INSIGHTS

Direct Tax

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Delhi HC | Secondment reimbursements held taxable under India-USA DTAA [1]

Under Indian domestic law, Fees for Technical Services (FTS) is broadly defined and includes any consideration for managerial, technical, or consultancy services. In contrast, the India-US DTAA uses a significantly narrower scope known as Fees for Included Services (FIS), which requires a strict **"make available"** condition to be met.

In a significant ruling, the Delhi High Court has held that reimbursements received by Ernst and Young U.S. LLP from its Indian affiliates towards seconded employees are taxable in India, being Fees for Technical/Included Services under Article 12 of the India-US DTAA as also under Sec 9(1)(vii) of the Act. The Court held that the secondment arrangement satisfied the make available condition. The judicially held test to such condition is where *knowledge "remains with" the recipient so that it may be deployed "without depending upon the provider."*

Brief Facts

- The taxpayer, "EY US", a US-based LLP and part of the global EY network is engaged in the field of assurance, tax, transaction and business advisory services.
- Pursuant to a deputation agreement between EY US and EY India entities, EY US seconded its employees to three Indian EY entities wherein secondees came to inculcate standard policies, culture and methodology within the personnel of EY Indian entities.
- The secondees were sent by EY USA to India to implement EY group policies and maintaining quality standards for which EY US received reimbursements from EY India on a cost-to-cost basis without mark-up.
- EY India entities bore the salary costs of secondees and deducted TDS thereon u/s. 192. No TDS was deducted at the time of reimbursement to EY USA.
- The AO / DRP held the secondment reimbursements taxable as FIS on the basis that the secondees retained lien with EY US, continued under the parent framework, and imparted training / group practices capable of being applied by EY India entities independently.
- The Tribunal ruled in favour of the taxpayer by holding that –
  - the secondees functioned as employees of the Indian entities,
  - the reimbursements were pure cost-to-cost payments, and
  - the make available test was not satisfied.

High Court Ruling

Examining the AO's analysis of the Statement of Work/engagement letters, the Court concluded that the scope of services included "training" rendered by EY US personnel to EY India entities and other Indian clients thus demonstrating actual transfer of technical knowledge, experience, skill or know-how and consequently reversed the Tribunal's decision. It heavily relied on the decision in Centrica India Offshore (P.) Ltd. v. CIT[2] in which case, the role of the secondees was to help the employees of a newly incorporated Indian subsidiary company to develop the required skill set so that they could later function independently without external assistance.

[1] CIT v. Ernst And Young U.S. LLP [ITA 423/2025; ITA 424/2025; ITA 715/2025; ITA 753/2025; & ITA 760/2025] dt June 18, 2026 (Delhi HC)

[2] Centrica India Offshore (P.) Ltd. v. CIT [2014] 44 taxmann.com 300 (Del HC). SLP dismissed - [2014] 51 taxmann.com 386 (SC)

The High Court distinguished the rulings relied upon by the taxpayer, observing that the nature of the services involved in those cases differed from the facts of the present case, which involved the transfer of technical knowledge and skills through training under a secondment arrangement.

Our Comments

This judgment may be read strictly with its peculiar facts and not as authority for a broader proposition that any absorption of foreign group culture and methods automatically satisfies "make available" test.

Moreover, when group culture and quality standards are likely to be updated on an annual basis, the Indian entity may require to be continually dependent on the foreign entity which develops and maintains such policies and standards.

Further, it is crucial to examine whether transfer of technical knowledge through training is an incidental advantage to the main implementation service.

Given various contrary decisions relied upon by the taxpayer, as well as AAR ruling in *Ernst & Young (P) Ltd*[3]., the present ruling appears unlikely to be the final word on the issue.

ITAT Mum | No penalty u/s 270A where essential statutory mischief is absent [4]

In a recent ruling, the Mumbai ITAT has deleted penalty levied under Sec. 270A of the Act on a charitable trust, holding that penalty cannot be imposed merely because a claim of depreciation was disallowed, where the trust's returned and assessed income both remained Nil. The Tribunal clarified that under-reporting under Sec. 270A is not an automatic consequence of every disallowance, it requires a real, statutory tax consequence, which was conspicuously absent in the facts of this case.

Brief Facts

- The taxpayer is a charitable trust and its income is governed by the provisions of Sec. 11.
- Depreciation was disallowed by invoking Sec. 11(6), and upheld by CIT(A). However, the AO was directed to allow the benefit of accumulation under Sec. 11(2), and after giving effect to the said appellate order, the income of the assessee has been computed at Nil.
- Thus, the ultimate tax effect of the disallowance is non-existent. There is no assessed positive income, no tax payable, and no demonstrated benefit of carry forward or set off arising from the claim of depreciation.
- In the penalty proceedings, the Revenue proceeded on the footing that since depreciation was not allowable in view of Sec. 11(6), the claim itself constituted under-reporting and hence, the penalty was rightly levied.
- The taxpayer contended that after giving effect to the appellate order, the assessed income was Nil; consequently, no tax was

[3] Ernst & Young (P.) Ltd., [2010] 189 Taxman 409 (AAR) Held that sharing of EY's group standards, templates, and best practices with the Indian member firm cannot, by itself, be regarded as making available technical knowledge, as the recipient was not enabled, through any transfer of technical know-how, to independently apply the underlying technology.

[4] Besant Montesori School v. ITO (Exem) [ITA No.2176/Mum/2026]

payable, and therefore no penalty could be levied under Sec 270A. Reliance was placed on coordinate bench ruling in Podar Literacy and Education Trust[5] where on identical facts, penalty under Sec. 270A was deleted for a charitable trust whose income remained Nil despite disallowance of depreciation.

Tribunal's ruling

Before the Tribunal, the issue centred on the controversy as to whether penalty under Sec. 270A can be sustained merely because the taxpayer's claim of depreciation had been disallowed despite the fact that after giving effect to the appellate order in quantum proceedings, the income of the taxpayer remains Nil and no tax is ultimately payable.

Key observations made by the Tribunal are summarised below:

- Penalty under Sec. 270A is not an automatic statutory reflex upon every disallowance. The provision requires a foundational jurisdictional fact — that assessed income exceeds returned income, or that the case otherwise falls within the specific clauses of Sec. 270A(2).
- A disallowance may alter the computation, but *"unless such alteration results in assessed income, tax liability, reduction of loss with statutory consequence, or any present or future tax advantage, it cannot ipso facto be elevated to the level of under-reporting so as to invite penalty."*
- On facts, both returned and assessed income remained Nil after giving effect to the accumulation benefit under Sec 11(2); there was no assessed positive income, no tax payable, and no demonstrated benefit of carry forward or set-off. Clause 270A(2)(a) requires assessed income to be greater than returned income ; since both remained Nil, even a plain reading of this clause was not satisfied.
- The Act does not provide that every disallowed claim shall necessarily entail penalty. Sec. 270A has its own conditions, contours, and statutory thresholds.
- Penalty provisions, though civil in character, *"carry serious fiscal consequences and therefore cannot be invoked mechanically or on a mere arithmetical disallowance divorced from its legal consequence."*

Ratio of Podar Literacy and Education Trust applied

The Tribunal relied on coordinate bench decision of Podar Literacy and Education Trust (supra), where on virtually identical facts, the Tribunal there held that –

- an inadmissible claim does not automatically translate into "under-reporting of income" unless it results in a tax advantage, reduction of tax liability, or deferment of tax.
- the taxpayer had not availed any carry-forward or set-off benefit, hence the essential ingredient of under-reporting was "conspicuously absent," and accordingly penalty was deleted.

Our Comments

This is a welcome decision that underscores the key requirements for invoking penalty under Sec. 270A. The ITAT held that the provision is intended to address genuine cases of tax-consequential under-reporting of income, which was clearly absent in the present case. As the charitable trust's income remained exempt and continued to be assessed at Nil both before and after the disallowance, no real under-reporting resulting in a tax liability had occurred, and therefore the penalty was not justified.

[5] Podar Literacy and Education Trust v. DCIT [ITA No.4762/Mum/2025]

ITAT Mum | Even project expenditure paid by one charitable trust to another attract deemed income provisions under Sec. 11(3)(d) [6]

As per Sec. 11 of the Act, income derived from property held under trust wholly for charitable or religious purposes is exempt to the extent applied for such purposes in India.

Where income cannot be fully applied during the year, a trust may accumulate income under Sec.11(2), subject to prescribed conditions and compliances. For continued exemption, the accumulated income must be applied for specified purpose within prescribed time. Under Sec 11(3)(d), upon breach of the prescribed conditions for exemption, the accumulated income becomes taxable in the year of breach. One such breach of conditions is when the income is "paid or credited" to any trust or institution registered under Sec. 12AA or covered under Sec. 10(23C) of the Act.

Recently, the Mumbai ITAT upheld the addition made under Sec. 11(3)(d) and held that accumulated income under Section 11(2), when paid to another charitable institution registered under Section 12AA (now Sec. 12AB regime), loses exemption irrespective of whether the payment is termed as donation, project expenditure, consultancy fees, research assignment charges, implementation charges or programme management costs.

The Tribunal rejected the taxpayer's attempt to distinguish between a "donation" and "project expenditure through an implementing agency". According to the Tribunal, once accumulated income is paid or credited to another registered charitable institution, Sec. 11(3)(d) is attracted.

Facts

The taxpayer is a registered charitable trust under Sec. 12A and claimed exemption under Sec 11 and 12 of the Act. The trust had accumulated income under Sec 11(2) from which it made payments to charitable institutions which were claimed as payments to implementing agencies for execution of specified projects.

Taxpayer's contentions

- The taxpayer contended that its relationship with the other charitable institutions was that of service provider–recipient and not donor-donee. Accordingly, the funds were actually spent on projects and there was no rollover of accumulated income.
- Further, it argued that the funds were not available for unrestricted use by the recipient institutions and were earmarked for specific projects.
- As regards the legislative intent behind Sec 11(3)(d), the taxpayer argued that it was only to prohibit a mere transfer of accumulated funds from one charitable body to another, not to disallow genuine expenditure incurred for project execution through expert agencies.

Revenue's contentions

- The CIT(A) held that accumulation under section 11(2) is conditional and must be applied by the very trust that accumulated it.
- The CIT(A) referred to provisions of Sec.11(2) and Sec 11(3)(d) wherein Explanation to Sec. 11(2) prohibits utilisation of accumulated funds through payments to another trust registered under Sec. 12AA is prohibited. Under Sec. 11(3)(d), accumulated income **"paid or credited"** to another charitable institution loses its exempt character and becomes taxable.

[6] D.L.Shah Trust For Applied Science, Technology, Arts And Philoso v. ITO [ITA Nos. 8 & 446/MUM/2026]

- Thus, emphasising the words **"paid or credited"**, the CIT(A) held that no distinction can be made based on the nomenclature or purpose of the payment, including **"project execution, consultancy services or implementation of charitable programmes through another trust."**
- The CIT(A) further observed that if Parliament intended to exempt payments made for **"project execution, consultancy services or implementation of charitable programmes through another trust"**, it would have expressly provided so. The object of the provision was to prevent **"rolling over" or "parking" of accumulated charitable funds** between tax-exempt entities.

Tribunal's ruling

The Tribunal concurred with the Revenue and held that the condition laid in Sec 11(3)(d) to treat the relevant accumulated income as deemed income of the year of breach is *"recipient centric and not purpose centric".* The only facts required to attract Sec 11(3)(d) are that funds "paid or credited" is out of accumulation under Sec 11(2), and that the recipient is another Sec 12AA-registered institution. Once these jurisdictional facts exist, the AO has no authority to carve out exceptions based on nature of services, invoices, or the transferor's control over the project.

Key observations made by Tribunal are summarised under:

- The Parliament deliberately used the wide expression "paid or credited" and not "donated," "contributed," or "granted" and did not qualify the provision by reference to the purpose of the payment. Hence, the Tribunal could not read in qualifications that Parliament consciously omitted.
- If the taxpayer's contention distinguishing a **"transfer"** from **"expenditure through an implementing agency"** is accepted, every transfer of accumulated income could be camouflaged as project expenditure, consultancy fees, or implementation charges. In such a scenario, the recipient trust would continue to enjoy exemption while the transferor trust simultaneously claims compliance with section 11(2), thereby defeating the legislative intent and rendering section 11(3)(d) virtually redundant.
- The Tribunal relied on Maharaja Ranjit Singh War Museum Trust[7] wherein the High Court held that after the insertion of Sec. 11(3)(d), payment or credit of accumulated funds by one charitable trust to another constitutes a deemed application in contravention of the permitted mode of utilisation, attracting the deeming fiction under Sec 11(3). The High Court distinguished the earlier decision in CIT v. M. Ct. Muthiah Chettiar Family Trust[8], holding that it was rendered under the pre-amendment law which did not contain the present deeming provision, and therefore cannot govern cases arising under the amended statutory regime.
- It further relied on Commissioner of Customs v. Dilip Kumar & Co wherein the Supreme Court held that where statutory language is plain and unambiguous, courts must give full effect to the legislative mandate and cannot create exceptions on equitable considerations. The Tribunal applied this principle to reject the taxpayer's proposed distinction between "donation" and "project expenditure," which finds no support in the plain wording of Sec. 11(3)(d).
- Recognising the taxpayer's application of accumulated income as 'artificial expenditure', the Tribunal referred to CIT v. Durga Prasad More[9] (SC), which laid that

[7] Maharaja Ranjit Singh War Museum Trust v CIT [121 taxmann.com 90] (Punjab & Haryana HC)
[8] CIT v. M. Ct. Muthiah Chettiar Family Trust[8] [245 ITR 400]
[9] CIT v. Durga Prasad More (1971) 82 ITR 540 (SC)

taxing authorities are entitled to look beyond the apparent form of a transaction and examine the surrounding circumstances to ascertain its true nature and substance.

Our Comments

The Tribunal has effectively drawn a fundamental distinction between application of current income under Sec. 11(1)(a) where inter-charity donations have judicially been recognised as valid application and utilisation of accumulated income under Sec. 11(2), which Parliament has deliberately subjected to stricter safeguards precisely because accumulation is a departure from the normal rule of immediate application. The ruling reinforces that once accumulated income under Sec 11(2) is paid or credited to another Sec 12AA registered institution, the deeming fiction under Sec 11(3)(d) operates automatically; irrespective of how the payment is labelled, documented, or structured and courts will look through artificial arrangements that seek to circumvent this statutory safeguard.

Delhi HC | Interim stay granted on TP Assessment Order on ROKA issue despite retrospective Finance Act 2026 amendment validating AO's action [10]

In a crucial ruling, the Delhi High Court has stayed a transfer pricing ("TP") assessment order that the taxpayer claimed was passed beyond the limitation period even despite the retrospective amendment made via Finance Act 2026 which validates the said assessment order under provisions in Sec. 144C and 153 of the Act.

Brief Facts

- A reassessment notice under Sec. 148 was issued to the taxpayer on 14.03.2023. In the ordinary course, the assessment had to be completed by 31.03.2024 (i.e.one year from the end of the financial year of notice).
- Since the case involved international transactions (TP additions), limitation stood extended by a further year up to 31.03.2025 under Sec 153(4); a provision that grants additional time to AOs in transfer pricing matters.
- The AO, however, passed the final assessment order only on 29.08.2025 under Sec 147 (income escaping assessment) read with Sec 144C(13) (giving effect to DRP directions) ; well after the 31.03.2025 cut-off.
- In an earlier writ (W.P.(C) 14952/2025) challenging this very order, the Court had already granted interim protection (25.09.2025) prima facie holding the assessment to be void for being time-barred.
- Before the fresh petition could be heard, the Finance Act, 2026 inserted new sub-sections 144C(4A)/(4B) and 153(10) — with retrospective effect from 2009 — clarifying that the extended time available under Sec 153/153B for TP cases would govern even orders passed under Sec 144C(3)/(13), effectively nullifying the Bombay HC (Shelf Drilling Ron Tappmeyer) and Madras HC (Roka Bathroom Products) rulings that had favoured taxpayers on this point.
- Faced with the amendment, the taxpayer withdrew its earlier writ with liberty to file a fresh one (the present petition) additionally challenging the vires of the retrospective amendment itself and sought a stay on the assessment order.

Rival Contentions

- **Taxpayer:** The amendment is a "colourable exercise" of legislative power targeted at undoing binding judgments of two High Courts, as evident from its own opening

[10] *Boang Technology Pvt. Ltd. v. ACIT, Central Circle 30* [W.P.(C) 6460/2026, order dated 12.05.2026]

language seeking to override "any judgment, order or decree of any court."

- **Revenue:** Granting interim relief would amount to staying the operation of a validly enacted statute which is impermissible as per Bhavesh D. Parish v. UOI (2000) 5 SCC 471, wherein it was held that *"granting an interim relief is improper unless the statute is actually set aside after a final hearing since there is a presumption in favour of constitutional validity"*. Reliance was also placed on the split verdict in ACIT v. Shelf Drilling Ron Tappmeyer Ltd [2025] 177 taxmann.com 262 (SC).

High Court's Ruling

- The High Court rejected the Revenue's "stay of statute" argument, holding it untenable in the facts of this case.
- Crucially, the Court observed that the AO had already anticipated and applied the amendment before it existed — i.e., the 29.08.2025 order was passed as though the retrospective provisions were already in force. What the Finance Act, 2026 now seeks to legislate had, in effect, already been done unilaterally by the AO.
- Since the AO's own order pre-empted the amendment rather than the other way around, staying that specific order does not amount to staying the operation of the amended law. It merely halts the individual assessment and any consequential penalty order that is pending adjudication.
- Accordingly, effect and operation of the assessment order dated 29.08.2025, and any penalty order passed pursuant to it, were stayed during the pendency of the writ petition.
- Notice has been issued to the Union of India as well, given the challenge to the Finance Act's vires. The next listing of this case is on 30.07.2026.

Key Takeaway

Retrospective validation of laws do not automatically insulate an assessment order passed in anticipation of that validation. Taxpayers facing similarly time-barred TP assessments, now overtaken by the Finance Act, 2026 amendment, may find this distinction significant while seeking interim protection.

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