IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

BEFORE SH. VIKAS AWASTHY, JUDICIAL MEMBER
AND
SH. NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 2694/Mum/2016
(Assessment Year : 2012-13)

Kraft Heinz Foods Company (earlier known as H.J. Heinz Company) C/o. Heinz India Pvt. Ltd. Unit Nos. 1901-1902, 19th Floor, E&G Wings, Lotus Corporate Park, Off. Western Express High way, Goregaon (East), Mumbai – 400 063 PAN No. **AACCH 2144 P**	Vs.	**ACIT (International Taxation) – 2(1)(1)** New Delhi
(ASSESSEE)		(RESPONDENT)

Assessee by	Shri Salil Kapoor, Ms. Ananya Kapoor, Ms. Soumya Singh and Shri Shivam Yadav,	Advs.
Revenue by	Dr. Shalini Verma, CIT-D.R.	

Date of hearing:	09.07.2026
Date of Pronouncement:	06.10.2026

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER :

The above captioned appeal is preferred by the assessee against the assessment order dated 23.11.2015, passed by Income Tax

Department, New Delhi (hereinafter referred to as 'ld. AO), passed u/s 144C(13)/143(3) of the Income Tax Act, 1961 (hereinafter 'the Act') in pursuance of directions of the ld. Dispute Resolution Panel-1, New Delhi (in short 'ld. DRP') dated 30.09.2015 pertaining to Assessment Year 2012-13.

2. Assessee has raised following grounds of appeal :

"Ground 1: General

1. *On the facts and in the circumstances of the case and in law, the Learned AO/ Dispute Resolution Panel-I, New Delhi (hereinafter referred to as the 'DRP') erred in assessing the total income at Rs 10,44,21,324 as against an income of INR 40,42,979 computed and returned by the Assessee,*

Ground 2: Taxing of reimbursements of Rs. 10,03,78,345 as Fees for Technical/included service ('FTS/FIS) and Royalty under the Act and Double Taxation Avoidance Agreement between India and USA ('DTAA')

2. *On the facts and in the circumstances of the case and in law, the Learned AO/ DRP erred in holding that the cost reimbursements of Rs. 10,03,78,345 received by the Assessee towards providing support services to its group affiliates are taxable as FTS both under section 9(1)(vii) of the Act as well as Article 12(4) of the DTAA;*
3. *On the facts and in the circumstances of the case and in law, the Learned AO erred in holding that the Assessee has made available technical knowledge, skill, experience, etc. to the recipient of services;*
4. *On the facts and in the circumstances of the case and in law, the Learned AO/ DRP further erred in holding that the cost reimbursements are also taxable as 'Royalty' both under section 9(1)(vi) of the Act as well as Article 12 of the DTAA:*
5 *On the facts and circumstances of the case, the Learned AO/ DRP failed to appreciate that the amounts represented pure reimbursement of costs and hence does not result into any taxable income accruing in India:*
6. *Without prejudice to the above, the Learned AO/ DRP failed to appreciate that the income, cannot be both 'royalty' as well as 'FTS' and hence the order passed on account of non application of mind, needs to be quashed;*

Ground 3: Not granting credit of taxes deducted at source ('TDS') of Rs 1,40,93,981

7. *On the facts and in the circumstances of the case and in law, the Learned AO erred in not granting credit for TDS of Rs 1,40,93,981 claimed by the Assessee in the return of income;*

Ground 4: Levy of surcharge and education cess in respect of tax on royalty

8. *On the facts and in the circumstances of the case and in law, the Learned AO erred in levying surcharge and education cess of Rs. 12,129 and Rs. 18,557 respectively while taxing royalty offered to tax under the India - USA double tax treaty,*

Ground 5: Initiation of penalty proceedings under section 271(1)(c) of the Act

9. *On the facts and in the circumstances of the case and in law, the Learned AO erred in initiating penalty proceedings under section 271(1)(c) of the Act for concealment of income and furnishing of inaccurate particulars of income, without appreciating the facts and circumstances of the case."*

3. The facts in brief are that the Assessee is a resident of USA, and for A.Y. 2012-13, it filed its return of income on 28.11.2012 declaring a total income at Nil. During the year under consideration, the Assessee received the following amounts from Heinz India Private Limited ("Heinz India"):

a. Rs. 40,42,979/- received as royalty income under Trademark and Technology License Agreement ("TTLA") dated 21.02.2005 entered with Heinz India for granting license to manufacture, distribute, market and sell Licensed products licensed products given in Exhibit A to TTLA.This income was duly offered to tax by the Assessee in its return

b. Rs. 10,03,78,345/-received as reimbursement of expenses in terms of Service Agreement" ("SA") with various associated companies including Heinz India dated 03.05.2007 for providing "Support Services", as defined in Section 1.8 of Article 1 of SA. The said receipt was not offered to tax as the same was considered reimbursement, which does not constitute the income chargeable to tax.

4. In the final assessment order dated 23.11.2015, the Assessing Officer ("A.O.") assessed the total income of the Assessee at Rs. 10,44,21,324/-by adding Rs. 10,03,78,345/- received pursuant to SA as income in the nature of FTS/Royalty. Aggrieved the assessee is before us.

5. The assessee has furnished a written submissions as follows:

A. **The nature of services provided by the Assessee is managerial and therefore, the same is not taxable**

1. The activities carried out by the Assessee under the SA are broadly in the area of human resources, strategic planning and marketing, finance and information systems, which at best constitute 'managerial services', which does not fall under the definition of FTS as provided under Article 12(4) of DTAA @ pgs. 422-423 of PB because under the India US tax treaty the term 'managerial' services is not included under the definition of fees for included services. Reliance is placed on Hon'ble Delhi High Court's decision in ***Steria (India) Ltd. vs. CIT*** [2016] 386 ITR 390 (Delhi) [Ref. pgs. 72-78 of CLC'], wherein similar services rendered by the assessee therein were held to be managerial in nature (Ref. para 3 @pg. 75 of CLC).

B. **The receipts of Rs. 10,03,78,345 from Heinz India constitute reimbursement of expenses and the same is not taxable in India as FTS under the Income-tax Act, 1961 ("the Act")**

2. In the present case, costs incurred by the Assessee in terms of time and effort of its employees for carrying out the activities are shared amongst the various affiliates on a uniform and consistent basis using appropriate allocation factor in the manner

specified in the Clause 5.2(d) of SA which specifically states that costs are allocated by the Assessee to its Affiliates without charging any mark-up/profit element [@pg. 344 of PB]. The expenses incurred by the Assessee and reimbursed by Heinz India are mere recoupment of expenses and would not constitute income of Assessee chargeable to tax. Reliance is placed on Hon'ble Tribunal's decision in ***CIT vs. JEFFERIES International Ltd.*** [2025] 170 Taxmann.com 584 (Mum-Tri) (Ref. pgs. 105-116 of CLC-(nature of services given in para 7 @pg. 107 finding given in para 11 @pgs. 109-112: para 13 @ pg. 115, para 17 @pg. 116.

C. **The Assessee does not 'make available' services to Heinz India and hence should not be taxable as FIS under the provisions of the DTAA under Article 12(4)(b) of the DTAA**

3. Without prejudice to the contention that Support Services are not in the nature of technical or consultancy service, it is submitted that even otherwise since the services provided by the Assessee were not made available to Heinz India and therefore the 'make available' clause provided under Article 14(4)(b) of the DTAA is not satisfied, the services don't tantamount to FTS. This is evident from the clause of the SA [Ref. Section 2.1 of Article 2 of SA @pg 342 of PB] which clearly states that Support Services are

being provided on 'continuing basis' and also, the fact that the term of the SA is only one year [Ref. Section 7.1 of Article 7 of SA @pg 344-345 of PB).

4. It is trite law that a 'technical or consultancy service' is taxable only if the services 'make available' technical knowledge, experience, skill, know-how, or processes. There are umpteen number of decisions in favour of the Assessee ruling that in case the services are required to be provided on a year on year basis then the same cannot be said to have been "made available" and hence, won't fall under the ambit of 'FTS". Reliance is placed on Hon'ble Delhi High Court's decisions in ***CIT vs. Bio-Rad Laboratories (Singapore) Pte. Ltd.*** [2023] 459 ITR 5 (Delhi HC)- [Ref. pgs. 68-71 of CLC-relevant para 148 14.1 @pg 70]: ***International Management Group (UK) Ltd. v. CIT*** [2024] 466 ITR 514 (Delhi HC) [Ref. Pgs. 1-67 of CLC-relevant para 86 @pg. 46. para 93 @ pg. 52. para 100@pg. 53]: ***Tungsten Automation England Limited*** (Formerly Known as Tungsten Network Limited) v. DCIT, International Taxation, Circle 3(1)(1), New Delhi ITA 92/2025 (Delhi HC) (Ref. pgs. 180-228 of CLC-relevant para 40 @pgs. 206-208, para 49 @pgs. 216-217, paras 60-61@pgs. 227-228]: ***JEFFERIES International Ltd.*** (supra)- [Ref. pgs. 105-116 of CLC-

(nature of services given in para 7 @pg. 107; finding given in parall @pgs. 109-112).

5. In terms of Support Services provided by the Assessee, Heinz India has not acquired any knowledge which could be used by Heinz India in its operations in India. It is submitted that the make available condition would be satisfied only if the rendering of service involves a clear and demonstrable transfer of technical skills, expertise or know-how to the recipient. It must involve a transfer of capabilities and not just the temporary use of the provider's knowledge, expertise or skill. It is submitted that mere usage or utilisation of technical or consultative material in aid of business would not be sufficient to attract Article 12(4)(b) of the DTAA. Reliance is placed on ***International Management Group (UK) Ltd***. (supra) (paras 93,95 @pg. 52 of CLC). Accordingly, it is submitted that the Assessee does not "make available" any technical knowledge, skill, etc. to Heinz India, nor does it develop and transfer any technical plan, design, etc. Therefore, the reimbursements received by the Assessee cannot be said to be covered within the meaning of FIS under the DTAA.

Counter to AO's case:

6. The AO treated the two agreements, TTLA and SA as interlinked and held that Support Services listed in SA flow from the terms of TTLA and hence, the same ancillary and subsidiary to the application or enjoyment of the right, property or information for which royalty is paid to the Assessee by Heinz India. [para 6.5-6.6 @pg. 11 of final assessment order]

D. **The receipts of Rs. 10,03,78,345 from Heinz India do not fall within the ambit of "ancillary and subsidiary clause" as provided under Article 12(4)(a) of the DTAA.**

7. It is humbly submitted that the amount received is not ancillary and subsidiary to the payment of royalty under TTLA. At the outset, it is stated that the purpose of both the agreements, TTLA and SA are entirely different. While one aims to provide license on which royalty is being earned, the aim of the SA is to ensure uniformity, consistency and international standards across all group companies, for the purpose of which these services and activities have been identified and support services are accordingly being provided which are of the nature of general management, human resources, finance, data processing. quality control, purchasing, business development, law and other related areas. It is pertinent to note that TTLA is only in respect of

Licensed Products which are given in Exhibit A to the TTLA (total 7 items are listed there) @pg. 388 of PB, and during the year under consideration, Heinz India paid royalty to the Assessee only in respect of sale of 'Tomato Ketchup', which is only one item of the seven items mentioned as Licensed Products.

8. The AO has failed to appreciate that the services charges under the SA are not paid only for sales covered under TTLA.

i. License is only for specified products [Ref. Clause 1.2 of TTLA @pg. 371 & licensed products given in Exhibit A to TTLA @pg. 388 of PB] and Royalty under TTLA is paid only for Licensed Products [Ref. Clouse 5.1 of TTLA @pg. 377 of PB)

ii. Services under the SA are not product specific and are not limited to the Licensed Products under TILA, and are in respect of total business/sales of the assessee.

iii. Since Support Services charges are paid for total sales, the said charges cannot be said to be ancillary and subsidiary to TTLA.

9. Attention in this regard is invited to pg. 231 of the PB, clear copy is attached as "ANNEXURE I" to this note, which provides product wise royalty paid by Heinz India to various parties during the A.Y. 2012-13 [Ref. last row at pg. 2311.

- It is submitted that sales breakup chart demonstrates that the sale of Licensed Products, i.e., "Tomato Ketchup', amounting to Rs 13,01,27,000/- is only 1% of the total sales of Rs. 12,66,32,19,000/-. It is submitted that no prudent businessman would incur a cost of Rs. 10,03,78,345/- for earning a revenue of Rs. 13,01,27,000/-. This very fact establishes that SA is for the business as a whole and not restricted to the Licensed Products establishes that SA is in the ordinary course of business.
- Furthermore, the chart show that Heinz India pays royalty to entities other than the Assessee also in respect of products which are other than "Tomato Ketchup', namely, Complan, Samprtiti Ghee, Glucon D and Others. This further supports the contention of the Assessee that there are other products which are not covered by TTLA, yet the Support Services are used for all the products being sold by Heinz India, which it shows that the SA is not linked or limited to the TTLA, which was the case of the AO.

10. There is no overlap between TTLA and SA agreement and therefore SA in no manner assists in the enjoyment of the TTLA. Moreover, they are altogether separate agreements.

11. It is further submitted that though AO had held the Support Services to be FTS/Royalty, the discussion in the assessment order

was limited to FTS and nothing has been mentioned that how the payment received pursuant to provision of Support Services tantamount to Royalty. Therefore, the submissions made herein are limited to the aspect of Support Services having been wrongly characterised as FTS.

12. Given the above, the learned AO has erred on facts and in law holding the Support Services to be in the nature of FTS and accordingly, the addition of Rs. 10,03,78,345/- made by the AO is liable to be deleted and appeal of the Assessee deserves to be allowed.

6. Per contra, the ld DR referred to page 27 of the AO's order to point out the example in Protocol of India US DTAA to show that payment received from US entity is fees for included services. The ld DR submitted that where the US entity provides consultancy services to Indian entity to improve the effectiveness of latter's use of the process, are ancillary and subsidiary to the use of manufacturing process as per Article 12(3(a) of the Treaty. The ld DR relied on the ITAT order in ITA 6252/Del/2012 for AY 2009-10 and ITA 1991/Del/2012 for AY 2011-12 wherein the ITAT vide order dated 23.08.2019 had held that the consideration received from the assessee in the area of supply chain, human resources, strategic planning and marketing, finance and

information system under the Agreement, qualifies as FTS under Income tax Act as well as DTAA. The ld DR argued that the condition of "make available" is not required to be satisfied as the addition is made under Article 12(4)(b) of the DTAA.

7. In its rejoinder, the ld AR stated that the ITAT order for AY 2009-10 and 2011-12, has not given any finding on Article 12(4)(a). Further the reimbursement is cost to cost basis and no mark up as noted in para 13 of the ITAT order. The ld AR relied on the order of the hon'ble Supreme Court in the case of Morgan Stanley for the proposition that once ALP has been accepted, no further adjustment can be made.

8. We have heard the rival submissions and have perused the materials on record. A little antecedent of the case is in order. The ITAT has passed an order in ITA 6252/Del/2012 for AY 2009-10 and ITA 1991/Del/2012 for AY 2011-12, deciding the issue of FTS against the assessee. The assessee has filed a Miscellaneous Application for both the years which are pending disposal. Meanwhile, the ITAT passed an order for the instant AY 2012-13 dated 01.08.2023 in ITA 2694/Del/2016 and decided the issue of FTS against the assessee following the ITAT orders for AY 2009-10 & 2011-12. The assessee filed an appeal before the hon'ble Delhi Court which has set aside the ITAT order dated 01.08.2023 with the following directions:

2. That prayer is reiterated before us today with Mr. Kapoor, learned counsel appearing for the appellant on instructions stating that the appellants undertake not to seek any adjournment before the Tribunal merely because of the pendency of the Miscellaneous Applications for Assessment Years ['AY'] 2009-10 and 2011-12. In view of the aforesaid, a request is made for the appellant being accorded an opportunity to press the appeal on merits before the Tribunal.

3. In view of the statement that has been made before us and which is recorded and accepted, we allow the instant appeal and set aside the order of the Tribunal dated 01 August 2023.

4. The appeal shall, consequently, stand revived before the concerned Tribunal which shall now proceed to examine the matter on merits and without being deterred by pendency of Miscellaneous Applications for the other AYs.

Therefore, in compliance with the hon'ble Delhi Court above directions, we proceed to adjudicate the issue before us for the instant year, on merits of the case.

9. The assessee is an US based entity, and has entered into a Trademark and Technology Agreement (TTLA) dated 21.02.2005 with Heinz India Pvt Ltd, an Indian entity. By way of TTLA, the assessee, as a Licensor, has granted License to the Heinz India the Trademark and trade name "Heinz" for use in connection with the distribution, marketing, and sale of 7 food products items manufactured by the Heinz India. The License is for specified products only, where Heinz India pays Royalty only in respect to one out of seven product, namely "Tomato Ketchup". A brief of the statistic regarding sale of specified product

i.e., 'tomato ketchup' by the Heinz India, under license from the assessee, are as follows: Heinz India has sold Rs 13.42 crore worth of Tomato Ketchup in AY 2009-10 on which Heinz India has paid Royalty of Rs 36.78 lakh; For AY 2010-11, the sale is 12.07 crore and Royalty is Rs 32.41 lakh; for AY 2011-12 the sale is 11.42 crore and royalty paid is Rs 34.55 lakh and for AY 2012-13 the sale is 13.01 crore and Royalty paid is Rs 40.43 lakh. Thus, on an average, the sale of Tomato Ketchup by Heinz India is only 1-2% of total sales made by it: for example, for AY 2012-13, the total sales by Heinz India, of various other products, is Rs. 1,266 crore out of which the sale of Tomato Ketchup is only 13.01 crore.

10. The assessee has also entered into a Support Service Agreement (SSA) with Heinz India dated 03.05.2007 whereby the assessee may provide services in the nature of supply chain, human resources, strategic planning and marketing, finance and information system as described in Article 3 of the SSA. For these support services, Heinz India shall pay a fees as determined under Article 5.2 of the SSA. Article 5.2 of SSA provides that for each WHQ Cost Center, all direct and indirect costs of the assessee are shared amongst its various affiliates, using appropriate allocation factor, and applying mark-up of 0% to the cost of performing Support Services. These expenses incurred by the assessee, are subsequently paid by Heinz India as per the expenses allocated to it.

These receipt of expenses incurred, is being termed as reimbursement of expenses, and claimed as not chargeable to tax by the assessee.

11. The issue for our adjudication is whether the amount of Rs 10,03,78,345/- received by the assessee from Heinz India for Support Services provided by the assessee, is taxable in India u/s 9(1)(vii) as FIS read with section 115A and 44D of the Act and Article 12(4) of the India USA DTAA. In order to adjudicate the issues, it would be prudent to reproduce the relevant Article of India-USA DTAA at this point as under:

Article 12

ROYALTIES AND FEES FOR INCLUDED SERVICES

1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) in the case of royalties referred to in sub-paragraph (a) of paragraph 3 and fees for included services as defined in this Article [other than services described in sub-paragraph (b) of this paragraph] :

(i) during the first five taxable years for which this Convention has effect,

(a) 15 per cent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that Contracting State, a political sub-division or a public sector company ; and

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

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

(b)in the case of royalties referred to in sub-paragraph (b) of paragraph 3 and fees for included services as defined in this Article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 3(b) of this Article, 10 per cent of the gross amount of the royalties or fees for included services.

3. The term "royalties" as used in this Article means :

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

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

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

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

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

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

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

(c)for teaching in or by educational institutions ;

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

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

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for included services, being a resident of a Contracting State, carries on business in the other Contracting State, in which the royalties or fees for included services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for included services are attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business Profits) or Article 15 (Independent Personal Services), as the case may be shall apply.

7. (a) Royalties and fees for included services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, or a resident of that State. Where, however, the person paying the royalties or fees for included services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for included services was incurred, and such royalties or fees for included services are borne by such permanent establishment or fixed base, then such royalties or fees for included services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

(b) Where under sub-paragraph (a) royalties or fees for included services do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State.

8. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for included services paid exceeds the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of the Convention.

12. The definition of FIS as per India US DTAA as above, juxtaposed with the Support Services provided by the assessee, we have to answer whether they are covered under the definition of FIS under India USA DTAA. We find that Support Services encompasses the areas of supply chain, human resources, strategic planning and marketing, finance and information system. On the other hand, the India USA DTAA describes "***fees for included services***" in Article 12(4) as rendering of any ***technical*** or ***consultancy*** services (including through the provision of services of technical or other personnel) if such services:

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

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

In such facts and circumstances, the hon'ble Delhi Court in the case of ***Steria (India) Ltd. vs. CIT*** (supra) have held, in the context of India UK DTAA, that similar kind of services such as Corporate Communications Services, Group Marketing Services, Development Services, Information System and Services, Legal Services, Human Relation Services etc, are considered as "managerial services". In this context, we note that under the India US DTAA, the 'managerial' services is excluded under the definition of "fees for included services". In such facts, the hon'ble Delhi Court further held that as the 'managerial services' is outside the ambit of "fee for technical service", and therefore the same is not taxable as FTS. Following the ratio of the above decision, we are of the view that the support services rendered by the assessee in the area of human resources, strategic planning and marketing, finance and information systems, would constitute 'managerial services', which does not fall under the definition of FIS as provided under Article 12(4) of DTAA.

13. We further find that the Revenue has invoked the provisions of sub clause (a) of clause 4 of Article 12 of DTAA, to treat the TTLA and SSA as closely interlinked agreements where the Support Services listed in SA, flows from the terms of TTLA, and consequently hold the consideration paid by Heinz India to the Assessee, as "ancillary and subsidiary to the

application or enjoyment of the right, property or information for which royalty is paid". First of all, from the reading and intention of the two agreements, to our mind, both the TTLA and SSA are two distinct and separate agreements. Where TTLA provides for license to manufacture 'Tomato Ketchup' on which royalty is being earned, the SSA is to ensure economies of scale and consistency of approach across all group companies. Whereas SSA provides for services related to general management, human resources, finance, data processing, quality control, purchasing, business development, law and other related areas, TTLA is only in respect of Licensed Products i.e., 7 items only. We note that during the year under consideration, Heinz India paid royalty to the Assessee only in respect of sale of 'Tomato Ketchup', which is only one of the seven items mentioned as Licensed Products. We therefore agree with the assessee that the AO has failed to appreciate that the services charges under the SSA are neither product specific, nor limited to the Licensed Products under TTLA, but are in respect of total business/sales of the assessee. We are therefore inclined to agree with the assessee that since Support Services charges are paid for total business operation of Heinz India, the said charges cannot be said to be ancillary and subsidiary to rights derived from TTLA. The said conclusion further derives support from the fact that the assessee receives royalty only on

Tomato Ketchup, one of the seven products. To grasp the scale of Heinz India total business in India, the financials show that Heinz India had made a total sale of Rs 1,266 crore in AY 2012-13 out of which sale of "Tomato ketchup", on which royalty is paid to the assessee, is only 13.01 crore which is only 1-2% of the total business turnover of Heinz India. Moreover, Heinz India pays royalty to entities other than the Assessee also, in respect of products which are other than "Tomato Ketchup', namely, Complan, Samprtiti Ghee, Glucon D and Others. This further supports the contention of the Assessee that there are other products which are not covered by TTLA, yet the Support Services are used for all the products being sold by Heinz India, which goes on the show that the SSA is not linked or limited to the TTLA, as held by the AO.

14. We further note that the AO has not established, with any cogent evidence, that the mandatory condition of "make available" to Heinz India, technical knowledge, experience, skill, know-how, or processes, or technical design as per Article 12(4)(b), is also satisfied. This is apparent from the reading of clause 2.1 of Section 2 of the SSA which provides that Support Services are being provided on 'continuing basis'. We also note that the term of the SSA is only one year, which makes it evident that the Heinz India requires the support services from the

Assessee on a regular basis and cannot operate on its own in an independent manner. We nowhere find that Heinz India has acquired, on a permanent basis, any technical knowledge from the assessee for operating its business in India. The AO has also not demonstrated that the support services involved transfer of technical skills, expertise or know-how to the Heinz India. In such factual matrix, there are plethora of judicial precedents such as Hon'ble Delhi High Court's decisions in ***CIT vs. Bio-Rad Laboratories (Singapore) Pte. Ltd*** *(supra);* ***International Management Group (UK) Ltd. v. CIT*** (supra); ***Tungsten Automation England Limited*** v. DCIT, International Taxation, Circle 3(1)(1), New Delhi and ***JEFFERIES International Ltd.*** (supra) where it is held that where the services are required to be provided on a year on year basis then the same cannot be said to have been "made available" and hence, won't fall under the ambit of 'FTS". We reproduce the decision of the hon'ble Delhi Court in the case of ***International Management Group (UK) Ltd. v. CIT*** (supra), given in context of India UK DTAA, which has similar worded definition of Fees for Technical Services (FTS) as under:

> ***93. As we read Article 13(4)(c) of the DTAA, it becomes manifest that the mere furnishing of service would not suffice and a liability of tax would be triggered only if the technical or consultancy service were couple with a transfer of the expertise itself. The expression "make available" must be construed as an enablement, conferral of knowledge and which would lead to the payer becoming skilled to perform those functions independently. The make available condition would be satisfied if the services rendered entails equipping the***

recipient with skill and evidencing an apparent conferment, alienation or transfer of skill, knowledge or know- how. This transfer of knowledge or skill is a pivotal factor in determining whether the consideration received can be classified as FTS. The "make available" stipulation ensures that only those services that impart lasting technical benefits are classifiable as FTS. It was on a consideration of the aforesaid that this Court in BioRad had held that the real test would be the transfer of technical knowledge, the knowledge and skills and expertise of the provider being absorbed by the payer and who would then have the capability to deploy that knowledge or skill without reference to the original provider. This reinforces our view that the make available condition would be satisfied only if the rendering of service involves a clear and demonstrable transfer of technical skills, expertise or know-how to the recipient. It must involve a transfer of capabilities and not just the temporary use of the provider's knowledge, expertise or skill.

94. This leads us to the definitive conclusion that the rendering of technical and consultancy services has to be read alongside and in conjunction with " make available" as that phrase appears in the aforesaid paragraph. On a plain textual reading of Article 13 it becomes apparent that both the rendering of service and the skill, knowledge and expertise being made available are conditions which must be concurrently and cumulatively satisfied. What we seek to emphasize is that Article 13 in unambiguous terms creates an enduring, unfading and imperishable link between the furnishing of service and a transmission or conferment of technical expertise, knowledge and skill.

95. It is also important to bear in mind that the mere usage or utilisation of technical or consultative material in aid of business would not be sufficient to attract Article 13 of the DTAA. If we were to accept the submission that handing over of research or advisory work were sufficient for the purposes of Article 13, it would render the " make available" condition comprised in Para 4 (c) wholly redundant and otiose since the mere rendering of service would have sufficed. As De Beers correctly holds "The tax is not dependent on the use of technology by the recipient." The make available prescription bids us to make a conscious distinction between a mere service provision and the impartation of lasting expertise. The offer of service or advise does not fundamentally alter the recipient's capabilities. These services, while potentially valuable, do not endow the recipient with new skills or knowledge which could be independently deployed in the future. The kernel of "make available" must therefore be recognised to be a transfer of technology or skills rather than a temporary reliance on external support.

In view of the discussion and judicial precedents cited above, we are of the considered view that the consideration received by the Assessee for

rendering support services to Heinz India, are not taxable as FIS under the provisions of the India USA DTAA either under Article 12(4)(a) or Article 12(4)(b) of the DTAA or under section 9(1)(vii) of the Act. Ground 1 to 6 are accordingly allowed.

15. With respect to Ground 7 regarding grant of TDS, we direct the AO to allow TDS credit as per the provisions of law.

16. The ground 8 in respect to surcharge and education cess, the same are consequential, hence dismissed. The ground 9 with respect to penalty, is premature.

17. In the result, the appeal in ITA 2694/Del/2016 is partly allowed.

Order pronounced in the open court on 06.10.2026

Sd/-	Sd/-
(VIKAS AWASTHY)	**(NAVEEN CHANDRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 06.10.2026

*Priti Yadav, Sr. Ps**

Copy forwarded to:

1. Assessee
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI