IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11074 OF 2025

Benteler Automative (China)
Investment Limited,
having its office at 1F, Building 3,
No.2808, West Huancheng Road,
Fengxian District, Shanghai, 201401 P.R., China .. Petitioner

Versus

1) Assistant Commissioner of Income-tax (IT),
Circle-1, Pune, having his office at Room No.314,
3rd Floor, B.O.Bhavan, Plot No.1,
Sector 17, Pune Satara Road, Parvati, Pune-411009.

2) Commissioner of Income-tax (IT&TP),
Pune, having his office at B.O.Bhavan, Plot No.1,
Sector 17, Pune Satara Road, Parvati, Pune-411009.

3) The Union of India
through the Secretary, Department of Revenue,
Ministry of Finance having his Office at 128-A,
North Block, New Delhi-110 001. .. Respondents

Mr. Sridharan, Senior Advocate *a/w Ravi Sawana, Neha Sharma, Priyanshi Chokshi, Advocates for the Petitioner.*

Mr. A. K. Saxena, *Advocate for Respondent Nos.1 and 2/ Revenue.*

Mr. Anil Singh, ASG *a/w Aditya Thakkar, Savita Ganoo, D.P. Singh, Priyanka Kothari, Adarsh Vyas, Rama Gupta, Rajdatt Nagre, Advocates for Respondent No.3.*

CORAM : B. P. COLABAWALLA &
AMIT S. JAMSANDEKAR, JJ.
RESERVED ON : NOVEMBER 25, 2025
PRONOUNCED ON : MARCH 27, 2026

JUDGMENT:- [PER B. P. COLABAWALLA, J.]

1. Rule. Respondents waive service. With the consent of parties, Rule made returnable forthwith and heard finally.

2. By this Petition, filed under Article 226 of the Constitution of India, the Petitioner seeks a declaration that the consideration received/receivable by the Petitioner from its Indian subsidiary, *Benteler India Private Limited* (for short *"**Benteler India**"*), pursuant to the Service Agreement entered into between them (Exhibit **"B"** to the Petition), is not taxable in India. Consequently, a relief is also sought to quash and set aside the impugned order dated 1st August 2025 passed by Respondent No.1 rejecting the Petitioner's application for *"NIL withholding tax"* Certificate and for a direction to the Respondents to issue a *"NIL deduction of tax at source"* Certificate under Section 197 of the Income Tax Act, 1961 (for short "**the IT Act**") as prayed for by the Petitioner in its application dated 1st July 2025. The Petitioner also seeks

a declaration and/or a direction to the Income Tax Authorities to grant a refund to the Petitioner of the amount of tax deducted at source (TDS) by *Benteler India* pursuant to the above-mentioned Service Agreement.

3. To put it in a nutshell, it is the Petitioner's case that it is a company incorporated under the laws of China and a resident of China. Under the Service Agreement (Exhibit "**B**" to Petition) entered into by the Petitioner with *Benteler India* (its subsidiary), the Petitioner supplies technical services to *Benteler India*. It is conceded before us that any payment made by *Benteler India* to the Petitioner [for the supply of technical services] would be taxed in India under the provisions of the IT Act, and more particularly Section 9(1)(vii) thereof. However, since India and China have entered into a *Double Taxation Avoidance Agreement* [for short the **"DTAA"**], taxation of the Petitioner would be governed by the provisions of the India-China DTAA as they are more beneficial to the Petitioner [Section 90 of the IT Act]. According to the Petitioner, it has no "Permanent Establishment" (for short **"PE"**) in India [as understood in Article 5 of the DTAA], and hence, is not liable to pay any tax in India under Article 7 thereof, for the technical services provided by it to *Benteler India*. The only other provision under which the Petitioner can be brought to tax in India is

Article 12 of the DTAA. According to the Petitioner, even under this Article, the Petitioner cannot be taxed in India because the technical services provided by the Petitioner to *Benteler India* do not fall within the definition of the words *"fees for technical services"* (for short also referred to as **"FTS"**), as understood under Article 12 (4) of the India-China DTAA. According to the Petitioner, though it rendered "technical services" to its subsidiary located in India, namely *Benteler India*, the wordings of Article 12 (4) clearly indicate that for the services provided by the Petitioner to *Benteler India* to fall within the meaning of the words *"fees for technical services"* [as defined in Article 12 (4)], the same would have to be rendered and/or performed by the Petitioner in India and not merely from China. According to the Petitioner, if the technical services provided by it are from China, then those services would not be covered within the definition of *"fees for technical services"* in Article 12 (4) of the India-China DTAA. Since it is an undisputed fact that the technical services provided by the Petitioner to *Benteler India* were rendered/performed by the Petitioner from China, and not in India, the payment for FTS would not fall within Article 12 (4) of the DTAA, and hence, cannot be taxed in India. This is the basis on which the Petitioner seeks the reliefs more particularly set out earlier.

4. On the other hand, the aforesaid interpretation of Article 12 (4) has been disputed by the Respondents as more elaborately set out later in this judgment. However, in a nutshell, it is the Respondents case that even assuming for the sake of argument, that the interpretation of Article 12 (4) is as per what the Petitioner contends, even then, in the facts of the present case, the Petition ought to be dismissed. According to the Respondents, admittedly the services rendered by the Petitioner to *Benteler India* from China was through E-mail Communications, Conference Calls, Video Conferencing etc. Once this is the case, as per the law prevailing in India, the rendition of these services, even if done virtually, equate to and is the same as a physical rendition of services in India. Hence, even assuming for the sake of argument that physical presence is required in India as sought to be contended by the Petitioner, the same is duly fulfilled. Without prejudice to the aforesaid argument, it is the Respondents case that it is an undisputed position that in the case of this very Petitioner, for at least 4 previous Assessment Years, fees paid to the Petitioner [for providing technical services] by *Benteler India*, were taxed in India. The Petitioner being aggrieved by this action of the Income Tax Department has in fact challenged the same before the Higher Authorities. The said challenge has not yet

succeeded. In other words, for the previous Assessment Years, it is held, at least till date, that the fees paid by *Benteler India* to the Petitioner [for the supply of technical services], is taxable in India. Once this is the case, there was no question of the Assessing Officer granting any "*Nil withholding tax*" Certificate under Section 197 of the IT Act. This in fact would be contrary to the assessments that were already done in relation to the Petitioner for previous Assessment Years, and which are challenged by the Petitioner before the Higher Authorities and is pending. In this regard, the Respondents also relied upon Rule 28AA of the Income Tax Rules, 1962. As far as the declaration sought by the Petitioner in prayer clause (a) is concerned, it is the case of the Respondents that such a declaration can never be granted in the present Petition as this very issue is pending in the Petitioner's own case not only before the ITAT, but also before the CIT (Appeals). If any such declaration is given in the present Petition, it would have a direct impact to those proceedings, and hence there is no question of granting such a declaration at this stage. All in all, therefore, the Respondents have contended that the Petition is bereft of merit and should be dismissed.

5. Before we delve into the controversy raised in the present Petition, it would be apposite to set out the parties hereto as well as the

brief facts of the case. The Petitioner is a company incorporated on 23rd August 2011 by the Benteler Group (based in Austria) and is a tax resident of China. The Petitioner provides management support services, finance and human resources services, quality system and warranty management services, information technology support services, facility management services, technical support on treasury, taxation, legal and internal control and other related services, to its related parties in the Asia Pacific region. The Petitioner is designated as the regional group headquarters for the Asia Pacific region of the Benteler Group.

6. Respondent No.1 is the Assistant Commissioner of Income Tax (IT), Circle-1, Pune who has passed the impugned order rejecting the application made by the Petitioner under Section 197 of the IT Act and Respondent No.2 is the Commissioner of Income Tax (IT & TP), Pune, who is the Jurisdictional Officer having jurisdiction over the Petitioner and Respondent No.1. Respondent No.3 is the Union of India and is the employer of Respondent Nos.1 and 2.

7. According to the Petitioner, it is a part of the Benteler Group which operates around the world with 170 plants, branches, and

trading companies in 38 countries. The Benteler Group develops and produces ready-to-install modules, components, and parts for automobile bodies, chassis and engines. The Petitioner has entered into a Service Agreement with *Benteler India* under which the Petitioner provides various services to it, namely management support services, finance and human resources services, quality system and warranty management services, information technology support services, facility management services, technical support on treasury, taxation, legal and internal control. A more detailed description of these services is set out in paragraphs 4(ii)(a) to (f) of the Petition. According to the Petitioner the aforesaid services are provided by it to *Benteler India* on an ongoing basis from China and the personnel providing these services are also based in China. According to the Petitioner, no employee of the Petitioner visits India to provide any of the above-mentioned services, and the entire provision of services is from China.

8. For the provision of these services to *Benteler India*, the Petitioner charges a service fee equal to the cost incurred by it plus a mark-up of 5%. The Petitioner raises an invoice on *Benteler India* on a monthly basis and *Benteler India* makes payment to the Petitioner against such invoice after deducting tax at source (TDS) at the rate of

10% under Section 195 of the IT Act read with the India-China DTAA. The total payments made by *Benteler India* to the Petitioner for the period April 2025 to July 2025 amounts to Rs.3.33 Crores, and on this payment, *Benteler India* has deducted tax at source (TDS) at the rate of 10% amounting to approximately Rs.33.31 Lakhs.

9. According to the Petitioner, taxation of income earned by it [who is admittedly a tax resident of China], is governed by the provisions of the India-China DTAA. Article 12 (1) of the India-China DTAA provides that "*fees for technical services*" arising in India and paid to a resident of China may be taxed in China (in a case where the service provider is in China). Article 12 (2) provides that "*fees for technical services*" may also be taxed in India if the beneficial owner of the fee is the recipient. Article 12 (4) defines the words *"fees for technical services"*, whereby if the provision of services is in India, then the fees for such services qualify as "*fees for technical services*". According to the Petitioner, if the provision of services is from China and no personnel of the Petitioner have come to India for rendering those services, then fees for such services do not qualify as *"fees for technical services"* as set out in Article 12 (4). It is on this basis that the Petitioner contends that the fees charged by it to *Benteler India* is not

taxable in India. This is also because admittedly the Petitioner does not have a PE in India as understood in Article 5 of the India-China DTAA. Accordingly, the Petitioner has claimed a refund of all amounts deducted by *Benteler India* [under Section 195 of the IT Act], in the IT returns filed by the Petitioner from A.Y.2015-16 onwards. The Assessing Officer has, however, denied the Petitioner any refund *inter alia* relying upon the decision of the ITAT, Mumbai Bench, in the case ***Ashapura Minichem Limited (40 SOT 220)*** and the decision of the Authority for Advance Ruling in ***Guangzhou Usha International Ltd (62 taxmann.com 96)***. In all these cases, the order of the Assessing Officer has been challenged before the Higher Authorities and is pending.

10. Be that as it may, the Petitioner filed separate applications for "*NIL withholding tax*" Certificate with respect to payments made by *Benteler India* to the Petitioner for A.Y.2023-24, 2024-25 and 2025-26 under Section 197 of the IT Act. All these applications were rejected by Respondent No.1. Aggrieved by this action of the 1st Respondent, the Petitioner filed Writ Petitions before this Court namely, WP/11534/2022 (for A.Y. 2023-24), WP/9290/2023 (for A.Y. 2024-25) and WP/10076/2024 (for A.Y. 2025-26). All these three Writ Petitions

were subsequently withdrawn by the Petitioner because by the time the Writ Petitions were taken up for disposal, the Financial Year had ended, thus rendering the Writ Petitions infructuous. Thereafter, again for A.Y. 2026-27 (the year under consideration in the present Petition) the Petitioner filed an application on 1st July 2025 seeking a "*NIL withholding tax*" Certificate with respect to payments made by *Benteler India* to the Petitioner under Section 197 of the IT Act. It is in this application that Respondent No.1 passed the impugned order dated 1st August 2025 once again rejecting the application filed by the Petitioner. It is because of this rejection that the Petitioner has once again approached this Court by filing the above Writ Petition and seeking the reliefs more particularly set out earlier.

SUBMISSIONS OF THE PETITIONER:

11. In this factual backdrop Mr. Sridharan, the learned Senior Counsel appearing for the Petitioner, submitted that Section 4 of the IT Act, and which is the charging provision, imposes income tax upon a person in respect of his total income for the previous year. Income tax is levied at the rates enacted by the Central Act i.e. the Annual Finance Act. Clause (b) to Section 5(2) of the IT Act provides that a total income of a non-resident shall include (i) income accrued or arising in India; (ii)

income deem to accrue or arise in India. Mr. Sridharan submitted that Section 9(1)(vii)(b) of the IT Act read with the Explanation to Section 9(2), amongst other things, provides that income by way of *"fees for technical services"* payable by a person who is a resident in India shall be deemed to accrue or arise in India and shall be included in the total income of the non-resident, whether or not (a) the non-resident has a residence or a place of business or a business connection in India; or (b) the non-resident has rendered services in India. Mr. Sridharan submitted that if one were to go by these provisions, it cannot be disputed that though the Petitioner is a non-resident, it would be liable to tax in India under the provisions of the IT Act.

12. He, however, submitted that Sections 4 and 5 are "subject to the other provisions" of the IT Act. Therefore, if any provision of the IT Act grants relief from such a levy, then levy under Section 4 is not attracted. According to the Petitioner, Chapter IX of the IT Act deals with double taxation relief and Section 90 deals with agreements with foreign countries or specified territories. In the present case, since India and China have entered into a DTAA, the provisions of Section 90(1) as well as Section 90(2) would be attracted, and the provisions of the IT Act would apply to the extent they are more beneficial to the assessee.

Since the provisions of the India-China DTAA are more beneficial to the assessee (the Petitioner), it would be taxed, if at all, as per the provisions of the said DTAA.

13. Having said this, Mr. Sridharan submitted that the income in question does not satisfy the definition of the words *"fees for technical services"* contained in Article 12 (4) of the India-China DTAA and hence is not taxable under Article 12 (2) of the said DTAA. Also, since the Petitioner does not have a PE in India, and the income in question would be income from business, it is exempt from taxation in India vide the first sentence of paragraph 1 of Article 7 of the India-China DTAA. Mr. Sridharan on the other hand submitted that the Revenue disputes the contention of the Petitioner and contends that the income in question fulfills the definition of the words *"fees for technical services"* as set out in Article 12 (4) read with Article 12 (6), and hence is taxable in India under Article 12 (2) of the India-China DTAA.

14. Mr. Sridharan thereafter took us through the scope of taxability of "*fees for technical services"* under the IT Act prior to the amendment by Finance Act, 1976 and how the various amendments were brought about to ensure that *"fees for technical services"* would be

brought to tax in India, as long as the payer was a resident in India. Though the same is not really relevant for our purposes, the reason why Mr. Sridharan took us through the aforesaid provisions was to throw light on what the law was pre 1976 and post 1976. In fact, Mr. Sridharan very fairly conceded that the managerial and consultancy services provided by the Petitioner fall within the definition of the words *"fees for technical services"* under Explanation 2 to Section 9(1)(vii) of the IT Act, and since the payer of these fees (*Benteler India*) is a resident of India, the place of performance of such services [in the present case by the Petitioner from China and not in India] is an irrelevant consideration under the provisions of the IT Act, and such fee would be taxable in India under Section 9(1)(vii) thereof.

15. Mr. Sridharan however submitted that in the present case, the parties would not be governed by Section 9(1)(vii) but by the DTAA entered into between India and China. He submitted that by virtue of Section 90(1) read with Section 90(2) of the IT Act, the provisions of the IT Act which are more beneficial than the provisions of the DTAA, then those provisions of the IT Act would prevail over the DTAA. On the flip side, if the DTAA is more beneficial as compared to the provisions of the IT Act, then the DTAA can be invoked by the assessee to claim

exemption/reduction of tax imposed by the domestic law. He submitted that this legal position is well settled by the Hon'ble Supreme Court in ***UOI vs. Aazadi Bachav Andolan [(2007) 263 ITR 706]*** and ***Engineering Analysis Centre of Excellence (P) Limited V/S CIT [(2021) 432 ITR 471 (SC)]***.

16. Coming to the facts of the present case, Mr. Sridharan submitted that in exercise of powers under Section 90 of the IT Act, India has entered into a DTAA with the Peoples Republic of China which came into force on 21st November 1994. This was notified vide Notification No.9747 dated 5th April 1995. Drawing our attention to the different Articles in the DTAA, and more particularly Article 12 thereof, Mr. Sridharan submitted that Article 12(1) provides that fees for technical services arising in India and paid to the resident in China may be taxed in China. This paragraph assigns a non-exclusive taxation right to China. However, Article 12 (2) stipulates that fees for technical services that arise in India may also be taxed in India. However, tax thereon shall not exceed 10% of the gross amount of the fees for technical services. He submitted that Article 12 (4) contains the definition of the term *"fees for technical services"*. He submitted that the term *"fees for technical services"* as used in that Article, means any

payment for the provisions of services of managerial, technical or consultancy nature by a resident of a Contracting State in the other Contracting State, but does not include payment for activities mentioned in paragraph 2(k) of Article 5 and Article 15 of the DTAA. Article 12 (5) excludes *"fees for technical services"* from the purview of Article 12 if such services are performed in India through a PE. Such income would then be governed by Article 7. Article 12 (6) defines the source rule of taxation (place where the fee arises) for Article 12 (2). It is a definition paragraph for Article 12 (2). According to Mr. Sridharan, the first part of Article 12 (6) *inter alia* provides that *"fees for technical services"* shall be deemed to arise in India when the payer is a resident of India. The second part of Article 12 (6) *inter alia* provides that where the person paying the fees for technical services, whether he is a resident of India or China or not, has a PE in India, and such fees are born by the PE, then such fees shall be deemed to arise in India where the PE is situated. Article 12 (7) adds the special arm's length price for fees for technical services, and which is not really relevant for our purposes.

17. According to Mr. Sridharan, the definition of the words *"fees for technical services"* as understood under Article 12 (4) of the

India-China DTAA expressly refers to provision of services by a resident of a Contracting State in the other Contracting State. Article 12 (2) of the India-China DTAA provides that fees for technical services arising in India may be taxed in India. Thus, for a fee to be taxed by India, the two conditions specified in Article 12 (2) should be satisfied, namely, (i) the activity should fall within the term *"fees for technical services"* as defined in Article 12 (4); and (ii) Article 12 (6) defining the State where the *"fees for technical services"* shall be deemed to be arise, also has to be fulfilled. The above two conditions must be simultaneously fulfilled and the same is self-evident from a bare reading of the relevant portions of Article 12 of the India-China DTAA. According to Mr. Sridharan, if one were to read Article 12 in its correct perspective, the term *"fees for technical services"* as used in the said Article would mean *any payment for provision of services ..... by a resident of China in India, but does not include payment for activities mentioned in .....* Thus, according to Mr. Sridharan, under the express language of Article 12 (4), the provision of services by a resident of China should be in India, which alone would be covered by the term *"fees for technical services"*. If the provision of services is not in India, then the payment for such services cannot be termed as *"fees for technical services"* under Article 12 (4). According to Mr. Sridharan, Article 5(2)(k) of the India-China DTAA

also establishes the significance of provision of services in India. Article 12 (4) refers to Article 5(2)(k), and in turn, Article 5(2)(k) refers to Article 12. Hence, these portions of these respective Articles throw light on the meaning of each other and have to be read together. According to Mr. Sridharan, it is clear that the expression *"in the other Contracting State"* in Article 12 (4) of the India-China DTAA is synonymous with the expression "within that Contracting State" implied in Article 5(2)(k). Mr. Sridharan submitted that vide Notification No.SO2562(E) dated 17th July 2019, the text of the erstwhile Article 5(2)(k) was transposed verbatim in Article 5(3)(b). This was to remove a doubt as to whether what falls in Article 5(2) need not fulfil the requirements of Article 5(1). This aspect has no relevance to the present matter and hence the Notification dated 17th July 2019 shifting the provisions from Article 5(2)(k) to 5(3)(b) does not affect the above conclusion that the expression "in the other Contracting State" is synonymous with the expression "within that Contracting State".

18. Mr. Sridharan thereafter submitted that the phrase *"provision of services ..... by a resident of a Contracting State in the other Contracting State"*, or a similar expression, is absent in all DTAAs entered into by India with other countries (except China, Israel and

Finland). It was therefore submitted that incorporation of the words *"provision of services ..... by a resident of a Contracting State in the other Contracting State"* in the India-China DTAA was a deliberate and conscious departure by India vis-a-vis most of its other DTAAs. According to Mr. Sridharan, none of the tax treaties (other than China, Israel and Finland) entered into by India require services to be provided *"in the other Contracting State"* as covered by Article 12. Thus, the India-China DTAA uniquely stipulates deviating from all other treaties of India that services are required to be provided by the resident of a Contracting State (i.e. China) in the other Contracting State (i.e. India), to qualify as *"fees for technical services"* under Article 12 (4). Evidently, such a stark departure by India from its uniform and consistent treaty practice with all other countries must be given its full significance and importance.

19. To put it in a nutshell, Mr. Sridharan submitted that qua *"fees for technical services"*, most of the India's DTAAs provided for taxation in India if the payer is in India. The exception to this rule is in the India-China, India-Israel, and India-Finland DTAAs. In these treaties, provision of services in India is a further essential criteria. In this regard, Mr. Sridharan brought to our attention Article 13 (5) of the

India-Israel DTAA and Article 12 (5) of the India-Finland DTAA. Mr. Sridharan submitted that under the treaties with Israel as well as Finland, twin conditions for taxability of *"fees for technical services"* have to be fulfilled, namely (i) that the payer should be resident of India; and (ii) the services must be rendered or performed in India [Article 13 (5) of the India-Israel DTAA and Article 12 (5) of the India-Finland DTAA]. In other words, the condition relating to performance of services in India, is forming part of the source rule contained in Article 13 (5) of the India-Israel DTAA, and Article 12 (5) of the India-Finland DTAA. However, in the India-China DTAA this condition of rendering/provision of services in India, is forming part of the definition of the words *"fees for technical services"* under Article 12 (4). According to Mr. Sridharan, this would be of little significance as the same stipulation is incorporated in all the three DTAAs. According to Mr. Sridharan, the earlier India tax treaties entered into pre 1977 uniformly provided taxability of *"fees for technical services"* only when rendered in India. This, again, reinforces that the place of provision or rendition of services can be a conscious basis of taxation in tax treaties. Treaties entered into post 1976 stipulate that for taxation of *"fees for technical services"* by India, only the payer should be a resident of India (except in treaties with China, Israel and Finland). In this regard Mr.

Sridharan referred to the DTAAs entered into between India-Japan, India-Austria, and India-Belgium. He submitted that these earlier treaties were thereafter replaced by new tax treaties entered into by India. In the new tax treaties (except China, Israel and Finland) the taxability of *"fees for technical services"* was delinked with the place of performance of services, and instead, the country of the residence of the payer was treated as the sole basis for the place of accrual of such income.

20. Mr. Sridharan submitted that though Article 12 (6) is couched as a deeming fiction, it is really nothing but a definition of the term "arising in a Contracting State". He submitted that this was necessary because Article 12(2) of most treaties refer to royalty or fee for technical services arising in India. If the words "arising in a Contracting State" in Article 12 (2) is to be given a meaning as per the respective domestic laws, it would lead to a chaotic situation. Different criteria in the domestic tax laws [for the phrase "arising in a Contracting State"] would be incorporated in the domestic tax laws. For example, it can be a place where services are performed, or the resident State of the payer, or the place where the services are used or where the payment is received. Hence, for the purpose of the treaty, and to add certainty, Article 12 (6)

defines the words "arising in a Contracting State". In other words, the place of arising of income under Article 12 (2) depends upon the criteria provided under Article 12 (6). Article 12 (6) narrows the scope of income arising in India to be limited to what is defined therein. When understood from this angle, the first part of Article 12 (6) cannot be held to be a deeming legal fiction. To put it differently, Mr. Sridharan submitted that Article 12 (6) stipulates that *"fees for technical services"* shall be deemed to arise in India when the payer is in India. For that provision to apply, the first criteria to be satisfied is that it should be *"fees for technical services"*. If the fee paid is not *"fees for technical services"* as understood under Article 12 (4), then one cannot invoke the provision of Article 12 (6) to bring those fees to tax in India.

21. According to Mr. Sridharan, the Certificate applied for by the Petitioner under Section 197 seeking a "*NIL withholding tax*" Certificate was rejected by the impugned order mainly relying upon the decision of the ITAT, Mumbai in ***Ashapura Minichem Ltd (supra)***. According to Mr. Sridharan, the aforesaid decision of the ITAT is *per incuriam* on account of non-consideration of key facts and circumstances. Mr. Sridharan submitted that the ITAT held that the use of services in the other Contracting State (i.e. India), is itself enough to

bring it within the expression "provision of services". This reasoning of the ITAT would render the first sentence of Article 12 (6) redundant. If the interpretation of "provision of services" as "use of services in India" is correct, then it was not necessary for the India-China DTAA to provide in the first sentence of Article 12 (6) that income shall be deemed to arise in India. Further, the above conclusion reached by the ITAT reduces the definition of the words *"fees for technical services"* in the India-China DTAA to be at par with the definition in the India-Germany DTAA despite there being a deliberate and conscious departure in the language of the definition in the India-China treaty, vis-a-vis all other Indian treaties. This would also render the words "provision of services ..... in the other Contracting State" under Article 12 (4) of the India-China DTAA, meaningless.

22. Mr. Sridharan then submitted that even assuming that the ITAT was correct in stating that the provision of services is equivalent to utilization of services in India, then also the condition of rendition of services in India must be satisfied under Article 12 of the India-China DTAA. Mr. Sridharan submitted that the ITAT incorrectly observed that the requirement of actual provision of services in India would render the first sentence of Article 12 (6) redundant. As an example, he submitted

that suppose a Chinese resident comes to India and provides services to a PE of a non-resident, say the Mumbai branch of Bank of America, a US Company. In such a case the *"fees for technical services"* shall be deemed to arise in India in terms of the second sentence of Article 12 (6). That is the purpose of the second sentence of Article 12 (6), and which point has been overlooked by the ITAT in ***Ashapura's case***. Mr. Sridharan submitted that according to the ITAT, Article 12 (6) is independent of Article 12 (4) and the provision of services in India is of no significance once the *"fees for technical services"* is deemed to arise in India. Mr. Sridharan submitted that this would lead to absurd results. Firstly, this would equate the provisions of the India-China DTAA with all other treaties of India which the Government of India has agreed to. Secondly, this would render meaningless the words "provision of services ..... in the other Contracting State" in Article 12 (4) of India-China DTAA. He submitted that though the ITAT rejected the reference of Article 13 (5) of India-Israel DTAA by holding that the interpretation of one treaty ought not to be based on wordings of another treaty, at the same time it has compared the Pakistan-China DTAA with the India-China DTAA. To put it in a nutshell, Mr. Sridharan submitted that the definition of the words *"fees for technical services"* is provided in Article 12 (4) and the meaning of the term "arising" in Article 12 (6). For Article

12(2) to attract tax thereunder, it has to be *"fees for technical services"* as defined in Article 12(4), and additionally, it should arise in India within the meaning of Article 12 (6). Both these conditions have to be cumulatively satisfied for the concerned fee to be taxed in India under the India-China DTAA. All these aspects have been overlooked in ***Ashapura's case*** by the ITAT.

23. To take the argument further that for the services to fall within the definition of the words *"fees for technical services"* the same have to be rendered and/or performed in India, Mr. Sridharan relied upon the *State Administration of Taxation* **("SAT")** Circular dated 9th December 1994 available on the website of the *State Taxation Administration of the People's Republic of China*. Mr. Sridharan submitted that the *State Administration of Taxation, China* has published this Circular on the interpretation and implementation of certain provisions of the DTAA between the Governments of India and China (effective from 1st January 1995). According to Mr. Sridharan, the time, text, and tenor of the Circular dated 9th December 1994 is reflective of the understanding of the treaty partner, namely China. Mr. Sridharan brought to our attention Clause IV of the said circular and submitted that according to the Chinese counterpart, India and China

have agreed to specify in Article 12, in addition to the provisions on the taxation of royalties, the provisions on taxation of *"fees for technical services"*, and where each company or enterprise sends personnel to the other to provide technical services, which do not constitute a PE, the fees for such technical services shall be subject to a 10% withholding tax in accordance with the provisions of paragraph 2 of Article 12 of the DTAA. In other words, Mr. Sridharan submitted that even the Chinese Government has interpreted Article 12(4) of the DTAA to mean that when personnel are sent by a resident of one Contracting State for rendering services in the other Contracting State, the same can be brought to tax in the other Contracting State under Article 12.

24. Mr. Sridharan submitted that thereafter, on 16th March 2011, the *State Administration of Taxation, China* issued an announcement on issues concerning implementation of the "technical service fee" clause under bilateral tax agreements between China and UK and other countries. He submitted that even this announcement takes into consideration the DTAA entered into with India and fortifies the interpretation of Article 12(4) as contended by the Petitioner. He submitted that this announcement categorically states that if the services on which the technical service fees are rendered outside China

such technical service fee would not be subject to income tax in accordance with the relevant provisions of China. On the flip side, naturally, it would mean that technical services rendered outside India would not be subject to income tax in accordance with the relevant provisions of India. Mr. Sridharan also relied upon Article 3 of the *Enterprise Income Tax Law of the People's Republic of China* to contend that even the Chinese domestic income tax law, corresponding to the Income Tax Act, 1961 [as it stood prior to introduction of Section 9(1)(vii) by the Finance Act, 1976], a non-resident is taxed in China only for source in China. Hence, any interpretation of Article 12(4) of the India-China DTAA has to bear in mind this essential background. Therefore, the above referred announcement by the SAT recognizes that the "technical service fee" clause in the India-China DTAA deals with the place where the technical service fee is incurred. Further the above circulars reflect at least the understanding of the Chinese Government that if services are rendered outside China, then the technical service fee would not be subjected to tax in China.

25. For all the aforesaid reasons, Mr. Sridharan submitted that the Petitioner be granted the declaration sought in the above Petition,

and consequently, also a "*NIL withholding tax*" Certificate under Section 197 of the IT Act.

SUBMISSIONS OF THE RESPONDENTS:-

26. On the other hand, the learned ASG, as well as Mr. Thakkar appearing on behalf of Respondent No.3, and Mr. Saxena appearing on behalf of Respondent Nos.1 and 2, submitted that this is not a case in which the Writ Court ought to exercise its extraordinary and discretionary writ jurisdiction or go into the question of interpretation of the India-China DTAA at this stage. They submitted that the admitted factual position in this case negates the very grounds raised by the Petitioner and hence the Petition ought to be dismissed on this basis alone. This apart, they submitted that the Certificate issued under Section 197 of the IT Act is a provisional Certificate and the assessment proceedings are still to take place. Hence, this issue, if at all could be considered once the assessment takes place and not at this stage. Further, the final assessment for previous years of this very Petitioner for the very income which forms the subject matter of the present Petition, has not been set aside in Appeal, and hence, the principle of consistency would apply, and no further inquiry at this stage ought to be

undertaken. It was also submitted that the Petitioners have an alternate remedy under Section 264 of the IT Act to challenge the rejection of the Certificate by the Assessing Officer and which has not been exhausted.

27. To elaborate on these submissions, the learned ASG as well as Mr. Thakkar and Mr. Saxena, in unison, submitted that the entire gravamen of the Petitioner's case is that for the services of the nature being provided by the Petitioner, the same must be physically provided in India for it to be considered as *"fees for technical services"* under Article 12(4) of the India-China DTAA, and hence taxable in India. They submitted that this is clear not only from the grounds raised in the Petition but also the submissions recorded in the impugned order dated 1st August 2025. The nature of services provided by the Petitioner, as stated by the Petitioner in their Note dated 1st July 2025 in support of their application seeking a Certificate under Section 197 of the IT Act, clearly states that the services which will be rendered by the Petitioner to *Benteler India* from China through e-mail communications, conference calls, video conference calls etc., will not be covered within the ambit of *"fees for technical services"* under Article 12(4) as they are rendered in China and not in India. In this regard, the Respondents placed reliance on paragraph 12 of the said Note which reads thus:-

> *"12. In view of the above,* ***services which will be rendered by the Company to Benteler India from China through email communications, conference call, video conferencing, etc*** *will not be covered within the ambit of Article 12(4) of the tax treaty as FTS, as they are rendered in China and not in India."*

28. According to the Respondents, looking at the facts of the Petitioner's case it would be clear that (a) services are being provided by the Petitioner; (b) services are being provided to a recipient in India; (c) services being provided to the recipient in India are for the purposes of them being utilized by the Indian company in India; (d) the specific nature of the services would also show that the services being rendered are for utilization by the Indian company; (e) the service recipient (in India) is paying monies to the Petitioner from India for the services it is provided; and (f) rendition of the service is taking place through interactive modes of video conferencing or conference calls or emails. Looking at this admitted factual position, the nature and manner in which the services are provided, as per the law prevailing in India, the rendition of these services, even if done virtually, equates to and is the same as a physical rendition of services in India. Hence, even assuming for the sake of argument that the interpretation of Article 12(4) is as per what the Petitioner submits, even then, the Petitioner is liable to pay tax in India as the services provided by them to *Benteler India* would be in

the nature of *"fees for the technical services"* under Article 12(4) of the India-China DTAA. In support of the proposition that the rendition of the services by the Petitioner, even if done virtually, equates to, and is the same as physical rendition of the services in India, the Respondents relied upon the following decisions:-

(1) ***State of Maharashtra V/S Praful B. Desai [(2003) 4 SCC 601].***

(2) ***Kishan Chand Jain V/S Union of India [(2023) SCC Online SC 1334].***

(3) ***Armin R. Panthaky V/S Rohinton Panthaky [(2024) SCC Online Bom 3603 (Full Bench)].***

(4) ***Ganesh Gouri Industries V/S R.C. Plasto Tanks & Pipes (P) Ltd [(2024) SCC Online (Del) 5359 (Division Bench)].***

29. It was accordingly submitted that taking the case of the Petitioner on a demurer i.e. that the India-China DTAA requires physical rendition of services in India, even then, as per the law in force in India, the services rendered by the Petitioner virtually would amount to a physical rendition of services in India. Hence, no further inquiry would arise, and on this ground alone the above Petition is liable to be dismissed.

30. Without prejudice to the aforesaid argument, the learned ASG, Mr. Thakkar as well as Mr. Saxena submitted that Section 197 of

the IT Act contemplates a case where any income of any person, or sum payable to any person, income tax is required to be deducted at the time of credit, or as the case may be, at the time of payment, and the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income tax at any lower rate or no deduction of income tax, as the case may be, then he can, on an application made by the assessee in that behalf, grant him such Certificate as may be appropriate. It was submitted that Section 197 itself contemplates that the CBDT can make rules specifying the cases in which and under what circumstances an application may be made for the grant of a Certificate under sub-section (1) of Section 197, and the conditions subject to which such Certificate may be granted. It was submitted that pursuant to this power, rules have been framed, and for our purposes, what would be relevant is Rule 28AA of the Income Tax Rules, 1962. According to the Respondents, Rule 28AA (2) itself contemplates that the estimated liability of the assessee shall be determined by the Assessing Officer after taking into consideration *inter alia* the tax payable on the assessed or returned or the estimated income, as the case may be, of the last 4 years. Hence, the grant of Certificate by the Assessing Officer under Section 197 would have to take into consideration the existing and estimated tax liability of the said person. The existing and estimated tax

liability is to be worked out by considering the parameters set out in sub-rule (2) of Rule 28AA which includes tax payable on the assessed or returned or estimated income, as the case may be, of last 4 previous years as also the existing liability under the Income Tax Act, 1961 and the Wealth Tax Act, 1957. According to the Respondents, once this is the case, the Assessing Officer was fully justified in rejecting the Certificate sought for by the Petitioner for "*Nil withholding of tax*". This is for the simple reason that in the previous 4 years it is an admitted position that the fees paid by *Benteler India* to the Petitioner for the services rendered by the Petitioner to *Benteler India* [and which are identical in the present Assessment Year as well] were brought to tax in India. In fact, being dissatisfied with the aforesaid action of the Income Tax Authorities, the Petitioner has invoked the Appellate remedies, either by approaching the CIT (Appeals), and thereafter the Tribunal, or the Dispute Resolution Panel (DRP), and thereafter the Tribunal. The Respondents submitted that all these pending cases are set out in the Writ Petition itself, the details of which are as under:-

A.Y.	Dispute Resolution Panel	CIT(A)	Tribunal
2015-16	-	Against Petitioner	Pending
2016-17	-	Against Petitioner	Pending

2017-18	-	Against Petitioner	Pending
2018-19	-	Against Petitioner	Pending
2019-20	Against Petitioner	-	Pending
2021-22	Against Petitioner	-	Pending
2022-23	Against Petitioner	-	Pending
2023-24	-	Pending	-

31. Once this is the case, and the assessments done in the case of the Petitioner for the previous assessment years [as set out above], having not been set aside, the Assessing Officer could never have granted to the Petitioner a *"Nil withholding of tax"* Certificate under Section 197 of the IT Act. In fact, if any such Certificate was granted, the same would have been contrary to the assessments done in the Petitioner's own case for the previous Assessments Years, and which have been challenged and pending before the ITAT.

32. The Respondents thereafter submitted that in judicial review under Article 226 of the Constitution of India, what the Court is concerned with is the judicial making process, and not the correctness

of the decision. In the facts of the present case, one can hardly find any fault with the judicial making process, and in fact the same has not even been put in issue by the Petitioner in the present case. The Assessing Officer, after taking into consideration all factors, including the fact that for the previous 4 assessment years this very income is brought to tax in India, and the same has not been set aside by any Appellate Forum, correctly refused to grant the "*Nil withholding of tax*" Certificate to the Petitioner. Once this is the case, there is no question of the Petitioner seeking this very relief before this Court under Article 226 of the Constitution of India. It is submitted that if one was to decide this matter on merits, it would have a direct bearing on the Appeals filed by the Petitioner in the previous years, and which are pending before the ITAT. If the Petitioner eventually succeeds before the ITAT, any tax deducted at source for the current assessment year would be refunded to the Petitioner with interest under the provisions of the IT Act. Hence, it was submitted that the Writ Petition ought not to be entertained and the same be dismissed.

33. Without prejudice to the aforesaid arguments, the Respondents also addressed us on merits regarding the interpretation of Article 12 (4) of the India-China DTAA. It was submitted that whilst

Article 12, and the entire DTAA, would have to be read as a whole to understand the true meaning and scope of the provisions thereof, only for the sake of argument, and since the Petitioner has sought to dissect Article 12 (4) and argue it *dehors* the other provisions of Article 12, this exercise is being done. It was submitted that however, Article 12, as also the other provisions of the India-China DTAA, should be read as a whole and not in a piecemeal manner. The Respondents pointed out that Article 12 (4) of the India-China DTAA defines the term *"fees for the technical services"* as used in the said Article to mean any payment for the provision of services of a managerial, technical or consultancy nature by a resident of a Contracting State in the other Contracting State, but does not include payment for activities mentioned in paragraph 2(k) of Article 5 and Article 15 of the DTAA. It was submitted that Article 12(4) is divided into two parts. The first part deals with laying down the meaning of the term *"fees for the technical services",* which in turn, consists of two portions (i) identifying the nature of the services i.e. managerial, technical or consultancy in nature; and (ii) the said services must be provided by a resident of a Contracting State in the other Contracting State. It is submitted that there is no dispute in the present case that the services rendered by the Petitioner are in the nature of managerial, technical or consultancy services. The second part

deals with an exclusionary clause whereby payment for activities mentioned in paragraph 2(k) of Article 5 and Article 15 of the DTAA are excluded. It was submitted that the issue in the present matter, as raised by the Petitioner, is in relation to the second half of the first part i.e. *"provision of services…. by a resident of a Contracting State in the other Contracting State"*. Article 3 (c) provides, *inter alia*, that the terms *"a Contracting State"* and *"the other Contracting State"* means China or India, as the context requires. The above portion, read with the Article 3(c), would read as *"provision of services …… by a resident of China in India"* or *"provision of services …… by a resident of India in China"*. It is submitted that the above portion of Article 12 (4) nowhere contains any words which reflect, or even hint at the necessity of physical presence, as urged by the Petitioner. Article 12 (4) is devoid of any conditions on how services are provided and the words of the said Article contain no reference to indicate physical presence only, as is being urged by the Petitioner. There is no mention of sending personnel as a pre-requisite anywhere in Article 12 (4). Further there is also no pre-requisite for services to be 'physically' provided or rendered in India. Article 12 (4) nowhere in its plain language seeks to restrict the phrase *"provision of services"* only to the rendering of the services as alleged by the Petitioner. The plain and common-sense meaning would

include, *inter alia*, the following elements of service i.e. rendering, receiving and utilizing. There is nothing in the plain language that deviates from the said ordinary meaning of the phrase *"provision of services"*. Further, the word *"in"*, simply qualifies the fact that the services would be provided in the other Contracting State. This would be a *sine qua non* in the sense that if the services were not in the other Contracting State, the question of a bilateral DTAA coming into the picture itself would not arise. The word *"in"* cannot and does not mean a physical presence or physical rendition in India or China, as the case may be, as is being urged by the Petitioner. No such restrictive words nor language is found in the plain and unambiguous language of Article 12 (4). The above interpretation would be even more evident and in complete conformity with the provisions of Article 12 (6) which inter alia provides that *"fees for technical services"* shall be deemed to arise in a Contracting State when the payer is the Government of that Contracting State, a political sub-division, a local authority thereof or a resident of that Contracting State. These provisions when read together make express and explicit, the above interpretation which is even otherwise evident on a plain reading of Article 12 (4).

34. It was submitted that Article 12 (6) creates a deeming fiction that *"fees for technical services"* shall be deemed to arise in a Contracting State when the payer is a resident of that Contracting State. Hence, on a plain reading of Article 12 (6), when the payer is in a particular Contracting State, the *"fees for technical services"* shall be deemed to arise in that Contracting State. Hence, in the context of the present case, the Indian party being the payer, the *"fees for technical services"* would be and are deemed to arise in India. It is therefore submitted that not only does Article 12 (4) not bear out the contention of the Petitioner, but Article 12 (6) makes even more express and explicit the fact that considering the payer is in India, the *"fees for technical services"* arise in India. In this connection reliance is placed on the judgment of the Hon'ble Apex Court in the case of ***Bhavnagar University V/S Palitana Sugar Mill Pvt Ltd [(2003) 2 SCC 111]***. Hence, it being evident that *"fees for technical services"* having arisen in India, it is conformity with the DTAA that the same would be taxed in India.

35. Without prejudice to the above, and with a view to further buttress the interpretation of the Respondents, attention was also invited to the provisions of Article 12 in its entirety. It was submitted

that a bare perusal of Article 12 in its entirety would further bear out and lend credence and support to the submissions of the Respondents. In this regard, it was submitted that Article 12 (1) would clarify that fees for technical services may be taxed in the State of residence of the recipient of the payment. This would be a case of resident-based taxation. Article 12 (2) however clarifies that such *"fees for technical services"* may also be taxed in the other Contracting State in which they arise, *albeit* the rate of tax is capped at 10%. The basis for Article 12 (2) is that since the source of the revenue is in the other Contracting State [in this case, India], India is entitled to tax the same. The expression "in which they arise" as used in Article 12 (2) as also the use of the word "arise" in Article 12 (6) are critical since it relates to the place where the *"fees for technical services"* arise.

36. Thereafter, our attention was drawn to Article 12 (3) and 12 (5) which deal with "royalty" and it was submitted that a bare perusal of Article 12 (5) would evince that the DTAA, where it seeks to provide for physical presence or a fixed base in the Contracting State, it expressly does so. The language of Article 12 (5) as against the language of Article 12 (4) and Article 12 (6) shows the clear intent and difference in the provisions qua "royalty" and *"fees for technical services"* and the

necessity of physical presence in the former [as per Article 12 (5)], as opposed to the lack of any such requirement in the case of the latter. In light of the above, it is submitted that on a plain reading of Article 12 as a whole, the submissions of the Respondents are duly borne out, and the contentions of the Petitioner that for the services provided by the Petitioner to *Benteler India* to fall within the meaning of the words *"fees for technical services"* [as defined in Article 12 (4)], the same would have to be rendered and/or performed by the Petitioner in India and not merely from China, is without any substance.

37. According to the Respondents, in fact their interpretation of Article 12 (4) is further borne out when one compares the provisions of Article 12 with the other Articles of the India-China DTAA. It is submitted that apart from the plain and clear language of Article 12, which specifically incorporates the source based taxation principle in relation to *"fees for technical services"*, a bare perusal of the DTAA would show how different Articles incorporate different mechanisms for taxation, and as and where necessary, the subject DTAA specifically provides for physical presence of a party. In this regard, our attention was drawn to Articles 14 and 20 of the India-China DTAA. It was submitted that Article 14 deals with Independent Personal Services and

provides that ordinarily, Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character, would be taxable only in that Contracting State. However, to this general rule, two exceptions are carved out which state that (a) if the said resident has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities, then, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State; or (b) if his stay in the other Contracting State exceeds, in the aggregate 183 days, in the taxable year concerned, then, only so much of the income as is derived from his activities performed in that other Contracting State may be taxed in that other Contracting State. Similarly, Article 20 deals with payments received by Professors, Teachers, and Research Scholars, and stipulates that an individual who is, or immediately before visiting a Contracting State was a resident of the other Contracting State and is present in the first mentioned Contracting State for the primary purpose of teaching, giving lectures, or conducting research at a university, college, school or educational institution, or a scientific research institution approved by the Government of the first mentioned Contracting State, shall be exempt from tax in the first mentioned Contracting State for a period of three years from the date of his arrival

in the first mentioned Contracting State, in respect of remuneration for such teaching, lectures or research.

38. On the other hand, Articles 16 provides that Directors fees and other similar payments derived by a resident of a Contracting State in his capacity as member of the Board of Directors of a company which is a resident of the other Contracting State may be taxed in that other Contracting State.

39. It was therefore submitted that Articles 14 and 20 expressly refer to presence or a person having a fixed base in a Contracting State, whereas Articles 16 lays down no such requirement. From all these Articles it was evident that the contracting parties have specifically provided for a presence or fixed base as and when required. In the absence of such a specific provision, even arguendo, the question of reading such a non-existent requirement into Article 12(4) cannot and would not arise. Further, even the residual Article in terms of Article 22, and more particularly paragraph 3 thereof, provides that income of a resident of a Contracting State may be taxed in the other Contracting State if the income arises in the other Contracting State. This is in conformity with the principles of Article 12 (2). Both Articles expressly

recognize the source-based taxation principles in the event payments are made or income is arising from the other Contracting State i.e. not the State of residence.

40. With respect to the Petitioner's reliance on the Circular dated 9th December 1994 [as raised in ground D of the Petition], it was submitted that firstly, reliance on the said circular is misplaced since there is no proof nor foundation to establish (i) the veracity of the circular; (ii) the accuracy of the translation of the circular; and (iii) whether the circular is still applicable or was withdrawn. All of the above, being questions of fact would be required to be pleaded and proved. None of this has been done in the Petition.

41. It was argued that assuming whilst denying that the said circular as produced is genuine, even then, the circular would be of no relevance in interpreting the DTAA. It was submitted that the Respondents have expressly stated in its affidavit-in-reply dated 1st October 2025, that the UOI was not aware of any such circular until the mention of the circular in the Petition filed by the taxpayer in this case; the circular was not exchanged between the Competent Authorities of India and China, nor was it considered by the Indian tax authority, prior

to the signing of the India-China tax treaty; the circular itself does not mention anywhere that it is meant to document any tax treaty negotiation procedure as a common understanding between India and China; on the contrary, the circular clearly mentions that is aimed at "interpretation and implementation of certain provisions" of the India-China tax treaty. Additionally, the circular is directed at the State Taxation Bureau of each province, autonomous region, and municipality directly under the Central Government, and the State Taxation Bureau of each planned city in China. This is also borne out from the last sentence contained in the circular, according to which, these state/local authorities have been directed to report any problems in the implementation of the India-China DTAA in a timely manner. It follows, therefore, that the circular was never intended to be an understanding reached upon between the two Competent Authorities. It was submitted that in any event, as per the Vienna Convention on the Law of Treaties, which constitutes customary international law, a treaty should be interpreted in good faith and in accordance with the ordinary meaning of the terms in light of the object and purpose of the treaty. Any unilateral interpretative declaration by one of the Contracting Parties in respect of the provisions of the tax treaty that purports to alter or modify (directly or indirectly) the text, meaning, or legal effect of the

treaty provisions, is not binding, and cannot be imposed upon the other Contracting Party. In the present case, this is especially so given that the contents of the circular have not been endorsed/agreed to by the Indian tax authority, nor has the circular been notified in the Official Gazette. There is nothing on record to even remotely suggest that China's understanding or view in respect of the treaty provisions, as set out in the circular, is commonly shared by India.

42. In light of the above uncontroverted factual position, even assuming whilst denying the said circular to be genuine, and it being an accurate translation, the same would not be relevant nor applicable for the purposes of interpreting the DTAA.

43. With respect to the reliance placed by the Petitioner on the other DTAAs [as raised in ground E of the Petition], it was submitted that the same is neither apt nor relevant. It is trite law that each DTAA is based on political and diplomatic considerations. Hence, the language of each DTAA would be tailored to suit the position of the two countries involved. It is not a situation akin to a statute where one Parliament is drafting different laws and a comparison of the words in different statutes is being undertaken. As explained in ***Azadi Bachao's case***,

the considerations for a DTAA are political in nature. The same would be myriad and different in different contexts, and hence, cannot be equated. It was submitted that the reliance on the DTAAs with other countries or between other countries would thus not be relevant. The plain language being unambiguous qua its ordinary meaning ought to be given effect, bearing in mind the object and purpose of the DTAA. For all the aforesaid reasons, it was submitted that the arguments canvassed by the Petitioner were bereft of merit, and hence, the Writ Petition be dismissed.

ANALYSIS & FINDINGS:-

44. We have heard the learned counsel for the parties. We have also perused the papers and proceedings in the above Writ Petition. The first argument canvassed on behalf of the Respondents is that even assuming for the sake of argument that the services to be rendered by the Petitioner are to be physically rendered in India, even then, the facts of the present case would clearly establish that the services were physically rendered in India. This argument is canvassed on the basis that it is an admitted position that the services which were being rendered by the Petitioner to the *Benteler India* from China was

through email communications, conference calls and video conferencing etc. This, according to the Respondents, is an undisputed factual position. According to the Respondents since these services were being rendered virtually through interactive modes on video conferencing or conference calls or emails, the nature and manner in which the services were provided, as per the law prevailing in India, even if done virtually, equates to and is the same as a physical rendition of services in India.

45. At the outset, this argument, though at first blush appears attractive, does not carry much substance. To give a very simple answer to this argument is that why can it not be assumed that *Benteler India* received these services in China and not in India as sought to be contended by the Respondents. The services may have been rendered in the presence of each other, but by merely saying that because the services were rendered to the Indian entity virtually, would mean that the services were physically rendered in India by the Chinese entity would be too broad a proposition for us to accept. Without there being any specific provision, either in law or in the DTAA, we are unable to accept this broad proposition that because the services were rendered by the Petitioner to *Benteler India* virtually, the same amounted to the said services being rendered physically [to *Benteler India*] in India.

46. We find that the reliance placed by the Respondents on the judgments of ***Praful B. Desai (supra)***, ***Kishan Chand Jain (supra)***, ***Armin R. Panthaky (supra)*** and ***Ganesh Gouri Industries (supra)*** is of no assistance to the Respondents. In the case of ***Praful B. Desai (supra)***, the question for consideration before the Hon'ble Supreme Court was whether in a criminal trial, evidence can be recorded by video conferencing. This Court [Bombay High Court], on an interpretation of Section 273 of the Criminal Procedure Code, 1973 held that it cannot be done. The Hon'ble Supreme Court, whilst holding that this Court was incorrect, opined that there was a difference between virtual reality and video conferencing. It stated that video conferencing has nothing to do with virtual reality and that advances in science and technology have now, so to say, shrunk the world. To put it in a nutshell the Hon'ble Supreme Court held that video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away with the same facility and ease as if he is present before you i.e. in your presence. In fact, he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. The Hon'ble Supreme Court opined that in video conferencing, both parties are in the presence of each other.

The Hon'ble Supreme Court opined that once this is the case, it was clear that so long as the accused or his pleader were present when evidence was recorded by video conferencing, that evidence being recorded in the "presence" of the accused, would thus fully meet the requirements of Section 273 of the Criminal Procedure Code, 1973.

47. We fail to understand how this decision can be of any assistance to the Respondents. What the Hon'ble Supreme Court has held is that when video conferencing takes place between two persons they are in the presence of each other. This was the requirement of Section 273 of the Criminal Procedure Code, 1973 and looking at the advancement in science and technology, the Hon'ble Supreme Court opined that when evidence is recorded by video conferencing, it fulfills the requirement of the said evidence being recorded in the presence of the accused as contemplated under Section 273 of the Criminal Procedure Code, 1973. In the facts of the present case, the services in question can be said to have been rendered in the presence of each other because they were rendered through video conferencing. But it is a giant leap from there to say that the said services are physically rendered in India because they were rendered through video conferencing. As mentioned earlier, it could easily be construed that instead of the

services being physically rendered in India, it was *Benteler India* who went to China for the purposes of receiving the said services.

48. The next decision relied upon by the Respondents is the decision in the case of ***Kishan Chand Jain (supra)***. In this matter, the Petitioner invoked the jurisdiction of the Hon'ble Supreme Court under Article 32 of the Constitution of India seeking directions for better functioning of the State Information Commissioner under the Right to Information Act, 2005. Whilst giving certain directions, the Hon'ble Supreme Court opined that recent technological advancements in terms of video conferencing must be used to promote inclusion of people in remote areas within the fold of the justice delivery system. Physical Courts require the litigants and parties living in remote areas to travel long distances to appear before the Court. With increasing costs of travel and other related expenses, video conferencing solutions provide a cost effective and efficient alternative to the physical Courts. It is in this light that the Hon'ble Supreme Court stated that in more than one way, virtual Courts democratize a legal process by expanding the courtroom area beyond the walls of the courtroom. It therefore went on to hold that it was the constitutional duty of every adjudicatory institution, may it be courts, tribunals, or commissions to adopt

technological solutions such as video conferencing and make them available to litigants and the members of the Bar on a regular and consistent basis. We fail to see how this decision also is of any assistance to the Respondents. All that this decision states is that it is the duty of the every adjudicatory institution, may it be courts, tribunals or commissions to adopt technological solutions and advancements such as video conferencing and make them available to the litigants and the members of the Bar so as to ensure access to justice by obviating the need for citizens to travel long distances to secure the right of being heard. We, therefore, find that the reliance placed on this decision to substantiate the proposition that by virtue of the services being rendered virtually, they are physically rendered in India, is wholly misconceived.

49. The next decision relied upon is the decision of a Full Bench of this Court in the case of ***Armin R. Panthaky (supra)***. The issue before the Full Bench, to which one of us (B. P. Colabawalla, J.) was a party, was whether under the *Parsi Marriage and Divorce Act, 1936* the Court had the jurisdiction to direct or allow the recording of evidence before the Court Commissioner in terms of Order 14 Rule 4 of *Civil Procedure Code, 1908* (**CPC**). It is whilst deciding the aforesaid issue

that the Full Bench in paragraph 13, placing reliance on the decision of the Hon'ble Supreme Court in *Praful B. Desai (supra),* opined that technological advancements have provided Courts with viable alternatives to live testimony, mitigating logistical and emotional challenges, while maintaining key elements of fairness. Once again, we fail to understand how the decision of the Full Bench of this Court can be of any assistance to the Respondents. It is true that technological advancements have in fact provided Courts with viable alternatives to live testimony, mitigating logistical and emotional challenges while maintaining key elements of fairness. However, this does not in any way support the case of the Respondents that because services were rendered virtually (by the advancement of technology) the same are deemed to have been rendered physically in India by the Petitioner.

50. The last judgment on this aspect relied upon is the decision in ***Ganesh Gouri Industries (supra)*** of the Delhi High Court. As far as this decision is concerned, the Respondents relied upon the observations made in paragraph 57 thereof wherein the Delhi High Court observed that given the advancement in technology, having a virtual business in a jurisdiction would be akin to having a physical presence as was also observed by another Division Bench of the Delhi

High Court in *WWE Inc. V/S Reshma Collection [(2014) SCC Online Del (2031)]*. We are afraid one cannot take one stray sentence in a decision without first examining the context in which it was written. Before the Delhi High Court what the Court really examined was whether the Commercial Court was correct in dismissing the Appellant's application under Order 39 Rule 4 of the CPC and restraining the Appellants from selling, soliciting, exporting, displaying, advertising directly or indirectly, or dealing in any manner with the impugned label/trade dress colour scheme of the impugned marks. In fact, it was the case of the Appellant that the Commercial Suit filed in Delhi was an attempt of forum shopping since the said Suit was inextricably linked to the prior Suit filed in Nagpur. It was the case of the Appellants that the Suit filed in Delhi is the second Suit between the parties in relation to the alleged trademark infringement and the first Suit was filed in April 2018 by the Respondents alleging infringement of its trademark "PLASTO" against the Appellant. That Suit in Nagpur was settled vide a settlement agreement, and the Appellant was to only refrain from using the mark PLASTO or tagline similar to that of "PLASTO HAIN TO GUARANTEE HAIN" against Ganesh Gouri on account of their use of the mark "AQUA PLAST", along with the tagline "NAAM HI GUARANTEE MAIN". It was the case of the Appellant that having

obtained a compromise decree from the Court in Nagpur, both parties being registered and carrying on business in Nagpur, the Respondents choice of Delhi in filing a Suit was *ex facie* forum shopping. It is whilst deciding this issue that the Delhi High Court in paragraph 57 made the observations that given the advancement in technology, having a virtual business presence in a jurisdiction would be akin to having a physical presence. Once again, we find that this decision is of no assistance to the Respondents. In the facts of the present case without there being anything on record to show otherwise, it could equally be stated that by virtue of the services being rendered by the Petitioner to *Benteler India* through video conferencing, would mean that the said services were physically rendered in China and not in India.

51. In view of the foregoing discussion, we are unable to agree with the Respondents that because the services were being rendered by the Petitioner to *Benteler India* through video conferencing etc, the same were in fact rendered in India and not from China. This argument of the Respondents is therefore rejected.

52. The next question to be decided is whether the Assessing Officer correctly rejected the application filed by the Petitioner under

Section 197 of the IT Act for the issuance of a *"NIL withholding tax"* Certificate. To examine this issue, it would first be apposite to refer to the provisions of Section 197. Section 197 deals with the Certificate granted by the Assessing Officer for the deduction of TDS at a lower rate. Section 197 reads thus:-

> "*Certificate for deduction at lower rate.*
>
> *197. (1) Subject to rules made under sub-section (2A), where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194K, 194LA, 194LBA, 194LBB, 194LBC, 194M, 194-O, 194Q and 195, the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate.*
>
> *(2) Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be.*
>
> *(2A) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (1) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.*"

53. As can be seen from this section, subject to the rules made under sub-section (2A), where in the case of any income of any person, or sum payable to any person, income-tax is required to be deducted at

the time of credit, or at the time of payment at the rates in force under the provisions of the sections mentioned therein, the Assessing Officer is satisfied that the total income of the Petitioner justifies the deduction of income-tax at any lower rate or no deduction of income-tax, as the case may be, the Assessing Officer shall on an application made by the assessee in this behalf, give to him such Certificate, as maybe appropriate.

54. Under sub-section (2) of Section 197, once such a Certificate is given, the person responsible for paying the income shall, until the Certificate is cancelled, deduct income-tax at the rates specified in such Certificate or deduct no tax, as the case may be. Sub-section (2A) gives the power to the CBDT to frame rules specifying the cases in which, and circumstances under which, an application may be made for the grant of a Certificate under sub-section (1) and the conditions subject to which such Certificate may be granted and providing for all other matters connected therewith.

55. Pursuant to the aforesaid power given to the board, rules have been framed. What is relevant for our purposes is Rule 28AA as substituted by the Income-tax (Second Amendment) Rules, 2011, which

have come into force on 1st April 2011. Rule 28AA reads as under:-

> ***"Certificate for deduction at lower rates or no deduction of tax from income other than dividends.***
>
> ***28AA.*** *(1) Where the Assessing Officer, on an application made by a person under sub-rule (1) of rule 28 is satisfied that existing and estimated tax liability of a person justifies the deduction of tax at lower rate or no deduction of tax, as the case may be, the Assessing Officer shall issue a certificate in accordance with the provisions of sub-section (1) of section 197 for deduction of tax at such lower rate or no deduction of tax.*
>
> *(2) The existing and estimated liability referred to in sub-rule (1) shall be determined by the Assessing Officer after taking into consideration the following:-*
>
> > *(i) tax payable on estimated income of the previous year relevant to the assessment year;*
> >
> > *(ii) tax payable on the assessed or returned income, as the case may be, of the last three previous years;*
> >
> > *(iii) existing liability under the Income-tax Act, 1961 and Wealth-tax Act, 1957;*
> >
> > *(iv) advance tax payment for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28;*
> >
> > *(v) tax deducted at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28;*
> >
> > *and*
> >
> > *(vi) tax collected at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28.*
>
> *(3) The certificate shall be valid for such period of the previous year as may be specified in the certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified*

period.

(4) The certificate shall be valid only with regard to the person responsible for deducting the tax and named therein.

(5) The certificate shall be issued direct to the person responsible for deducting the tax under advice to the person who made an application for issue of such certificate."

(b) in rule 31A, in sub-rule (4), after clause (iv), the following clauses shall be inserted, namely:-

"(v) furnish particulars of amount paid or credited on which tax was not deducted in view of the issue of certificate of no deduction of tax under section 197 by the Assessing Officer of the payee;

(vi) furnish particulars of amount paid or credited on which tax was not deducted in view of the compliance of provisions of sub-section (6) of section 194C by the payee."

56. Sub-rule (1) of Rule 28AA clearly stipulates that where the Assessing Officer, on an application made by a person under sub-rule (1) of Rule 28 is satisfied that the existing and estimated tax liability of a person justifies the deduction of tax at a lower rate, or no deduction of tax, as the case may be, the Assessing Officer shall issue a Certificate in accordance with the provisions of sub-section (1) of Section 197 for deduction of tax at such lower rate or no deduction of tax.

57. Sub-rule (2) of Rule 28AA also gives guidance as to how the existing and estimated liability referred to in sub-rule (1) shall be determined by the Assessing Officer. One of the things that the

Assessing Officer has to take into consideration is the tax payable on the assessed or returned income, as the case may be, of the last three previous years.

58. Sub-rule (3) of Rule 28AA stipulates that the Certificate shall be valid for such period of the previous year as may be specified in the Certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified period.

59. In the facts of the present case, the Assessing Officer has given elaborate reasons as to why a *"NIL withholding tax"* Certificate under Section 197 cannot be issued to the Petitioner. We find that in the present factual scenario, the action of the Assessing Officer was fully justified. We say this for the simple reason that in the facts of the present case, for the previous assessment years also, it was the case of the Petitioner that by virtue of the provisions of India-China DTAA and more particularly Article 12(4) thereof, the Petitioner was not liable to pay any tax in India. This contention of the Petitioner was negated originally by the Assessing Officer as well as CIT (Appeals) or the DRP, and which issue is now pending before the ITAT. These details have been set out in the Writ Petition itself, and for the sake of convenience

are reproduced hereunder:-

A.Y.	Dispute Resolution Panel	CIT(A)	Tribunal
2015-16	-	Against Petitioner	Pending
2016-17	-	Against Petitioner	Pending
2017-18	-	Against Petitioner	Pending
2018-19	-	Against Petitioner	Pending
2019-20	Against Petitioner	-	Pending
2021-22	Against Petitioner	-	Pending
2022-23	Against Petitioner	-	Pending
2023-24	-	Pending	-

60. In the present case, the Certificate applied for under Section 197 by the Petitioner was explicitly on the basis that it is not liable to pay any tax in India. Once this issue is already pending before the Tribunal and authorities higher than the Assessing Officer have already taken the view that the Petitioner is liable to tax in India, and findings of those higher authorities have not been set aside and are holding the field even today, we are clearly of the view that the Assessing

Officer could not have issued any Certificate under Section 197 to the Petitioner, granting him a *"NIL withholding tax"* Certificate. In fact, if the Assessing Officer were to do so, he would be holding directly contrary to what authorities higher to him have already decided against the Petitioner.

61. In the facts of the present case, assessments have already been made in the Petitioner's own case for previous assessment years, holding them liable to pay tax in India. The challenge to those assessments is still pending before the ITAT. They have not yet been set aside. Therefore, in our considered view, the Assessing Officer correctly rejected the application filed by the Petitioner seeking a *"NIL withholding tax"* Certificate.

62. Mr. Sridharan, the learned Senior Advocate appearing for the Petitioner, sought to place reliance on the Forms to be filled out under Rule 28AA and sought to contend that in the facts of the present case, Rule 28 AA would not have any application because there was no liability to pay Income-tax since the tax has already been paid when the same was deducted at source by *Benteler India*. He has made elaborate submissions in this regard in the written submissions submitted by the

Petitioner.

63. We find that though a valiant attempt was made to justify as to why Rule 28AA would not apply, or that the Certificate has been wrongly refused, the fact of the matter remains that the authorities higher than the Assessing Officer have already ruled that the payment made by the *Benteler India* to the Petitioner for the services rendered by it to *Benteler India,* is taxable in India. Once this is the case, the Assessing Officer could not have issued any Certificate under Section 197 to the Petitioner, granting it a *"NIL withholding tax"* Certificate because if that was done, it would run in the teeth of the rulings given by the higher authorities in the Petitioner's own case for the earlier assessment years.

64. In fact, when one peruses Rule 28AA, the same itself contemplates that the existing and estimated liability referred to in Rule 28AA(1) shall be determined by the Assessing Officer after taking into consideration, *inter alia*, the tax payable on the assessed or returned income, as the case may be, for the last previous three years. In the Petitioner's own case, in the last three previous years, the authorities concerned, namely either CIT (Appeals) or Dispute Resolution Panel

(DRP) (both authorities being higher than the Assessing Officer), have already ruled at least in the three previous years, that payments made by *Benteler India* to the Petitioner for the services rendered by it to *Benteler India,* would be taxable in India. This is certainly one of the factors, and in our view, the most important factor to be taken into consideration before any Certificate is issued by the Assessing Officer under Section 197(1) of the IT Act.

65. All and all, we find that the impugned order dated 1st August 2025 passed by the Assessing Officer rejecting the application of the Petitioner for *"NIL withholding tax"* Certificate is unexceptionable and hence calls for no interference under Article 226 of the Constitution of India.

66. This now only leaves us to deal with the declaration sought by the Petitioner that the consideration received/receivable by the Petitioner from *Benteler India* pursuant to the service agreement (Exhibit 'B' to the Petition) is not taxable in India. Though we have noted elaborate arguments of both parties on this aspect of the matter, especially on the interpretation of the India-China DTAA, we are of the view that in the facts of the present case, it would not be prudent to give

any findings on the aforesaid issue.

67. We say this for the simple reason that this very issue is already pending in the Petitioner's own case for the previous assessment years before the ITAT. Even in the matters before the ITAT, it is the case of the Petitioner that it is not liable to pay any tax in India because of the provisions of the India-China DTAA and has sought refunds of the tax deducted at source by *Benteler India* in those respective assessment years. Since this issue is live and pending before the ITAT, we do not think that this is a fit case where we should exercise our jurisdiction under Article 226 of the Constitution of India, nor should we give any declaration one way or the other, whether the Petitioner is liable to tax in India or otherwise. Any declaration given by us on this issue would directly impact the appeals filed by the Petitioner for the previous assessment years, which are pending before the ITAT.

68. All the arguments that have been canvassed before us by the Petitioner as well as the Respondents in relation to the interpretation of the India-China DTAA can be canvassed by the respective parties before the ITAT, who shall, we are sure, after hearing the parties, give their findings thereon. In these circumstances, we

decline to enter upon this dispute between the parties and leave it to the ITAT to decide the aforesaid issue in the pending appeals of the Petitioner.

69. In view of the foregoing discussion, Rule is discharged and the Writ Petition is also disposed of. However, in the facts and circumstances of the case, there shall be no order as to costs.

70. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[AMIT S. JAMSANDEKAR, J.] **[B. P. COLABAWALLA, J.]**