VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

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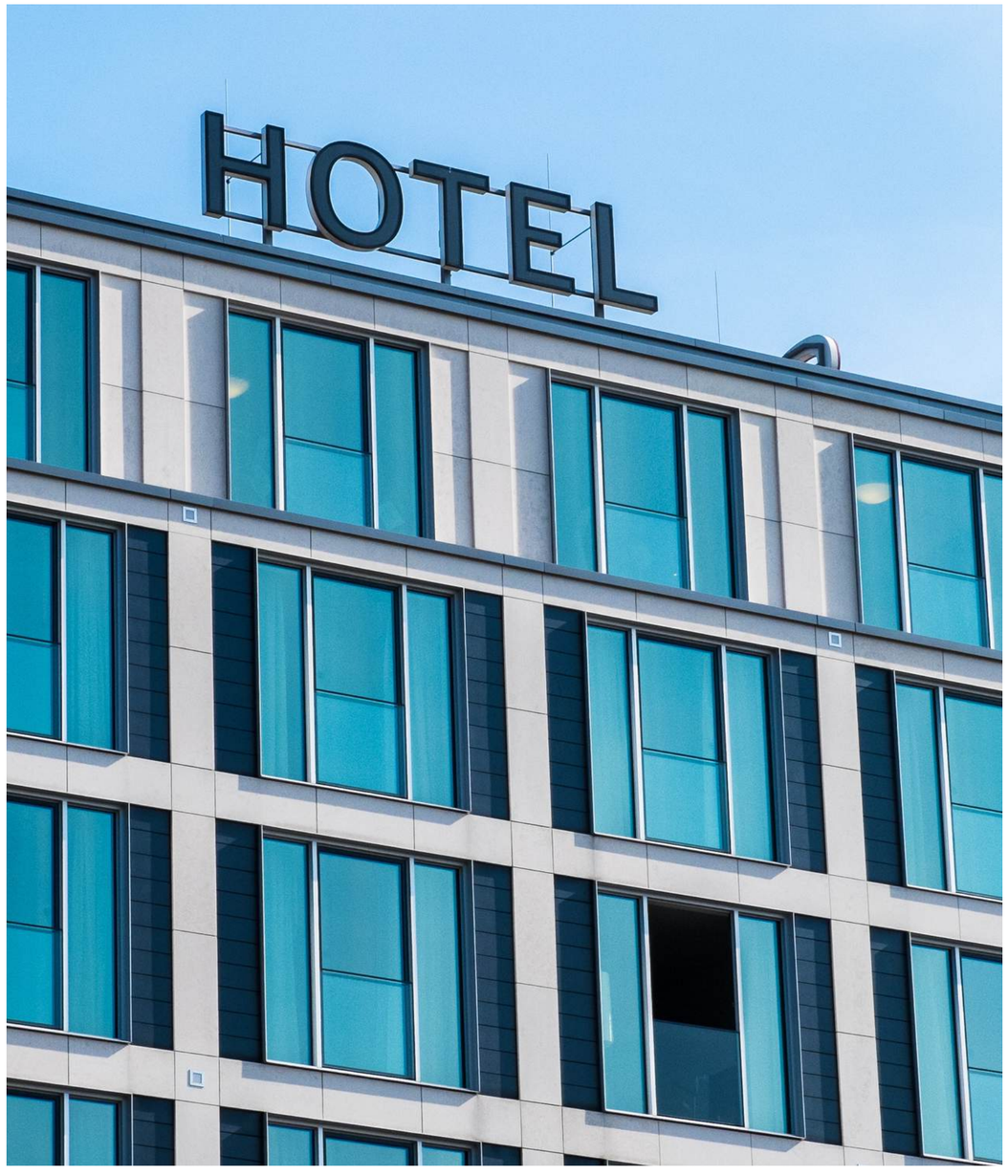
Substantive Control by Hyatt Triggers PE in India; Legal Form Set Aside

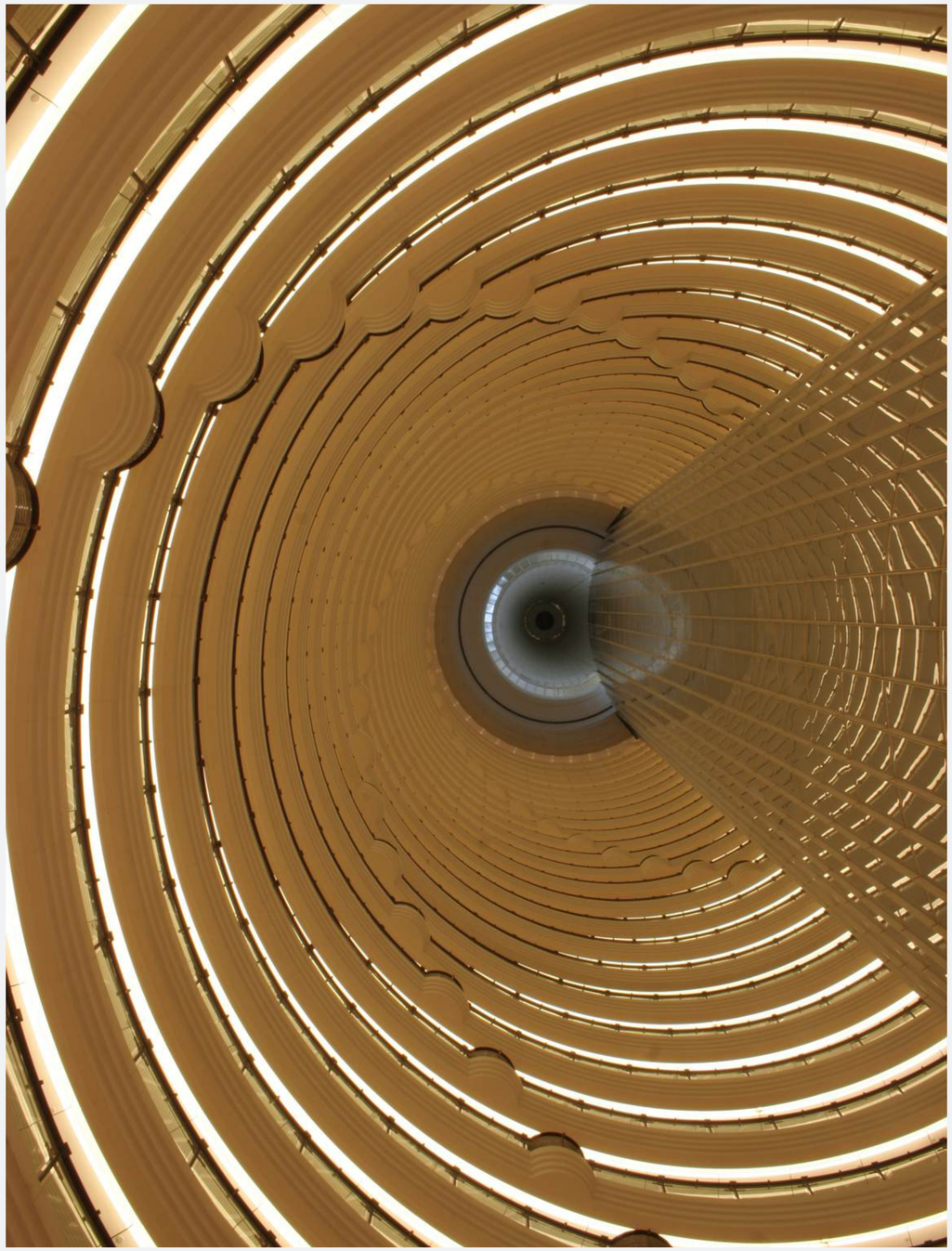
Facts

The appellant, a company incorporated under Dubai law and a tax resident of the UAE, entered into two Strategic Oversight Services Agreements (SOSA) with Asian Hotels Limited (AHL), India, in 2008 for providing strategic planning services. Following AHL's reorganization, the agreements continued with Asian Hotels (North) Ltd. For AY 2009–10, the appellant filed a Nil return, claiming no tax liability under the India-UAE DTAA due to the absence of a Permanent Establishment (PE) in India. However, the Assessing Officer held that the appellant had a business connection and a PE in India, and that the payments qualified as royalties/fees for technical services. This was upheld by the DRP and later by the ITAT, which relied on the Supreme Court's decision in the Formula One World Championship Limited v. Commissioner of Income Tax, International Taxation-3, Delhi & Anr. case. The ITAT's decisions for AYs 2009–10 to 2017–18 was challenged before the High Court. The High Court heard all eight appeals together. By order dated 22.12.2023, it ruled in favour of the appellant on the issue of royalty but held that the appellant had a PE in India. It referred the issue regarding applicability of Article 7(1) of the DTAA to a larger bench. Aggrieved, the appellant has filed the present appeals.



Rulings

In the present case, The Hon'ble Tribunal held that the High Court rightly concluded that the appellant's involvement went beyond high-level decision-making and extended to active operational control over the Indian hotel. This included oversight of day-to-day functions, enforcement of compliance, and receipt of profit-linked fees, establishing a clear commercial nexus with the hotel's core activities. These factors fulfilled the conditions for a Fixed Place Permanent Establishment under Article 5(1) of the India–UAE DTAA. The Court also affirmed that income can be attributed to a PE in India even if the foreign entity reports global losses. It emphasized that taxability is determined by the existence and activities of the PE in the source country and not by the overall profitability of the parent entity. In view of these, all the appeals were dismissed.

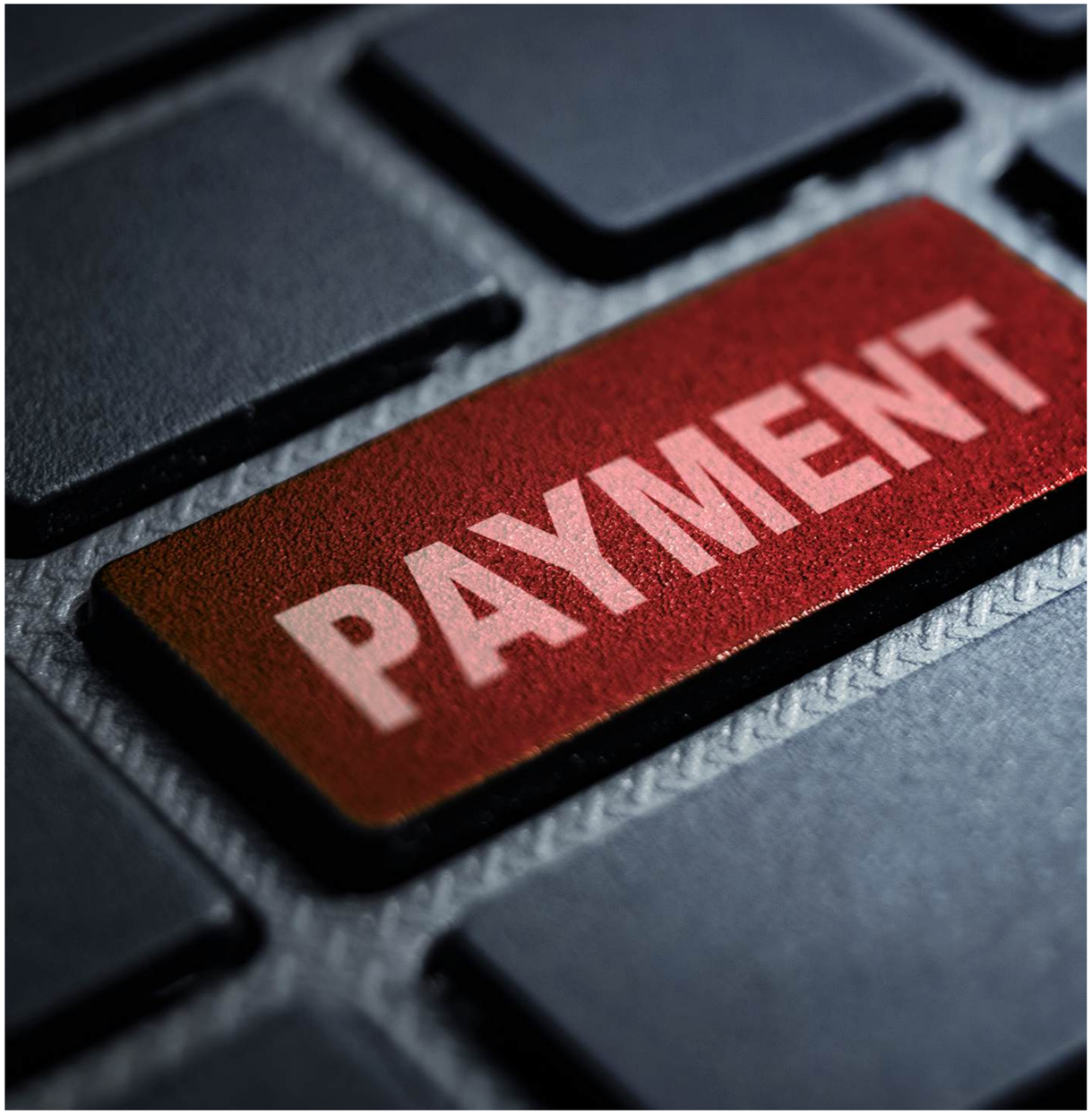


Source: SC, in the case of Hyatt International Southwest Asia Ltd. Vs ADIT vide [TS-954-SC-2025] on July 24, 2025

E-License Services to Genpact Not FTS Under UK DTAA; ‘Make Available’ Test Upheld

Facts

The appellant, Tungsten Network Ltd., a UK-based company and tax resident of the UK, filed appeals under Section 260A of the Income Tax Act, challenging the ITAT's common order dated 18.12.2024 relating to AYs 2016–17 and 2017–18. The case arose from payments received by the appellant from Genpact India Pvt. Ltd. for services rendered under agreements originally entered into by OB10 Ltd., later acquired by the appellant. The Assessing Officer initiated reassessment proceedings on the ground that these payments escaped assessment, treating them as fees for technical services (FTS) taxable under Article 13 of the India–UK DTAA. The assessee contended that the income was business income not taxable in India in the absence of a Permanent Establishment (PE). However, both the Dispute Resolution Panel (DRP) and the Assessing Officer upheld the taxability of the receipts as FTS. The ITAT dismissed the assessee’s appeals, leading to the current appeals before the High Court.



High Court Rulings

Rulings

The Hon’ble Court held that the services provided by the Assessee, granting access to its proprietary e-invoicing platform did not amount to "Fees for Technical Services" (FTS) under Article 13(4)(c) of the India–UK DTAA. It is found that no technical knowledge, skill, or knowhow was made available to Genpact India Pvt. Ltd. (GIPL), as the license granted was limited, non-exclusive, and did not transfer any rights to the software or its source code. The training provided was only to enable use of the platform, not to transfer the technology needed to independently render the services. Hence, the “make available” condition was not satisfied. Reliance on the Centrica case was rejected as inapplicable. Accordingly, the payments received were not taxable as FTS, and the assessment orders were set aside. Therefore, appeals were allowed.

Source: HC, Delhi in the case of Tungsten Automation England Limited vs DCIT vide [TS-917-HC-2025(DEL)] on July 14, 2025

No Royalty Tax on Software and Embedded Hardware Sales Under India-Ireland DTAA

Facts

The assessee, engaged in providing cloud networking solutions and selling related software and hardware, received income from India through: (i) sale of standardized software licences, (ii) software embedded in hardware, and (iii) hardware replacement and support services. It claimed that these were not taxable in India, relying on the Supreme Court ruling in Engineering Analysis, which held that such transactions do not constitute royalty or FTS under DTAA. However, the AO treated the total receipts of ₹35.83 crore as royalty income taxable in India, and alternatively classified support services as FTS. The DRP upheld the AO's view based on identical reasoning adopted in AY 2020–21. A final assessment was passed assessing income at ₹39.48 crore. The assessee has now appealed against the same.

Rulings

In the present case, the ITAT held that the assessee's income from sale of software licenses, software embedded in hardware, and hardware replacement/support services is not taxable as 'royalty' under Article 12 of the India-Ireland DTAA. Relying on the SC ruling in Engineering Analysis, the Tribunal noted that no copyright rights were transferred only a non-exclusive, non-transferable license to resell was granted. It also found that software embedded in hardware was part of a bundled product sale and not royalty. Regarding support services, the bench held these were mere hardware replacements and not technical services. The decision was reinforced by SC dismissals in Microsoft and MOL Corp., affirming Engineering Analysis. Thus, no income was taxable in India. The appeal of the assesse was partly allowed.

Source: ITAT, Bangalore in the case of Arista Networks Limited vs DCIT, vide [[TS-845-ITAT-2025(Bang)] on June 23, 2025

Derivatives Distinct from Shares; Gains Exempt Under Article 13(4) of India–Mauritius DTAA

Facts

The brief facts are that the assessee, M/s 3 Sigma Global Fund, is a public limited company and a tax resident of Mauritius, holding a valid Tax Residency Certificate (TRC) and a global business license issued by the Financial Services Commission of Mauritius. It operates as an investment fund, dealing in shares, derivatives, and other securities. For the Assessment Year 2022–23, the assessee declared total income comprising ₹17.80 crore as Short-Term Capital Gains (STCG), ₹1.88 crore from derivatives, and ₹24 lakh as dividend income. The assessee claimed that gains from derivatives were not taxable in India under Article 13(4) of the India–Mauritius DTAA, which exempts capital gains from assets other than shares or immovable property. However, the Assessing Officer denied treaty benefits by invoking the Principal Purpose Test, treating derivative income as taxable under Article 13(3A), on the basis that derivatives are closely linked to shares. The Dispute Resolution Panel (DRP) upheld the assessee's eligibility for treaty benefits but concurred with the AO in treating derivative income as taxable under Article 13(3A). Aggrieved, the assessee filed an appeal before the ITAT.

Rulings

The Hon'ble Tribunal held that the derivatives are distinct financial contracts and not equivalent to shares, even if shares are the underlying assets. It held that gains from derivatives fall under Article 13(4) of the India–Mauritius DTAA and are therefore taxable only in Mauritius. The Tribunal relied on the Supreme Court's decision in Engineering Analysis, the Vanguard case, and clarifications by the Revenue Secretary excluding non-share securities from source-based taxation under the amended treaty. The bench also noted that in AY 2023–24, the Revenue had accepted a similar claim by the assessee, reinforcing the need for consistency. Consequently, the addition of ₹1.88 crore was deleted. Other grounds raised were found to be infructuous or consequential. Accordingly, the appeal of the assesse was partly allowed.

Source: ITAT, Mumbai in the case of M/s 3 Sigma Global Fund vs ACIT vide [TS-928-ITAT-2025(Mum)] on June 26, 2025

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