the facts and circumstances of the case and in law, the Ld. AO/Ld. DRP has erred in not appreciating that there exists an employer-employee relationship between the expatriates and the Indian Associated Enterprises (AEs) and thus, no service was rendered by the Appellant to the Indian AEs.

3.2. On the facts and circumstances of the case and in law, the Ld. AO/ DRP has erred in ignoring and not taking cognizance of documents submitted as additional evidence to substantiate the existence of employer- employee relationship between the Indian AEs and the expatriates which inter-alia included the employment contract entered into between the Indian AEs and the expatriates and thereby, erroneously concluding that no independent employment agreement was entered into between them.

3.3. On the facts and circumstances of the case and in law, the Ld. AO/Ld. DRP has erred in not appreciating the fact that the Appellant has not performed any specific function apart from transfer of personnel in order to support the Indian AEs and thus, there could be no FTS in the absence of any service being rendered.

3.4. On the facts and circumstances of the case and in law, the Ld. AO/Ld. DRP has erred in not appreciating the fact that the reimbursement amount constitutes salary which is not taxable as FTS as per the provisions of section 9(1)(vii) of the Act and Article 12 of India-Japan DTAA.

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3.5. On the facts and circumstances of the case and in law, the Ld. AO/Ld. DRP has erred in not appreciating that the Indian AEs have withheld taxes under section 192 of the Act on the entire salary paid to the expatriates as evidenced by Form 16 issued to the expatriates and such expatriates have offered the entire income to taxes in their respective returns of income filed under the Act.

3.6. On the facts and circumstances of the case and in law, the Ld. AO/Ld. DRP has erred by not appreciating that the payments made by the Indian AEs to the Appellant are pure reimbursements of the actual employee costs, without any element of income.

Levy of surcharge and health and education cess on alleged FTS income

4. On the facts and circumstances of the case and in law, the Ld. AO has erred in not appreciating the fact that the Appellant is eligible to be governed by the provisions of the India-Japan DTAA in respect of the alleged FTS income and the same should be taxable at the flat rate of 10% without including any surcharge and health and education cess.

Levy of interest under section 234B of the Act

5. On the facts and circumstances of the case and in law, the Ld. AO has erred in charging interest under section 234B of the Act.

Initiation of penalty proceedings

6. On the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under Section 270A of the Act against the Appellant on account of the addition made in the final assessment order.

All the above grounds are without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case."

3. Briefly stated, the assessee is a Japanese company engaged in the business of engineering, manufacturing and sale of brake system and components of automobile companies. The assessee is a tax resident of Japan.

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It has opted to be governed by the provisions of the Double Taxation Avoidance Agreement between India and Japan ("India-Japan DTAA"), being more beneficial to it. In AY 2017-18, for the effective and efficient conduct of the business of its Indian Associated Enterprises, namely Advics South India Pvt. Ltd. and Advics North India Pvt. Ltd. ("Indian AEs/ AEs"), the assessee assigned some of its employees for a limited period as per the request raised by the AEs by way of Temporary Transfer Agreement(s) ("TTA") along with their respective Memorandum of Understanding ("MOU"). Pursuant to this arrangement, three expatriates/ employees ("expats/ seconded employees/ employees") employed with the assessee were identified by the AEs in accordance with their business objective. Thereafter, the AEs entered into a separate employment agreement with these

three expats respectively who then became the employees of the respective AEs. The AEs were responsible for payment of salaries to these expats. However, for administrative convenience, the assessee agreed to disburse part of the remuneration of these expats on behalf of the AEs in their home country i.e. Japan which were subsequently reimbursed by the AEs on cost-to-cost basis without any mark-up. The AEs duly withheld and deposited tax on entire salary payments made to the expats whether disbursed in India or Japan for the services rendered by them in India in accordance with section 192 of the Act.

3.1 For the AY 2017-18, the assessee cross charged by way of debit notes aggregating to an amount of Rs. 2,70,27,031/-, the details of which are provided below, from its AEs towards the amount of salaries paid to the expats in Japan by the assessee on behalf of its AEs:

Sr. No. Name of Employees Amount (Rs.) Work Profile

1. Mr. Hiroshi Asano 86,28,498 Senior Project Manager

2. Mr. Makoto Ogawa 74,27,325 General Manager

3. Mr. Toshitaka Suga 1,04,68,693 Managing Director Add: Relocation Expense of 5,02,513 the aforementioned employees Total 2,70,27,029 ITA No.- 1053/Del/2022 Advics Co., Ltd.

3.2 For the relevant AY 2017-18, the assessee e-filed its return of income on 29.11.2017 declaring income of Rs. 10,05,04,070/-. The case of assessee was selected for scrutiny under CASS. Statutory notice(s) under section 143(2) and 142(1) of the Act were issued and served upon the assessee. The assessee complied with the notices by filing response/submissions/documents electronically which were duly examined by the Ld. Assessing Officer ("AO").

3.3 The submissions/replies filed by the assessee were not found tenable by the Ld. AO for the reasons that

- the assessee is providing service to Indian AEs through the expats;

- the assessee is under an obligation for paying salary to the expats;

- the expats are providing key management/consultancy/technical services to the Indian AEs;

- in all the AEs the President of the company is a seconded employee whose appraisal cannot be done independently by the Indian AEs;

- the expat employee is not working under the direct supervision, control and management of Indian AEs; and

- the assessee has failed to provide the employment agreement.

3.4 The Ld. AO relied upon various decisions in support of his contention that the employee reimbursement cost received by the assessee is taxable as FTS including, inter-alia the decision of the jurisdictional Hon'ble Delhi High Court in the case of Centrica India Offshore (P.) Ltd. vs. CIT [2014] 364 ITR 336 drawing parity between the facts of that case and the assessee in the present case.

3.5 The Ld. AO vide his draft assessment order dated 10.06.2021 passed under section 143(3) read with section 144C of the Act proposed to make an ITA No.- 1053/Del/2022 Advics Co., Ltd.

addition of Rs. 2,70,27,031/- received by the assessee on account of expat/ seconded employees cost reimbursement from the Indian AEs to be taxable as Fees for Technical Services ("FTS") as per Article 12 of the India-Japan DTAA as well as under the provisions of the Act to the returned income of Rs. 10,05,04,070/-.

3.6 The assessee filed objections before the Ld. DRP who vide its directions dated 11.02.2022 under section 144C(5) of the Act upheld the action of the Ld. AO by treating the employee reimbursement salary cost of Rs. 2,70,27,031/- taxable as FTS. The observations and findings of the Ld. DRP are reproduced below:

"4.2.1 Ground Number 2 along with the sub-grounds 2.1 to 2.5 relate to disallowance of employee cost reimbursement from the Indian AE to the assessee by treating the same as FIS. Brief facts of the case is that the Assessee is a Company incorporated under the laws of Japan and is a tax resident of Japan. During the year under consideration, the company (assessee) sent 3 of its expatriate employees on secondment to its Indian AEs. These employees were seconded to India to enable the Indian AEs to have employees having special knowledge, techniques, ability and experience to work for the Indian AEs and take forward the business of the Indian AEs. The expatriate employees of the assessee held positions of Managing Director, General Manager and Senior Manager in Indian AEs. The salaries to these seconded employees were paid by the assessee in Japan which was subsequently reimbursed by the Indian AEs to the assessee. The Ld. AO treated this reimbursement to the assessee from its Indian AEs as Fees for Technical Services in terms of Article 12 of the DTAA between India and Japan. In arriving at this conclusion the AO made the following significant observations:

> "Hence it is seen that Mr. Toshikata Suga is acting as President in 2 Indian AEs and Mr. Hiroshi Asano is the President of the 3rd Indian AE. Hence it is clear that the assessee has seconded key employees having requisite knowledge, experience and expertise to provide their services at highest levels to its Indian AEs, and the salary/other costs of these personnel incurred by the assessee is reimbursed by the Indian AEs to the assessee. The assessee further stated that the appraisal of the President of every group company is done as per the group policy in consultation with the group president. Hence, the Indian AE is not even independently appraising 2 out of 3 employees seconded. At this stage, it is important to ITA No.-

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analyze the provisions of India Japan DTAA which deal with the Managerial/Technical/Consultancy services.

8. Article 12 of the DTAA between India and Japan Article 12 of the DTAA between India and Japan states that:

"The term 'fees for technical services' as used in this article means payments of any amount to any person other than payments to an employee of a person making payments and to any individual for independent personal services referred to in article 14, in consideration for the services of a managerial, technical or consultancy nature, including the provisions of services of technical or other personnel."

Hence the Article 12 of the DTAA between India and Japan categorically states that the FTS includes payment made for the consideration of managerial, technical or consultancy nature including the provisions of services of technical or other personnel.

In the case under scrutiny, the assessee has seconded key management personnel to its Indian AE and the AE is making payment for the services of these employees to the assessee in the form of reimbursement of salaries and other expenses of these employees Consequently, it squarely falls under the ambit of Article 12 of the DTAA and is to be categorized as FTS"

4.2.2 The AO has also relied on a number of judicial precedents in support of his conclusions.

4.2.3 The assessee has objected to the conclusion of the assessee that the reimbursements made by the Indian AE to the assessee towards the salary paid by the assessee in Japan to key personnel working for the Indian AE's are in the nature of FTS taxable in the hands of the assessee in India. The assessee has filed detailed submissions in this regard. The crux of the submissions of the assessee is as under:

a) Existence of employee-employer relationship between expatriates and Indian Company The amount was paid by the Indian company as salaries to the expatriates and it was only for administrative convenience that part of the salaries were paid by the Assessee in Japan, which was cross charged on cost-to-cost basis, without any element of profit or mark-up.

b) No service element in secondment to Indian Company There is no service which is provided by the Assessee to the Indian Company.

Thus, without any presence of service element, the amounts do not qualify as "FTS".

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c) Reimbursement of Salary is not taxable as FTS as per the provision of the Income-tax Act 1961.

d) The Indian subsidiaries undertake withholding in hands of expatriates on the complete amount (including the amount paid in Japan) and the complete amount is offered to tax by the expatriates in India.

e) Payments made by the Indian entity are towards reimbursement of actual employee cost and does not have any element of income the payments are made on a cost to cost basis without any profit element or a mark-up, reconciled and evidenced by debit notes, pa slips, etc. Thus, there is no income accruing to the Assessee to warrant any addition.

4.2.4 The assessee filed an additional evidence w.r.t the grounds of objection filed by the assessee, vide letter dated 08.10.2021. The additional evidence filed by the assessee relate to the assessee's claim of existence of employer/employee relationship between the expatriate employees and the Indian AEs, and that the reimbursement of actual expatriate employee cost by the Indian AE does not have any element of income. It was remanded to the AO for comments. After examination of the additional evidences the AO has commented in para 4.2 to para 6 of the remand report as under:

> "4. Hence it is clear that the assessee has seconded its key employees having requisite knowledge, experience and expertise to provide their services at highest levels to its Indian AEs, as per their requirement and the salary/other costs (as stated by the assessee company) of these personnel incurred by the assessee is reimbursed by the Indian AEs to the assessee company in the guise of salary/other cost. Since, the seconded key employees are sent for temporary purpose to deliver their expertise in the concerned filed. Further, as per Article 4.1 and 6.1 it is also noted that the ADVICS has the ultimate command on the seconded employee. During the course of assessment proceeding it is noticed that the seconded employees are providing key management/consultancy/technical services to the Indian company and these facts are confirmed by the assessee vide submission dated 31.03.2021 that "the employees were seconded to India to enable the Indian AEs to have employees having special knowledge, techniques, ability and experience to work for the India AEs and take forward the business of the Indian AEs". In all the AE, the president of the company is a seconded employee whose appraisal can't be done independently by the Indian AE. Their salary and other expenses are also paid by the assessee and not by the Indian AEs. Consequently, it squarely falls under the ambit of Article 12 of the DTAA and is to be categorized as FTS. This view is also supported by various judicial pronouncements as discussed in the assessment order. Hence, the contention of the assessee ITA No.- 1053/Del/2022 Advics Co., Ltd.
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> that the reimbursement of salary/other cost is not taxable in India is not acceptable.
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> 5. Further, on the issue of other additional documents such as Copy of the VISA letter showcasing that secondee employees were working in India on 'employment VISA, Copy of form 16 issued by the Indian AEs to such secondee employees and Copy of

sample debit notes raised by the assessee on the Indian AEs submitted by the AR of the assessee to substantiate its claim that the seconded employees are the employee of Indian ALs. This argument does not match with the facts of the case and payments received by the assessee company form its AEs is nothing but the FTS as per Article 17 of the India-France DTAA.

6. In view of the above, the contention of the assessee is not accepted at this juncture also. Report is hereby submitted for your kind perusal and necessary directions."

4.2.5 The DRP as carefully considered the order of the AO, the submissions of the assessee, the additional evidence filed by the assessee during DRP proceedings and the remand report of the AO on the additional evidences filed. The crucial issue involved is whether the reimbursements of salary paid to the expatriate employees from the Indian AEs to the assessee is taxable in the hands of the assessee as fee for technical services. The AO has contended that the expatriate employees have been provided by the AE to provide managerial/technical/consultancy services to the Indian AE and therefore the reimbursements made by the Indian AEs to the assessee are in the nature of fee for technical services in terms of Article 12 of DTAA between India and Japan. Article 12 of India Japan DTAA provides that the term 'fees for technical services' as used in this article means payments of any amount to any person other than payments to an employee of a person making payments and to any individual for independent personal services referred to in article 14, in consideration for the services of a managerial, technical or consultancy nature, including the provisions of services of technical or other personnel.

4.2.6 The assessee has submitted that the key personnel were transferred to the Indian AEs as Per a Temporary Transfer Agreement (TTA). As per Article 2 of the TTA, the employees of the assessee (ADVICS) were seconded to the Indian AEs to have employees with special knowledge, techniques, ability and experience. Article 1 provides that the transferred/seconded employee will continue to retain his position as ADVICS employee. Articles 4.1 and 6.1 further amplify the position that the assessee, ADVICS has the ultimate command over the seconded employees. It is further noticed that the temporary transfer of the ADVICS employee to Indian AEs is as per TTA between the Indian AEs and the assessee and not under any independent agreement between the expatriate employees and the AEs. The assessee has ITA No.- 1053/Del/2022 Advics Co., Ltd.

argued that the status of the seconded employee vis-à-vis the Indian AEs of the assessee is that of an employee employer relationship. However, there is no independent employment agreement between the seconded employee and the Indian AEs. Assignment/secondment of the transferred employees to the Indian AEs and control over them is exercised by the assessee. As rightly observed by the AO in page 8 of his order, the seconded personnel cannot be said to be working under direct supervision, control and management of Indian AE, instead they are in India to provide their expertise, knowledge and other skills to the Indian AE and in exchange for these services, payments are made by the AEs to the assessee. It is further noticed that the salary payments to the seconded employees are directly made by the assessee. The assessee has submitted that the TDS has been deducted from such reimbursements, but such salary payment has not been directly made to the persons claimed to be the direct employees of Indian AEs by the assessee There is a third party

control, i.e. that of the assessee, on the conditions of services to be provided by the seconded employees for the Indian AEs. If there was no control of the assessee over the seconded employees to Indian AEs, there would be a direct employment agreement between the AEs and the seconded personnel and the employment would not be channelled through the assessee under TTA. In the circumstances, the DRP finds no infirmity in the conclusion of the AO that the services in the nature of managerial and technical nature were provided by the assessee to the Indian AEs through the expatriate/ seconded employees and accordingly the receipts in the nature of reimbursement towards salary cost of seconded employees are FIS.

4.2.7 The AO has relied on the following case laws to fortify his conclusion that secondment of skilled personnel for provision of managerial and technical service to Indian entities by foreign company and the amount received by the foreign company for such services is in the nature of fee for technical services:

a) ITAT Bangalore in case of Flughafen Zurich, AG [2017] 79 taxmann.com 199 (Bangalore-Trib).

b) ITAT Bangalore in case of Food world Supermarkets Ltd. [2015] 63 taxamann.com 43 (Bangalore Trib).

c) TAT Mumbai in case of General Motors Overseas Corporation [2020] 115 taxmann.com 129 (Mumbai-Trib).

d) Hon'ble Delhi High Court in the case of Centrica Indian Offshore (P) Ltd. [2014] 41 taxamnn.com 300 (Delhi).

4.2.8 The Hon'ble ITAT Chennai dealing with similar facts in the case of Panasonic Corporation upheld this view by observing that the rendering of highly technical services through seconded employees of a foreign company to an Indian company and reimbursement of salary cost of such deputed ITA No.- 1053/Del/2022 Advics Co., Ltd.

employees to the foreign company falls within the ambit of FTS. Chennai ITAT ruled that payment received by a foreign company from its Indian subsidiary towards salary cost recharge of employees deputed in India, constitutes FTS for AY 2013-14 and not mere reimbursements. The Hon'ble ITAT noted that the personnel seconded to Indian subsidiary were all in senior Technical / Managerial positions and the ultimate responsibility and the direction, control and supervision of the personnel vested with Panasonic Corporation (resident of Japan) and Ruled that "Since the employees deputed by the assessee are high level technical executives and they are rendering highly technical services to Panasonic India, the (payments for such services would fall within the ambit of FIS as defined in Explanation 2 to Section 9(1)(vii) of the Act."; The issue involved in the instant case is identical to the issue decided by the ITAT Chennai in the case of Panasonic Corporation where technical/managerial services were provided by a foreign company to the Indian AEs through senior executives working in technical and managerial capacities. As observed by the AO, these seconded employees functioned under substantial control of the assessee (ADVICS) and therefore, in effect

provided services to the domestic AEs on behalf of the assessee company. In view of the above, the DRP find no infirmity in the action of the AO to treat the reimbursement of salary cost to the assessee from the Indian AEs on account of the managerial and technical services received by the AE from the seconded employees of the assessee as FTS."

3.7 Pursuant to the above, the Ld. AO passed the final assessment order on 19.03.2022 under section 143(3) read with section 144C(13) of the Act assessing the total income of the assessee at Rs. 12,75,31,101/- (Returned Income Rs. 10,05,04,070/- + Addition Rs. 2,70,27,031/-).

4. Aggrieved, the assessee is in appeal before the Tribunal and all the grounds of appeal relate thereto.

5. Ground no. 1 and 2 are general in nature.

6. The main grievance of the assessee is raised in ground No. 3 (along with its sub-ground nos. 3.1 to 3.6) wherein the assessee has challenged the taxability of the employee salary cost reimbursements amounting to Rs.

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2,70,27,031/- to the assessee by the AEs as FTS as per the provisions of section 9(1)(vii) of the Act and Article 12 of India-Japan DTAA.

6.1 The Ld. AR submitted that the assessee is on the payroll of the Indian AEs for the period of transfer. The seconded employees/ expats worked in India as employees of the respective Indian AEs which can be corroborated from the employment visa's of the expats as well as the contract of employment between the expats and the respective Indian AEs, copies of which are available on record.

6.2 The expats worked under the direct supervision, control and management of the Indian AEs. The AEs are completely responsible for the conduct of the seconded employees and the employees are required to follow internal policies of the Indian AEs. The expats while exercising their employment in India have rendered general and routine supervision service to ensure that the quality and standards set by the group are followed by the Indian AEs and hence the allegation of the Ld. AO that the expats are providing key management / consultancy / technical services are fallacious.

6.3 He submitted that there is no service element involved in the secondment of expats. The assessee has just transferred the expats in order to support the Indian AEs. The impugned payments are in the nature of salary and hence cannot be taxed as FTS. He further submitted that the payment being pure reimbursement of salary costs cannot be taxed as FTS. There is no mark-up or fee charged by the assessee from the Indian AEs. There is no element of income as these payments are merely reimbursement of actual salary costs. He relied upon several favourable rulings in support thereof including the decision of the Hon'ble Delhi Tribunal in the case of Ernst & Young U.S. LLP

vs. ACIT [2023] 153 taxmann.com 95 (Delhi-Trib) and Yamazen Machinery and Tools India (P.) Ltd. vs. ACIT [2023] 14 taxmann.com 96 (Delhi - Trib.) ITA No.- 1053/Del/2022 Advics Co., Ltd.

6.4 He also submitted that as per the terms of the TTA and corresponding MOU, the Indian AEs have a right to undertake performance appraisal of the seconded employees in accordance with its employment policies and that the appraisal of the President of Indian AEs is also done by the Board of the Indian AEs in accordance with the group policy.

6.5 Referring to the relevant clauses of the TTA and MOU, the Ld. AR submitted that it is the responsibility of the Indian AEs to pay the entire salaries of the employees /expats which have been duly paid after deducting the TDS thereon. The assessee has paid certain portion of the salary to the expats in Japan only for administrative convenience, for and on behalf of the India AEs. The full amount of salary has been offered to tax by expats in India by filing their respective ITRs. The assessee has submitted copies of ITRs of expats and Form 16 issued to the expats evidencing the same.

6.6 The Ld. AR then referred to Explanation 2 to section 9(1)(vii) of the Act which provides that "For the purposes of this clause, "fees for technical services"

> means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries"" and submitted that once the payment is in the nature of salary, the same cannot be classified as FTS.
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> 6.7 The Ld. AR referred to the decision of the Hon'ble Delhi High Court in the case of Centrica India Offshore (P.) Ltd. (supra) relied upon by the Ld. AO to hold the impugned receipts taxable as FTS in the hands of the assessee and submitted that the fact pattern of the said case is distinguishable from the ITA No.- 1053/Del/2022 Advics Co., Ltd.
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> facts of the present case and thus the ratio of the said case is inapplicable. He submitted a chart outlining the differences with reference to the relevant clauses of TTA and MOU. He further submitted that the other cases relied upon by the Ld. AO are also distinguishable on facts for which he submitted a chart outlining the differences in the fact pattern of the said cases and the assessee's case. He then drew our attention to several decisions where the courts have in a similar fact pattern held the impugned receipts to be not taxable as FTS.
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> 7. The Ld. DR strongly supported the order of the lower authorities. The Ld. DR submitted that the case of the assessee is squarely covered by the decision of the Hon'ble Supreme Court rendered in the context of service tax dated 19.05.2022 in

Civil Appeal No. 2289-2293 of 2021 in the case of C.C., C.E & S.T-Bangalore vs. M/s. Northern Operating Systems Pvt. Ltd. reported in [2022] 61 GSTL 129 and placed a copy of the said decision on record, wherein the Hon'ble Supreme Court held that the assessee was the service recipient of the overseas group company concerned, which can be said to have provided manpower supply service, as a taxable service. Thus, the impugned issue has been conclusively decided by the Hon'ble Apex Court by holding employees secondment activity as provision of service. He submitted that facts of the present case are absolutely identical with the facts of the case in Northern Operation Systems Pvt. Ltd.'s case (supra).

8. In rebuttal, the Ld. AR submitted that Northern Operating Systems Pvt. Ltd.'s case (supra) is distinguishable on facts as well as in law due to the reasons that - (i) it deals with the levy of service tax on manpower services provided by the foreign company and thus has no application on facts of the present case; and (ii) in the present case, the receipt in dispute is in the nature of salary reimbursements by the Indian companies on which they have duly deducted tax under section 192 of the Act for the component paid to the expats in India as well as abroad remitted for administrative convenience only. The Ld. ITA No.- 1053/Del/2022 Advics Co., Ltd.

AR submitted a chart outlining the factual disparity between the facts of Northern Operation Systems Pvt. Ltd.'s case (supra) and assessee's case by giving reference to the relevant clauses of the TTA and MOU, in response to which the Ld. DR offered his point-wise written comments thereto.

9. We have heard the Ld. Representatives of the parties, considered their submissions and perused the records. It is an undisputed fact that the assessee is a tax resident of Japan and thus governed by the provisions of the India-Japan DTAA. The assessee has opted to be governed by the provisions of the India-Japan DTAA being more beneficial to it. The issue that needs to be considered by this Bench here is the taxability of receipts of Rs. 2,70,27,031/- in the nature of reimbursement towards salary cost by the assessee from its Indian AEs that has been treated as FTS by the Revenue and charged to tax under the provisions of Article 12 of India-Japan DTAA viz-a-viz the claim of the assessee that the same be treated as employee salary cost cross charged by the assessee which has no element of service/ income.

10. FTS is defined under Article 12(4) of the India-Japan DTAA to mean "payments of any amount to any person other than payments to an employee of a person making payments and to any individual for independent personal services referred to in article 14, in consideration for the services of a managerial, technical or consultancy nature, including the provisions of services of technical or other personnel." It is the case of the Revenue that the expats were seconded to the AEs for rendering managerial/ technical services and hence the payments made are in the nature of FTS. According to Revenue the expats are employees of the assessee and not of the Indian AEs and hence this was contract for service and salary reimbursement cost is

taxable as FTS. It is, however, a fact corroborated with evidence that the expats were employees of Indian AEs during the term of their transfer and were paid salaries by AEs after ITA No.- 1053/Del/2022 Advics Co., Ltd.

due deduction of tax on the entire amounts either disbursed in India or in Japan.

10.1 The Ld. AO/ DRP has observed that services in the nature of managerial and technical nature were provided by the assessee to the Indian AEs through the expats and accordingly the impugned receipts in the nature of reimbursement towards salary cost of expats are FTS. Although there is no specific reference in TTA/ MOU, it has always been the case of the assessee that the expats were seconded to the AEs to carry on routine business activities of Indian AEs as their employees. No material/ evidence have been brought on record by the Revenue to substantiate its claim that the assessee rendered any managerial/ consultancy/ technical services to the Indian AEs through the expats in furtherance of its business in India. Further, the payment made by the Indian AEs is a pure reimbursement of salary costs of expats which has been cross charged by raising debit notes on the Indian AEs. It cannot be, in our view, regarded as FTS in the hands of the assessee as the same is taxable as salary in the hands of the expatriate employees.

10.2 From the perusal of the TTA along with their respective MOUs, it can be inferred that the expats worked under the direct control and supervision of the Indian AEs and that during the entire period of secondment, the AE are the real and economic employer of these expats. Article 2 of the respective MOU entered into with both the Indian AEs which is reproduced below clearly states that the expats would work as per the instructions and orders of the Indian AEs (pages 18 to 24 of the Paper Book) refers:-

"Article 2. PURPOSE OF TEMPORARY TRANSFER .....The word "Temporary Transfer shall mean, in accordance herewith, (1) for ADVICS and the assigned employee, in principle, to cease the employment agreement entered into by and between them, and (1) for ADSNI/ADSSI and the assigned employee to separately enter into an employment agreement. Based on such employment agreement, the assigned employee belongs to ADSNI. As such, the ITA No.- 1053/Del/2022 Advics Co., Ltd.

assigned employee works in accordance with ADSSI's/ADNSI's orders and instructions, and ADSNL/ADSSI pays corresponding salaries and usages to the assigned employee"

Further Article 5 of the TTA reproduced below infers that the AEs shall be completely responsible for the conduct of the expats and the expats are required to follow the rules and policies of AEs. (page 6 of the Paper Book refers):

> Article 5. Applicable Rules Unless otherwise stipulated in this Agreement, the rules and policy of ADSSI shall apply to Assigned Employee with respect to such matters as working hours, recess, and holidays."
>
> 10.3 The fact on record reveals that the assessee has duly furnished the relevant TTA(S) along with their MOU entered into between the assessee and Indian AEs by way of additional evidence filed before the Ld. DRP vide letter dated 08.10.2021 and the employment contracts entered into between the assessee and the expats which has not been taken into cognizance by the Ld. DRP/ AO. The assessee has transferred/ provided the required personnel to the Indian AEs in order to support the business of the Indian AEs in terms of TTA/ MOU. There is no provision of any service; be it managerial or technical by the assessee through the expats/ seconded employees to the Indian AEs under the TTA/ MOU. The employment contracts entered into between the expats and the respective Indian AEs read with MOU makes it clear that the Indian AEs are under an obligation to pay expat's salary and the appropriate taxes have to be withheld thereon. (Pages 26-28 of the Paper Book refer).

Accordingly, the Indian AEs have duly deducted tax under section 192 of the Act and deposited the same into the Government account for the salaries paid to the expats in India as well as abroad (remitted solely for administrative convenience) The expats have offered the entire salary income to tax in their respective returns of income filed under the relevant provisions of the Act which is supported by Form 16 (TDS certificates forming part of the Paper Book) issued to the expats by their respective employers i.e. Indian AEs.

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11. The Revenue has heavily relied upon two cases, namely Centrica India Offshore (P) Ltd. (supra) and Northern Operating Systems Pvt. Ltd. (supra) to substantiate its claim of taxability of employee reimbursement cost as FTS. On the contrary, the Ld. DR cited many decisions wherein the courts/ tribunals have in the identical set of facts held these cases (supra) to be inapplicable.

12. So far as the applicability of the jurisdictional Hon'ble Delhi High Court's decision in the case of Centrica India Offshore (P.) Ltd. (supra), in our considered view, the same would not apply to the assessee's case due to following reasons which are well substantiated by reference to the relevant clause(s) of TTA and MOU:

> S. Facts of Centrica India Facts of Advics Co., Relevant Clauses of No. Offshore (P) Ltd. Ltd. (assessee) TTA and MOU
>
> 1. The seconded employees Seconded employees Article 1 of TTA (Page 5 were not specifically taken taken into employment of Paper Book read with into employment by the by the Indian AEs. Article 1 and Article 2 Indian Company. of MOU (Page18 of Paper Book).

2. The obligation to pay the The Indian AEs are Article 10 of TTA (Page salary was of Foreign obligated/solely 7 of Paper Book) and company. Indian responsible for payment Article 2 of MOU (Page Company was merely of all the costs viz. 18 of Paper Book) reimbursing the salary salary and wages etc. paid by Foreign Company. and benefits to the Seconded employees had expats which is clearly no right against Indian spelt out in the TTA(s) Company in case of failure along with their of payment of salary. corresponding MOU.

3. The employment contracts All compensation and Article 5 & 10 of the issued by Indian Company benefits accruing to TTA (Page No. 6 and 7 to seconded employees employees are in of Paper Book) and were silent on salary accordance with Article 2 of the MOU details. applicable rules of (page 18 of Paper Book) Indian AEs.

4. The seconded employees TTA along with their Article 1 & 2 of the TTA ITA No.- 1053/Del/2022 Advics Co., Ltd.

were not specifically corresponding MOU (Page 5 of the Paper realised by Foreign clearly demonstrates Book) and Article 1 & 2 Company during the that the seconded of the MOU (Page 18 of period of secondment. employees shall work Paper Book) "exclusively" for the AEs in the conduct of its business.

5. The supervision and TTA along with their Refer Article 2 of the control over the employees corresponding MOU MOU (Page 18 of Paper was not clearly spelt out. clearly state that the Book) seconded employees shall work under the direct supervision and control of the Indian AEs during their entire period of employment with them.

6. The India entity was setup The Indian AEs have No specific reference in as a captive unit engaged their business TTA/ MOU. in providing services in the independent from that nature of coordinating of the assessee. Further with third party Indian the employees seconded vendors and its overseas by the assessee were not entities. The employees taking forward business seconded by the overseas of the Appellant in India entity were to oversee the but were effectively quality control of work of working under the vendors. control and supervision of AEs.

7. Employees were seconded Employees were for initial period to seconded to the Indian operationalize the Indian entities to carry on company. business activities as their employee and which continued even after the initial period to operationalize the AEs.

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13. The other cases relied by the Ld. AO/ DRP are also distinguishable on facts which can be seen from the table below as submitted by the Ld. AR:

Case Facts Assessee's Facts Flughafen Zurich AG (2017) 79 Taxmann.com - ITAT Bangalore Seconded employees taken into Flughafen Zurich AG entered entered employment by the Indian

AEs. The into an agreement with Bangalore expatriate employees work exclusively International Airport Ltd. ('BIAL'), inter for the Indian AEs and are under their alia, Expatriate Remuneration direct control.

Reimbursement Agreement for secondment of skilled personnel. Thus, agreement was with a third party for providing technical/managerial services and the expatriate employees were not employees of BIAL but continued to be employees of Flighafen AG. Secondees in this case at the time of agreement were under the employment of the assessee and therefore it was not an employment or recruitment by BIAL.

```
Entire Salary and other emoluments of    The Indian AEs are obligated/solely
the    seconded    employees    paid     by
```

responsible for payment all the costs viz.

Flughafen AG. salary and wages etc. and benefits to the expats which is clearly spelt out in the TTA and in the respective MOU. All compensation and benefits accruing to employees are in accordance with applicable rules of the AEs.

Flughafen AG was providing managerial Employees were seconded to the Indian services to the Indian third party AEs to carry on routine business company. activities as their employee and which continued even after the initial period to operationalize the AEs.

Food World Supermarkets Ltd. [2015] 63 Taxmann.com 43 (Bangalore Tribunal) The assessee was an Indian company Seconded employees taken into engaged in the business of ownership and employment by the Indian AEs by way operation of supermarket chain in India. of TTA/MOU/Employment Contracts. DFCL was a company based in Hong Kong The expats/ seconded employees work and engaged in the identical business exclusively for the Indian AEs and are activity as that of assessee. under their direct control.

The secondees are assigned by DFCL and there is no separate contract of employment between the assessee and the ITA No.- 1053/Del/2022 Advics Co., Ltd.

secondees.

The secondees are under the legal obligation as well as employment of DFCL and assigned to the assessee only for a short period of time.

Entire salary to assigned personnel and The Indian AEs are solely responsible assessee would reimburse such amount for payment all the costs viz. salary to DFCL. and wages etc. and benefits to the expats which is clearly spelt out in the TTA and in the respective MOU. All compensation and benefits accruing to employees are in accordance with applicable rules of the AEs.

General Motors Overseas Corporatiion (2020) 115 Taxmann.com 129 At the outset, it is submitted that the The instant case is purely a case of impugned case is not a case of secondment as evident

from the secondment i.e., transfer of employees. various documents submitted by the Instead, it was held that the same was a assessee. case of transfer of technology. (Findings of the Hon'ble Mumbai Tribunal) The secondees are assigned by the Seconded employees taken into Foreign Entity and there is no separate employment by the Indian AEs by way of employment contract between the Indian a separate employment contract entity and the secondees. between the AEs and the expats.

The entire salary and other direct costs of The Indian AEs are obligated/solely the assigned personnel is paid by the responsible for payment of all costs foreign entity which is subsequently viz. salary and wages etc. and benefits reimbursed by the Indian entity. to the expats which is clearly spelt out in the TTA and in the respective MOU.

> All compensation and benefits accruing to employees are in accordance with applicable rules of the AEs.

14. We find that the decisions cited by the Ld. AR are more applicable to the facts of the present case wherein the courts/ tribunals have distinguished Centrica India Offshore (P.) Ltd.'s case (supra) in the identical fact scenario holding it to be inapplicable. Reference may be made to the following decisions:

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(i) DIT(IT) vs. Abbey Business Services India (P.) Ltd. [2020] 122 taxmann.com 174 (Karnataka) wherein in the similar fact pattern as that of the assessee, the Hon'ble High Court on the basis of the following factual observations, held that the secondees were employees of the taxpayer i.e. the Indian entity and not of the foreign company:

Secondees were to work at places as instructed by the taxpayer; Secondees were to function under the control, direction and supervision of the taxpayer, in accordance with the policies, rules and guidelines applicable to other employees of the taxpayer; and Secondees in their capacity as employees assisted the functioning of the taxpayer.

(ii) M/s Faurecia Automotive Holding vs. DCIT (ITA No.784/PUN/2015) wherein it has been held that when the foreign company did not provide any 'service' to the Indian company and only received reimbursement on account of part employee cost paid outside India, such amounts would not qualify as FTS.

(iii) M/s. Toyota Boshoku Automotive India Private Limited vs. DCIT [IT(TP)A No. 1646/Bang/2017) wherein the Bangalore Tribunal held that reimbursement made by the Indian company to Toyota Corporation, Japan towards seconded employees

cannot be regarded as 'fees for technical services'.

15. Similar view has been taken by the Co-ordinate Bench of Delhi Tribunal in the case of Yamazen Machinery and Tools India Pvt. Ltd. vs. ACIT (ITA No. 582/Del/2020) wherein under the similar fact pattern to that of the assessee the Tribunal observed that the decision in the case of Centrica India Offshore (P.) Ltd. vs. CIT [2014] 364 ITR 336 relied upon by the Revenue is inapplicable and held that the payment made by the assessee towards reimbursement of ITA No.- 1053/Del/2022 Advics Co., Ltd.

expenses is in the nature of salary cost of the assigned employees subject to TDS under section 192 of the Act, hence, cannot be treated as FTS under section 9(1)(vii) of the Act and Article 12 of the tax treaty. Accordingly, there was no obligation on the part of the assessee to withhold tax at source under section 195 of the Act.

16. Now coming to the applicability of the case of Northern Operating Systems Pvt. Ltd. (supra) to the assessee's case, the Ld. AR has drawn distinction between the facts in Northern Operating Systems Pvt. Ltd.'s case and that of the assessee (tabulated below) on which the Ld. DR has offered his point-wise comments; which is as under:

S. Facts of Northern Facts of Advics Relevant Comments of No. Operating Systems Japan Co. Clauses of TTA Ld. DR Pvt. Ltd. (assessee) and MOU

1. The seconded Seconded Articles 1 & 5 of The employees/ expats employees were the TTAs [refer submissions were not specifically entirely taken page 5 & 6 of the filed are taken into into employment Paper Book read completely employment by the by the Indian AEs with Articles 1 & misleading in Indian company i.e, i.e., Advics South 2 of the MOU view of express NOS as the terms of Indian Private language of their employment Ltd. ('ADSSI') and article 1 of TTA even during the Advics North which clearing period of India Private Ltd. mentions...while secondment, was in ('ADSNI') retaining his accordance with the position as an policy of the overseas Advics entity i.e., Northern employee.

	Trust Management Services Ltd. ('NTMS') (refer para 57 at page 32 of the Annexures).				
2.	The obligation to pay the remuneration which inter alia, includes the salary, employee benefits etc., was of the	The Indian AEs are obligated responsible for payment of remuneration viz, salary and wages,	Article 10 of the TTA along with relevant appendix (refer page 7 & 10 of Paper Book) read	The assessee' comments a completely misleading. There is difference	

Foreign Company i.e., NTMS. The Indian Company i.e., NOS was reimbursing merely the remuneration which amongst included others salary, employee benefits etc., paid by the Foreign Company. (refer para 57 and Article III of the Secondment Agreement at pages 32 & 20 of the Annexures respectively).	benefits to the expats etc. which is clearly spelt out in the TTAs and in the corresponding MOUs	with Article 2 of the MOU (refer page 20 of Paper Book)	between the 2 cases as is evident from the conjoint reading of Article 1 of MOU of the assessee and Para 53 of the decision of Hon'ble Supreme Court clearly highlighting Facially, or to put it differently, for all appearances, the seconded employee, for the duration of her or his secondment, is under the control of the assessee, and works under its direction. Yet, the fact remains that they are on the pay rolls of their overseas employer. What is left unsaid- and perhaps crucial, is that this is a legal requirement, since they are entitled to social security benefits in the country of their origin .It is doubtful whether without the comfort of this assurance, they would agree to the secondment.

				Furthermore, t reality is tha the secondment is a part of t global policy the employ loaning services, temporary basi On the cessati of secondment period, have to repatriated with accordanc a g repatriation policy (of the overseas entit
3.	All compensation and benefits accruing to the employees are in accordance with applicable rules of the Foreign entity including the salary and allowance of the expats which is decided by the overseas entity. (refer the 'Duration & Base Salary and Bonus' clauses of the Letter of Understanding and para 54 at page 22 & page 32 of the Annexures).	All compensation and benefits which inter alia, includes the salary, accruing to employees are in accordance with the applicable rules of the Indian AEs.	Article 10 of the TTA (refer page 6 & 7 of Paper Book) read with Article 2 of the MOU (refer page 20 of Paper Book)	The submissions filed by assessee factually incorrect. Compensation to employees is n in accordan with applicable rul of Indian AEs but as per TTA entered with Indian AE and payments are as "expense division t which con various items be paid Japan and to b paid in India and inclu various i viz Overse

				salary Bonus to be ITA No.- 1053/Del/ Advics Co. paid in JPY onl and in Japan.
4.	In addition to the reimbursements made by the Indian entity, the Secondment Agreement further requires for the AE to pay an administrative cost (@1% of the actual cost) to the foreign entity for the payroll services rendered by the foreign entity i.e., NTMS. (refer Article III of the Secondment Agreement at page 20 of the Annexures).	No such administrative cost is required to be paid by the AEs	Not applicable	The statements made are misleading. Identical terms are provided in Article 10.3 of TTA which also mentions o Article 10. which is not stated in the TTA enclosed by the assessee.
5.	The seconded employees were not specifically released from employment of the Foreign Company during the period of secondment as they were still on the payroll of NTMS (i.e., the foreign entity) and were entirely remunerated (included but not limited to salary and employees benefits) by the Foreign entity (refer Articles I & II of the secondment Agreement and para 57 at pages	The TTAs along with their corresponding MOUs clearly demonstrate that the seconded employees hall work "exclusively" for the Indian AEs in the conduct of its business operations. Reference is made to the visa letter issued to the seconded employees from where it is evident that the expats were	As evident from the Visa Letters at page 30 to 33 of Paper Book.	The assesse made completely incorrect and misleading statement. Article Secondment of agreement NOS cas clearly mentions: "The employees seconded NOS sha continue to be remunerated through th payroll of NTMS only for t

	19, 20 and 32 of the Annexures).	coming to India on an employment visa and that the same was being sponsored by the respective India AEs thus evidencing that the Indian AEs were the real employers of the expats during the secondment period.		purpose continuation of social security retirement and health benefits but for all practical purposes, NOS; shall be the employer."
6.	The supervision and control over the employees were not clearly spelt out as held by the Supreme Court (refer para 57 at page 32 of the Annexures).	The TTAs along with their corresponding MOUs clearly state that the seconded employees shall work under the direct supervision and control of the Indian AEs during their entire period of employment with them.	Articles 5 of the TTA (refer page 6 of Paper Book read with Article 2 of the MOU) (refer page 20 of Paper Book).	There is no such mention by the Hon'ble Supreme Court in Para 57 that supervision and control over the employees were not clearly spelt out. Supervision and control over the overseas employees is clearly and unequivocally spelt out in Article II of Secondment agreement under 'Duties Obligation as, "A. The employee shall act in accordance with the instructions and directions of NOS. B. During the secondment period, the

				employee shall devote the whole of their time, attention and skills to the duties of their
				ITA No.- 1053/Del/2 Advics Co.,
				secondment. C.The employees shall reportable and responsible to NOS.
7.	Employees were seconded in order to assist the Indian entity i.e, NOS to carry out a specific service viz, the IT enabled back-office support services for another group entity i. e., Northern Trust Company, pursuant to the Services Agreement entered into with it (refer para 52 at page 31 of the Annexures).	Employees were seconded to the Indian AEs to carry on routine business activity of Indian AEs as its employee.	No specific reference in TTAs and MOUs	Completely incorrect statement made Article 2 of TTA reads as under; "Purpose Temporary transfer, ADVICS sh send to ADSNI an ADVICS employee with special knowledge, techniques, ability experience work ADSNI."
8.	Foreign entity i.e. NTMS to provide replacement of employees rejected e by the Indian entity (refer Articles II(E) of Secondment Agreement at page 20 of the Annexures).	The Indian AE has right to terminate the employment of the seconded employees and Advics Japan i.e, assessee, was not under any obligation to replace such employees.	Article 4 of the TTA (refer page 5 of Paper Book).	Replacement or non replacement of the terminated/ rejected employee does not alter the nature transaction any manner. Even in case of NOS, replacement is only need based which is evident from the words,

					"to request from NTMS, replacement of any employee who in opinion of NOS are qualified.....

9.	The deployment of seconded employee is in relation to business of foreign entity i.e. NTMS. (refer para 57 at page 32 of the Annexures).	The seconded employees have been deployed for furthering the objective of the business of Indian AEs.	Article 1 of the MOU (refer page 20 of Paper Book).	Completely misleading submission. Investment in Indian AEs have been made by the assessee and during the course of assessment proceedings, the assessee submitted Advics Japan is a separate legal entity and the investment in the Indian AEs are made by the assessee in its own capacity, as part of its own business and not on behalf of any other person. (submissions dated February 18, 2021, Paper Book Page 33)

16.1 From the perusal of the above table, we are of the considered view that the reliance placed by the Revenue on Northern Operating Systems (P.) Ltd.'s case (supra) to substantiate its claim to tax the impugned receipts as FTS in the hands of the assessee is misplaced. Even though there may be certain similarities between the factual positions of both the cases (supra), the applicability of this case to the assessee's case, in our humble opinion is questionable. Comments of Ld. DR provided

> in point 2. of the above table in our view infact supports the case of the assessee which spells out how a secondment arrangement is generally made and to be understood. Part salary has been disbursed in Japan by the assessee only for administrative convenience. Further, the decision in the case of Northern Operating Systems ITA No.- 1053/Del/2022 Advics Co., Ltd.

(P.) Ltd. (supra) has been rendered in the context of erstwhile service tax regime to determine the taxability of services provided by the assessee to the Indian entity for the purpose of levy of service tax. It is in this context that the Hon'ble Supreme Court considering the facts of that case held those services taxable as "manpower recruitment supply services" under the erstwhile provisions of the service tax laws. However, the present case involves determination of taxability of the impugned receipts either as employee salary cost or FTS under the provisions of the Act and/ or India-Japan DTAA. In this regard, reference may be made to the decision of the Delhi Bench of the Tribunal in the case of Serco India (P.) Ltd. vs. DCIT wherein the Hon'ble Tribunal in para 22.7 and 22.8 in similar fact pattern observed and held as under:-

> "22.7 We have given thoughtful consideration to the issue quo applicability of Centrica and Northern decisions (supra) to the instant case. It is well-settled that the interpretation of any expression used in the context of any statute is not automatically to be imported while interpreting the like expression of other statutes. The expression used in any statute has to be interpreted in the light of its own context and object. The meaning assigned to a particular word in a particular statute cannot be imported to a word used in a different statute. Taxation depends upon the language of the charging section and what is brought to tax within the four corners of the charging section. Therefore, one should be careful and cautious when applying the ratio of judgments relating to one tax enactment as a precedent in a case relating to another fax enactment. This rule of caution is important and should not be overlooked, more so when the language of the enactment and the object and purpose of the enactment are different. It is also well settled that ration decidendi of a case from one enactment, cannot be applied to an altogether different legislation.
>
> 22.8 From the facts and circumstances as demonstrated by the parties, the observation made by Ld. DRP and the points as summarized in the said charts and on examination by us Independently, we are of the considered view that the facts and issues involved in the cases Centrica and Northern Operating Systems (supra) were altogether different and distinct from the facts and issues involved in the Assessee's case, as the Hon'ble Apex Court, in those cases dealt with different facts, issues and Acts and therefore dictum laid down in those case, is n applicable to the instant case."

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16.2 The various courts/ tribunals have considered the applicability of the Northern Operating Systems (P.) Ltd.'s case (supra) in the similar fact pattern to that of the assessee in the present case and decided the issue in favour of the assessee in those cases holding the same to be inapplicable.

The following decisions may be referred:

> (i) The Delhi Tribunal in the case of Ernst & Young U.S. LLP vs. ACIT (IT) [2023] 153 taxmann.com 95 (Delhi - Trib.) wherein the Tribunal held as under:
>
> "22. A perusal of the judgment of the Hon'ble Supreme Court (supra) shows that it was in the context of manpower recruitment and supply of services for which the assessee was recipient of services and was liable to pay service tax. As mentioned elsewhere, this judgment was delivered to discern the true nature of relationship between the seconded employees and the assessee and nature of services provided in that context by oversees group companies to the assessee".

(ii) The Hon'ble Karnataka High Court in the case of Flipkart Internet (P.) Ltd. vs. Dy. CIT (International Taxation) [2022] 139 taxmann.com 595 wherein the Hon'ble High Court held as under:

> "32.(E)(x) It needs to be noted that the judgment rendered was in the context of service tax and the only question for determination was as to whether supply of manpower was covered under the taxable service and was to be treated as a service provided by a Foreign Company to an Indian Company. But in the present case, the legal requirement requires a finding to be recorded to treat a service as 'FIS' which is "make available"

to the Indian Company.

(xi) Accordingly, any conclusion on an interpretation of secondment as contained in the M.S.A. to determine who the employer is and determining the nature of payment by itself would have no conclusive bearing on whether the payment made is for 'FIS" in light of the further requirement of "make available."

(iii) The Delhi Tribunal in the case of Serco India (P.) Ltd. vs. DCIT [2023] 154 taxmann.com 56 (Delhi-Trib.) wherein the Tribunal following the decision of the Karnataka High Court (supra) has held Northern Operating (supra) to be inapplicable.

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17. In the light of the above factual matrix and legal position, in our considered view, the impugned receipts are in the nature of employee salary reimbursement cost not having any element of income and not taxable in India as FTS under the provisions of the India-Japan DTAA. Consequently, the addition of Rs. 2,70,27,031/- on account of cross charge by the assessee from its Indian AEs is deleted. Ground No. 3 (along with its sub-ground nos. 3.1 to 3.6) are allowed.

18. Ground No. 4 relating to levy of surcharge and education cess on the impugned addition which is subject to tax at special rate provided under the India-Japan DTAA becomes academic and not

adjudicated in view of our decision on ground No. 3 above.

19. Ground No. 5 relating to levy of interest under section 234B is consequential in nature.

20. Ground No. 6 relating to initiation of penalty proceedings under section 270A of the Act is pre-mature and hence not adjudicated.

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

Order pronounced in the open court on 12 th April, 2024.

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

Dated: 12/04/2024
veena
Copy forwarded to -
1. Applicant
2. Respondent

ITA No.- 1053/Del/20
Advics Co.,

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