IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(IT)A Nos.490 & 491/Bang/2024
Assessment Years: 2013-14 & 2016-17

IBM Canada Limited C/o IBM India Private Limited 12, Subramanya Arcade, Bannerghatta Road Dharmaram College SO Bangalore South Bangalore 560 029 Karnataka, India **PAN NO : AAFCI9552H**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

IT(IT)A Nos.500/Bang/2024
Assessment Years: 2014-15

IBM China Hongkong Limited C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AAFCI9668C**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

ITA Nos.495 & 496/Bang/2024
Assessment Years: 2014-15 & 2016-17

IBM Israel Limited C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AAGCI1993R**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

IT(IT)A Nos.501/Bang/2024
Assessment Year: 2012-13

IBM Deutschland GMBH ("IBM Germany") C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AAFCI9549E**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

IT(IT)A Nos.489/Bang/2024
Assessment Year: 2012-13

IBM Canada Limited C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AAFCI9552H**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

IT(IT)A Nos.504/Bang/2024
Assessment Year: 2012-13

BM Osterreich Internationale Buromaschinen Gasellschaft MBH ("IBM Austria") C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AAFCI9551E**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

IT(IT)A Nos.502/Bang/2024
Assessment Year: 2012-13

IBM Del Peru SAC C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AAFCI9550F**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

ITA Nos.545 & 546/Bang/2024
Assessment Year: 2013-14 & 2015-16

Campagnie IBM France C/o IBM India Private Limited Bangalore 560 029	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore

PAN NO : AADCC9604J		
APPELLANT		**RESPONDENT**

IT(IT)A No.487/Bang/2024
Assessment Year: 2014-15

IBM Australia Limited C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AABCI4837K**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

IT(IT)A No.499/Bang/2024
Assessment Year: 2016-17

IBM Corporation C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AABCI0847B**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

IT(IT)A No.492 to 494/Bang/2024
Assessment Years: 2013-14, 2015-16 & 2016-17 respectively

IBM Japan Limited C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AACCI2887G**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

ITA No.542 & 497/Bang/2024 IT(IT)A No.497/Bang/2024
Assessment Years: 2014-15 & 2016-17 respectively

IBM United Kingdom Limited C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AACCI2862H**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

ITA No.544/Bang/2024
Assessment Years: 2017-18

IBM Corporation C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AABCI0847B**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

IT(IT)A No.503/Bang/2024
Assessment Years: 2017-18

IBM Netherland B V C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AACCI2916A**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

IT(IT)A No.498/Bang/2024
Assessment Years: 2017-18

IBM United Kingdom Limited C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AACCI2862H**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

ITA No.543/Bang/2024
Assessment Years: 2017-18

IBM Canada Limited C/o IBM India Private Limited Bangalore 560 029 **PAN NO : AAFCI9552H**	**Vs.**	DCIT (International Taxation) Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

IT(IT)A No.488/Bang/2024 & ITA No.541/Bang/2024
Assessment Years: 2018-19 & 2019-20 respectively

IBM Australia Limited C/o IBM India Private Limited	**Vs.**	DCIT (International Taxation)

Bangalore 560 029 **PAN NO : AABCI4837K**		Circle-1(2) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Sharath Rao, A.R., Shri Rajat Nahata, A.R. & Shri Dhiraj R., A.R.
Respondent by	:	Shri D.K. Mishra, D.R.

Date of Hearing	:	10.05.2024
Date of Pronouncement	:	20.05.2024

O R D E R

PER BENCH:

Income Tax Appeals at Sl.Nos.1 to 18 above are relating to sustaining the penalty levied u/s 271(1)(c) of the Income Tax Act, 1961 (in short "The Act") by NFAC and Sl.Nos.19 to 24 are with regard to sustaining penalty u/s 270A of the Act by NFAC arising out of different orders of NFAC for the respective above assessment years.

2. Facts of the case are that IBM is a multinational corporation, headquartered in the USA with multiple subsidiaries around the globe, including India. IBM foreign entities received notices under section 148/ section 143(2) of the Income-tax Act, 1961 ("the Act") for various assessment years against which the entities had voluntarily offered the reimbursement of salary cost of the seconded employees to tax as Fees for Technical Services ("FTS") either in the return of income which was filed in response to the initial 148 notice or by way of a revised computation at the stage of assessment/ reassessment proceedings. Furthermore, IBM Australia Limited also offered the Asia Pacific ("AP") Information Technology ("IT") service receipts and the miscellaneous support service receipts/ other receipts by way of a revised computation at the stage of assessment proceedings. Parallelly, IBM India Private Limited ("IBM India") had also opted for the settlement option under the Direct Tax Vivad Se Vishwas Act, 2020 ("VsV") to settle the pending litigations with

respect to the TDS demands under section 201 of the Act; with respect to the taxability of the very same payments in the nature of reimbursement of salary cost (secondment reimbursements) for AY 2009-10 to AY 2015-16. IBM India has duly deducted TDS under section 192 in respect of all the salaries of the seconded employees, in respect of which costs were reimbursed to the IBM foreign companies; Thereafter, reassessment/ assessment proceedings were conducted on the IBM foreign entities and reassessment orders under section 143(3) read with section 147 of the Act/ assessment order under section 143(3) of the Act were issued along with show-cause notices for imposing penalty under section 271(1)(c) of the Act for the matters pertaining to AY 2012-13 to AY 2016-17 and under section 270A of the Act for AY 2017-18 to AY 2019-20 respectively; IBM foreign entities had filed a detailed response during the course of penalty proceedings and requested the officer to drop the penalty proceedings. However, the Assessing Officer ("AO") imposed penalty under section 271(1)(c)/ section 270A of the Act against which the IBM foreign entities preferred an appeal before the CIT(A). Separately, IBM foreign entities had identified certain mistakes which were apparent from record in the penalty orders against which the rectification applications were filed. As on date, the said applications are still pending disposal, except in the case of IBM Corporation for AY 2016-17 and AY 2017-18 and IBM China Hong Kong Limited ("IBM CHK") for AY 2014-15 wherein the rectification order has already been passed;

2.1 During the course of hearing before the ld. CIT(A), detailed submissions were made by the ld. A.Rs for the assessees along with required documentation to substantiate the claim of the assessees. Furthermore, the following assessees also furnished revised grounds of appeal in respect of the below cases:

- IBM Australia for the AY 2018-19 and the AY 2019-20
- IBM Nederland B.V. for the AY 2017-18
- IBM Corporation for the AY 2017-18
- IBM United Kingdom Limited for the AY 2017-18 and
- IBM Canada Limited for the AY 2017-18

2.2 For the case of convenience, the subject matters are classified into following categories based on facts of the case and for ease of understanding:

- ***Category A**: 271(1)(c) cases where **original return** under section 139(1) of the Act was **not filed** and **receipts were offered to tax in the return** filed under section 148 of the Act*
- ***Category B**: 271(1)(c) case where **original return** under section 139(1) of the Act was **not filed** and **receipts were offered to tax during the reassessment proceedings***
- ***Category C**: 271(1)(c) case where **original return** under section 139(1) of the Act **has been filed** however, secondment related receipts were offered to tax only in the return filed under section 148 of the Act*
- ***Category D**: 270A case where original return under section 139(1) of the Act has been filed however, secondment related receipts were offered to tax only in the return filed under section 148 of the Act*
- ***Category E**: 270A case where original return under section 139(1) of the Act has not been filed and **receipts were offered to tax in the return** filed under section 148 of the Act*
- ***Category F**: 270A case where original return under section 139(1) of the Act **has been filed** and receipts were **offered to tax during the course of the assessment proceedings***

Entity	AY	Section	ITA No.	ITR	Offered to tax
Category A: 271(1)(c) cases where original return under section 139(1) of the Act was not filed and receipts were offered to tax in the return filed under section 148 of the Act					
IBM Canada Limited	2013-14	271(1)(c)	490/Bang/2024	Not filed	In ROI filed u/s 148
IBM Canada Limited	2016-17	271(1)(c)	491/Bang/2024	Not filed	In ROI filed u/s 148
IBM China Hong Kong Limited	2014-15	271(1)(c)	500/Bang/2024	Not filed	In ROI filed u/s 148

Entity	AY	Section	ITA No.	ITR	Offered to tax
IBM Israel Limited	2014-15	271(1)(c)	495/Bang/2024	Not filed	In ROI filed u/s 148
IBM Israel Limited	2016-17	271(1)(c)	496/Bang/2024	Not filed	In ROI filed u/s 148
Category B: 271(1)(c) case where original return under section 139(1) of the Act was not filed and receipts were offered to tax during the reassessment proceedings					
IBM Deutschland GMBH ("IBM Germany")	2012-13	271(1)(c)	501/Bang/2024	Not filed	During re-assessment proceedings
IBM Canada Limited	2012-13	271(1)(c)	489/Bang/2024	Not filed	During re-assessment proceedings
BM Osterreich Internationale Buromaschinen Gesellschaft m.b.H ("IBM Austria")	2012-13	271(1)(c)	504/Bang/2024	Not filed	During re-assessment proceedings
IBM Del Peru SAC	2012-13	271(1)(c)	502/Bang/2024	Not filed	During re-assessment proceedings
Category C: 271(1)(c) case where original return under section 139(1) of the Act has been filed however, secondment related receipts were offered to tax only in the return filed under section 148 of the Act					
Compagnie IBM France	2013-14	271(1)(c)	545/Bang/2024	Filed but not offered	In ROI filed u/s 148
Compagnie IBM France	2015-16	271(1)(c)	546/Bang/2024	Filed but not offered	In ROI filed u/s 148
IBM Australia	2014-15	271(1)(c)	487/Bang/2024	Filed but not offered	In ROI filed u/s 148
IBM Corporation	2016-17	271(1)(c)	499/Bang/2024	Filed but not offered	In ROI filed u/s 148
IBM Japan Limited	2013-14	271(1)(c)	492/Bang/2024	Filed but not offered	In ROI filed u/s 148
IBM Japan Limited	2015-16	271(1)(c)	493/Bang/2024	Filed but not offered	In ROI filed u/s 148
IBM Japan Limited	2016-17	271(1)(c)	494/Bang/2024	Filed but not offered	In ROI filed u/s 148
IBM United Kingdom Limited	2014-15	271(1)(c)	542/Bang/2024	Filed but not offered	In ROI filed u/s 148
IBM United Kingdom Limited	2016-17	271(1)(c)	497/Bang/2024	Filed but not offered	In ROI filed u/s 148

Entity	AY	Section	ITA No.	ITR	Offered to tax
Category D: 270A case where original return under section 139(1) of the Act has been filed however, secondment related receipts were offered to tax only in the return filed under section 148 of the Act					
IBM Corporation	2017-18	270A	544/Bang/2024	Filed but not offered	In ROI filed u/s 148
IBM Netherland B V	2017-18	270A	503/Bang/2024	Filed but not offered	In ROI filed u/s 148
IBM United Kingdom Limited	2017-18	270A	498/Bang/2024	Filed but not offered	In ROI filed u/s 148
Category E: 270A case where original return under section 139(1) of the Act has not been filed and receipts were offered to tax in the return filed under section 148 of the Act					
IBM Canada Limited	2017-18	270A	543/Bang/2024	Not filed	In ROI filed u/s 148
Category F: 270A case where original return under section 139(1) of the Act has been filed and receipts were offered to tax during the course of the assessment proceedings					
IBM Australia	2018-19	270A	488/Bang/2024	Filed	During assessment proceedings
IBM Australia	2019-20	270A	541/Bang/2024	Filed	Secondment receipts offered in the ITR, AP IT/ other receipts offered during assessment proceedings

3. Background of the issue pertaining to taxability of reimbursement of salary cost of employees

3.1 During the AYs in contention *(i.e., AY 2012-13 to AY 2019-20)*, the IBM Foreign Entities seconded/ assigned certain employees to IBM India, whereby the expatriate employees from the respective foreign countries were deputed to India for fixed duration and

deputations working under the direction and control of IBM India. Suitable expatriate agreements between the respective IBM Foreign Entity and IBM India were entered into. In the subject transaction, IBM India reimbursed salary and other related costs to the respective IBM Foreign Entities, as a part of these salaries were paid abroad for administrative convenience and the IBM Foreign Entities sought reimbursement from IBM India. Furthermore, IBM India has always reported such receipts in its Form 3CEB filed as per the provisions of the Act. Furthermore, all entities which filed return of income under section 139(1) of the Act falling under Category C, D and F had also duly reported the said receipts in Form 3CEB, but did not offer the secondments receipts to tax on the basis of its bonafide belief that the same is not taxable.

3.2 The subject receipts are in the nature of actual costs initially incurred by the respective IBM Foreign Entity in respect of certain employees seconded to IBM India. Therefore, such payment being in the nature of expenses incurred by the respective IBM Foreign Entity on behalf of IBM India on a cost-to-cost basis, no income element is embedded in such payment. Accordingly, there being no income element in the aforesaid reimbursement, the same is not chargeable to tax in India and hence, not subject to taxes as FTS under the Act.

3.3 The above view was backed by various judicial precedents including the Hon'ble Delhi High Court ("HC") decision in the case of DIT vs HCL Infosystems Ltd. [2005] 274 ITR 261 (Delhi HC), which was pronounced on 6 January 2004. Thereafter, the jurisdictional Bangalore Income-tax Appellate Tribunal ("ITAT") in the case of M/s Abbey Business Service (India) Private Limited vs DCIT [2012] 23 Taxmann.com 346 (Bangalore ITAT) *vide* order dated 18 July 2012 has also upheld the said view. Therefore, the Assessees was under a

bonafide belief that receipts in the nature of reimbursement of salary cost of employees was not liable for taxation as FTS in India.

3.4 At this juncture, ld. A.Rs for the assessees submitted that they want to strongly highlight that IBM Corporation *(one of the IBM Foreign Entities)* in its own case received a notice under section 143(2) of the Act on 3 August 2012 in respect of RoI filed for AY 2011-12. It is in the said assessment for the AY 2011-12 that the issue of taxation of secondment reimbursements was first scrutinized threadbare. After a thorough analysis of this issue, an amount of Rs 83,49,00,000 was accepted to be not taxable *vide* assessment order dated 25 March 2015. They also submitted that IBM Corporation is largest of the IBM Foreign Entities in the context of receipt of secondment reimbursements from India. This order has achieved finality since the same has neither been revised under section 263 nor has been reassessed under section 147 of the Act.

3.5 Subsequent to the above, the issue on taxability payments to seconded employees was revisited in the Hon'ble Delhi HC decision in the case of Centrica India Offshore (P.) Ltd. vs CIT [2014] 44 taxmann.com 300 (Delhi HC) dated 25 April 2014, wherein the said issue was held against the assessee. The AO in the subject matter has placed heavy reliance on the said decision of the Hon'ble Delhi HC, without appreciating that the Petitioner's case is distinguishable on facts.

3.6 Thereafter, IBM India was subject to proceedings under section 201 of the Act ("201 proceedings") for non-deduction of taxes under section 195 of the Act on the secondment reimbursements, i.e., reimbursement of salary and other related costs of employees paid by IBM India to IBM overseas entities *(for AY 2009-10 to AY 2015-16*), contending the same to be taxable as FTS under the Act/ respective

tax treaties and thereby, order under section 201 of the Act dated 29 March 2016 ("201 order") was passed. There is no mention of Service PE in the 201 orders.

3.7 Against the adverse CIT(A) order issued to IBM India, IBM India had appealed the same to the ITAT, which referred the appeal to a Special Bench of the ITAT. In this regard, they referred to para 37 of the detailed order of the division bench of the ITAT referring the case to the Special Bench to resolve the conflict, noting the judicial conflict in the views expressed by various judicial authorities over a period of time in respect of the subject matter since there were conflicting HC judgments on this issue as well conflicting ITAT judgments, which they reproduced below –

> *"37. We may also mention : that in the case of another IBM group company case viz., DCIT (IT) Vs. MIS.IBM Corporation IT (IT)A.No.1/Bang.2014 & IT(IT)A.No.6/Bang/2017 order dated 6.1.2017, the Tribunal took the view that there was an obligation on the part of the Assessee in that case to deduct tax at source u/s.195 of the Act when making payment by way of reimbursement. The conclusions of the Tribunal are contained in paragraph 5 of its order and it is based on failure by the Assessee to furnish certain details before the AO which is extracted in paragraph 2.1 of the CIT(A)'s order which was subject matter of the aforesaid appeal. The CIT(A)'s order which was subject matter of the aforesaid appeal in paragraph 2.4 of his order has referred to the decisions of the ITAT in the case of Mis. Abbey Business Services India Pvt.Ltd.(supra) and IDS Software (supra) and concluded in para 2.5 that the aforesaid decisions were rendered on its own facts and had no applicability to the facts of the Assessee's case.* ***We however find that the facts of the case in these appeals and the facts of the case in the case of Mis. Abbey Business Services India Pvt.Ltd. (supra) and IDS Software (supra) are identical."***

3.8 In the aforesaid referral order, the division bench has discussed various case laws in detail including HCL Infosystems Ltd. *(supra),* Centrica India Offshore *(supra)* and M/s Abbey Business Service *(supra).* While drawing a conclusion, the division bench held

that the facts of IBM are similar to the jurisdictional ITAT ruling of M/s Abbey Business Service *(supra).* This *Abbey* decision of the ITAT has been confirmed by the jurisdictional Karnataka HC. The HC has in fact distinguished the case of *Centrica* to say that the said judgment was in the context of Service PE, which is not the case in the case of *Abbey*. Thereby, it can be said that the bonafide belief of the Petitioner that the said receipts are not taxable [owing to which the said receipts were not offered to tax in the original return of income filed u/s 139(1)/ no return of income was filed u/s 139(1)] stood reaffirmed by the ITAT referral order for constituting the Special Bench to decide the case.

3.9 The very same ITAT judgment of M/s Abbey Business Service *(supra)* has since been confirmed by the jurisdictional Karnataka HC in the case of ***DIT Vs Abbey Business Services Private Limited (2020) 122 taxmann.com 174,*** wherein the Hon'ble HC has specifically distinguished the case of Centrica India Offshore *(supra)* and held that issue in favour of the assessee. They submitted that the facts in the case of the Petitioner are similar to that of Abbey Business Services *(supra)* and therefore, said decision ought to apply in the case of the Petitioner.

3.10 Thereafter, the Karnataka HC has again upheld the non-taxability of secondment reimbursements in the case of *Flipkart Internet Private Limited (2022) 139 taxmann.com 595.*

3.11 The AO in the penalty order has specifically relied on the decision of the Hon'ble SC in the case of CCCEST vs Northern Operating Systems (P.) Ltd [2022] 138 taxmann.com 359 (SC) and the Hon'ble Delhi HC decision in the case of Centrica India Offshore Private Limited (348 ITR 45) (2014) and upheld the taxability of reimbursement of salary expense of seconded employees as FTS.

However, we submit that there are plethora of judicial precedents that have referred to both the *Northern Operating* case of the Supreme Court and the *Centrica* case of the Delhi HC and have still upheld the non-applicability of these cases and holding that the secondment reimbursements are not taxable as "fees for technical services" under section 9(1)(vii) of the Act read with Article of the DTAA. These judgements are as follows:

- Karnataka HC judgment in Flipkart Internet (P.) Ltd (2022) 139 taxmann.com 595;(page 57-77 case law compilation)
- Delhi ITAT in Ernst & Young US LLP [2023] 153 taxmann.com 95 (Delhi-Trib); (page 78-87 case law compilation)
- Delhi HC in Boeing India Pvt Ltd [2023] 146 taxmann.com 131(Delhi) (page 88-93 case law compilation); and
- Bangalore ITAT in Google LLC vs JCIT(OSD)/DCIT(IT) [2023] 147 taxmann.com 428 (Bangalore-Trib)

3.12 They drew our attention to the table capturing various Courts/ Tribunal decisions on said issue in a chronological order, which is as follows:

Sl No._	**Caselaw with Citation**	**Favourable/ unfavourable**	**Forum**	**Date of pronouncement**
1	DIT vs HCL Infosystems Limited [2005] 144 Taxman 492 – followed by Karnataka HC in *Abbey case*	Favourable	Delhi HC	6 January 2004
2	Karl Storz Endoscopy India (P) Limited (ITA No 13 of 2008) (Delhi HC) (refer page 199 – 201 of PB)	Favourable	Delhi HC	13 September 2010
3	Abbey Business Services India Pvt Ltd (23 Taxmann.com 346) – later on confirmed by Karnataka High Court	Favourable	Bangalore ITAT	18 July 2012
4	Marks & Spencer Reliance India Private Limited [2013]	Favourable	Mumbai ITAT	4 September 2013

Sl No._	Caselaw with Citation	Favourable/ unfavourable	Forum	Date of pronouncement
	38 taxmann.com 190 (Mumbai – Trib) (refer page 202 – 213 of PB)			
5	Centrica India Offshore (P) Ltd [2014] 44 taxmann.com 300 (Delhi)	Unfavourable	Delhi HC	25 April 2014
6	Marks & Spencer Reliance India Private Limited [2017] ITA No 893 of 2014 (Bom HC) (refer page 214 – 216 of PB)	Favourable	Bombay HC	3 May 2017
7	Morgan Stanley Asia (Singapore) Pte Ltd vs DDIT [2018] 95 taxmann.com 165 (Mumbai ITAT);	Favourable	Mumbai ITAT	6 July 2018
8	M/s Faurecia Automotive Holding vs DCIT (ITA No 784/PUN/2015) (Pune ITAT)	Favourable	Pune ITAT	8 July 2019
9	DIT vs Abbey Business Services India Pvt Ltd [2020] 122 taxmann.com 174 (Karnataka)	Favourable	Karnataka HC	1 December 2020
10	Toyota Boshoku vs DCIT [2022] 138 taxmann.com 166 (Bangalore – Trib)	Favourable	Bangalore ITAT	13 April 2022
11	Goldman Sachs vs DCIT [2022] 138 taxmann.com 162	Favourable	Bangalore ITAT	29 April 2022
12	Northern Operating system Pvt Ltd CIVIL APPEAL NO. 2289-2293 OF 2021	Under service tax law, not in the context of income-tax	Supreme Court	19 May 2022
13	Flipkart Internet (P.) Ltd (2022) 139 taxmann.com 595	Favourable	Karnataka HC	24 June 2022
14	Delhi HC in Boeing India Pvt Ltd [2023] 146 taxmann.com 131(Delhi) (refer page 193 – 198 of PB)	Favourable	Delhi HC	11 October 2022

Sl No._	Caselaw with Citation	Favourable/ unfavourable	Forum	Date of pronouncement
15	Google LLC vs JCIT(OSD)/DCIT(IT) [IT(IT)Appeal Nos 167/Bang/2021 & 688/Bang/2022]	Favourable	Bangalore ITAT	20 February 2023
16	Ernst & Young US LLP [2023] 153 taxmann.com 95 (Delhi-Trib) (refer page183 – 192 of PB	Favourable	Delhi ITAT	20 June 2023
17	Central Circle vs M/s Caterpillar India Pvt. Ltd [ITA No. 1031/Chny/2022] (refer page 217 – 222 of PB)	Favourable. Distinguishing Northern Operating System (supra)	Chennai ITAT	9 October 2023

3.13 Nevertheless, with respect to the section 201 proceedings initiated on IBM India on the same subject matter, while the appeals were pending before the ITAT and despite the fact that the Hon'ble ITAT constituted a Special Bench to hear the appeals, noting the judicial conflict in the views expressed by various judicial authorities, with the sole intention of not furthering any litigation on this aspect, IBM India had settled its appeals under VsV scheme for the AY 2009-10 to AY 2015-16, wherein tax liability of approximately Rs 83 crore was duly paid by IBM India as per the VsV Scheme and the litigation pertaining to seven years was settled to end litigation and attain closure.

3.14 IBM India, on acceptance of the said receipts to tax in India, withdrew its pending appeals before the ITAT (Special Bench) and remitted the taxes due under the VsV scheme *(for the AY 2009-10 to AY 2015-16).*

3.15 The VsV scheme was also opted by the IBM Foreign Entities for the AY 2007-08 to AY 2017-18 *(these are in respect of cases which*

are not subject to reassessment since they are settled under VsV scheme), in respect of the secondment receipts (in respect all IBM Foreign Entities) and receipts from IBM India for services rendered under the AP IT Services Centre (specifically for IBM Australia). The total tax liability accepted on such cases which were opted under VsV to end litigation and attain closure was approximately Rs 33 crores.

3.16 In summary, a total of 62 applications were filed under the VsV Act and Rs 116 crores *(Rs 83 crores + Rs 33 crores)* was accepted as tax liability by IBM India and IBM foreign entities collectively under the VsV Scheme.

3.17 Considering the above backdrop and IBM's intention to not further any litigations, in cases where the proceedings were ongoing and could not be closed under VsV, IBM Foreign Entities had voluntarily offered the aforesaid receipts to tax in India at the first possible instance [ie, (i) where proceedings were initiated under section 148, such receipts were offered to tax in the return filed in response to such notice (without receiving the reasons for reopening); and (ii) where the proceedings were already initiated and ongoing, such receipts were offered to tax during the course of the said proceedings].

4. Proceedings before the AO

4.1 The AO in the penalty orders has refused to accept the 'bonafide' intention of the entities for not offering the secondment receipts to tax and for not filing original return offering such receipts (only for cases where original return was not filed). It was considered that secondment of employees to India is used as a tax shifting construct/ arrangement between IBM foreign entities and IBM India. Further, the AO observed that the entities have conspired to escape

taxation in India and it is only consequent to initiation of 201 proceedings on IBM India and issuance of notice under section 148 of the Act that all the particulars of income were declared by the foreign entities;

4.1.2 The AO in the penalty orders has relied on the decision of the Hon'ble Supreme Court ("SC") in case of CCCEST vs Northern Operating Systems (P.) Ltd [2022] 138 taxmann.com 359 (SC) and the Hon'ble Delhi High Court ("HC") decision in the case of Centrica India Offshore Private Limited (348 ITR 45) (2014) and upheld the taxability of reimbursement of salary expense of seconded employees as FTS; and

4.1.3 Further, the AO has stated that the foreign entities ought to have made an application before the jurisdictional TDS AO as per section 197 of the Act in order to understand its tax liability.

4.2 Specific observation by the AO with respect to penalty under section 271(1)(c) of the Act

4.2.1 The AO in the penalty order has confirmed that the Assessee has 'concealed' particulars of income under section 271(1)(c) of the Act *(for AY 2012-13 to AY 2016-17)* by failing to furnish original return of income under section 139 of the Act and has made full disclosure of income only in the reassessment proceedings under section 148 of the Act.

4.2.2 The AO in concluding so has provided a blanket statement for all the foreign entities and has completely disregarded the fact that not all IBM foreign entities had failed to furnish original return under section 139 of the Act.

4.2.3 Further, the AO in the penalty order has taken shelter under Explanation 3 to section 271(1)(c) without considering the specific exclusion for cases where the taxpayer fails to furnish return of income on account of '**reasonable cause'**. Moreover, cases where the original return of income is filed by the taxpayer under section 139 of the Act, such cases ought to be outside the ambit of Explanation 3 to section 271(1)(c). However, the AO has completely disregarded the said fact in case of IBM foreign entities where due return was filed under section 139 of the Act *(for AY 2012-13 to AY 2016-17).*

4.3 Specific observation by the AO with respect to penalty under section 270A of the Act

4.3.1 The AO in the penalty order has confirmed that the Assessee has 'under reported income which is in consequence of misreporting' by not filing a return within the timelines stipulated under section 139 of the Act and hence liable to penalty under section 270A of the Act *(for AY 2017-18 to AY 2019-20).*

4.3.2 As discussed above, in concluding so the AO has provided a blanket statement for all the foreign entities and has completely disregarded the fact that not all IBM foreign entities had failed to furnish original return under section 139 of the Act.

4.3.3 The AO in the penalty order has arbitrarily rejected the submission and the explanations offered and has therefore, denied the applicability of the provisions of section 270A(6) of the Act, contending the explanations of the Assessee to not be 'bonafide'.

4.3.4 In the case of IBM Australia for the AY 2014-15, the AO had levied penalty for receipts on secondment receipts. However, while quantifying the amount of penalty, the AO has levied penalty both

secondment receipts as well as receipts from the AP IT services/ other miscellaneous services.

4.4 Proceedings before the CIT(A)

4.4.1 Against the above observation made by the AO, the Assessees preferred an appeal before the Commissioner of Income Tax (Appeals) ["CIT(A)"] and filed its detailed submission along with documentary evidence substantiating the claim of the Assessee. Further, Assessee filed a detailed background on the issue of taxability of salary cost of seconded employees along with detailed table capturing various Courts/ Tribunal decisions on said issue.

4.4.2 With respect to penalty levied under section 271(1)(c) of the Act *(AY 2012-13 to AY 2016-17)*, the following specific submissions / contentions were made before the CIT(A):

a) Substantiating the 'bonafide' intention of the Assessee for not offering secondment receipts to tax under Explanation 1 to section 271(1)(c) of the Act;
b) Justifying the non-applicability of Explanation 3 to section 271(1)(c) of the Act on account of 'reasonable cause' *(for all cases w.r.t. AY 2012-13 to AY 2016-17)* and the specific exclusion of cases where return of income was duly furnished under section 139 of the Act;
c) In respect of cases falling under Category C, the IBM foreign entities contested the validity of the penalty orders where the matter was adjudicated basis incorrect facts of the case stating that the Assessee failed to furnish return of income under section 139 of the Act, where in fact due return of income was furnished under section 139 of the Act and the details of secondment receipts were duly disclosed in the Form 3CEB filed for the relevant years.

d) In respect of cases falling under Category A and B, the IBM foreign entities contested the validity of the penalty orders by highlighting that the receipts were duly offered to tax in the revised ROI *(even before receipt of reasons for reopening the assessment)* or voluntarily during the course of the reassessment proceedings.

e) Reason for levy of penalty under section 271(1)(c) of the Act *(i.e, whether for concealment of income or for furnishing of inaccurate particulars)* was not discernible from the penalty orders.

4.4.3 With respect to penalty levied under section 270A *(AY 2017-18 to AY 2019-20)* of the Act, the following specific submissions / contentions were made before the CIT(A):

a) Substantiating the 'bonafide' intention of the Assessee for not offering secondment receipts to tax under section 270A(6) of the Act which states that where an Assessee offers a 'bonafide' explanation to the satisfaction of the AO and duly discloses all material facts to substantiate the explanation offered, such case would not be considered to be a case of under-reporting of income;

b) Contesting the validity of the penalty orders *(for all entities other than IBM Canada)* where the matter was adjudicated basis incorrect facts of the case stating that the Assessee failed to furnish return of income under section 139 of the Act, where in fact duly return of income was furnished under section 139 of the Act and the details of secondment receipts were duly disclosed in the Form 3CEB filed for the relevant years.

c) In the case of IBM Canada, it was submitted that the receipts were duly offered to tax in the revised ROI even before receipt of reasons for reopening the assessment.

d) Reason for levy of penalty under section 270A of the Act *(i.e, whether for underreporting of income or for underreporting of*

income in consequence of misreporting) was not discernible from the penalty orders.

e) Arbitrary reference to the term 'misreporting' without substantiating under which specific limb of section 270A(9) of the Act, misreporting has been undertaken.

4.4.4 However, the CIT(A) vide its order confirmed the order passed by the AO and upheld the penalty levied upon the Assessee. In respect of the 270A cases, the CIT(A) deleted levy of penalty for 'misreporting' but however levied penalty for 'under-reporting'.

4.4.5 Against the orders passed by the CIT(A), the Assessee has preferred the present appeal before your goodself which is registered vide ITA No. 487 to 504/Bang/2024 and ITA No. 541 to 546/Bang/2024.

4.5 Ld. A.Rs' submissions before ITAT

4.5.1 At the outset, Assessee placed reliance on the detailed order of the division bench of the Income Tax Appellate Tribunal ("ITAT") referring the matter of IBM India to Special Bench of the ITAT, wherein the division bench held the facts of IBM to be similar to the jurisdictional ITAT ruling of *M/s Abbey Business Service (India) Private Limited vs DCIT [2012] 23 Taxmann.com 346 (Bangalore ITAT),* which had decided the issue in favour of the taxpayer and later upheld by the Karnataka HC.

4.5.2 Further, in the subsequent judgment of the Hon'ble Jurisdictional High Court in the case of Flipkart Internet (P.) Ltd. [2022] 139 taxmann.com 595 (Karnataka), the High Court upheld the decision in the case of Abbey Business Service (India) Private Limited (supra) and distinguished the decision of the Hon'ble judgment of the

Apex Court in Northern Operating Systems (P.) Ltd. [2022] 138 taxmann.com 359. Hence, ld. A.Rs submitted that as of the today, the issue of secondment of employees are not taxable.

4.5.3 However, the foreign entities considering the prolonged litigation with income tax department and for administrative reasons paid the tax merely to buy peace. Hence, although the taxes were not paid during the filing of return u/s 139, the payments were made while filing the revised return u/s 148 and/or during the assessment proceedings. The ld. A.Rs submitted that imposition of penalty is not automatic and the tax payment made by the assessee is it to buy peace and the same cannot be considered as concealment. Assessee relies on the decision of the Punjab and Haryana High Court in the of **Rajiv Garg [2008] 175 Taxman 184** wherein the court has held as under:

> *"Undisputedly, the assessee filed the return of income declaring its total income at Rs. 47,05,230, which inter alia included long-term capital gain on sale of shares amounting to Rs. 29,74,951. The return was processed in terms of section 143(1)(a) of the Act on 15-3-1999. Subsequently, on the basis of some information with regard to sale proceeds of the shares amounting to Rs. 32,40,385 on which the capital gain was declared at Rs. 29,74,951 by the assessee in the original return,* ***a notice under section 148 of the Act was issued. Pursuant to the said notice, the assessee filed the revised return of income showing higher income****. The said return of income was accompanied by a note in which the assessee submitted that he surrendered the entire amount of sale proceeds of shares* ***to buy peace of mind and to avoid hazards of litigation*** *and also to save himself from any penal action. Later on, on the basis of revised return, the assessment was framed and the return submitted by the assessee was regularized as it is. ……..* ***The Department has simply rested its conclusion on the act of assessee of having offered additional income in the return filed in response to the notice issued under section 148 of the Act.*** *The Tribunal has further held that the additional income so offered by the assessee was done in good faith and to buy peace. The Tribunal has relied upon the decision of the Apex Court in case of CITv. Suresh Chandra Mittal [2001] 251 ITR*

9, wherein the Supreme Court has upheld the decision of the Madhya Pradesh High Court CITv. Suresh Chandra Mittal [2000] 241 ITR 124 , where in similar circumstances it was held that ***the initial burden lies on the revenue to establish that the assessee had concealed the income or had furnished inaccurate particulars of such income.*** *…….. Therefore, in view of the aforesaid finding, the Tribunal was justified in upholding the order of the Commissioner of Income-tax (Appeals), whereby the penalty imposed under section 271(1)(c) of the Act by the Assessing Officer was ordered to be deleted."*

4.5.4 Without prejudice to the above, the Assessee places heavy reliance the assessment order dated 25 March 2015 issued in the case of IBM Corporation for AY 2011-12 wherein, the issue of taxation of secondment reimbursements was first scrutinized and decided in favour of the Assessee. It was specifically highlighted that the said order has achieved finality since the same has neither been revised under section 263 nor has been reassessed under section 147 of the Act;

4.5.5 Assuming but not admitting, in case of conflicting rulings, the Assessee is entitled to place reliance on rulings favorable to him and ought not to be penalized for adopting a favourable view in the said issue. Relevant judicial precedents were discussed to justify that non-acceptance of the bonafide explanation offered by the Assessee and mere rejection of Assessee's claim on account of difference of opinion by the AO would per se not lead to levy of penalty;

4.5.6 It has been held by judicial precedents that penalty cannot be imposed in a case where an adjustment has been made in respect of a debatable issue. Without prejudice to the fact that IBM group believes that reimbursement of secondment receipts are not taxable, it wishes to submit that penalty cannot be levied in respect of an adjustment which is debatable or in respect of which two views are

possible. In relation to the same, IBM Foreign Entities wish to place reliance on the below judicial precedents:

- **CIT v. Reliance Petroproducts [2010] 322 ITR 158 (SC)**

The revenue contended that since the assessee had claimed excessive deductions knowing that they were incorrect, it amounted to concealment of income. It was argued that the falsehood in accounts can take either of the two forms: (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. Such contention could not be accepted as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be in accurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. ***Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that, by itself, would not attract the penalty under section 271(1)(c). If the contention of the revenue was accepted, then in case of every return where the claim made was not accepted by the Assessing Officer for any reason, the assessee would invite penalty under section 271(1)(c).That is clearly not the intendment of the Legislature.***

(Emphasis Supplied)

- ✓ **GE packaged Power Inc vs DCIT *(ITA No: 765/Del/2019)* (Delhi ITAT) and others**

"Facts are not in dispute. It is not disputed that substantial questions of law on the quantum additions confirmed by ITAT have already been framed by Hon'ble Delhi High Court regarding all the additions in respect of which penalties (disputed in the present appeals before us) have been levied by the AO, u/s 27l(l)(c) of IT Act. It is also not in dispute that quantum additions were on disputable and debatable issues on which different views could legitimately exist. In these facts and circumstances, respectfully following the aforesaid precedents, vide order of Hon'ble Delhi High Court in CIT vs. Liquid Investment and Trading Company (supra), decision of Hon'ble Bombay High Court in CIT vs. Nayan Builders & Developers (supra), decision of ITAT, Delhi in ACIT vs. Moradabad Toll Road Co. Ltd. (supra); and after due consideration of PCIT vs. Mis Shree Gopal Housing and Plantation Corporation (supra); in our view the issue regarding penalty u/s 27l(l)(c) of IT Act disputed in the appeals before us is covered in favour of the assessee by the aforesaid orders; and, therefore, we hold that the

penalties levied u/s 27l(l)(c) and disputed in the present appeals before us, are not sustainable. Accordingly, the penalties levied u/s 27l(l)(c) ofIT Act and disputed in the present appeals before us are hereby cancelled."

(Emphasis Supplied)

- ✓ **CIT vs Harsh International Pvt Ltd (ITA 620/2019, 622/2019 and CM Appl 30811/2019, 301813/2019)**

"Having heard the learned counsel for the appellant and having perused the impugned order, this Court is of the view that the ITAT was right in deleting the penalty levied under Section 271(1)(c) of the Act. It has to be noted that penalty proceedings are an outcome of assessment and if the assessment itself is debatable, the penalty proceedings cannot survive."

(Emphasis Supplied)

4.5.7 Without prejudice to the above, it was highlighted that in case of a non-resident, the tax liability if any is required to be discharged only by way of TDS. Furthermore, IBM India had duly deducted taxes under section 192 of the Act in respect of same secondment reimbursements. Given the same, there was no requirement on part of the IBM Foreign Entities to obtain a certificate under section 197 of the Act. Additionally, they submitted that the provisions of section 197 of the Act are not mandatory in nature and cannot be imposed upon any assessee.

4.5.8 Without prejudice to the above legal submission, the ld. Ars for the Assessee submitted para wise rebuttal to the observations made by the CIT(A) with respect to each of the categories of cases.

Category A: 271(1)(c) cases where original return under section 139(1) of the Act was not filed and receipts were offered to tax in the return filed under section 148 of the Act

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
- Assessee did not offer the FTS receipts to tax under section 139 of the Act - Receipts were offered to tax only after proceedings under section 201 of the Act were initiated in case of IBM India - Receipts were offered to tax only after a notice under section 148 of the Act was issued, initiating the reassessment proceedings/ during the course of reassessment proceedings. - Reference to Explanation 3 to section 271(1)(c) of the Act was upheld *(Page 10/11 of the CIT(A)'s order)*	- In addition to the above, legal submissions, it is submitted that IBM India has reported such receipts in 3CEB - Explanation 3 refers to the term 'reasonable cause'. Reliance can be placed on decision of SC in ***Singapore Airlines Ltd. vs Commissioner of Income Tax [2022] 144 taxmann.com 221 (SC) – page 112-141 of case law compilation*** wherein the SC (at page 117) has dealt with the aspect of 'reasonable cause". The Supreme Court has held that where there are contradictory judicial pronouncements on an issue, that itself amounts to a "reasonable cause" for not having done TDS, which acts as a defence against levy of penalty. IBM foreign entities had reasonable cause to not file a return under section 139 of the Act basis: - IBM Corp's assessment order for AY 2011-12 which had attained finality - Plethora of judicial precedents in assessee's favor on the secondment matter, including the Special Bench referral order in IBM India's own case which has referred to IBM's facts being similar to ***M/s Abbey Business Service (India) Private Limited vs DCIT [2012] 23 Taxmann.com 346*** (Bangalore ITAT)
- The CIT(A) has contended that mere acceptance of tax liability will not preclude the levy of the penalty on the assessee. - The CIT(A) has relied on the ruling of the Supreme Court ("SC") in ***MAK Data P. Ltd. vs CIT-II [2013] 38 taxmann.com 448 (SC)*** <u>to support the above contention</u> *(Page 10/11 of the CIT(A)'s order)*	- *MAK Data (supra)* ruling is in the context of a case where income was voluntarily offered pursuant to a survey proceeding under section 133A of the Act. No bonafide explanations were provided under Explanation 1 of section 271(1)(c) of the Act in respect of the income being surrendered. The only argument made by the Assessee was that it voluntarily offered receipts to tax and therefore, penalty cannot be levied.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
	- In the case of IBM, the matter in respect of taxability of secondment expenses which is at the least a debatable issue, even if not considered as in issue which actually now stands decided in favor of the Assessee. - The above case is therefore distinguishable on facts. Assessee relies on ruling by the Punjab and Haryana HC in the case of ***CIT v. Rajiv Garg [2008] 175 Taxman 184*** **– page 204 case law compilation**
The CIT(A) has contended that the explanations offered by IBM are not bonafide, since: - The explanation offered by the Assessee was rejected by the AO - Failure on part of the Assessee to offer receipts to tax in the first instance (u/s 139) and thereby contending that the Assessee had not disclosed all the facts material to the computation of its total income. Reference drawn to Delhi Tribunal's ruling in the case of ***Ajay Jain vs ITO [2013] 32 taxmann.com 270 (Delhi ITAT)*** *(Page 12 to 13 of the CIT(A)'s order)*	- The AO and CIT(A) have erred in holding that the conduct of the Assessee is not bonafide merely because, the Assessee adopts a position contrary to revenue's position, basis prevailing judicial precedents. - Receipts were not offered under section 139 of the Act basis juridical precedents/ IBM Corp's order for AY 2011-12. - AO cannot contend that the Assessee had not disclosed all material facts, especially when secondment receipts were always disclosed in Form 3CEB. - Ruling of *Ajay Jain vs ITO (supra*) is distinguishable on facts since no explanations were offered by the taxpayer in respect of the income surrendered. Also, the receipts surrendered were not litigative in nature.
The CIT(A) has rejected the judicial precedents of ***Abbey Business Services India (P.) Ltd (supra) and ([2020]122 taxmann.com 174 (Karnataka HC)***, by contending that the same are distinguishable on facts. *(Page 13 of the CIT(A)'s order)*	- CIT(A) has distinguished the facts of IBM with those of Abbey solely on the basis that IBM has voluntarily offered receipts to tax. However, the CIT(A) has failed to look into the similarity of facts of both these cases. CIT(A) has failed to acknowledge that ITAT in the Special Bench referral order in case of IBM India has noted that the facts in case of IBM are similar to those in case of Abbey *(supra)*. - Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
	AO cannot be expected to seek recourse to the same.
The CIT(A) has contended that the explanations offered by the Assessee are not bonafide since no application under section 197 was presented by the Assessee. The CIT(A) observed that: - The option to present an application under section 197 of the Act was open to the Assessee - section 195(2) and section 197 of the Act are in the nature of safeguard sections to make sure that taxes are rightfully deducted on payments. - Assessee has not availed any of the safeguards and basis that has rejected the Assessee's contention of 'bonafide belief'. (Page 13-14 of the CIT(A)'s order)	- Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same. - Therefore, the same isn't sufficient ground to contend that the Assessee's conduct is not bonafide.
The CIT(A) has rejected the judicial precedents cited by the Assessee on the ground that: - In all of the rulings relied, the 'make available' criteria under the respective DTAAs was not satisfied. - Assessee offering receipts to tax establishes by itself that the 'make available' criteria is satisfied and the subject receipts are taxable as FTS. *(Page 14-15 of the CIT(A)'s order)*	- Merely because IBM has voluntarily offered receipts to tax, it does not mean that the same is perse taxable, given that the same were offered to avoid litigation. IBM has time and again reiterated repeatedly that it still continues to believe that the secondment receipts are not taxable as FTS.
CIT(A) rejected the Assessee reference to provisions of 273B of the Act to define the term reasonable cause including reliance on ***Singapore Airlines Ltd. vs Commissioner of Income Tax [2022] 144 taxmann.com 221 (SC)***. *(Page 15 of the CIT(A)'s order)*	- The SC in the subject ruling has laid down the legal proposition that if Courts/ Tribunals in the ensuing years have passed contradictory judgements, it results in genuine and a bonafide difficulty on part of the Assessee and therefore qualifies to be a 'reasonable cause' under section 273B of the Act. - The reference to the above case by the Assessee was only in the context of the

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
	legal principle emanating from the same which could also be used in the context of section 271(1)(c) of the Act. - However, the CIT(A) has incorrectly opined that the reference to the subject ruling is misplaced merely because the same is not rendered in context of section 271(1)(c) of the Act. The principle emanating from the subject ruling would also have a bearing on the interpretation of section 271(1)(c) of the Act.

Category B: Category B: 271(1)(c) case where original return under section 139(1) of the Act was not filed and receipts were offered to tax during the reassessment proceedings

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
- The CIT(A) has held that there could be situations of overlap between *'concealment of particulars income and inaccurate particulars of income'* - The CIT(A) placed reliance on the Delhi HC's ruling in the case of ***New Holland Tractors vs CIT [2014] 49 taxmann.com 573 (Delhi)*** - The CIT(A) has observed that penalty order and notice both state that penalty is levied for concealment of particulars of income *(Page 8-9 of the CIT(A)'s order)*	- Reliance placed by Delhi HC in case of ***New Holland Tractors (supra)*** is incorrect as the same is distinct on facts. The subject case does not deal with a case where reason for levy of penalty overlaps. - Merely because 'concealment' and 'furnishing of inaccurate particulars' may overlap does not mean that the AO is required to be specific in respect of which limb penalty is levied and must specify the same in the assessment order/ penalty notice. - Reliance to be placed on the cases relied upon in the submission made before the CIT(A). -
- Assessee did not offer the FTS receipts to tax under section 139 of the Act - Receipts were offered to tax only after proceedings under section 201 of the Act were initiated in case of IBM India - Receipts were offered to tax only after a notice under section 148 of the Act was issued, initiating the reassessment proceedings/ during the course of reassessment proceedings.	- In addition to the above, legal submissions, it is submitted that IBM India has reported such receipts in 3CEB - Explanation 3 refers to the term 'reasonable cause'. Reliance can be placed on decision of SC in ***Singapore Airlines Ltd. vs Commissioner of Income Tax [2022] 144 taxmann.com 221 (SC)*** wherein the SC has dealt with the aspect of 'reasonable cause". IBM foreign entities had reasonable cause to

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
- Reference to Explanation 3 to section 271(1)(c) of the Act was upheld *(Page 10 of the CIT(A)'s order)*	not file a return under section 139 of the Act basis: - IBM Corp's assessment order for AY 2011-12 which had attained finality - Plethora of judicial precedents in assessee's favor on the secondment matter, including the Special Bench referral order in IBM India's own case which has referred to IBM's facts being similar to ***M/s Abbey Business Service (India) Private Limited vs DCIT [2012] 23 Taxmann.com 346*** (Bangalore ITAT)
- The CIT(A) has contended that mere acceptance of tax liability will not preclude the levy of the penalty on the assessee. - The CIT(A) has relied on the ruling of the Supreme Court ("SC") in ***MAK Data P. Ltd. vs CIT-II [2013] 38 taxmann.com 448 (SC)*** <u>to support the above contention</u> *(Page 10 of the CIT(A)'s order)*	- *MAK Data (supra)* ruling is in the context of a case where income was voluntarily offered pursuant to a survey proceeding under section 133A of the Act. No bonafide explanations were provided under Explanation 1 of section 271(1)(c) of the Act in respect of the income being surrendered. The only argument made by the Assessee was that it voluntarily offered receipts to tax and therefore, penalty cannot be levied. - In the case of IBM, the matter in respect of taxability of secondment expenses which is a debatable issue if not considered in favor of the Assessee. - The above case is therefore distinguishable on facts. Assessee relies on ruling by the Punjab and Haryana HC in the case of ***CIT v. Rajiv Garg [2008] 175 Taxman 184***
The CIT(A) has contended that the explanations offered by IBM are not bonafide, since: - The explanation offered by the Assessee was rejected by the AO - Failure on part of the Assessee to offer receipts to tax in the first instance (u/s 139) and thereby contending that the Assessee had not disclosed all the facts	- The AO and CIT(A) have erred in holding that the conduct of the Assessee is not bonafide merely because, the Assessee adopts a position contrary to revenue's position, basis prevailing judicial precedents. - Receipts were not offered under section 139 of the Act basis juridical precedents/ IBM Corp's order for AY 2011-12.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
material to the computation of its total income. Reference drawn to Delhi Tribunal's ruling in the case of ***Ajay Jain vs ITO [2013] 32 taxmann.com 270 (Delhi ITAT)*** *(Page 11/12 of the CIT(A)'s order)*	- AO cannot contend that the Assessee had not disclosed all material facts, especially when secondment receipts were always disclosed in Form 3CEB. - Ruling of *Ajay Jain vs ITO (supra*) is distinguishable on facts since no explanations were offered by the taxpayer in respect of the income surrendered. Also, the receipts surrendered were not litigative in nature.
The CIT(A) has rejected the judicial precedents of ***Abbey Business Services India (P.) Ltd (supra) and ([2020]122 taxmann.com 174 (Karnataka HC)***, by contending that the same are distinguishable on facts. *(Page 11-12 of the CIT(A)'s order)*	- CIT(A) has distinguished the facts of IBM with those of Abbey solely on the basis that IBM has voluntarily offered receipts to tax. However, the CIT(A) has failed to look into the similarity of facts of both these cases. CIT(A) has failed to acknowledge that ITAT in the Special Bench referral order in case of IBM India has noted that the facts in case of IBM are similar to those in case of Abbey *(supra)*. - Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same.
The CIT(A) has contended that the explanations offered by the Assessee are not bonafide since no application under section 197 was presented by the Assessee. The CIT(A) observed that: - The option to present an application under section 197 of the Act was open to the Assessee - section 195(2) and section 197 of the Act are in the nature of safeguard sections to make sure that taxes are rightfully deducted on payments. - Assessee has not availed any of the safeguards and basis that has rejected the Assessee's contention of 'bonafide belief'. *(Page 12-13 of the CIT(A)'s order)*	- Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same. - Therefore, the same isn't sufficient ground to contend that the Assessee's conduct is not bonafide.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
The CIT(A) has rejected the judicial precedents cited by the Assessee on the ground that: - In all of the rulings relied, the 'make available' criteria under the respective DTAAs was not satisfied. - Assessee offering receipts to tax establishes by itself that the 'make available' criteria is satisfied and the subject receipts are taxable as FTS. *(Page 13 of the CIT(A)'s order)*	- Merely because IBM has voluntarily offered receipts to tax, it does not mean that the same is perse taxable, given that the same were offered to avoid litigation. IBM has time and again reiterated repeatedly that it still continues to believe that the secondment receipts are not taxable as FTS.
CIT(A) rejected the Assessee reference to provisions of 273B of the Act to define the term reasonable cause including reliance on ***Singapore Airlines Ltd. vs Commissioner of Income Tax [2022] 144 taxmann.com 221 (SC)***. (Page 13-14 of the CIT(A)'s order)	- The SC in the subject ruling has laid down the legal proposition that if Courts/ Tribunals in the ensuing years have passed contradictory judgements, it results in genuine and a bonafide difficulty on part of the Assessee and therefore qualifies to be a 'reasonable cause' under section 273B of the Act. - The reference to the above case by the Assessee was only in the context of the legal principle emanating from the same which could also be used in the context of section 271(1)(c) of the Act. - However, the CIT(A) has incorrectly opined that the reference to the subject ruling is misplaced merely because the same is not rendered in context of section 271(1)(c) of the Act. The principle emanating from the subject ruling would also have a bearing on the interpretation of section 271(1)(c) of the Act.

Category C: 271(1)(c) case where original return under section 139(1) of the Act has been filed however, secondment related receipts were offered to tax only in the return filed under section 148 of the Act

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
- Assessee did not offer the FTS receipts to tax under section 139 of the Act - Receipts were offered to tax only after proceedings under section 201 of the Act were initiated in case of IBM India - Receipts were offered to tax only after a notice under section 148 of the Act was issued, initiating the reassessment proceedings/ during the course of reassessment proceedings. - Reference to Explanation 3 to section 271(1)(c) of the Act was upheld *(Page 10-11 of the CIT(A)'s order)*	- In addition to the above, legal submissions, it is submitted that IBM India has reported such receipts in 3CEB - Explanation 3 refers to the term 'reasonable cause'. Reliance can be placed on decision of SC in ***Singapore Airlines Ltd. vs Commissioner of Income Tax [2022] 144 taxmann.com 221 (SC)*** wherein the SC has dealt with the aspect of 'reasonable cause". IBM foreign entities had reasonable cause to not offer the receipts to tax in the return under section 139 of the Act basis: - IBM Corp's assessment order for AY 2011-12 which had attained finality - Plethora of judicial precedents in assessee's favor on the secondment matter, including the Special Bench referral order in IBM India's own case which has referred to IBM's facts being similar to ***M/s Abbey Business Service (India) Private Limited vs DCIT [2012] 23 Taxmann.com 346*** (Bangalore ITAT)
- The CIT(A) has contended that mere acceptance of tax liability will not preclude the levy of the penalty on the assessee. - The CIT(A) has relied on the ruling of the Supreme Court ("SC") in ***MAK Data P. Ltd. vs CIT-II [2013] 38 taxmann.com 448 (SC)*** <u>to support the above contention</u> *(Page 10/11/15/16 of the CIT(A)'s order)*	- *MAK Data (supra)* ruling is in the context of a case where income was voluntarily offered pursuant to a survey proceeding under section 133A of the Act. No bonafide explanations were provided under Explanation 1 of section 271(1)(c) of the Act in respect of the income being surrendered. The only argument made by the Assessee was that it voluntarily offered receipts to tax and therefore, penalty cannot be levied. - In the case of IBM, the matter in respect of taxability of secondment expenses which is a debatable issue if not considered in favor of the Assessee. - The above case is therefore distinguishable on facts. Assessee relies on ruling by the Punjab and Haryana HC

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
	in the case of ***CIT v. Rajiv Garg [2008] 175 Taxman 184***
The CIT(A) has contended that the explanations offered by IBM are not bonafide, since: - The explanation offered by the Assessee was rejected by the AO - Failure on part of the Assessee to offer receipts to tax in the first instance (u/s 139) and thereby contending that the Assessee had not disclosed all the facts material to the computation of its total income. Reference drawn to Delhi Tribunal's ruling in the case of ***Ajay Jain vs ITO [2013] 32 taxmann.com 270 (Delhi ITAT)*** *(Page 11/12 of the CIT(A)'s order)*	- The AO and CIT(A) have erred in holding that the conduct of the Assessee is not bonafide merely because, the Assessee adopts a position contrary to revenue's position, basis prevailing judicial precedents. - Receipts were not offered under section 139 of the Act basis juridical precedents/ IBM Corp's order for AY 2011-12. - AO cannot contend that the Assessee had not disclosed all material facts, especially when secondment receipts were always disclosed in Form 3CEB. - Ruling of *Ajay Jain vs ITO (supra*) is distinguishable on facts since no explanations were offered by the taxpayer in respect of the income surrendered. Also, the receipts surrendered were not litigative in nature.
- The CIT(A) has highlighted that in the case of Assessee's group company, IBM Australia for AY 2007-08 and AY 2008-09, the then CIT(A)-IV, Bangalore *vide* order dated 20 November 2013 had upheld the addition of reimbursement of expenses on seconded employees as FTS. Therefore, the CIT(A) has rejected the Assessee's claim that it was not aware of the Department's position on the treatment of reimbursement of secondment expenses as FTS. - Hence the Assessee's claim that it harbored a bona fide belief that the receipts from reimbursement of secondment expenses were not taxable, is rejected in the face of the facts of its case	- While the CIT(A)'s order was received prior to the favorable order passed in case of IBM Corp, the said order of IBM Australia was challenged before the ITAT. Thereafter, the appeal was withdrawn because IBM Australia chose to settle the litigations under the Vivad se Vishwas Act, 2020. Therefore, it cannot be said that the issue was settled in the case of IBM Australia for the AY 2007-08 and AY 2008-09. - Further, the issue of taxation of secondment reimbursements was scrutinized and thereby, decided in favour of the Assessee in the order passed subsequently in case of IBM Corporation for AY 2011-12. We specifically wish to highlight that the said order has achieved finality since the same has neither been revised under section 263 nor has been reassessed under section 147 of the Act.

Observation of the CIT(A)	**Rebuttal to the CIT(A)'s observations**
(Page 11/12/14/15 of the CIT(A)'s order)	
The CIT(A) has rejected the judicial precedents of ***Abbey Business Services India (P.) Ltd (supra) and ([2020]122 taxmann.com 174 (Karnataka HC)***, by contending that the same are distinguishable on facts. *(12-13 of the CIT(A)'s order)*	- CIT(A) has distinguished the facts of IBM with those of Abbey solely on the basis that IBM has voluntarily offered receipts to tax. However, the CIT(A) has failed to look into the similarity of facts of both these cases. CIT(A) has failed to acknowledge that ITAT in the Special Bench referral order in case of IBM India has noted that the facts in case of IBM are similar to those in case of Abbey *(supra)*. - Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same.
The CIT(A) has contended that the explanations offered by the Assessee are not bonafide since no application under section 197 was presented by the Assessee. The CIT(A) observed that: - The option to present an application under section 197 of the Act was open to the Assessee - section 195(2) and section 197 of the Act are in the nature of safeguard sections to make sure that taxes are rightfully deducted on payments. - Assessee has not availed any of the safeguards and basis that has rejected the Assessee's contention of 'bonafide belief'. *(Page 13-14 of the CIT(A)'s order)*	- Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same. - Therefore, the same isn't sufficient ground to contend that the Assessee's conduct is not bonafide.
The CIT(A) has rejected the judicial precedents cited by the Assessee on the ground that: - In all of the rulings relied, the 'make available' criteria under the respective DTAAs was not satisfied.	- Merely because IBM has voluntarily offered receipts to tax, it does not mean that the same is perse taxable, given that the same were offered to avoid litigation. IBM has time and again reiterated repeatedly that it still continues to believe

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
- Assessee offering receipts to tax establishes by itself that the 'make available' criteria is satisfied and the subject receipts are taxable as FTS. *(Page 14-15 of the CIT(A)'s order)*	that the secondment receipts are not taxable as FTS.

Category D: 270A case where original return under section 139(1) of the Act has been filed however, secondment related receipts were offered to tax only in the return filed under section 148 of the Act

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
The CIT(A) has rejected the submission of IBM in respect of discrepancies under which limb penalty is levied, basis the below contentions: - The provisions of section 270A(2)(a) of the Act are applicable - The AO has levied penalty for under-reporting of income, which is the same reason that was recorded in the assessment order read with the corrigendum - Receipts were offered to tax only after a notice under section 148 of the Act was issued, initiating the reassessment proceedings. - The CIT(A) has distinguished the facts of the case from Karnataka HC's ruling in ***Manjunatha Cotton & Ginning Factory [2013] 35 Taxmann.com 250 (Karnataka HC)*** - The CIT(A) has concluded that the provisions of 270A(8) need not be invoked and that the case of the Assessee is covered under section 270A(2)(a) of the Act. *(Page 15 of the CIT(A)'s order)*	- While the assessment order mentions under-reporting, the penalty notice mentions under-reporting in consequence of misreporting. - It is settled position of law that levy of penalty must be specific and discernible.
The CIT(A) has rejected the judicial precedents of ***DIT(IT) vs Abbey Business***	- CIT(A) has distinguished the facts of IBM with those of Abbey solely on the

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
Services India (P.) Ltd ([2012] 23 taxmann.com 346 (Bangalore ITAT) and ([2020]122 taxmann.com 174 (Karnataka HC), by contending that the same is distinct in facts, on account of the below reasons: - In Abbey's case, the ITAT/ HC has concluded that there was no profit element as reimbursements were made on a cost-to-cost basis. In the absence of a profit element, the question of taxability under the provisions Act would not arise. - Furthermore, since income was not taxable under the Act, the taxability of the same under the provisions of the DTAA was not analyzed in the subject ruling. - The CIT(A) has opined that in IBM's case, the Assessee has himself admitted to taxability of the secondment receipts as FTS, since they were voluntarily offered to tax. - The CIT(A) also highlighted that in Abbey's case, the Assessee had furnished an application under section 195 while IBM has not exercised this option. *(Page 15 &16 of the CIT(A)'s order)*	basis that IBM has voluntarily offered receipts to tax. However, the CIT(A) has failed to look into the similarity of facts of both these cases. - CIT(A) has failed to acknowledge that ITAT in the Special Bench referral order in case of IBM India has noted that the facts in case of IBM are similar to those in case of Abbey *(supra)*. - Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same.
The CIT(A) has contended that the explanations offered by the Assessee are not bonafide since no application under section 197 was presented by the Assessee. The CIT(A) observed that: - The option to present an application under section 197 of the Act was open to the Assessee at the time of receipt of payment - The placed reliance on Karnataka HC's ruling in ***Flipkart Internet (P.) Ltd. vs DCIT International Taxation [2022] 139 taxmann.com 595***	- Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same. - Therefore, the same isn't sufficient ground to contend that the Assessee's conduct is not bonafide. - Deduction under section 192 of the Act establishes employer-employee relationship and is therefore relevant. This aspect has also been discussed in numerous judicial precedents.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
(Karnataka HC), whereby the Assessee had presented an application under section 197, in respect to deductibility of tax on similar receipts - The CIT(A) highlighted that section 195(2) and section 197 of the Act are in the nature of safeguard sections to make sure that taxes are rightfully deducted on payments. - The CIT(A) has thereafter contended that the Assessee has not availed any of the safeguards and basis that has rejected the Assessee's contention of 'bonafide belief'. Furthermore, the CIT(A) has contended that deduction of TDS under section 192 of the Act would not be of any relevance since the credit of taxes deducted under section 192 of the Act are given in the hands of the employees whereas the Assessee's receipts were in nature of FTS. *(Page 16-17 of the CIT(A) order)*	
The CIT(A) has rejected the below judicial precedents cited by the Assessee: - *DIT(IT) Abbey (supra),* - *Ernst and Young U.S. LLP [2023] 153 taxmann.com 95 (Delhi-Trib.)* - *Addl. DIT (IT) vs Marks and Spencer Reliance India P. Ltd. [2013] 38 taxmann.com 190 (Mumbai-Trib.)* - *Flipkart (Supra)* The subject precedents were rejected on account of the below contentions: - In all of the above rulings, the 'make available' criteria under the respective DTAAs was not satisfied. - Assessee offering receipts to tax establishes by itself that the 'make available' criteria is satisfied and the subject receipts are taxable as FTS.	Merely because IBM has voluntarily offered receipts to tax, it does not mean that the same is perse taxable, given that the same were offered to avoid litigation. IBM has time and again reiterated repeatedly that it still continues to believe that the secondment receipts are not taxable as FTS.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
(Page 17 & 18 of the CIT(A) order)	
- The CIT(A) has contended that mere acceptance of tax liability will not preclude the levy of the penalty on the assessee. - The CIT(A) has rejected IBM's reference to the Punjab and Haryana HC's ruling in ***CIT v. Rajiv Garg [2008] 175 Taxman 184 (Punjab and Haryana HC)*** by drawing reference to SC's ruling in ***MAK Data P. Ltd. vs CIT-II [2013] 38 taxmann.com 43 8 (SC)*** - The CIT(A) has noted that the Assessee was cognizant about the nature of payments received by it but chose not to offer the same to tax. *Above reference has not been made in IBM Corporation's order for the AY 2017-18* *(Page 18 of the CIT(A) order)*	- *MAK Data (supra)* ruling is in the context of a case where income was voluntarily offered pursuant to a survey proceeding under section 133A of the Act. No bonafide explanations were provided under Explanation 1 of section 271(1)(c) of the Act in respect of the income being surrendered. The only argument made by the Assessee was that it voluntarily offered receipts to tax and therefore, penalty cannot be levied. - In the case of IBM, the matter in respect of taxability of secondment expenses is a debatable issue with various judicial precedents in support of the tax payer. - The above case is therefore distinguishable on facts. - Reference to ***CIT v. Rajiv Garg [2008] 175 Taxman 184*** ruling by the Punjab and Haryana HC to be retained.
The CIT(A) has contended that the Assessee had offered the additional receipts only in response to the notice under section 148 indicating that its explanation was not bona fide and was hence not accepted by the AO. Consequently, the CIT(A) has rejected the plea of the Assessee with respect to the said cases being covered under the exclusion specified under section 270A(6) of the Act. *(Page 18 of the CIT(A) order)*	- The contention that the explanations of the Assessee are not bonafide merely because receipts were offered in the 148 return is not sufficient. - The Assessee wishes to re-iterate that it had bonafide reasons to not offer receipts to tax under section 139 basis the IBM Corporation's order and judicial precedents.

Category E: 270A case where original return under section 139(1) of the Act has not been filed and receipts were offered to tax in the return filed under section 148 of the Act

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
The CIT(A) has rejected the submission of IBM in respect of discrepancies under which limb penalty is levied, basis the below contentions: - The provisions of section 270A(2)(b) of the Act are applicable - The AO has levied penalty for under-reporting of income, which is the same reason that was recorded in the assessment order read with the corrigendum - Receipts were offered to tax only after a notice under section 148 of the Act was issued, initiating the reassessment proceedings. - The CIT(A) has distinguished the facts of the case from Karnataka HC's ruling in ***Manjunatha Cotton & Ginning Factory [2013] 35 Taxmann.com 250 (Karnataka HC)*** - The CIT(A) has concluded that the provisions of 270A(8) need not be invoked and that the case of the Assessee is covered under section 270A(2)(b) of the Act. *(Page 14 of the CIT(A) order)*	- While the assessment order mentions under-reporting, the penalty notice mentions under-reporting in consequence of misreporting. - It is settled position of law that levy of penalty must be specific and discernible. – see Delhi HC in *Prem Brothers (page 142-145 of case law compilation, at page 145, para 8. Also, Pune ITAT in Kishore Digambar Patil vs ITO – page 157-176 of case law compilation)*
The CIT(A) has rejected the judicial precedents of ***DIT(IT)*** *vs* ***Abbey Business Services India (P.) Ltd ([2012] 23 taxmann.com 346 (Bangalore ITAT) and ([2020]122 taxmann.com 174 (Karnataka HC)***, by contending that the same is distinct in facts, on account of the below reasons: - In Abbey's case, the ITAT/ HC has concluded that there was no profit element as reimbursements were made	- CIT(A) has distinguished the facts of IBM with those of Abbey solely on the basis that IBM has voluntarily offered receipts to tax. However, the CIT(A) has failed to look into the similarity of facts of both these cases. - CIT(A) has failed to acknowledge that ITAT in the Special Bench referral order in case of IBM India has noted that the facts in case of IBM are similar to those in case of Abbey *(supra)*.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
on a cost-to-cost basis. In the absence of a profit element, the question of taxability under the provisions Act would not arise. - Furthermore, since income was not taxable under the Act, the taxability of the same under the provisions of the DTAA was not analyzed in the subject ruling. - The CIT(A) has opined that in IBM's case, the Assessee has himself admitted to taxability of the secondment receipts as FTS, since they were voluntarily offered to tax. - The CIT(A) also highlighted that in Abbey's case, the Assessee had furnished an application under section 195 while IBM has not exercised this option. *(Page 15 of the CIT(A) order)*	- Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same.
The CIT(A) has contended that the explanations offered by the Assessee are not bonafide since no application under section 197 was presented by the Assessee. The CIT(A) observed that: - The option to present an application under section 197 of the Act was open to the Assessee at the time of receipt of payment - The placed reliance on Karnataka HC's ruling in ***Flipkart Internet (P.) Ltd. vs DCIT International Taxation [2022] 139 taxmann.com 595 (Karnataka HC),*** whereby the Assessee had presented an application under section 197, in respect to deductibility of tax on similar receipts - The CIT(A) highlighted that section 195(2) and section 197 of the Act are in the nature of safeguard sections to make sure that taxes are rightfully deducted on payments.	- Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same. - Therefore, the same isn't sufficient ground to contend that the Assessee's conduct is not bonafide. - Deduction under section 192 of the Act establishes employer-employee relationship and is therefore relevant. This aspect has also been discussed in numerous judicial precedents.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
- The CIT(A) has thereafter contended that the Assessee has not availed any of the safeguards and basis that has rejected the Assessee's contention of 'bonafide belief'. Furthermore, the CIT(A) has contended that deduction of TDS under section 192 of the Act would not be of any relevance since the credit of taxes deducted under section 192 of the Act are given in the hands of the employees whereas the Assessee's receipts were in nature of FTS. *(Page 15 &16 of the CIT(A) order)*	
The CIT(A) has rejected the below judicial precedents cited by the Assessee: - *DIT(IT) Abbey (supra),* - *Ernst and Young U.S. LLP [2023] 153 taxmann.com 95 (Delhi-Trib.)* - *Addl. DIT (IT) vs Marks and Spencer Reliance India P. Ltd. [2013] 38 taxmann.com 190 (Mumbai-Trib.)* - *Flipkart (Supra)* The subject precedents were rejected on account of the below contentions: - In all of the above rulings, the 'make available' criteria under the respective DTAAs was not satisfied. - Assessee offering receipts to tax establishes by itself that the 'make available' criteria is satisfied and the subject receipts are taxable as FTS. *(Page 17 of the CIT(A) order)*	Merely because IBM has voluntarily offered receipts to tax, it does not mean that the same is perse taxable, given that the same were offered to avoid litigation. IBM has time and again reiterated repeatedly that it still continues to believe that the secondment receipts are not taxable as FTS.
- The CIT(A) has contended that mere acceptance of tax liability will not preclude the levy of the penalty on the assessee. - The CIT(A) has rejected IBM's reference to the Punjab and Haryana HC's ruling in ***CIT v. Rajiv Garg***	- *MAK Data (supra)* ruling is in the context of a case where income was voluntarily offered pursuant to a survey proceeding under section 133A of the Act. No bonafide explanations were provided under Explanation 1 of section 271(1)(c) of the Act in respect of the income being

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
[2008] 175 Taxman 184 (Punjab and Haryana HC) by drawing reference to SC's ruling in ***MAK Data P. Ltd. vs CIT-II [2013] 38 taxmann.com 43 8 (SC)*** - The CIT(A) has noted that the Assessee was cognizant about the nature of payments received by it but chose not to offer the same to tax. *(Page 17 of the CIT(A) order)*	surrendered. The only argument made by the Assessee was that it voluntarily offered receipts to tax and therefore, penalty cannot be levied. - In the case of IBM, the matter in respect of taxability of secondment expenses is a debatable issue with various judicial precedents in support of the tax payer. - The above case is therefore distinguishable on facts. - Reference to ***CIT v. Rajiv Garg [2008] 175 Taxman 184*** ruling by the Punjab and Haryana HC to be retained.
- The Assessee's contention that there was reasonable cause for its failure to offer the receipts from IBM India and hence it was covered under the provisions of section 270A(6) is rejected. - Further, the Assessee's reliance on the decision of the SC in the case of ***Singapore Airlines Ltd. vs Commissioner of Income Tax [2022] 144 taxmann.com 221 (SC)*** is held to be misplaced since the said decision was rendered in the context of penalty u/s 271C and the yardstick of reasonable cause u/s 273B was applied based on the facts of that case. *(Page 17-18 of the CIT(A) order)*	- The contention that the explanations of the Assessee are not bonafide merely because receipts were offered in the 148 return. - The Assessee had bonafide reasons to not offer receipts to tax under section 139 basis the IBM Corporation's order and judicial precedents. - The SC in the subject ruling has opined that if Courts/ Tribunals in the ensuing years have passed contradictory judgements, it results in genuine and a bonafide difficulty on part of the Assessee and therefore qualifies to be a 'reasonable cause' under section 273B of the Act. - The reference to the above case by the Assessee was only in the context of the principle emanating from the same which could also be used in the context of section 270A of the Act. - However, the CIT(A) has incorrectly opined that the reference to the subject ruling is misplaced merely because the same is not rendered in context of section 270A of the Act. The principle emanating from the subject ruling would

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
	also have a bearing on the interpretation of section 270A of the Act.
- The CIT(A) has highlighted that in the case of Assessee's group company, IBM Australia for AY 2007-08 and AY 2008-09, the then CIT(A)-IV, Bangalore *vide* order dated 20 November 2013 had upheld the addition of reimbursement of expenses on seconded employees as FTS. Therefore, the CIT(A) has rejected the Assessee's claim that it was not aware of the Department's position on the treatment of reimbursement of secondment expenses as FTS. - Hence the Assessee's claim that it harboured a bona fide belief that the receipts from reimbursement of secondment expenses were not taxable, is rejected in the face of the facts of its case *(Page 17 of the CIT(A) order)*	- While the CIT(A)'s order was received prior to the favorable order passed in case of IBM Corp, the said order of IBM Australia was challenged before the ITAT. Thereafter, the appeal was withdrawn because IBM Australia chose to settle the litigations under the Vivad se Vishwas Act, 2020. Therefore, it cannot be said that the issue was settled in the case of IBM Australia for the AY 2007-08 and AY 2008-09. - Further, the issue of taxation of secondment reimbursements was scrutinized and thereby, decided in favour of the Assessee in the order passed subsequently in case of IBM Corporation for AY 2011-12. We specifically wish to highlight that the said order has achieved finality since the same has neither been revised under section 263 nor has been reassessed under section 147 of the Act.

Category F: 270A case where original return under section 139(1) of the Act has been filed and receipts were offered to tax during the course of the assessment proceedings

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
The CIT(A) has rejected the submission of IBM in respect of discrepancies under which limb penalty is levied, basis the below contentions: - The provisions of section 270A(2)(a) of the Act are applicable - The AO has levied penalty for under-reporting of income, which is the same reason that was recorded in the	- While the assessment order mentions under-reporting, the penalty notice mentions under-reporting in consequence of misreporting. - It is settled position of law that levy of penalty must be specific and discernible.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
assessment order read with the corrigendum - Receipts were offered to tax only after a notice under section 148 of the Act was issued, initiating the reassessment proceedings. - The CIT(A) has distinguished the facts of the case from Karnataka HC's ruling in ***Manjunatha Cotton & Ginning Factory [2013] 35 Taxmann.com 250 (Karnataka HC)*** - The CIT(A) has concluded that the provisions of 270A(8) need not be invoked and that the case of the Assessee is covered under section 270A(2)(a) / 270A(2)(b) of the Act. *(Page 14 of the CIT(A) order)*	
The CIT(A) has rejected the judicial precedents of ***DIT(IT)*** *vs* ***Abbey Business Services India (P.) Ltd ([2012] 23 taxmann.com 346 (Bangalore ITAT) and ([2020]122 taxmann.com 174 (Karnataka HC)***, by contending that the same is distinct in facts, on account of the below reasons: - In Abbey's case, the ITAT/ HC has concluded that there was no profit element as reimbursements were made on a cost-to-cost basis. In the absence of a profit element, the question of taxability under the provisions Act would not arise. - Furthermore, since income was not taxable under the Act, the taxability of the same under the provisions of the DTAA was not analyzed in the subject ruling. - The CIT(A) has opined that in IBM's case, the Assessee has himself admitted to taxability of the secondment receipts as FTS, since they were voluntarily offered to tax.	- CIT(A) has distinguished the facts of IBM with those of Abbey solely on the basis that IBM has voluntarily offered receipts to tax. However, the CIT(A) has failed to look into the similarity of facts of both these cases. - CIT(A) has failed to acknowledge that ITAT in the Special Bench referral order in case of IBM India has noted that the facts in case of IBM are similar to those in case of Abbey *(supra)*. - Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
- The CIT(A) also highlighted that in Abbey's case, the Assessee had furnished an application under section 195 while IBM has not exercised this option. *(Page 21-22 of the CIT(A) order)*	
The CIT(A) has contended that the explanations offered by the Assessee are not bonafide since no application under section 197 was presented by the Assessee. The CIT(A) observed that: - The option to present an application under section 197 of the Act was open to the Assessee at the time of receipt of payment - The placed reliance on Karnataka HC's ruling in ***Flipkart Internet (P.) Ltd. vs DCIT International Taxation [2022] 139 taxmann.com 595 (Karnataka HC),*** whereby the Assessee had presented an application under section 197, in respect to deductibility of tax on similar receipts - The CIT(A) highlighted that section 195(2) and section 197 of the Act are in the nature of safeguard sections to make sure that taxes are rightfully deducted on payments. - The CIT(A) has thereafter contended that the Assessee has not availed any of the safeguards and basis that has rejected the Assessee's contention of 'bonafide belief'. Furthermore, the CIT(A) has contended that deduction of TDS under section 192 of the Act would not be of any relevance since the credit of taxes deducted under section 192 of the Act are given in the hands of the employees whereas the Assessee's receipts were in nature of FTS.	- Provisions of section 195(2)/ 197 of the Act are not mandatory and therefore the AO cannot be expected to seek recourse to the same. - Therefore, the same isn't sufficient ground to contend that the Assessee's conduct is not bonafide. - Deduction under section 192 of the Act establishes employer-employee relationship and is therefore relevant. This aspect has also been discussed in numerous judicial precedents.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
(Page 22-23 of the CIT(A) order)	
The CIT(A) has rejected the below judicial precedents cited by the Assessee: - *DIT(IT) Abbey (supra),* - *Ernst and Young U.S. LLP [2023] 153 taxmann.com 95 (Delhi-Trib.)* - *Addl. DIT (IT) vs Marks and Spencer Reliance India P. Ltd. [2013] 38 taxmann.com 190 (Mumbai-Trib.)* - *Flipkart (Supra)* The subject precedents were rejected on account of the below contentions: - In all of the above rulings, the 'make available' criteria under the respective DTAAs was not satisfied. - Assessee offering receipts to tax establishes by itself that the 'make available' criteria is satisfied and the subject receipts are taxable as FTS. *(Page 23 of the CIT(A) order)*	Merely because IBM has voluntarily offered receipts to tax, it does not mean that the same is perse taxable, given that the same were offered to avoid litigation. IBM has time and again reiterated repeatedly that it still continues to believe that the secondment receipts are not taxable as FTS.
- The CIT(A) has contended that mere acceptance of tax liability will not preclude the levy of the penalty on the assessee. - The CIT(A) has rejected IBM's reference to the Punjab and Haryana HC's ruling in ***CIT v. Rajiv Garg [2008] 175 Taxman 184 (Punjab and Haryana HC)*** by drawing reference to SC's ruling in ***MAK Data P. Ltd. vs CIT-II [2013] 38 taxmann.com 43 8 (SC)*** - The CIT(A) has noted that the Assessee was cognizant about the nature of payments received by it but chose not to offer the same to tax. *(Page 20 of the CIT(A) order)*	- *MAK Data (supra)* ruling is in the context of a case where income was voluntarily offered pursuant to a survey proceeding under section 133A of the Act. No bonafide explanations were provided under Explanation 1 of section 271(1)(c) of the Act in respect of the income being surrendered. The only argument made by the Assessee was that it voluntarily offered receipts to tax and therefore, penalty cannot be levied. - In the case of IBM, the matter in respect of taxability of secondment expenses is a debatable issue with various judicial precedents in support of the tax payer. - The above case is therefore distinguishable on facts.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
	- Reference to ***CIT v. Rajiv Garg [2008] 175 Taxman 184*** ruling by the Punjab and Haryana HC to be retained.
- The CIT(A) has relied on the below cases to contend that where an Assessee has himself admitted that an amount represented his own income, no further evidence would be necessary to show that income has been concealed: • ITO vs Leela Mammen (ITAT, Cochin) 63 TTJ 252 • CIT vs Dr. R.C. Gupta & Co. (Raj.) 122 ITR 719 • ACIT vs S.M. Kanappa Automobiles (P.) Ltd. (ITAT, Bangalore) 72 ITD 474 • T. Prashanth Reddy vs ACIT [2011] 9 taxmann.com 231 (Hyderabad ITAT) - Further, the CIT(A) concluded that the Assessee accepting that receipts are in nature of FTS, itself indicates that under reporting has undertaken and therefore, penalty is leviable. *(Page 20 of the CIT(A) order)*	- It is submitted the payment are made to buy peace. It is reiterated that there are multiple judicial precedence including Jurisdictional Karnataka High Court and Bangalore ITAT decision including assessee's own special bench matter wherein it has been categorically held that the said receipts are not taxable. However, to avoid litigation, once the assessment proceedings were initiated, the assessee made the tax payment merely to buy peace.
The CIT(A) has contended that the Assessee had offered the additional receipts only in response to the notice under section 148 indicating that its explanation was not bona fide and was hence not accepted by the AO. Consequently, the CIT(A) has rejected the plea of the Assessee with respect to the said cases being covered under the exclusion specified under section 270A(6) of the Act. *(Page 23 of the CIT(A) order)*	- The contention that the explanations of the Assessee are not bonafide merely because receipts were offered in the 148 return is not sufficient. - The Assessee wishes to re-iterate that it had bonafide reasons to not offer receipts to tax under section 139 basis the IBM Corporation's order and judicial precedents.

Observation of the CIT(A)	Rebuttal to the CIT(A)'s observations
- The CIT(A) has highlighted that in the case of Assessee's group company, IBM Australia for AY 2007-08 and AY 2008-09, the then CIT(A)-IV, Bangalore *vide* order dated 20 November 2013 had upheld the addition of reimbursement of expenses on seconded employees as FTS. Therefore, the CIT(A) has rejected the Assessee's claim that it was not aware of the Department's position on the treatment of reimbursement of secondment expenses as FTS. - Hence the Assessee's claim that it harboured a bona fide belief that the receipts from reimbursement of secondment expenses were not taxable, is rejected in the face of the facts of its case *(Page 21 of the CIT(A) order)*	- While the CIT(A)'s order was received prior to the favorable order passed in case of IBM Corp, the said order of IBM Australia was challenged before the ITAT. Thereafter, the appeal was withdrawn because IBM Australia chose to settle the litigations under the Vivad se Vishwas Act, 2020. Therefore, it cannot be said that the issue was settled in the case of IBM Australia for the AY 2007-08 and AY 2008-09. - Further, the issue of taxation of secondment reimbursements was scrutinized and thereby, decided in favour of the Assessee in the order passed subsequently in case of IBM Corporation for AY 2011-12. We specifically wish to highlight that the said order has achieved finality since the same has neither been revised under section 263 nor has been reassessed under section 147 of the Act.

Hence, in light of the above factual position and judicial precedence, it is submitted that the entire penalty levied in the case of the Assessee deserves to be quashed.

5. On the other hand, ld. D.R. submitted that assessee has not offered the reimbursement of salary cost of the secondment of employees to tax. The same has been applied by assessee while filing revised return u/s 148 of the Act or applying the same for taxation while framing the assessment when the assessee has been cornered and unearthed the discrepancies or lapses by the department. Hence, the penalty is to be sustained.

6. We have heard the rival submissions and perused the materials available on record. In these cases the penalty is levied either u/s 271C of the Act or u/s 270A of the Act, which can be actually classified as follows:

Category 'A':

Levy of penalty u/s 271(1)(c) of the Act, where the original return u/s 139(1) of the Act has not been filed and receipts were offered to tax in the return filed u/s 148 of the Act.

Name of the assessee	ITA No.	Assessment year
IBM Canada Limited	490/Bang/2024	2013-14
IBM Canada Limited	491/Bang/2024	2016-17
IBM China Hongkong Limited	500/Bang/2024	2014-15
IBM Israel Limited	495/Bang/2024	2014-15
IBM Israel Limited	496/Bang/2024	2016-17

Category 'B'

Levy of penalty u/s 271(1)(c) of the Act where original return u/s 139(1) of the Act was not filed and receipts were offered to tax during re-assessment proceedings.

Name of the assessee	ITA No.	Assessment year
IBM Deutschland GMBH ("IBM Germany")	501/Bang/2024	2012-13
IBM Canada Limited	489/Bang/2024	2012-13
IBM Osterreich Internale Buromaschinen Gesellschaft MBH ("IBM Austria")	504/Bang/2024	2012-13
IBM Del Peru SAC	502/Bang/2024	2012-13

Category 'C'

Levy of penalty u/s 271(1)(c) of the Act where original return u/s 139(1) of the Act has been filed, however, secondment related receipts were offered to tax only in the return filed u/s 148 of the Act.

Name of the assessee	ITA No.	Assessment year
Compagnie IBM France	545/Bang/2024	2013-14
Compagnie IBM France	546/Bang/2024	2015-16

IBM Australia	487/Bang/2024	2014-15
IBM Corporation	499/Bang/2024	2016-17
IBM Japan Limited	492/Bang/2024	2013-14
IBM Japan Limited	493/Bang/2024	2015-16
IBM Japan Limited	494/Bang/2024	2016-17
IBM United Kingdom Limited	542/Bang/2024	2014-15
IBM United Kingdom Limited	497/Bang/2024	2016-17

Category 'D'

Levy of penalty u/s 270A of the Act where return u/s 139(1) of the Act has been filed. However, secondment related receipts were offered to tax only in the return filed u/s 148 of the Act.

Name of the assessee	ITA No.	Assessment year
IBM Corporation	544/Bang/2024	2017-18
IBM Netherland B V	503/Bang/2024	2017-18
IBM United Kingdom Limited	498/Bang/2024	2017-18

Category 'E'

Levy of penalty u/s 270A of the Act where return u/s 139(1) of the Act has not been filed. However, secondment related receipts were offered to tax only in the return filed u/s 148 of the Act.

Name of the assessee	ITA No.	Assessment year
IBM Canada Limited	543/Bang/2024	2017-18

Category 'F'

Levy of penalty u/s 270A of the Act where original return u/s 139(1) of the Act has been filed and receipts were offered to tax during the course of assessment proceedings.

Name of the assessee	ITA No.	Assessment year
IBM Australia	488/Bang/2024	2018-19
IBM Australia	541/Bang/2024	2019-20

6.1 As seen from the above, the assessee has offered the said receipts offered during the course of original assessment proceedings or during the return filed u/s 148 of the Act or during the

reassessment proceedings. There was no avoiding of the income offered to tax by the assessee. The assessee made a plea before us that though at the time of filing of original return of income or at the time of filing revised return of income, there was a bonafide belief which the assessee is having regarding the taxability of the impugned secondment receipts. At the time of filing original return of income or at the time of revised return of income, there is a doubt in the mind of the assessee regarding taxability of secondment charges. Hence, assessee has not offered the same at earlier stage. However, later, to buy peace, assessee offered the same for taxation. It is also noted that the issue in dispute with regard to taxability of secondment receipts, there is a judgement of jurisdictional High Court in the case of Abbey Business Services India Pvt. Ltd. in ITA No.214 of 2014 dated 1.12.2020, wherein the High court held as under:

"*9. We have considered the submissions made by learned counsel for the parties and have perused the record. Before proceeding further, it is apposite to take note of Section 9(i)(vii) and Section 195(1) of the Act, which is reproduced below for the facility of reference:*

9(i)(vii) income by way of fees for technical services13 payable by--

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1.--For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that

date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2.--For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction16, assembly, mining or like project undertaken by the recipient16 or consideration which would be income of the recipient chargeable under the head "Salaries".

195(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

10. After having noticed the relevant statutory provisions, we may take note of relevant clauses of DTAA. Article 5 of DTAA deals with 'permanent establishment'. Article 5(2)(k) describes the expression 'permanent establishment' and furnishing of services including managerial services, other than those taxable under Section 13 within a Contracting State by an enterprise through employees or other personnel. Article 7 deals with business profits and provides that profits of a business of a Contracting State shall be taxable only in that state unless the enterprise carries on business in other contracting state to a permanent establishment situate therein. Article 13 inter alia provides that provisions of paragraphs 1 and 2 of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical 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 right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base.

11. Now we may advert to the facts of the case in hand. From perusal of the relevant clauses of the agreement as well as the nature of services provided by the assessee under the agreement, it is evident that the assessee had entered into a secondment agreement for securing services to assist assessee in its business. The expenses incurred by the seconded employees which were reimbursed by the assessee is not liable to deduction to tax at source and the aforesaid amount could not be considered as 'fees for technical services'. It is also pertinent to note that secondment agreement constitutes an independent contract of services in respect of employment with assessee. From the perusal of the key features of the agreement, which have been reproduced by the Commissioner of Income Tax (Appeals), it is evident that the seconded employees have to work at such place as the assessee may instruct and the employees have to function under the control, direction and supervision of the

assessee and in accordance with the policies, rules and guidelines applicable to the employees of the assessee. The employees in their capacity as employees of the assessee had to control and supervise the activities of Msource India Pvt. Ltd. Therefore, the assessee for all practical purposes has to be treated as employer of the seconded employees. There is no obligation in law for deduction of tax at source on payments made for reimbursement of costs incurred by a non resident enterprise and therefore, the amount paid by the assessee was not to suffer tax deducted at source under Section 195 of the Act. Similar view has been taken by High Court of Delhi in HCL INFO SYSTEM LTD. supra in respect of salaries paid to foreign technicians on behalf of the assessee.

12. So far as reliance placed by learned counsel for the revenue on the decision of M/S CENTRICA INDIA OFFSHORE PVT. LTD. supra is concerned, from perusal of paragraph 29 of the aforesaid decision, it is evident that the High Court of Delhi considered the issue whether the secondment of employees by BSTL and DEML, the overseas entities fall within Article 12 of India, Canada and Article 13 of India, UK DTAAs, which embody the concept of service permanent establishment. In the instant case, the issue of permanent establishment is not involved. Therefore, the aforesaid decision is not applicable to the fact situation of the case.

In view of preceding analysis, the substantial questions of law framed by a bench of this court are answered against the revenue and in favour of the assessee."

6.2 Earlier to this judgement, the chargeability of secondment receipts was subject matter of appeal before this Tribunal. The Tribunal in view of the divergent views on this issue referred the matter to Special Bench in the assessee's own case, wherein it categorically observed that the facts in the case of IBM India Ltd. are similar to that is in case of Abbey Business Services India Pvt. Ltd. cited (supra). In our opinion, the conduct of assessees is bonafide though it was not agreed by the department and it is also noted that assessees have all material time disclosing this secondment receipts in its Form 3CB filed with the department and also with bonafide explanation before the lower authorities regarding not offering the said receipts for taxation, when the assessees itself have voluntarily offered the said receipts for taxation either at the stage of original assessment or at the stage of reassessment or in return filed in response to notice issued u/s 148 of the Act penalty could not be levied. It cannot be construed that assessees have concealed any

material facts from the department or furnished inaccurate particulars of income. In our opinion, there is a reasonable cause for not offering the same for taxation in original return filed u/s 139(1) of the Act or in revised return u/s 148 of the Act as the assessees are in bonafide belief that said receipts are not liable for taxation in view of the fact that there are contradictory decisions on this impugned issue.

6.3 Further, there is a decision of the jurisdictional High Court in the case of Abbey Business Services India Pvt. Ltd. in ITA No.214 of 2014 dated 1.12.2020 which was in favour of the assessee. In such circumstances, levy of penalty u/s 271(1)(c) or 270A of the Act in these group cases is not justified. Accordingly, we delete the penalty in all these cases.

7. In the result, all the appeals of the assessees are allowed.

Order pronounced in the open court on 20th May, 2024

Sd/-	**Sd/-**
(Beena Pillai)	**(Chandra Poojari)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 20th May, 2024.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.