IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHE (I),MUMBAI.

BEFORE SHRI PRAMOD KUMAR, VICE-PRESIDENT
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER

I.T.A. Nos. 160 to 162/Mum/2022
Assessment Years: 2007-08 & 2009-10

DCIT (IT) -1(1)(1), Mumbai. **(Appellant)**	**Vs.**	M/s AC Nielsen Corporation, 6th Floor, Block C, Godrej Park, 02, Godrej Business Dist., Phiroj Shah Nagar LBS Marg, Mumbai 400079 [PAN:AAECA8632R] **(Respondent)**

Appellant by	**Sh. Soumendu Kumar Dash, DR**
Respondent by	**Sh.Paras Savla/ Pratik Poddar, AR.**

Date of Hearing	**02.08.2022**
Date of Pronouncement	**27.10.2022**

ORDER

Per:Anikesh Banerjee, JM:

The batch of three appeals were filed by the revenue directed against the order of the ld. Commissioner of Income Tax(Appeal)-55,Mumbai, [in brevity the CIT(A)] bearing appeal No. Din & Order No. ITBA/APL/S/250/2021-

22/1037388527(1), date of order 30.11.2021, the order passed u/s 250 of the Income Tax Act 1961, [in brevity the Act] for A.Y.2007-08 to 2009-10. The impugned order was emanated from the order of ld. Dy. Commissioner of Income tax (IT) -1(1)(1), Mumbai (in brevity the AO) order passed u/s 143(3) read with section 254 and 144 C(3) of the Act. The revenue has taken the following grounds which are as follows:

> *"1. "Whether on the facts and circumstance of the case and in law, the CIT(A) was justified in holding that payments received by the assessee for rendering certain services to the Indian companies as per the terms of "General Services Agreement" (GSA) do not qualify as "Fees for included Services" (FIS) under Article 12(4)(b) of the India- USA DTAA?"*
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> *2. "Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in holding that GSA receipts are not taxable in India without appreciating that market research, target research and competitor research services provided by the assessee company to Indian companies enable them to carry out such researches in future for the Indian clients and thus, make available the technical skills, knowledge as per Article 12(4)(b) of the India-USA DTAA and as such payments for such services constitute "Fees for Included Services?"*
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> *3. "Whether on facts the CIT(A) was justified in accepting that the Neilsen Company (US) Inc., i.e.assessee and AC Nielsen ORG Pvt.*

Ltd. which subsequently provided services i.e. from 01/01/2007 was providing similar services ignoring the fact that no similar services were provided as mentioned in the GSA dated 28/11/2007?"

4. Whether the CIT(A) was justified on relying on the decision of IT AT which states that the decision of AAR in Perfetti VAN Holding set aside by the Hon'ble Delhi High Court is pending and not yet finalised?"

5. The appellant craves leave to amend or alter or add a new ground which may be necessary.

The Appellant prays that the order of the CIT (A) on the above grounds be set aside and that of the Assessing Officer be restored."

2. For sake of brevity.Here, we are passing the common order for all the three appeals. In the factual back drop, all are the common issues. With the consent of both the sides the ITA No. 160/Mum/2022 has been taken as lead case.

3. The brief fact of the case is that the assessee is a company established under the laws of Delaware USA and has registered office in New York. AC Nielsen Group is one of the leading business and information companies in the world andis represented in India through two legal entities namely ACNielsen Org Marg Pvt. Ltd.(in brevity ACNOM) for customized research services and retail measurement services ACNielsen Research Services Pvt. Ltd. (in brevity ACNRS) for rendering services in the fieldof commercial, financial, accounting and legal, logistics etc. In

the year of appeal a sum of Rs.15,06,52,986/- was received from Indian entities for the services which was claimed exempted under Article 12 of India-USA DTAA.

3.1 In the original assessment order, the ld. AO taxed entire income, 50% as royalty and 50% as fees for included services (FIS). It was upheld by CIT(A). However, matter has been sent back to the file of AO for fresh adjudication by Hon'ble order of ITAT vide order dated 02.03.2016. The AO has passed order as per the directionof the ITAT on 14.02.2018, taxing entire amount of Rs. 15,06,52,986/- as fees for included services (FIS). The assessee has filed appeal against the order of the ld. AO before the ld. CIT(A). The ld. CIT(A) after considering the order of the ITAT Jurisdictional Bench and the submission of the assessee, accepted the assessee's claim and dismissed the addition made by the ld. AO.

4. Being aggrieved, the revenue filed appeal before us.

5. We heard the rival submission and considered the documents available in the record. The ld. Sr. DR, first relied on the assessment order, relevant para 13.4 is extracted as below:

> *"13.4 To illustrate that services are made available to the Indian concerns let us look into the facts again of A.Ys. 2004-05 to 2006-07 which are equally applicable to the present year also since there is no change in the clauses of the*

agreement. In the submissions provided, there are instances that the employees of the Indian concerns are called to attend training programme. One of such instance was the training on Hyperion Financial Management (HFM) Architecture at Hong Kong. In the invitation sent to the Indian concerns, it was mentioned as under:

"Nielsen Company will conduct a HFM training in Hong Kong during March 22-23. You are selected to represent your country / sub - region to attend this training and you'll have to pass onward the knowledge to your local team or other markets. "[Emphasis supplied]

This clearly shows that technical knowledge has been made available to the Indian concerns for its use and as specifically provided in the GSA these can be redistributed to the other Associated Companies pursuant to separate agreements. It can be assumed safely that there will be various other training imparted to the Indian concerns so that the continuity of the business is ensured on the agreed objectives."

5.1 The ld. Counsel vehemently argued that the appellant submitted the facts before the AO that services rendered by the Indian entities wherein nature of management services which cannot be treated as royalty and don't satisfy 'make

available' conditions to qualify as FIS. Also, General Service Agreement(in brevity GSA) receipts don't include any consideration for use of proprietary products/analytical tools etc. However, the ld. AO did not accept this explanation and held the entire receipts of Rs.15,06,52,986/- as FIS, as per Article 12(4)of the India-US Tax Treaty and also u/s 9(1)(vii) of the Act. Accordingly, holding before taxable in India.

5.2 In this respect the assessee submitted the following facts which is reproduced as follows:

> *"ACNielsen Corporation ("ACNielsen/ the appellant company") is a company established under the laws of Delaware, USA having its registered office at 770 Broadway, NY 10003-9595, New York, USA.*
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> *ACNielsen is one of the world's leading business & information companies and has leading market positions in marketing and media information, directories and consumer information, as well as educational information. The ACNielsen Group also offers other marketing information services tailored to industries such as pharmaceuticals, financial services and telecommunications.*
>
> *The ACNielsen Group is represented in India through its two legal entities i.e. ACNielsen Org- Marg Private Ltd.*

("ACNOM") for customized research services & retail measurement services and ACNielsen Research Services Pvt. Ltd. ("ACNRS") for customized market research services.

ACNielsen has entered into General Service Agreement ("GSA") dated 2 June 2003 with ACNOM and ACNRS ("collectively referred as the Indian entities") for rendering of services in the field of commercial, financial, accounting and legal matters, logistic, developing and engineering, sales and marketing and other matters for successfully conducting a business.

As per the GSA, ACNielsen bills the Service Receiving Affiliates for the intra group services rendered at mark up. The total cost in this regard would be direct and indirect costs and expenses incurred in rendering the relevant services; including all cost of personnel, travel' and equipment, all expenses paid to third parties and all related overhead expenses. However, as per GSA no mark-up is computed on the third party expenses and on remuneration/ payments made by ACNielsen to Associated Enterprise for availing support services.

During the year under consideration, ACNielsen had received a sum of Rs. 15,06,52,986 towards GSA Agreement from the Indian entities.

In the return of income filed for the aforesaid assessment, the said receipts was claimed as exempt from Indian Income-tax on the ground that the said GSA receipts are not covered by Article 12 of the lndo-USA Tax Treaty.

During the course of assessment proceedings, the learned Deputy Director of Income-tax (International Taxation) - 1(1), Mumbai ("DDIT") called for various details, which were duly submitted by ACNielsen. The DDIT called upon ACNielsen to show cause as to why not the said receipts be treated as 'Royalty/ Fees for technical services' as per Indo-USA Tax Treaty and be subjected to tax in India.

ACNielsen vide its letters dated 19 November 2010 and 2 December 2010 explained to DDIT the following:

■ *The nature of each type of service rendered by ACNielsen under GSA,*

• *Nature of expenditure incurred by ACNielsen for which it is reimbursed by the Indian entities; and*

■ *Why the said receipts would not be treated as royalty/ fees for included services as per Article 12 of the Indo-USA Tax Treaty.*

It was also argued before the DDIT that the nature of services rendered by ACNielsen to the Indian entities were in the nature of management services, which cannot be treated as royalty as per Article 12(3). Further, the said services do not make available any technical knowledge, experience, skill, know-how or process to the Indian entities and therefore, cannot be taxed as 'fees for included services'.

It was submitted before the DDIT that GSA charges do not include any consideration for the use of any proprietary products/ analytical tools. The Indian entities are making separate payment towards software products/ analytical tools either to its regional office/ vendors directly.

Disregarding the above explanations of ACNielsen, the DDIT treated 50% of the receipts of Rs. 15,06,52,986 as income in the nature of 'royalty' taxable as per Article 12(3)(a) and remaining 50% as income in the nature of 'fees for included services', taxable as per Article 12(4)(a) in India @ 15%.

Aggrieved by the order of the DDIT, the appellant company is in appeal before your honour."

5.3 The ld. Counsel further relied on the order of the ld. CIT(A) in para 5.2.3 which is extracted as below:

"5.2.3 The appellant has submitted that Hon'ble ITAT has decided the issue in its favour for A.Y. 2004-05, 2005-06 and 2006-07 on the same set of facts and circumstances, vide common order dated 22.07.2019. It is noticed that identical grounds were raised in those years. The Hon'ble Tribunal followed its decision for A.Y. 2010-11 in the case of in The Nielsen Company (US) LLC in ITA no. 4360/Mum/2015 dated 22.05.2019.

I have perused the GSA dated 02.06.2003 between appellant and ACNielsen ORG-MARG Limited which was applicable for A.Y. 2004-05, 2005-06 and 2006-07 for which Hon'ble ITAT has decided issue in favour of the appellant. The said agreement was also applicable in A.Y. 2007-08 till 31.12.2006. I have also perused GSA dated 28.11.2007 between The Nielsen Company (US) Inc, the appellant and ACNielsen ORG-MARG Pvt Ltd, applicable from 01.01.2007 for two years and find that both the agreements are similar, except that some of the services are to be rendered now by The Nielsen Company (US) Inc. Therefore, the issue of the taxability of GSA receipts remains same for the entire year and is not affected by the new agreement. Therefore, respectfully following the decision of Hon'ble Tribunal, it is held that receipt under GSA is not taxable as FIS as it doesn't satisfy "make available" criteria as

per Article 12(4) of the India-US DTAA. Thus, ground no. 2 & 3 are decided in favour of the appellant."

5.4 The ld. Counsel fully relied on the order of the Coordinate Bench of assessee's own case in case of **ITA No. 4362/Mum/2015 date of order 22.05.2019**. The relevant para 20 to 22 is extracted below:

"20. In view of the above factual and legal discussions, we hold that the assessing officer erred in taxing the service agreement receipt as 'fee for included services' as per Article 12(4) of India USA DTAA for such services as mentioned in para 4 (supra), in absence of clause in the service agreement dated 09.01.2009, that the recipient would be able to perform these services of its own without any further assistance of the assessee.

21. The ratio of decision of Cochin Tribunal in M/s US Technology Resources Pvt. Ltd. vs. ACIT (supra) relied by Id. DR for the revenue is not helpful to the revenue. In the said case the assessee rendering the services in the field of management decision making. Further, in the said case it was clearly held the expertise and technology was made available by USA company was a technical services within meaning of Article 12(4)(b) of India-USA DTAA.

22. In the result, the ground No. 2 of the appeal is allowed."

6. Considering the above fact, it is clear that the activities of the assessee is related to the GSA which the assessee was entered in agreement on 02.06.2003. The GSA receipts are not taxable under Article 12(4) of India-USA DTAA. From the memorandum of understanding, it is, obvious that as provided in clause 4B of Article 12 of the India-USA DTAA, that if the technical and consulting services made available are technical knowledge, experience, skill, know howor process orconsistthe development and transfer of a technical plan or technical design are considered to be technical or consultancy services.

6.1 It is also clarified that consultancy services not of technical nature cannot fall under "Included Services". In view of this memorandum of understanding between two sovereign countries, the consultancy services which are technical in nature alleging to be included as technical and consultancy services for the purpose fees for included service as per sub-clause 4B of Article 12 of DTAA between India –USA. The services provided by the assessee consist of.

i) Development and determination of short-term business strategies.

ii) Overall management and co-ordination in relation to general policies and strategies per country perdivision.

iii) Maintenance of external relationship, to the extent that these services do not compromise shareholder services.

iv) Humanresource services regarding group policy.

v) Legal consultant services.

vi) Insurance services.

vii) Development, control and maintenance of management information systems;

viii) Administrative support to group companies, including analysis of management information;

ix) Development of short term and long-term IT policies and strategies;

x) Management and co-ordination of IT policies between group companies.

xi Tax invoices;

xii Financial risk management services, to the extent these services donot compromise financing services;

xiii Support in the area of international staffing career development and international job rotation;

xiv Market research, target research and competitor research; and stock-based compensation.

7. We have noted that while undertaking the above services, the assessee had not executed any contract to make anybusiness. So, as to use services

independently by applying the technology. All the services undertaken by the assessee or either support service IT enable services; co-ordination of tax services as rendered above are not stage which request transfer of technology receipts to skill company. We are fully relied on the order of the coordinate bench in this issue and the addition amount of Rs.15,06,52,986/- are liable to be deleted. All other appeals are mutatis mutandis factually similar with ITA No. 160/Mum/2022.

8. In the result, all the appeals of the Revenue bearing **ITA Nos. 160 to 162/Mum/2022** are dismissed.

Order pronounced in the open court on 27.10.2022

Sd/-	Sd/-
(PRAMOD KUMAR)	**(ANIKESH BANERJEE)**
VICE-PRESIDENT	**JUDICIAL MEMBER**

AKV
Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent
(3) The CIT
(4) The CIT (Appeals)
(5) The DR, I.T.A.T.

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