2025:DHC:3997-DB

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision : 19.05.2025*

\+ **ITA 157/2025, CM Nos.30185/2025 & 30186/2025**

COMMISSIONER OF INCOME TAX, INTERNATIONAL TAXATION-1, NEW DELHI .....Appellant

Through: Mr Puneet Rai, SSC, Mr Ashvini Kumar Mr Rishabh Nangia, and Mr Gibran JSCs and Mr Nikhil Jain, Advocate.

versus

COURSERA INC. .....Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE TEJAS KARIA

VIBHU BAKHRU, J. (*ORAL*)

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 [**the Act**], *inter alia*, impugning the common order dated 21.08.2024 [**impugned order**] passed by the learned Income Tax Appellate Tribunal [**ITAT**] in ITA No.2416/Del/2023 and ITA No.3646/Del/2023 in respect of Assessment Year [**AY**] 2020-21 and 2021-22 respectively. The learned ITAT allowed the aforesaid appeals preferred by the respondent [**Assessee**] assailing the final assessment order dated 28.06.2023 passed under Section 143(3) read with Section 144C(13) of the Act.

2. The Revenue has confined the present appeal to the impugned order in so far as it relates to ITA No.2416/Del/2023 in respect of AY 2020-21. In terms of the impugned order, the learned ITAT allowed the appeal of the

Assessee, *inter alia,* impugning the final assessment order dated 28.06.2023 passed by the AO under Section 143(3) read with Section 144C(13) of the Act.

3. The Assessee is a company incorporated in United States of America and is a tax resident of the said country. The Assessee operates a global online learning platform providing online courses and degrees from leading universities and companies. The AO sought to tax the receipts from provision of said services as fees for technical services [**FTS**] within the meaning of Section 9(1)(vii) of the Act and fees for included services [**FIS**] within the meaning of paragraph 4 of Article 12 of India USA Double Taxation Avoidance Agreement [**Indo-US DTAA**].

4. The learned ITAT accepted the Assessee's contention that the receipts from the services rendered are neither in the nature of royalty nor FTS (as it did not entail any included services) which are chargeable to tax under the Act.

5. In the aforesaid context, the Revenue has projected the following question of law for consideration of this Court: -

> "A. Whether on the facts and in the circumstances of the case, and in law, the Hon'ble ITAT is correct in holding that customized service as provided by the assessee do not qualify as "Make Available" as per Article 12 of India-USA DTAA?
> B. Whether on the facts and in the circumstances of the case, and in law, the Hon'ble ITAT is correct in holding that the user services provided by the assessee which involved high degree of human intervention of training element would not satisfy as "Make Available" as per Article 12 of India-USA DTAA?"

FACTUAL CONTEXT

6. On 23.12.2020, the Assessee had filed its return of income for the AY 2020-21 under Section 139(1) of the Act declaring total income of ₹17,98,07,270/-. The Assessee's return was picked up for scrutiny and a notice dated 29.06.2021 under Section 143(2) of the Act, was issued. The said proceedings culminated into the draft assessment order dated 28.09.2022 which was passed under Section 144C(1) of the Act.

7. It was the Assessee's case before the AO that it had received the gross amount of ₹75,66,52,591/- during the previous year relevant to AY 2020-21 in respect of services rendered. The Assessee had explained that it operates a platform which hosts multimedia courses for consumption of end users. The Assessee has onboarded various educational institutions offering various courses in multiple disciplines, on its platform. The said courses in the disciplines of management, arts, humanities, data analysis and philosophy etc, are offered online. The Assessee claimed that its customers included individuals, educational institutions as well as the corporates. The Assessee claims that the receipts did not constitute consideration for industrial, commercial, or scientific knowledge or experience, etc. and there was no element of its services, whereby it made available any technical knowledge/skills etc to the customers. The Assessee, thus claimed that its income was not chargeable to tax either as royalty or as FTS under the Act read with the Indo-US DTAA.

8. Paragraphs 1 to 4 of Article 12 of the Indo-US DTAA are relevant and are reproduced below: -

"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 subparagraph (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 or 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."

9. The Assessee claimed that by virtue of paragraph 4 of Article 12 of the DTAA its receipts cannot be treated as FIS as the Assessee did not make available any technical knowledge, experience, skill, know-how, or processes. The Assessee claimed that its services were confined to offering its platform for access to various courses conducted by other institutions/ organisations.

10. The AO examined one of the agreements entered into by the Assessee [Assessee's agreement with Gandhi Institute of Technology and Management] and found that the Assessee provided two kinds of services: content services and user services. Insofar as the user services are concerned, the Assessee provided services for; (i) preparing customised

landing page featuring the organization logo and selected courses; (ii) generating user engagement reports; (iii) providing payment solution(s) to allow users to seamlessly access premium course experiences and skip checkout; and (iv) rendering enterprise-level user support. The AO also noticed that the agreement included additional services which, *inter alia*, provided for training for using the platform. On the aforesaid basis, the AO concluded that the Assessee was not merely providing content services but was providing a whole range of user services, which is specific to a particular user. Additionally, the AO observed that such services also involved a high degree of human intervention and no separate consideration for such user services was received by the Assessee. The AO thus, proceeded to propose an addition of ₹75,66,52,591/- to the Assessee's returned income (which was nil).

11. The Assessee filed his objections before the Dispute Resolution Panel [**DRP**]. The DRP considered the Assessee's objections. The DRP was not persuaded by the objections raised by the Assessee. However, it took note of the submission that the AO had not factually examined the terms and conditions of the agreement, which was picked up by the AO, namely the services that were, in fact, rendered in terms of the agreement with Gandhi Institute of Technology and Management. Accordingly, the DRP issued directions to the AO to verify the Assessee's contentions. The relevant extract of the directions issued by the DRP on 24.04.2023 are extracted below:

> "**4.2.3 The Panel has considered the rival averments as mentioned above**. The Panel takes a note of the AO's remarks made at para no. 9.3 to 9.4 of the draft

order by which he has attempted to substantiate that assessee is not only providing content services to the customer in India but also providing whole range of user services which involve a high degree of human intervention. The AO further states that there is an element of training involved with respect to the customer and the client and the basis of the information availed through the proceedings conducting by him u/s 133(6) of the Act.

The Panel also takes a note of assessee's submission dated 14.02.2023 by which it has filed a copy of agreement with Gandhi Institute of Technology and Management which does not appear to be considered and discussed by the AO in the draft assessment order. The AO needs to factually examine the assessee's contention as to whether the terms and condition of this agreement do enable the assessee to make it service provider in hosting content services and user services in relation to courses developed by the educational institution and also enabling the assessee for providing technical services to its customer.

Accordingly, the AO is directed to verify the assessee's contention in light of the said agreement by passing a speaking and reasoned order. The Panel hastens to clarify that the AO shall not conduct any fresh inquiry in this regard; the verification shall be made on the basis of documents/submissions available on the assessment records. The assessee's objections in this regard are hereby, disposed off accordingly.

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5. Directions under section 144C of the Income Tax Act:

The Assessing Officer is directed to complete the assessment as per the above directions of the Dispute Resolution Panel. The Assessing Officer shall place a copy of these directions as annexure to the final order, to be read as a part of the order. While passing the final order, the Assessing Officer shall incorporate the

> reasons given by the Dispute Resolution Panel in respect of various objections, at appropriate places. The Grounds of Objections are decided as above."
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> [emphasis added]

12. However, it does not appear that the AO undertook any fresh exercise. The AO reiterated its earlier observations and proceeded to pass the final assessment order dated 28.06.2023.

13. The learned ITAT did not find merit in the Revenue's contention that the Assessee had provided any technical services, especially the once which involved human intervention. Accordingly, the learned ITAT rejected the contention that the Assessee's receipts were chargeable to tax under the Indo-US DTAA as FIS. The relevant extract of the learned ITAT's decision is set out below:

> "11. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. Insofar as the activity of the assessee is concerned, it is established on record that the assessee provides a global online learning platform, wherein, various courses and degrees from leading universities and companies are provided. It is a fact on record that the contents of such courses and degrees are created by the concerned universities and companies and not by the assessee. The assessee acts as a mere facilitator between the concerned university/companies and the customers who want to undertake the courses of the concerned university/companies. The assessee merely provides access to the contents of the universities/companies through the platform on receipt of fees.
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> 12. In fact, the Assessing Officer in the draft assessment order has clearly observed that the assessee is not an educational institution but an aggregation service provider, which brings educational learning on

one platform. He has further stated that the course contents were not created by the assessee, but by the educational institutions. The customers who want to undertake course/degree get access to the contents/study materials through the platform provided by the assessee. Tests/examinations are also conducted by the concerned universities and companies and not by the assessee. Certificate for completion of course/degrees are also issued by the concerned universities/companies along with the logo of the assessee. These facts clearly indicate that while providing access to various courses/degrees, the assessee does not provide services of technical nature to the customers. In fact, while disposing of the objections raised by the assessee against the draft assessment order, learned DRP has clearly observed that the Assessing Officer has neither properly examined the agreement with Gandhi Institute of Technology and Management, nor has factually examined assessee's contention that the terms and conditions of the agreement do not make the assessee a technical service provider. However, while passing the final assessment order, the Assessing Officer has completely ignored the directions of learned DRP. This is evident from the following observations of the Assessing Officer in the final assessment order

> *"13. In response to the directions of Hon'ble DRP, the agreement of the assessee with GITAM was perused.* ***It is seen that the observations regarding the agreement of the assessee with GITAM has been discussed in the Draft assessment order (refer to para 8.2 and 8.3)****. Accordingly, the final assessment order is being passed at total assessed income of Rs. 75,66,52,591/- taxable at as per provisions of the Income Tax Act, 1961 and applicable surcharge and cess. Necessary forms to be issued, applicable interest to be charged and credit of taxes, if any after verification from the ITD system are to be allowed. Penalty u/s 270A is being proposed to*

initiate as discussed in earlier paragraphs of the order. Detailed computation of tax payable and interest charged u/s 234A, 234B and 234C of the Act is being attached as part of the final order. Notice of demand is being issued."

13. As could be seen from the highlighted portion of the observation of Assessing Officer, without properly implementing the directions of learned DRP, he has merely stated that the agreement with Gandhi Institute of Technology and Management has been discussed in the draft assessment order. By these observations what the Assessing Officer implies is, learned DRP has issued directions without proper application of mind. This, in our view, is highly objectionable and against the provision contained under section 144C(13) of the Act.

14. Be that as it may, Assessing Officer's findings/observations on the role of assessee are self-contradictory. While on one hand, the Assessing Officer has acknowledged the fact that the assessee is an aggregation service provider and not a content creator, in the same breath, he says that assessee's contention that it is a mere aggregator of educational courses is not correct. The Assessing Officer has not brought on record any material to establish the fact that the assessee provides technical services through its online platform. Merely because the assessee has a customized landing page, it does not mean that the assessee provides technical services, that too, through human intervention. The Assessing Officer, in our view, has not been able to prove such fact. Even, assuming for argument's sake, the services provided by the assessee is of technical nature, that by itself would not be enough to bring such receipts within the purview of Article 12(4) of India – USA DTAA, unless the make available condition is satisfied. Burden is entirely on the Revenue to prove that in course of rendition of services, the assessee has transferred technical knowledge, know-how, skill etc. to the service recipient, which enables him to utilize

> such technical knowledge, know-how, skill etc. independently without aid and assistance of the service provider."

14. It is clear from the above that the learned ITAT's conclusion that the services provided by the Assessee did not include any element of included services and, therefore, the Assessee's receipts were not chargeable to tax as FIS under the Indo-US DTAA, is based on the findings of fact in respect of the services rendered by the Assessee.

15. We do not find that the said findings can be stated to be perverse by any stretch. There is no dispute that if the services provided by the Assessee are not of technical nature as stated by the learned ITAT, the Assessee's receipts would not be chargeable to tax as FTS under the Act read with the Indo-US DTAA. In any event, the amount receipt is not chargeable to tax as FIS within the scope of Article 12 of the India US DTAA.

16. In view of the above, we find that no substantial question of law arises for consideration of this Court.

17. The application for condonation of delay of 92 days in re-filing the present appeal is allowed.

18. The appeal is dismissed and the pending application is also is also disposed of.

VIBHU BAKHRU, J

TEJAS KARIA, J

MAY 19, 2025

M *Click here to check corrigendum, if any*