Mumbai bench ITAT in rediff case on 5/9/2011 explaining CA Certificate importance in present regime of Sec. 195/Form 15CA & 15CB vis a vis PAYER AND PAYEE

However, what also follows from the above discussions is that, in order to examine whether a disallowance under section 40(a)(i) can be made, the first step is that the Assessing Officer has to examine whether the recipient of a payment has tax liability in respect of the remittance in question, and that aspect of the matter can only be examined when all the relevant details are duly furnished by the assessee. A certificate issued by chartered accountant, on which a lot of reliance is placed by the learned CIT(A), cannot be a conclusive determination of taxability in the hands of the recipient of income. In our considered view, such a chartered accountant's certificate is not a substitute for such a determination of taxability in the hands of the recipient by the Assessing Officer.

7. It is, in our considered view, essential to understand the nature of a chartered accountant's certificate on the basis of which foreign remittances are made...

In our humble understanding, so far as TDS under the revised procedure of making remittances to non-residents is concerned, the position is now like this. In case a person has to make a remittance to a non-resident, and he is of the view that the no TDS is warranted or tax is required to be deducted at a certain rate, he can approach an independent chartered accountant for certifying, in the prescribed format, the rate at which tax is to be deducted or that tax is not to be deducted, and make the remittance on the basis of such a certificate. Even this remittance on the basis of the chartered accountant's certificate is at assessee's own risk of consequences which follow the short deduction or non-deduction of tax at source. The assessee has to give an undertaking to that effect. However, as long as assessee's stand is at least supported by a chartered accountant's certificate, the assessee is at least allowed to make the remittance on that basis...

Under the revised scheme, the assessee can, subject to the support of a chartered accountant's certificate and furnishing of an undertaking extracted earlier in this order, first make the remittance and the finalization of withholding tax liability follows. All it does is that the real time control mechanism to ensure revenue collections from foreign remittance at the point of remittance, which was in the nature of steering control, is given up, though naturally with the right to take suitable remedial measures when any loss of revenue is caused by the tax-deductors. Nothing more than this paradigm shift in approach needs to be read into this scheme of things. It is not abandonment of the institution of AO (TDS) in favour of the professionals in accountancy practice.

Section 9

GVK Industries Ltd vs. ITO (Supreme Court) 371 ITR 453.

The assessee paid fees to a non-resident (NRC). The obligation of the NRC was to: (i) Develop comprehensive financial model to tie-up the rupee and foreign currency loan requirements of the project.(ii) Assist expert credit agencies world-wide and obtain commercial bank support on the most competitive terms. (iii) Assist the appellant company in loan negotiations and documentation with the lenders. The assessee claimed that as the fees were paid for services rendered outside India, the same were not chargeable to tax in India and that the assessee was under no obligation to deduct TDS u/s 195. However, the AO and CIT rejected the claim of the assessee. The High Court (228 ITR 564) held that the said payment was not assessable u/s 9(1)(i) but that it was assessable u/s 9(1)(vii). The assessee claimed that s. 9(1)(vii) was constitutionally invalid as it taxed extra-territorial transactions. However, this claim was rejected by the Constitution Bench of the Supreme Court in 332 ITR 130. On merits, the matter was remanded to the Division Bench of the Supreme Court. HELD by the Division Bench dismissing the appeal:

(i) **Re S. 9(1)(i)**: The NRC is a Non-Resident Company and it does not have a place of business in India. The revenue has not advanced a case that the income had actually arisen or received by the NRC in India. The High Court has recorded the payment or receipt paid by the appellant to the NRC as success fee would not be taxable under Section 9(1)(i) of the Act as the transaction/activity did not have any business connection. The conclusion of the High Court in this regard is absolutely defensible in view of the principles stated in **C.I.T. V. Aggarwal and Company** 56 ITR 20, **C.I.T. V. TRC** 166 ITR 1993 and **Birendra Prasad Rai V. ITC** 129 ITR 295;

(ii) **Re S. 9(1)(vii)**: The principal provision is Clause (b) of Section 9(1)(vii) of the Act. The said provision carves out an exception. The exception carved out in the latter part of clause (b) applies to a situation when fee is payable in respect of services utilized for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income from a source outside India.

(iii) **Re "Source Rule" in s. 9(1)(vii)**: On a studied scrutiny of the said Clause (b) of Section 9(1)(vii), it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The Clause further mandates and requires that the services should be utilized in India.

(iv) **Re "Source Rule" vs. "Residence Rule"**: The two principles, namely, "Situs of residence" and "Situs of source of income" have witnessed divergence and difference in the field of international taxation. The principle "Residence State Taxation" gives

primacy to the country of the residency of the assessee. This principle postulates taxation of world-wide income and world-wide capital in the country of residence of the natural or juridical person. The "Source State Taxation" rule confers primacy to right to tax to a particular income or transaction to the State/nation where the source of the said income is located. The second rule, as is understood, is transaction specific. To elaborate, the source State seeks to tax the transaction or capital within its territory even when the income benefits belongs to a non-residence person, that is, a person resident in another country. The aforesaid principle sometimes is given a different name, that is, the territorial principle. It is apt to state here that the residence based taxation is perceived as benefiting the developed or capital exporting countries whereas the source based taxation protects and is regarded as more beneficial to capital importing countries, that is, developing nations. Here comes the principle of nexus, for the nexus of the right to tax is in the source rule. It is founded on the right of a country to tax the income earned from a source located in the said State, irrespective of the country of the residence of the recipient. It is well settled that the source based taxation is accepted and applied in international taxation law.

(v) **Re meaning of the expression, managerial, technical or consultancy service in s. 9(1)(vii)**: The expression "managerial, technical or consultancy service" have not been defined in the Act, and, therefore, it is obligatory on our part to examine how the said expressions are used and understood by the persons engaged in business. The general and common usage of the said words has to be understood at common parlance. By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it. The word "consultancy" has been defined in the Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter.

(vi) **Re Facts**: On facts, the NRC had acted as a consultant. It had the skill, acumen and knowledge in the specialized field i.e. preparation of a scheme for required finances and to tie-up required loans. The nature of activities undertaken by the NRC has earlier been referred to by us. The nature of service referred by the NRC, can be said with certainty would come within the ambit and sweep of the term 'consultancy service' and, therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be taxable under the head 'fee for technical service'. Once the tax is payable paid the grant of 'No Objection Certificate' was not legally permissible. Ergo, the judgment and order passed by the High Court are absolutely impregnable.

210 Taxman 310/253 CTR 208

Bombay High Court in Commonwealth case on upfront appraisal (loan) fees Held to be not interest u/s 2(28A) or Technical Fees Under India UK DTAA/Act (Pure business income; taxable when PE/Business connection there); *The submission that the upfront appraisal fee constitutes fees for technical services within the meaning of those words in Article 13(4)(c) is unsustainable. The said fees did not constitute payment in consideration of the respondent rendering any technical or consultancy services to the applicant/borrowers. As we have noted earlier, the entire appraisal process was to enable the respondent to take a decision as to whether the credit facilities ought to be advanced to the applicants or* ***not. The respondent did not thereby or even while doing so, impart any technical or consultancy services to the applicants.*** *Understandably, the appellants were unable to indicate anything that even remotely suggested that during*

the appraisal or by the appraisal report, the respondent made available to the applicants or the borrowers, any technical knowledge, experience, skill, know-how or processes or that the same consisted of development and transfer of any technical plan or technical design. In fact, it was quite the contrary. The process involved the respondent appraising itself of various aspects of the applicant for the credit facilities which would obviously involve an appraisal of the applicants existing assets, tangible as well as intangible, including its technical knowledge, experience, skill, know-how and the quality of its processes and technical abilities. By no stretch of imagination can it be said that the respondent imparted to the applicants or the borrowers, any technical services, much less technical services of the nature referred to Article 13(4)(c) of the DTAA. 20. The Tribunal thus rightly upheld the findings of the CIT (Appeals) that the income on account of the upfront appraisal fees was business income and as the respondents did not have a permanent establishment in India, the same could not be charged to tax in India under Article 7 of the DTAA

IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on: 07.05.2015 Pronounced on: 27.05.2015 + ITA 95/2005

M/S. LUFTHANSA CARGO INDIA

The following two questions of law have to be answered in this appeal, under Section 260A of the Income Tax Act, 1961 (hereafter "the Act"):

1. Whether the Income Tax Appellate Tribunal (ITAT) has rightly interpreted the agreements between the assessee and non-residents and is right in holding that payments made by the assessee to the non-residents are not fee for technical services within the meaning of Section 9(1)(vii) of the Income Tax Act, 1961 so as to oblige the assessee to deduct tax at source under Section 195 of the Act from such payments?

2. Whether the ITAT was right in holding that payments made by the assessee fell within the purview of the exclusionary clause of Section 9(1)(vii)(b) of the Act and were not, therefore, chargeable to tax at source?

Mr. Rohit Madan, learned counsel for the revenue argues that the AO's finding that the assessee used sophisticated technical experience and skills of the personnel of the Technik in the process of repairs and overhaul carried out on the aircraft clearly showed that the services were technical in nature. It was argued that the assessee defaulted in not deducting tax before making payments in accordance with the provisions of Section 195(1) of the Act and therefore, it could not plead that the receipts in the hands of the non-residents is not chargeable to tax under the Act. Counsel also stressed that if the assessee was of the view that no tax was deductible on the payments made to foreign companies it should have made an application with the AO under Section 195(2) of the Act. Stating that Section 195(1) is concerned with "payment to non residents" and not with the taxability of the corresponding "income of the non-resident" it was argued that if the assessee defaulted by not having deducted tax at source at the time of payment, it cannot later argue that the corresponding income of the non-resident was not chargeable to tax. Learned counsel also relied on the concurrent findings of the CIT (A) that all payments made were in accordance with the Agreements signed by the Assessee with Technik. It was contended that payments for various services were specified in the Agreement on annual basis while other charges are on man hour basis. The charges were for specialized and sophisticated services which fell squarely within the ambit of "fees for technical services" as envisaged under Explanation 2 to Section 9(1)(vii) of the Act.

He drew our attention to the various findings recorded in the orders of the CIT (A). 13. Mr. Madan next submitted that to fall under the excepted category in Section 9 (1) (vii) (b), i.e *"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"*, there should be clinching evidence to establish that indeed the income is earned wholly out of India. It was argued that the CIT (A) held correctly that in terms of the agreement between the assessee and LCAG the latter only has priority over others in use of the aircraft. Crucially, there was no compulsion restricting the assessee to wet-leasing the aircraft to third parties. The lower authorities found that aircraft were wet-leased to LCAG and also to other parties. Therefore it could not be said that the revenues were earned wholly from a source outside India. The findings of the AO that since the income from leasing of aircrafts is assessed to tax in India, the source of income is situated in India were also highlighted.

14. Learned counsel stated lastly, that the amendment, with retrospective effect, of Section 9 and substitution of Section 9 (2) meant that such payments amounted to income in the hands of the non-resident Indians. The said amendment reads as follows: *"Section 9...(2) For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,- (i) the non-resident has a residence or place of business or business connection in India; or (ii) the non-resident has rendered services in India."* It was submitted that any doubts as to whether the assessee was obliged to deduct tax at source, is set at rest by virtue of Section 9 (2) which clarifies that income of a non-resident is deemed to arise in India and "shall be included in the total income of the non-resident" regardless of whether such entity has a place of business or business connection and the situs of services provided. *Assessee's contentions* 15. Mr. Ajay Vohra, learned senior counsel for the assessee, argued that the findings of the ITAT with respect to the nature of services, i.e they were not technical services is correct and should not be disturbed. It was submitted that the ITAT took pains to analyze the correspondence, invoices raised by Technik and the relevant clauses of the agreement with it. The service obtained from that entity was in line with Attachment C, which was concerned only with overhaul and repair.

16. It was urged that by reason of Section 5(2) of the Act, a non-resident is liable to tax in India in respect of all income from whatever source derived which – (a) is received or is deemed to be received in India by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to him in India during the year. Section 9 of the Act deems certain income to accrue or arise in India. Counsel submitted that the said provision prescribes that fees for technical services payable, *inter alia*, by a person resident in India is deemed to accrue or arise in India and, therefore, liable to tax in India in the hands of non-resident service provider. He relied on the Supreme Court judgment in *Ishikawajima – Harima Heavy Industries Ltd. v. DIT* 2007 (288) ITR 408 to say that to apply Section 9(1)(vii), services should not only be rendered in India, but also utilized in India. It was argued that to nullify the said decision Parliament enacted Explanation to Section 9(2) by Finance Act, 2007 which was again substituted by Finance Act, 2010 w.e.f. 1.06.1976. The effect of those amendments by enactment of Section 9(2) is to clarify beyond doubt that income by way of, *inter alia*, fees for technical services would be deemed to accrue or arise in India and consequently taxable in India, in the hands of the non-resident recipients, if the payer is a resident, irrespective of the situs of services, i.e. the place where the services are rendered.

17. Mr. Vohra said that Section 9(1)(vii) (b) of the Act provides an exception to the general source rule by providing that where the services rendered by the non-resident service provider (recipient of income) are utilized by the resident payer for purpose of earning income from any source outside India, then, in that situation, such fees would not be deemed to accrue or arise in India. It was highlighted that the Explanation to Section 9(2), added by Finance Act, 2010 w.e.f. 1.06.1976 merely clarifies the source rule, i.e., income is deemed to accrue or arise in India where the payer is an Indian resident and the situs of services, i.e. the place where services are performed is immaterial. The Explanation is not intended to take away the exception provided in clause (b) to Section 9(1)(vii) of the Act. The assessee submits that there is no conflict between the provisions of Explanation to Section 9(2) and clause (b) to Section 9(1)(vii) of the Act; the two provisions operate in different fields. Resultantly, the exception provided in Section 9(1)(vii) (b) of the Act is not taken away by the retrospective insertion of Explanation to Section 9(2) of the Act.

18. The assessee relied on Supreme Court judgment in *Sundaram Pillai v. Pattabiraman* 1985 (1) SCC 591 to highlight that the object of an Explanation to a statutory provision is to explain the meaning and intendment of the Act itself, where there is any obscurity or vagueness in the main enactment or to clarify the same so as to make it consistent with the dominant object which it seems to sub-serve. It cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming a hindrance in the interpretation of the same. Counsel lastly relied on the recent Supreme Court judgment interpreting Section 9(1)(vii) of the Act in *GVK Industries Ltd. v. ITO* 371 ITR 453. Explaining the interplay between Section 9(1)(vii) and the amendment made by Finance Act, 2007 and Finance Act, 2010 resulting in retrospective insertion of Explanation to Section 9(2) of the Act, the Court clarified that the exception provided in

terms of clause (b) to Section 9(1)(vii) was not overridden by insertion of Explanation to Section 9(2) of the Act and that for *"fees for technical services"* to be taxed in India, it is imperative that the payer is resident in India and that the services are utilized in India. As a sequitur, where the resident utilizes the services provided by the non-resident service provider for purpose of earning income from any source outside India, payment for such services is not deemed to accrue or arise in India and hence not taxable in India. The Supreme Court also dealt with the two principles, namely situs of residence and situs of source of income and pointed out that the "Source State Taxation" rule which confers primacy to right to tax a particular income or transaction to the State/nation where the source of the said income is located, is accepted and applied in international taxation law. In the said judgment, it was observed that *"deduction of tax at source when made applicable, it has to be ensured that this principle is not violated."*

Question No.1:

The ITAT, in the impugned order has returned a finding that the services provided by Technik did not fall within the expression "technical service" and that Section 9(1)(vii) did not apply at the threshold. To arrive at this conclusion, the ITAT held that the assessee had no say in the work done by Technik and did not know what kind of repairs were carried out and that none of its employees ever visited Technik‟s facility in connection with such work. The ITAT surmised that since what the assessee asserted is that the overall components are returned duly certified by Technik that it had carried out the prescribed repairs, along with warranty and tax, there was no technical assistance by providing managerial, consultancy or technical services. It concluded that Technik performed the entire work on *"an inanimate body without any involvement or participation of assessee's personnel"*. It also held that managerial or physical exertion by Techengineers on the assessee‟s components did not render such services managerial, technical and consultancy services within the meaning of Section 9(1)(vii)(d). 20. This Court is of the opinion that the ITAT was unduly influenced by all the regulatory compulsions which the assessee had to face. Besides international convention and domestic law that mandated aircraft component overhaul, the manufacturer itself – as a condition for the continued application of its warranty, and in order to escape any liability for lack of safety, required periodic overhaul and maintenance repairs. Unlike normal machinery repair, aircraft maintenance and repairs inherently are such as at no given point of time can be compared with contracts such as cleaning etc. Component overhaul and maintenance by its very nature cannot be undertaken by all and sundry entities. The level of technical expertise and ability required in such cases is not only exacting but specific, in that, aircraft supplied by manufacturer has to be serviced and its components maintained, serviced or overhauled by designated centres. It is this specification which makes the aircraft safe and airworthy because international and national domestic regulatory authorities mandate that certification of such component safety is a condition precedent for their airworthiness. The exclusive nature of these services cannot but lead to the inference that they are technical services within the meaning of Section 9(1)(vii) of the Act. The ITAT‟s findings on this point are, therefore, erroneous. This question is accordingly answered in favour of the Revenue.

Question No.2.

21. This question relates to the treatment of expenditure incurred by the assessee (i.e. the payments made) towards its activities outside India. Here, the assessee‟s submission was that the payment made fell within the exclusionary part of Section 9(1)(vii)(b) and was not affected by the Explanation to Section 9(2). The assessee stressed upon the fact that no foreign technician was deputed to work in India. The assessee‟s submission is that the source of its income is wet-leasing activity to non-resident companies and consequently the source of income is outside India. It is evident that Parliamentary endeavor –

through the later retrospective amendment, was to target income of non-residents. But importantly, the condition spelt out for this purpose was explicit: "*where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub- section (1), such income shall be included in the total income of the non-resident... whether or not,- (ii) the non-resident has rendered services in India."* The revenue urges that the fiction created by the said amendment is to do away with the requirement of the non-resident having a place of business, or business connection, irrespective of whether *"..the non-resident has rendered services in India."* Did this amendment make any difference to payments made to such companies – even in relation to income accruing abroad? The revenue grounds its arguments in the assumption that the later, 2010 retrospective amendment, overrides the effect of Section 9 (1) (vii) (b) exclusion. While no doubt, the explanation is deemed to be clarificatory and for a good measure retrospective at that, nevertheless there is nothing in its wording which overrides the exclusion of payments made under Section 9(1)(vii)(b). The Supreme Court clarified this in *G.V.K Industries* (supra): Thus, it is evident that the "source" rule, i.e the purpose of the expenditure incurred, i.e for earning the income from a source in India, is applicable. This was clearly stated by the Supreme Court, when it later held that: *"The exception carved out in the latter part of clause (b) applies to a situation when fee is payable in respect of services utilized for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income from a source outside India. On a studied scrutiny of the said Clause, it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The Clause further mandates and requires that the services should be utilized in India."* 25. In the present case, the ITAT held that the overwhelming or predominant nature of the assessee‟s activity was to wet-lease the aircraft to LCAG, a foreign company. The operations were abroad, and the expenses towards maintenance and repairs payments were for the purpose of earning abroad. In these circumstances, the ITAT‟s factual findings cannot be faulted. The question of law is answered in favour of the assessee and against the revenue.

Comments: Following rulings are not considered in above said order:

- ***a) Delhi high court decision in case of Havells's on source concept;***
- ***b) Delhi high court decision in case of Panalfa Ltd on meaning of words "technical" "managerial" and "consultancy"***
- ***c) Impact of DTAA/Treaty and word "make available" and case laws thereon;***

Refer:

i) Madras High Court in ***CIT v. Aktiengesellschaft Kuhnle Kopp & Kausch W. Germany By BHEL***, (2003) 262 ITR 513.

ii) Chennai ITAT in DCIT vs Hofincons Infotech & Industrial Services (P Ltd citation **152 ITD 249**

iii) M/s. Ajapa Integrated Project Management Consultant Pvt. Ltd., Chennai (24 taxmann.com 16) (Chennai)

iv) ITAT Chennai Bench in the case of Mahindra Holidays & Resorts India Ltd. vs. JCIT (38 taxmann.com 207) (Chennai)

"When assessee is marketing its time share unit abroad, without doubt, the business is being carried on outside India in respect of such time share units and the income earned is also from a source outside India. Franchisees are also earning their income by virtue of marketing the time share units of the assessee abroad. The franchisees were also therefore, earning income in the course of their business or profession carried abroad. Thus, whether we consider "such persons" to be the non-resident entity or to

be the assessee in India, it means that as long as the fees were for service utilized in a business or profession, carried outside India, it could not be treated as income chargeable to tax"

v) **Chennai bench B ITAT in case of M/s Capricorn Food Products India Limited (29.08.2013) in ITA 1247/Mds/2013:"** *In any case, sub-clause (b) of clause (vii) of Section 9(1) of the Act clearly mentions that fees paid in respect of services utilized in a business or profession carried on by such person outside India or for the purpose of making or earning income from any source outside India, would not come within the purview of income by way of fees for technical services. Addition of Explanation to sub-section (2) to Section 9 through Finance Act, 2010 with retrospective effect from 1.6.1976 will therefore have no effect on taxability of income earned by non-resident outside India in the course of his business or profession carried out outside India by him. There is no case for the Revenue that the foreign agents were not engaged in a business ofearning commission by canvassing market overseas."*

vi) ***Delhi High Court in case of Havells (contra) and adverse view on source concept***

vii) ***Mumbai Bench of ITAT in Bajaj Hindustan Limited ITA NO.63/MUM/09(2007-08) 03/08/2011***

IN THE HIGH COURT OF DELHI AT NEW DELHI
Reserved on: 17.03.2015
Pronounced on: 29.05.2015

ITA 325/2014

M/S. GRUP ISM P. LTD

The following questions of law were framed by this Court at the time of admission of this appeal under Section 260A of the Income Tax Act, 1961 ("the Act"):

(1) Did the ITAT fall into error in holding that the payment incurred by the assessee to the extent of ₹ 94,31,826 to the UAE concerns was not technical service in terms of Second Explanation to Section 9 (1) (vii) read with Section 194J?

(2) Did the ITAT fall into error in holding that Article 14 of the Double Taxation Avoidance Treaty applied to the UAE concerns in the circumstances of the case?

Question No. 1:
11. At the outset, it would be apt to quote the relevant parts of Section 9(1)(vii), which read as follows:

—9. (1) The following incomes shall be deemed to accrue or arise in India:—
...
(vii) income by way of fees for technical services payable by—
...

(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 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 construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head _Salaries'.//

12. The revenue contends that the remittances in question, made by the assessee (a resident) to the two UAE entities (non-residents), come within the scope of Section 9(1)(vii)(b).It is not in dispute that the two exceptions to the applicability of Section 9(1)(vii)(b), enumerated in the said sub-clause itself, do not apply in this case. The only dispute between the assessee and revenue concerns the interpretation of the phrase „fees for technical services", as defined in Explanation 2 to Section 9(1)(vii).

13. Explanation 2 defines „fees for technical services" to mean managerial, technical or consultancy services. Revenue contends that the services for which the assessee remitted the sums to CGS International and Marble Arts & Crafts classify as „consultancy services". This Court does not accept the revenue"s submissions, and in light of the thorough determination carried out by the CIT(A), upheld by the ITAT, affirms their view.

Nature of services rendered by the UAE Entities

16. This Court, in its recent ruling in *Director of Income Tax v. Panalfa Autoelektrik Ltd.*, (2014) 272 CTR 117 discussed the meaning of the phrase „consultancy services" as employed in Explanation 2 to Section 9(1)(vii). The Court noted as follows:

—20. The moot question and issue is whether the non-resident was providing consultancy services. In other words, what do you mean by the term "consultancy services"? This Court in Bharti Cellular Limited and Others (supra) had referred to the term "consultancy services" in the following words:-

"14. Similarly, the word "consultancy" has been defined in the said Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as "ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval from for a proposed action". It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant."

The AAR in the case of In Re: P.No. 28 of 1999, reported as [1999] 242 ITR 208 had observed:- "By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it."

21. The word 'consultant' refers to a person, who is consulted and who advises or from whom information is sought. In Black's Law Dictionary, Eighth Edition, the word 'consultation' has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It may mean a meeting in which parties consult or confer. For consultation service under Explanation 2, there should be a provision of service by the non-resident, who undertakes to perform it, which the acquirer may use. The service must be rendered in the form of an advice or consultation given by the non-resident to the resident Indian payer.//

(emphasis supplied)

Subsequent to the decision in *Panalfa Autoelektrik (supra)*, the aforesaid definitions were also adverted to by the Supreme Court in *GVK Industries Ltd. v. ITO*, (2015) 371 ITR 453.

17. Gauged from the above excerpts, it is evident that „consultancy services" would mean something akin to advisory services provided by the non-resident, pursuant to deliberation between parties. Ordinarily, it would not involve instances where the non-resident is acting as a link between the resident and another party, facilitating the transaction between them, or where the non-resident is directly soliciting business for the resident and generating income out of such solicitation. Indeed, as held by this Court in *Panalfa Autoelektrik (supra),* since Section 9 is a deeming provision, the interpretation cannot be overly broad in nature.

It is evident that in the transaction between the assessee and Marble Arts & Crafts, the former (non-resident) acted as an agent of the assessee for the purposes of the latter‟s dealings with the Works Department, Abu Dhabi, which included coordinating with the authorities in the said department and handling invoices for the assessee. As far as CGS International is concerned, it acts as a liaisoning agent for the assessee, and receives its remuneration from each client that it successfully solicits for the assessee. Facially, such services cannot be said to be included within the meaning of „consultancy services‟, as that would amount to unduly expanding the scope of the term „consultancy‟. Therefore, this Court does not accept the revenue‟s contention that the services provided were in the nature of „consultancy services‟. Consequently, the remittances made by the assessee would not come within the scope of the phrase „fees for technical services‟ as employed in Section 9(1)(vii) of the Act. This question is answered against the revenue and in favour of the assessee.

Question No. 2

20. This question involves a determination of whether the services provided by the UAE entities are in the nature of „independent personal services‟ defined in Article 14 of the DTAA. Article 14, to the extent relevant here, reads as follows:

—1. Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character shall be taxable only in that State...
2. The term "professional services" includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.//

21. The two requirements for the applicability of Article 14, as applied in this case, are: a) income must be of a resident of the Contracting State (herein, UAE); and b) income must be in respect of professional services or other independent activities of a similar character. Article 4(1)(b) of the DTAA defines „resident of a contracting state‟ in the context of UAE to mean any *person* who under the laws of that State is liable to tax therein. Article 3(e) defines „person‟ to include a company. Therefore, the CIT(A) rightly rejected the revenue‟s contention that Article 14 is inapplicable for the reason that the services in question were provided by companies, as opposed to individuals. As to whether Article 14 applies to the nature of services provided by CGS International and Marble Arts & Crafts, the CIT(A) observed as follows:

—In the DTAA with UAE, there are Article (sic) to consider assessability of income from immovable property (Article 6), business profit (Article 7), shipping (Article 8), associated enterprise (Article 9), dividends (Article 10), interest (Article 11), royalties (Article 12), capital gains (Article 13), Independent personal services (Article 14), dependent personal services (Article 15) etc. There is no clause or Article governing payment for the so called technical services as in other DTAAs i.e. Article 13 of DTAA with UK or Article 12 of DTAA with Singapore. In view of the fact that the non residents do not have any permanent establishment within the meaning of Article 5 of DTAA in India, the remittances to them could only have been considered under Article 14 or Article 22 of DTAA. Under Article 14 of DTAA, the consideration paid to the non-resident is liable to be taxed in the contracting state i.e. UAE. In case remittances are considered as other income under Article 22 of the DTAA, it would also be taxable in the contracting state i.e. UAE.//

22. This Court agrees with the CIT(A)‟s approach, quoted above.

Since the income of CGS International and Marble Arts & Crafts can only be classified under Article 14 or Article 22 of the DTAA – both of which provide that the income shall be taxable in the State of residence (UAE)–the issue as to whether the services provided by the two UAE entities fall within the scope of „professional services‟ under Article 14 is irrelevant to the outcome of this case. Their incomes would necessarily be taxable in UAE, whether by virtue of Article 14 or Article 22. For this reason as well, the assessee was not obligated to deduct tax on the remittances made to CGS International and Marble Arts & Crafts. The second question is answered accordingly.

23. Thus, both questions of law are answered against the revenue and in favour of the assessee. Consequently, the appeal is dismissed. No costs.

Refer on Independent Personal Services (latest trends) Article 14 /15 of DTAA/Treaty

i) **Mumbai ITAT detailed order in case of Bennet Coleman & Co, Pvt Ltd 152 ITD 331**

ii) **Chennai ITAT in case of Wheels India Limited**

IN THE INCOME TAX APPELLATE TRIBUNAL 'D' BENCH: CHENNAI I.T.A. No. 2136/Mds/2010
Assessment Year: 2007 M/s. Wheels India Ltd., Padi, Date of Pronouncement: 26-11-2013

Revenue has assailed the order of CIT (Appeals) primarily on Deleting the dis-allowance made by the Assessing Officer u/s 40(a)(ia) in respect of legal charges paid to M/s. Reed Smith, LLP, USA. With regard to third issue raised in the grounds of appeal in respect of legal charges paid to M/s. Reed Smith, LLP, USA, the ld.DR submitted that the assessee neither approached the department u/s.195(2) before remitting the above payments to non-residents nor filed the prescribed undertaking and the certificate from the Chartered Accountant. As far as payment of legal fee to M/s. Reed Smith, LLP, USA, the ld. Counsel submitted that the legal charges have been paid for the services rendered outside India and the recipients of fees do not have any permanent establishment in India. Therefore, no dis-allowance u/s 40(a)(i) is warranted. In order to support his contentions the ld. Counsel relied on the order of Mumbai Bench of the Tribunal in the case of Maharashtra State Electricity Board Vs. DCIT reported as 90 ITD 793 (Mum) and GE India Technology P. Ltd. Vs. CIT reported as 327 ITR 456 (SC). In the Fourth ground of appeal, the assessee has raised objection in deleting the dis-allowance made by the Assessing Officer u/s 40(a)(ia) in respect of legal charges paid to M/s. Reed Smith, LLP, USA without deduction of tax at source. It is a well settled law that, if the payments are made for professional services rendered abroad and the party does not have any permanent establishment in India, the tax is not to be deducted at sources. Moreover, as per article 15 of DTA agreement between India and USA, the professional services rendered by the lawyers in USA are chargeable only in USA unless they have a fixed base regularly available in India or has stay in India exceeding ninety days in the taxable year. In the present case, the foreign party has confirmed that they do not have any permanent establishment in India nor it is a case where they stay in India is more than ninety days as aforesaid. Accordingly, for the services rendered by the foreign law firm outside India there is no question of deduction of tax on the payments made. Accordingly, this ground of appeal of the Revenue is also dismissed. ***(Also see citations at 154 TTJ 537: 318 ITR 237 Clifford chance)***

iii) **India Morocco DTAA Payment of legal consultancy fees for initiating and/or prosecuting anti counterfeiting proceedings Applicability of Article 14 Independent Personal Services vs Applicability of Article 12 Held Article 14 read with Article 4 is applicable and that payment is not taxable in india in absence of fixed base in India (Kirloskar Proprietrary Ltd vs DCIT 2015 54 Taxmann.com 344) Pune Tribunal**

iv) **Panaji Bench Cedrick Jordan Da Silva (2014) 62 SOT 239**

v) **Hyd bench ITAT in case of Cyient Limited (ITA 1450,1452,/Hyd/2013) order dated 25/03/2015 (payment to US Law firm for assistance in takeover of a company) India USA DTAA Article 15 applied**

vi) (Also see citations at 154 TTJ 537: 318 ITR 237 Clifford chance)

Refer on same lines: (FTS Clause absent in DTAA like in India UAE DTAA; India Phillphines DTAA; India Thailand DTAA etc))

i) **Bangalore bench of ITAT in IBM India Private Limited (India Phillipines DTAA) for business information services, work force management services (ITA 489 to 498/Bang /2013)**

ii) **Andaman sea foods Kolkta Tribunal 2012 (18) ITR (Tribunal) 509 (Kol)**

iii) **Mumbai ITAT in BNP Paribas SA vs DCIT (ITA 8693/Mum/1995) (India UAE treaty)**

iv) **Bang ITAT in Spice Telecom (2008) 113 TTJ 502 (Bang) (SB)**

v) ***Assistant Commissioner of Income Tax Vs. Viceroy Hotels Ltd. reported as 18 ITR (Trib) 282 (Hyderabad).(India Thailand DTAA)***

vi) ***Bangkok Glass Industry Co. Ltd. Vs. Assistant Commissioner of Income Tax reported as 257 CTR (Mad) 326. (India Thailand DTAA)***

vii) **Mc Kinsey cases (below) ITA No. 5452/Mum/2014 Assessment Year: 2011-12 (13.02.2015)**

M/s. McKinsey Business Consultants Sole Partner Limited Liability Company MEPE Date of Order : 13.02.2015

[2015] 54 taxmann.com 300 (Mumbai-Trib.)

Before us, learned senior counsel, Shri Porus Kaka submitted that there is no FTS clause in the Indo-Greece DTAA and therefore, such an income if at all can be taxed as business income under Article 3. However, such a business income can be taxed as business income under Article 3, only when assessee has a permanent establishment in India. Admittedly assessee does not have permanent establishment in India, therefore, the amount received by the assessee for rendering of services cannot be taxed in India. He further submitted that in the group cases of the assessee, the Tribunal in series of decisions, in the context of other DTAA's, where FTS clause is enshrined have held that, it is not fees for technical services, as and there is no make available of technical knowhow etc. In the context of Indo-Thailand Treaty and IndiaIndonesia Treaty where there is no FTS clause, the Tribunal has held that it is to be treated as business income. Since, assessee does not have any permanent establishment, then it cannot be taxed in India. He specifically drew our attention to the decision of ITAT Mumbai Bench in the case of McKinsey and company (Thailand), ITA No. 7624/Mum/2010, order dated 10.07.2013. Thus, the issue involved is squarely covered in favour of the assessee. 5. On the other hand Ld. DR strongly relied upon the order of the DRP as well as order of the AO. 6. We have heard the rival submissions and also the relevant findings given in the impugned order. The sole issue arising in this appeal is, whether the fees for borrowed services rendered by the assessee is taxable in India as FTS or not. The assessee's case is that in absence of FTS clause in the India-Greece DTAA, the fees received by the assessee is nothing but business income, which falls within the ambit of business profit under Article 3 of Indo-Greece DTAA. Since, such a business profit can only be taxed as is attributable to the permanent establishment, therefore, in this case when there is no permanent establishment the said business income cannot be taxed in India. On the other hand department's case is that Article 17 provides that the domestic law will govern the assessment and taxation of income wherever, there is no provision in the treaty, accordingly, the said income is to be taxed as FTS under section 9(1)(vii) of the Indian Income-tax Act. A bare perusal of Article 17 makes it abundantly clear that it deals with residual items of income which are not covered by any of the articles of the treaty. However, in this case the assessee has earned income by rendering the services in the course of its business and therefore, it is nothing but business profit which is covered under Article 3. Admittedly the assessee does not have PE in India the same cannot be held to be taxed in India as per the express provision of Article 3. Exactly similar nature of case has been dealt by the Tribunal in the case of McKinsey company, (Thailand). Since, similar provisions are

appearing in Indo-Greece DTAA, we hold that the fees received by the assessee cannot be taxed in India as FTS. Accordingly ground 1 to 4 raised by the assessee as treated as allowed.

Hon'ble Madras High Court in the case of *CIT vs. Faizan Shoes Pvt. Limited* reported as *367 ITR 155 (Mad).;* •

Delhi High court EON case 246 CTR 40 & (329 ITR 9); Allahabad high court Model Exim (2013) 358 ITR 72;

Bombay high court in Terracom and Chriag Mahesh Bhakta (2014 orders)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION INCOME TAX APPEAL NO. 1073 OF 2012 *The Commissioner of Income Tax21 … Appellant v/s Shri Chirag M. Bhakta … Respondent*

The revenue approached the Tribunal against the order of the Commissioner of Income Tax (Appeals) by urging that the said Commissioner has erred in deleting the disallowance made by the Assessing Officer under Section 40(a)(i) of commission payment of Rs.59,94,757/to one Mahendra Singh Jamnadas for not deducting tax at source. The revenue pointed out that the commission payment was made for services rendered in India and hence Section 9 is squarely applicable. The commission payment has been made for services and which fall within the purview of the provision, namely, Explanation 2 under Section 9(1)(vii) of the Act. In dealing with this argument, the Tribunal, after perusal of the entire record including the agreement in question, pointed out that the assessee was paying similar commission in earlier years and there was no such disallowance. The issue of T.D.S. never arises as the said person has no permanent establishment in India. The amount was not taxable as the services were not rendered in India. In para 6 of the order passed by the Tribunal, it has referred to the appointment order and also the entire record. The nature of the services rendered have also been considered. It is in these circumstances that there was no conclusion that the matter does not fall within the purview of the Explanation 2 and as urged before us. These are matters fully covered by the same, that the services rendered are of the nature, namely, looking after sales, creditworthiness of buyers and overseeing the payment to assessee in the business of export of cycle and cycle parts. In such circumstances, the concurrent findings of fact are consistent with the material produced including the agreement. They do not give rise to any substantial question of law, much less, as framed in the present appeal. The appeal is, therefore, devoid of any merits and,

therefore, stands dismissed.

----Taxability in India--Fees for technical services--Resident of Sri Lanka appointed as â€œresident executiveâ€ for Indian branch of U. K. entity for promotion of sales and brand name of employer in Sri Lanka--Job description fitting in with marketing executive not technical service--Payments made by remittance to bank account in Sri Lanka--Services rendered outside India by non-resident--Payments of remuneration and reimbursement of expenses not taxable in India--Income-tax Act, 1961, s. 9(1)(vii)--Double Taxation Avoidance Agreement between India and Sri Lanka, art. 14-- ***Oxford University Press , In re*** **364 ITR. . . 251**

Art. 7 **--Deduction of tax at source--Non-resident--Taxability in India--Non-resident agent of artistes in foreign countries engaged by assessee to bring foreign artistes to perform in India--No participation of agent in event organised by assessee as an artiste--Agentâ€™s commission not taxable in India--** ***Director of Income-tax (International Taxation)*** **v.** ***Wizcraft International Entertainment P. Ltd.*** **(Bom) . . 364 ITR . 227**

I*N THE HIGH COURT OF DELHI AT NEW DELHI + ITA No. 292/2014 Reserved on : 22nd July, 2014 % Date of Decision : 18th September, 2014 DIRECTOR OF INCOME TAX (INTL. TAX.)-II ....Appellant* *Versus* ***PANALFA AUTOELEKTRIK LTD***

"Whether the ITAT was right in holding that the commission paid to M/s. Agenta World Trading and Consulting Establishment for procuring export orders, is not fee for technical services under Section 9(i)(vii) of the Income Tax Act, 1961?i *n view of the aforesaid discussion, the substantial question of law mentioned above has to be answered in favour of the respondent-assessee and against the appellant-Revenue*

IN THE HIGH COURT OF DELHI AT NEW DELHI + ITA No. 292/2014 Reserved on : 22nd July, 2014 % Date of Decision : 18th September, 2014

DIRECTOR OF INCOME TAX (INTL. TAX.)-II ….Appellant
Versus **PANALFA AUTOELEKTRIK LTD**

272 CTR (Del) 117,

"Whether the ITAT was right in holding that the commission paid to M/s. Agenta World Trading and Consulting Establishment for procuring export orders, is not fee for technical services under Section 9(i)(vii) of the Income Tax Act, 1961?

In order to appreciate the controversy, we would first like to refer and interpret Sections 5(2), 9(1)(i) and 9(1)(vii) of the Act, though, the Assessing Officer in the present case had not invoked Section 9(1)(i) of the Act.

Section 5(2) states that total income of a person, who is a non-resident, includes income from all sources which (a) is received or deemed to be received in India in such year by or on behalf of such person; (b) accrues or arises in India; or (c) is deemed to accrue or arise in such year in India. Explanation 1 of the aforesaid section clarifies that income accruing or arising out of India shall not be deemed to be received in India by reason of the fact that it is taken into account in a balance sheet prepared in India. We are required to decide, whether the commission paid to non-resident would be income deemed to be earned in India. Section 9, as is clear from the heading itself, does not deal with income which is received or accrued or has arisen in India but deals with income which does not fall under any of the aforesaid categories. Section 9 creates a deeming fiction of income which is not received in India or accrues or arises in India but is deemed to accrue or arise in India. While interpreting a deeming clause, the courts have to be cautious that they should not expand the scope beyond what is mandated and required by the deeming clause. The deeming clause by its very nature enacts a fiction to treat what is unreal as real and, therefore, unless the situation is covered under the language of the provision, its scope should not be expanded and widened beyond what is clearly apparent and perceivable. In such cases, purpose should be ascertained why the legal fiction is created and then full effect should be given to it without being boggled down or bidden when it comes to the inevitable corollaries, because we imagine the unreal as real. Section 9(1)(i) brings to tax income of a non-resident accruing or arising, whether directly or indirectly, through and from any business connection in India, or through or from any property in India etc. What is meant by „business connection" has been interpreted by the Supreme Court in the case of ***CIT, Punjab versus R.D. Aggarwal and Co.*** [1965] 56 ITR 20 and subsequently in ***Barendra Prasad Ray versus ITO*** [1981] 129 ITR 295. We need not dwell on the said aspect in detail for several reasons, though Circular No. 23 dated 23rd July, 1969 issued by the Central Board of Direct Taxes would not be applicable as it stands withdrawn with effect from 22nd October, 2009 vide Circular No.7 of 2009. Firstly, the Assessing Officer had not invoked the said provision; secondly, as per Explanation 1 clause (a) to Section 9, in case of a business of which all operations are not carried out in India, only such part of income as is reasonably attributable to the operations carried out in India is deemed to be accrued or arisen in India under clause 9(1)(i). In the present case, clause (b) to Section 9(1)(vii) would be applicable as the respondent-assessee, the payer was a resident of India. The exceptions carved out under clause (b) are not applicable as it is not the case of the respondent-assessee that the fee paid was in respect of services to be utilised in business or profession carried out by the payer outside India, or for the purpose of making or earning of any income from any source outside India. The respondent-assessee"s manufacturing unit was in India and it would be proper to hold that the source of income would be the manufacturing unit of the respondent-assessee in India, even if the sale proceeds were on account of exports.

The main question and issue, which would arise is whether the payment made to the non-resident would be covered under the expression, “fee for technical services” as defined in Explanation 2 quoted above. There are three categories of technical services as per Explanation 2; managerial services, technical services and consultancy services, and it includes provisions for services of technical and other personnel albeit there are specific exclusions, but we are not concerned with the same in the present appeal. 14. The expressions “managerial, technical and consultancy services” have not been defined either under the Act or under the General Clauses Act, 1897. The said terms have to be read together with the word „services‟ to understand and appreciate their purport and meaning. We have to examine the general or common usage of these words or expressions, how they are interpreted and understood by the persons engaged in business and by the common man who is aware and understands the said terms.

The expression “management services” was elucidated upon by this Court in ***J.K. (Bombay) Limited versus CBDT and Another***, [1979] 118 ITR 312 in the following terms:- “6. It may be asked whether management is not a technical service. According to an Article on “Management Sciences”, in 14 Encyclopaedia Britannica 747, the management in organisations include at least the following: “(a) discovering, developing, defining and evaluating the goals of the organization and the alternative policies that will lead toward the goals, (b) getting the organization to adopt the policies, (c) scrutinizing the effectiveness of the policies that are adopted, (d) initiating steps to change policies when they are judged to be less effective than they ought to be.” Management thus pervades all organisations. Traditionally administration was distinguished from management, but it is now recognised that management has a role even in civil services. According to the Fontana Dictionary of Modern Thought, page 366, management was traditionally identified with the running of business. Therefore, management as a process is practised throughout every organization from top management through middle management to operational management.” Recently this Court in ***CIT versus Bharti Cellular Limited and Others***, [2009] 319 ITR 139 had observed:- “The word "manager" has been defined, inter alia, as: "a person whose office it is to manage an organization, business establishment, or public institution, or part of one; a person with the primarily executive or supervisory function within an organization, etc., a person controlling the activities of a person or team in sports, entertainment, etc." It is, therefore, clear that a managerial service would be one which pertains to or has the characteristic of a manager. It is obvious that the expression "manager" and consequently "managerial service" has a definite human element attached to it. To put it bluntly, a machine cannot be a manager.” Reference can be also made to the decision of the Authority for Advance Rulings in ***In Re***: ***Intertek Testing Services India Private Limited***, [2008] 307 ITR 418, wherein it was elucidated:- “First, about the connotation of the term “managerial”. The adjective “managerial” relates to manager or management. Manager is a person who manages an industry or business or who deals with administration or a person who organizes other people‟s activity [New Shorter Oxford Dictionary]. As pointed out by the Supreme Court in R. Dalmia v. CIT [1977] 106 ITR 895, “management” includes the act of managing by direction, or regulation or superintendence. Thus, managerial service essentially involves controlling, directing or administering the business.”

The moot question and issue is whether the non-resident was providing consultancy services. In other words, what do you mean by the term “consultancy services”? This Court in ***Bharti Cellular Limited and Others*** (supra) had referred to the term “consultancy services” in the following words:- “14. Similarly, the word “consultancy” has been defined in the said Dictionary as “the work or position of a consultant; a department of consultants.” “Consultant” itself has been defined, inter alia, as “a person who gives professional advice or services in a specialized field.” It is obvious that the word “consultant” is a derivative of the word “consult” which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as “ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval from for a proposed action”. It is obvious that the service of consultancy also necessarily entails human intervention. The

consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant." The AAR in the case of ***In Re: P.No. 28 of 1999***, reported as [1999] 242 ITR 208 had observed:- "By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it."

21. The word „consultant" refers to a person, who is consulted and who advises or from whom information is sought. In Black"s Law Dictionary, Eighth Edition, the word „consultation" has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It may mean a meeting in which parties consult or confer. For consultation service under Explanation 2, there should be a provision of service by the non-resident, who undertakes to perform it, which the acquirer may use. The service must be rendered in the formof an advice or consultation given by the non-resident to the resident Indian payer.

The OECD Report on e-commerce titled, *Tax Treaty Characterisation Issues arising from e-commerce: Report to Working Party No.1 of the OECD Committee on Fiscal Affairs* dated 01st February 2001, has elucidated:- "*Technical services* 39. For the Group, services are of technical nature when special skills or knowledge related to a technical field are required for the provision of such services. Whilst techniques related to applied science or craftsmanship would generally correspond to such special skills or knowledge, the provision of knowledge acquired in fields such as arts or human sciences would not. As an illustration, whilst the provisions of engineering services would be of a technical nature, the services of a psychologist would not. 40. The fact that technology is used in providing a service is not indicative of whether the service is of a technical nature. Similarly, the delivery of a service via technological means does not make the service technical. This is especially important in the e-commerce environment as the technology underlying the internet is often used to provide services that are not, themselves, technical (*e.g.* offering on-line gambling services through the internet).

41. In that respect, it is crucial to determine at what point the special skill or knowledge is used. Special skill or knowledge may be used in developing or creating inputs to a service business. The fee for the provision of a service will not be a technical fee, however, unless that special skill or knowledge is required when the service is provided to the customer. For example, special skill or knowledge will be required to develop software and data used in a computer game that would subsequently be used in carrying on the business of allowing consumers to play this game on the internet for a fee. Similarly, special skill or knowledge is used to create atroubleshooting database that customers will pay to access over the Internet. In these examples, however, the relevant special skill or knowledge is not used when providing the service for which the fee is paid, *i.e.* allowing the consumer to play the computer game or consult the troubleshooting database. 42. Many categories of e-commerce transactions similarly involve the provision of the use of, or access to, data and software (see, for example, categories 7, 8, 9, 11, 13, 15, 16, 20 and 21 in annex 2). The service of making such data and software, or functionality of that data or software, available for a fee is not, however, a service of a technical nature. The fact that the development of the necessary data and software might itself require substantial technical skills is irrelevant as the service provided to the client is not the development of that data and software (which may well be done by someone other than the supplier) but rather the service of making the data and software available to that client. For example, the mere provision of access to a troubleshooting database would not require more than having available such a database and the necessary software to access it. A payment relating to the provision of such access would not, therefore, relate to a service of a technical nature. *Managerial services* 43. The Group considers that services of a managerial nature are services rendered in performing management functions. The Group did not attempt to give a definition of management for that purpose but noted that this term should receive its normal business meaning. Thus, it would involve functions related to how a business is run as opposed to functions involved in carrying on that business. As an illustration, whilst the functions of hiring and training commercial agents would relate to management, the functions performed by these agents (*i.e.* selling) would not.

44. The comments in paragraphs 40 to 42 above are also relevant for the purposes of distinguishing managerial services from the service of making data and software (even if related to management), or functionality of that data or software, available for a fee. The fact that this data and software could be used by the customer in performing management functions or that the development of the necessary data and software, and the management of the business of providing it to customers, might itself require substantial management expertise is irrelevant as the service provided to the client is neither managing the

client‟s business, managing thesupplier‟s business nor developing that data and software (which may well be done by someone other than the supplier) but rather making the software and data available to that client. The mere provision of access to such data and software does not require more than having available such a database and the necessary software. A payment relating to the provision of such access would not, therefore, relate to a service of a managerial nature. *Consultancy services* 45. For the Group, "consultancy services" refer to services constituting in the provision of advice by someone, such as a professional, who has special qualifications allowing him to do so. It was recognised that this type of services overlapped the categories of technical and managerial services to the extent that the latter types of services could well be provided by a consultant." We broadly agree with the aforesaid observations.

However, in the case of selling agents, we add a note of caution that taxability would depend upon the nature of the character of services rendered and in a given factual matrix, the services rendered may possibly fall in the category of consultancy services.

Thus, the technical services consists of services of technical nature, when special skills or knowledge relating to technical field are required for their provision, managerial services are rendered for performing management functions and consultancy services relate to provision of advice by someone having special qualification that allow him to do so. In the present case, the aforesaid requisites and required necessities are not satisfied. Indeed, technical, managerial and consultancy services may overlap and it would not be proper to view them in water tight compartments, but in the present case this issue or differentiation is again not relevant. 26. In view of the aforesaid discussion, the substantial question of law mentioned above has to be answered in favour of the respondent-assessee and against the appellant-Revenue.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 1306 OF 2013
A.P. Moller Maersk A/S.]
C/o. Maersk Line India Pvt. Ltd

The assessee is a foreign company engaged in the shipping business and is a tax resident of Denmark. A firm by name and style M/s. A.P. Moller Maersk A/S was designated as the managing owner of the company as well as another Denmark resident shipping company by name Atieselskabet Dampskibsselskabet Svendborg (ADS). M/s. A.P. Moller Maersk A/S was assessed to tax during the assessment years 2001-02 to 2003-04. The Commissioner of Income Tax held that A.P. Moller Maersk A/S being the managing owner, the income from the shipping business would be taxed in the hands of t two shipping companies referred to above. Pursuant to the directions of the Commissioner, the Assessing Officer assessed the income in the hands of the assessee which was allowed benefit of Double Taxation Avoidance Agreement (DTAA) between India and Netherlands. It was observed that the assessee had three agents working for them viz. Maersk Logistics India Limited (MLIL), Maersk India Private Limited (MIPL) and Safmarine India (Pvt) Limited (SIPL). These agents would book cargo and act as clearing agents for the assessee. In order to held them in this business, the assessee had procured and maintained a global telecommunication facility called MaerskNet which is a vertically integrated communication system. The agents would incur pro rata costs for using the said system and the agents

share of the cost was, therefore, recovered from these three agents. According to the assessee, it was merely a system of cost sharing and hence the payments received by the assessee from MIPL, MLIL and SIPL were in the nature of reimbursement of expenses.

The Assessing Officer did not accept this contention and held that the amounts paid by these three agents to the assessee is consideration / fees for technical services rendered by the assessee and, accordingly, held them to be taxable in India under Article 13(4) of the DTAA and assessed tax at 20% under section 115A of the Income Tax Act, 1961. The assessee submitted before the Tribunal that without this system, it was not possible to conduct international shipping business efficiently and in having the system set up, the assessee had incurred costs. A share of this cost would have to be borne by each of the agents which utilise the system and, accordingly, these pro rata costs relatable to each of the agents was billed to the agents and these amounts were thus paid. It was merely a "charging back" to the agent, proportionate costs of the global shipping communications system and did not, in any manner, amount to rendering of any technical services.

6. Mr. Kaka, the learned senior counsel appearing on behalf of the assessee pointed out that but for the system, it would not be possible to efficiently carry out the business of shipping cargo and that each of these agents would be in a position to effectively communicate with the assessee and other relatable companies in the group so as to efficiently carry out the shipping business on a global scale especially since the consignments would be sourced from and dispatched to different locations. No technical service was thus rendered by the assessee. It is merely an automated system using advanced technology and there was no human element involved in terms of "rendering of services" which would be the requirement of Article 13(4). Mr. Tejveer Singh on the other hand submitted that the agent were using devices provided by the assessee which would amount to the assessee rendering technical services, the consideration for which would be correctly termed as "fees for technical services" and, therefore, the same was liable to be taxed in India.

In this behalf, there is no finding by the Assessing Officer or the Commissioner that there was any profit element involved in the payments received by the assessee from its Indian agents. On the other hand, having considered the various submissions, we are of the view that no technical services as contemplated by the Act have been rendered in the instant case.

Our attention is also drawn to the decision of this Court in the case of *Commissioner of Income-tax V/s. Siemens Aktiongeselleschaft* reported in *[2009] 310 ITR 320 (Bom)*, wherein this Court has held that once there is a treaty between two sovereign nations, though it is open to a sovereign Legislature to amend its laws, a DTAA entered into by the Government, in exercise of the powers conferred by section 90(1) of the Act must be honoured. The provisions of Section 9 Income Tax Act were applicable and the provisions of DTAA, if more beneficial than the I.T. Act, the provisions of DTAA would prevail. Thus, in the instant case also, it is not possible for the revenue to unilaterally decide contrary to the provisions of the DTAA. We are informed that the agreements inter parties had been performed and the payments were made by the agents to use Maersk Net for the Maersk group's global shipping business and for no other reason. It related to shipment of cargo and their movement across the oceans. The views

of the revenue that it amounted to technical service is misconceived.
In fact, the Assessing Officer relied upon the decision of M/s. Arthur Anderson & Co. in ITA No.9125/Mum/1995, Mumbai, 'D' bench in
which the Tribunal had observed that repayment of money may be construed as "reimbursement" only if it is bereft of profits for the services rendered. There is no profit element in the pro rata costs paid by the agents of the assessee to the assessee and accordingly, we have no hesitation in holding that the amounts paid by the agents to utilise the amount arose out of the shipping business cannot be brought to tax as sought to be done.

IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI I .T.A. No.6882/Mum/2011 Assessment Year :2005-06

Morgan Stanley International Incorporated
C/o BSR&Co.
Chartered Accounts, Date of Pronouncement : 18.12.2014

After hearing of the case, it came to our notice that, the Hon'ble Delhi High Court in the case of Centrica India Offshore (P.) Ltd. V/s CIT, (2014) 364 ITR 336, while interpreting Article 13 of India-UKDTAA and Article 12 of India-Canada-DTAA, on similar kind of transaction has held that secondment of employees of overseas entities who have been paid salary by the overseas entity and reimbursed to the assessee company by the Indian company was held to be payment for technical services within the meaning of FIS clause and also under make available clause of Article 12. For the purpose of clarification, the case was re-fixed for seeking comments of both the parties. The ld. Sr.Counsel, Shri Arvind Sonde submitted that there was an earlier decision of the Hon'ble Delhi High Court in the case of DIT V/s HCL Infosystem Ltd (2005) 274 ITR 261(Del), wherein this issue of reimbursement of salary was decided in favour of the assessee. This decision of the Delhi High Court has not been considered by the Hon'ble Delhi High Court in its latest decision. However, without prejudice he submitted that the Hon'ble Supreme Court in the case of, DIT (IT) V/s Morgan Stanley & Co., (2007) 292 ITR 416 (SC), while examining the issue of Permanent
Establishment under India-US DTAA in the context of nature of activity performed by stewards and deputationists deployed by Morgan Stanley Co. to work in India as employees of MSAS; an Indian entity, held that the deputed employees constitutes PE in India within Article 5(2)(l) i.e. Service PE. This issue has been discussed by the Hon'ble Supreme Court at great length. This decision of the Hon'ble Supreme Court has been considered in the decision of the Hon'ble Delhi High Court in the case of Centrica India Offshore (P.) Ltd.(supra) and relying on the said decision, Hon'ble High Court held that seconded employees constitutes Service PE in India. Once, it is held that the seconded employees constitute Service PE of the assessee in India, in terms of decision of the Hon'ble Supreme Court in of Morgan Stanley & Co (supra), then the payment of Salary cannot be taxed as FIS, because in para 6 of Article 12 of the DTAA, it is clearly provided that if the royalties or FIS are attributable to PE, then in such cases the provisions of Article 7

would apply and the income has to be computed in accordance with Article 7. If such a computation of business income is to be done; then the salary cost has to be allowed as deduction to the assessee and no income would be taxed in that case. He submitted the above said submission is without prejudice to his earlier submissions that,
no income is liable to be taxed in India on account of reimbursement of the salary cost received by the assessee from the Indian company.
8. The ld. DR submitted that the issue of Service PE has not been dealt , either by the AO or by the ld.CIT(A) and how much amount is attributable as per Article 7 of DTAA, needs to be examined and therefore, the matter should go back to the file of the AO. The main issue before us
is, whether such a payment received by the assessee on account of reimbursement of cost of salary paid to the Seconded employee , constitutes fees for included services (FIS) within the meaning of Article 12(4) of India-US DTAA, that is, it is taxable in India and hence TDS u/s 195 of the Act was required to be deducted.

In the current global scenario the international business entities have extended their business worldwide and they have made their presence by establishing their own subsidiaries or group entities from whom they have business arrangement. These overseas entities
depute their technical staff and human resources in the other countries, which are growing economies to support their global business functions and to ensure quality and consistency in their operations. Under a classic Secondment agreement, the seconded employees who are under employment of non-resident parent company are deputed or transferred to subsidiary company in the overseas countries to work for special assignment which are more technical and managerial in nature. These seconded employees usually work under direct control and supervision of the subsidiary entities in their country. Since these seconded employees belong to the main parent entity, therefore, they continue to receive their remuneration and salaries with all social security and benefits from the parent entity. The salary cost and remuneration are reimbursed by the subsidiary company to the parent entity. Strictly speaking on paper they remain the employees of the parent entities but they are under direct supervision and control of subsidiary entity, where their day to day activities are managed and governed by them and so much so they can be removed by them. Once the terms of secondment is over, they revert back to their parent company entity.
In a way subsidiary entity is the economic employer of the seconded employee who ultimately bears the salary cost and exercise control
over their work. Generally it is contended that reimbursement of cost cannot be treated as payment for FTS or FIS, unless there is an explicit agreement between the parties that technical services would be provided through these employees. The deputation of employees is mainly for the benefit of the subsidiary company to smoothly and efficiently conduct the business. However, such a reimbursement of salary cost by the subsidiary entity has been matter of huge controversy, as to what is the nature of such payment, whether it is ‘fee for included services’ or not. Other related controversy is that, on the basis of duration of the stay of seconded /deputed employees in the host countries, whether the non-resident parent entity constitute the service PE in the host country or not.

In the present context the salary paid to the seconded employees by the parent company, the TDS has been already been deducted u/s 192 of the Act, which has been credited to the Government of India account. In case, if it is to be held that reimbursement of salary is nothing but payment for rendering technical services, then TDS has to be deduced u/s 195 of the Act.

The Hon'ble Bombay High Court, earlier in the case of Siemens Aktiongesellschaft (supra) has held that reimbursement of expenses cannot be regarded as revenue receipt following the decision of the Hon'ble Delhi High Court in the case of CIT V/s Industrial Engineering Projects (1993) 202 ITR 1014 (Delhi) and therefore no TDS is required to be deduced u/s 195. However, this decision is not relied upon as this issue was decided on a different context. We have to examine our case and the issue in hand in the light of Delhi High Court decision. If we have to apply the ratio laid down by the Hon'ble Delhi High Court in the present case, then it has to be seen, whether overseas entity i.e. the assessee is the real economic employer of the seconded employees i.e. the employees are maintaining their lien on employment with the original overseas and whether the assessee remains responsible for the work of seconded employees in India or not. The case of the assessee before us has been that, seconded employees were under direct control and supervision of Indian entity who were managing their activities on day to day basis and the assessee was only paying their salary for the employees convenience and benefit. Whether this fact will lead to any deviation from the ratio laid down by the Hon'ble Delhi High Court, we are not entering into semantics of overall terms of employment of the seconded employees, whether the assessee is the real or legal employer or the Indian entity is the employer. We are proceeding on the premise that the seconded employees are the real employees of the assessee who have come to India to render services and once they are rendering services on behalf of assessee in India then, they constitute Service PE in India. Such an establishment of PE under these circumstances have been dealt by the Hon'ble Supreme Court in the case of Morgan Stanley & Co (supra). The Hon'ble Supreme Court held that the employees of overseas entities to the Indian entity constitutes service PE in India Thus, from the aforesaid decision it is amply clear that such deputed employees if continued to be on pay rolls of overseas entities or they continue to have their lien with jobs with overseas entities and are rendering their services in India, Service PE will emerge. This concept and the ratio has been storngly upheld by the Hon'ble Delhi High Court also. We therefore, hold that the seconded employees or deputationist working in India for the Indian entity will constitute a Service PE in India. It is an undisputed fact in this case, that DTAA benefit has been availed by the assessee and therefore, treaty benefit has to be given to the assessee for granting relief. Now, if the taxability of such payment has to be examined and determined on the basis of computation of business profit under Article 7, then the salary paid by the assessee would amount to cost to the assessee, which is to be allowed as deduction while computing the business profit of the PE in India. In our opinion, if logical conclusion of the decision of the Hon'ble Supreme Court in the case of Morgan Stanley & Co (supra) and the

decision of Hon'ble Delhi High Court in the case of Centrica India Offshore (P.) Ltd(supra) is to be arrived at, then the seconded employees will constitute Service PE of the assessee in India and in that case any payment received on account of rendering of service of such employees will have to be governed under Article 7 as per unequivocal terms of para 6 of Article 12. Thus, the ratio laid down in the decision of Hon'ble Delhi High Court, will not help the case of the revenue, in any manner because under the concept of PE, FIS cannot be taxed under Article 12, but only as a business profit under Article 7. It is very interesting to note that, similar provision is also embodied in the India-Canada DTAA in para 6 of Article 12, but this issue was neither raised or brought to the notice before the Hon'ble Delhi High Court nor it was contested by either parties.

Thus, the decision of the Hon'ble Delhi High Court and all other decisions relied upon by the revenue will not apply in the case of the assessee, as nowhere the concept of para 6 of Article 12 have been taken into account for determining the taxability of such a payment under the provisions of treaty. Thus, in our conclusion, the payment made by the Indian entity to the assessee on account of reimbursement of salary cost of the seconded employees will have to be seen and examined under Article 7 only, that is, while computing the profits under Article 7, payment received by the assessee is to be treated as revenue receipt and any cost incurred has to be allowed as deduction because salary is a cost to the assessee which is to be allowed. Accordingly, the AO is directed to compute the payment strictly under terms of Article 7 and not under Article 12 of the DTAA. In view of the aforesaid finding, the grounds raised by the assessee is treated as allowed.

ITA.No.276 & 277/Hyd/2010, ITA.452/Hyd/2011,

594 & 595/Hyd/2013 & C.O. 26 & 27/Hyd/2013

M/s. DQ Entertainment (International) Pvt. Ltd. Hyderabad.

Date of pronouncement : 28.03.2014

Factual Background

We have heard the learned D.R. and Ld. Counsel in detail and perused the paper book placed on record and various case law relied upon. Before adverting to consideration of the issues under dispute, it will be relevant to consider assessee's business and the nature of payments being made by assessee to the above foreign companies. ***Assessee company is in the business of production of 2D and 3D animation films for companies like Walt Disney, Columbia, DIC Animation, Stan Lee Media in Holywood, Bardel Animation, Amberwood Entertainment, Nelvana in Canada and Cromosoma, MSL Audio Visuals in Spain, Universal Cartoon Studios LLC, California, Mike Young Productions LLC, California etc. (Overseas Clients). Assessee gets orders from these companies for production of animation films at their requisition of scheduled deliverables. During the financial years 2006-07 & 2007-08, assessee gave some episodes or part of an episode on sub-contract to***

foreign sub-contractors or rather outsourced a part of the project out of the orders it received from some of the Overseas Clients*. In that process, assessee made payment of Rs.2,10,15,353/- and Rs.55 ,34,940/- to Maxim International (Animation Division),* ***Hong Kong*** *(which was later renamed as Global Exchange (MI/GE)) as per an agreement on 8th May, 2006 named as 'Outsourcing Facilities Agreement'. By this outsourcing agreement, MI/GE has to provide production work/Production material to assessee by availing the necessary production premises, facilities, personnel, materials, services and expertise, the details of which are mentioned in clause-1 of the agreement, dated 08.05.2006. In the case of HGA, the Ld. CIT(A) in ITA.No.296/2008-09 passed similar order incorporating name of the party to whom it is paid as MI/GE but considering the amounts of HGA. Later on, he passed an order under section 154 on 18.12.2009 incorporating the errors pointed out by assessee. Not only that, the CIT(A) also decided the two issues which were not adjudicated in the order on the application of DTAA, even though the appeal was allowed in the first instance on other reasons, as discussed in the order dated 31.02.2009. We have considered all the orders together.*

Arguments

The learned D.R. referring to the Orders of the A.O. reiterated the contentions of the A.O. that the payments made to the two companies do fall under 'fees for technical services' and referred to elaborate discussion made by the A.O. in the assessment order. He also relied on the order to support the Assessing Officer's contention that payments made are indeed covered by the provisions of the I.T. Act and since assessee has not made TDS before making the payment, demands under section 201 and 201(1A) were raised correctly.

Ld. Counsel in reply, however, submitted that the A.O. raised the demands under section 201(1) read with section 195 as he has considered that the payments made by assessee to HGA and MI/GE are towards 'fees for technical services' whereas assessee's contention was that these payments are made in the course of business activity and as they do not have any business connection or PE in India, the payments are not taxable in India, as it did not arise in India even under the deeming provisions of section 9(1)(vii).

It was submitted that assessee has made the payments to HGA, MI/GE as business payments and have a bonafide reason that the amounts are not taxable in India for the following reasons :

i. *The payments received by it from foreign clients for exactly the similar work executed by it have not been subjected to withholding tax nor was it called upon to file its return by the several countries from the residents of which assessee received payments for services rendered by it.*

ii. *Assessee was permitted by the RBI to make remittances to the payers on the basis of the certificate obtained from the Chartered Accountants opinion and certificate.*

iii. *The foreign concerns namely HGA China and MI/GE, Hongkong are not found to be taxable in India in the relevant assessment years. The belief is later vindicated by the fact that the Department did not initiate any proceedings or issue any notices u/s 142(1) or Sec 148 or Sec 163 of the IT Act to bring to tax their incomes either before or after the orders u/s 201 were passed. The bonafides of the belief is also vindicated by the decision in the case of Titan Industries Ltd Vs ITO (2007) (11 SOT 206, 210, wherein the Hon'ble Bangalore Bench has held*
"Moreover, it was not the case of the revenue that professional fees paid to C of Hongkong was taxable in India and steps had been taken to tax the same. If the receipts are not taxable in the hands of the recipient, their payer is not required to deduct tax at source as per provisions of Sec 195" (PP 136-141 of PB on Case Law). The decision in the case of Crompton Greaves Ltd Vs DCIT (PP 193-204 of PB on CL) in ITA Nos 2210 to 2212/Mum/2000 dt 24-02-2012 is to the same effect.

iv. *In ACIT Vs Leap International (P) Limited (15 Taxmann.com 251) (Chennai) (PP 38-45 of Case Law - 2), the ITAT followed the decision of the Hon'ble Supreme Court in the case of GE India Technology Centre (P) Ltd Vs CIT 327 ITR 456*
and held that tax is not deductible u/s 195(1) as the recipient rendered services of Clearing and Forwarding at Foreign Ports and the payments made were for those services.

v. *In Ajappa Integrated Projects Management Consultants (P) Limited Vs ACIT (24 Taxmann.com 116 (Chennai) (PP 21-28 of Case Law -2), assessee paid for technical services to persons in Nigeria. Assessee was in the business of consultancy and provision of technical services and getting income therefrom. Assessee had no Branch in Nigeria. On these facts the ITAT held that the provisions of exception in 9(I)(vii)(b) are applicable and that assessee's belief that no tax was deductible was bonafide and the decisions in the cases of Prasad Productions (SB) (Supra) and of GE India Technology Centre (supra) apply.*

vi. *According to Supreme Court decision in the case of Ishikajawa Harima Heavy Industries Vs CIT (288 ITR 408), as the services were not rendered or utilized in India, the income of N-R is not taxable. The Explanations in Sec by Finance Act 2007 did not make any change to the Supreme Court decision because the Explanation becomes applicable where income is deemed to accrue or arise in the first instance. While SC held that the income cannot be deemed to accrue or arise unless services were rendered in India and utilized in India. The Explanation could not overcome the SC judgement. In any case, the inclusion of Technical Services under Explanation in Sec 9 was inserted in Sec 195 only by Finance Act 2012. The Demand u/s 201(1) cannot be justified retrospectively. Assessee could not be expected to do the impossible that is to deduct tax when the relevant explanation did not exist in the Act.*

Relying on the above decision, it was the submission that since assessee had bonafide belief that for the reasons stated above the amounts are not covered by provisions of TDS and therefore, raising demand does not arise. Further, the Ld. Counsel relying on the principles laid down by the Hon'ble Allahabad

High Court in the case of Ramakrishna Vedantakumar 182 ITR 603 submitted that where assessment proceedings are not initiated in the case of PEs, raising demand under section 201(1A) does not arise. Similar proposition was also laid down by the decision of ITAT the case of Dresser Rand India Pvt. Ltd. vs. ADIT 53 SOT
273 (Mum.) (Tribu.), to submit that provisions of section 195 do not come into play on the facts of the case. 12. We have considered the issue and examined the details, orders placed on record along with the detailed submissions and case law relied upon.

Held by ITAT

20. After considering the detailed order passed by Ld. CIT(A) we agree with the findings that :
1. The payments received by it from foreign clients for exactly the similar work executed by it have not been subjected to withholding tax nor was it called upon to file its return by the several countries from the residents of which assessee received payments for services rendered by it.

2. there was no element of any Technical Services in the production of animation films nor in the production of a part or certain episodes of an animation film so to attract the provision of Section 9(1) (vii) read with Section 5(2)(b) of the Act.

3. just because such expertise, knowledge, technology and experience is possessed by the said party and the same has been utilized for rendering the services, it cannot be said that the services so rendered are in the nature of technical and consultancy services without making any technology available to the other party. The payment in question paid by the assessee-company or any part thereof could not be treated as 'fees for included services' within the meaning of 'fees for technical services' defined in section 9(1)(vii) of the Act".

4. it was never the case of the Assessing Officer that there was Permanent Establishment for MI/GE or HGA in India, instead it was his case that though services were rendered by MI/GE, HGA only in Hong Kong/ China, yet the same were utilized by the assessee in its business in India and as such the Assessing Officer stated that irrespective of the situs of the services, income is deemed to accrue or arise in India in the hands of MI/GE,HGA and consequentially the assessee is liable to deduct taxes u/s 195 of the Act.

5. the assessee's business with its Overseas Clients undoubtedly constitute a business carried on by resident outside India, making the assessee to satisfy the first category of income referred to in the sub-clause (b). However, the Assessing Officer laid emphasis only on the second category of income to say that originating cause of the income of the assessee is located in India and as such he held that the assessee is not making or earning income from the source outside India. The Assessing Officer failed to examine the provisions of Sub-clause (b) of Section 9 (l) (vii) of the Act in a proper perspective in the aforesaid manner;

Based on above findings it is clear that assessing officer's attempt to raise demands u/s 201 is not correct. Even explanation-1 to section 9(1) excludes the income pertaining to operations carried out outside India. The foreign parties have not done any activity in India nor they have any PE in India. As there is no liability to deduct tax on the amounts paid u/s 195, it is not correct on the part of AO to raise demands. The AO it seems had issued notice u/s. 201 (1) in respect of payments by assessee to TV Arts also and on explanation by the assessee that it was the payments resulted in income from business, the proceedings were dropped. The assessee, in its reply in regard to T.V. Arts relied on Article 7 of DTAA between India & Philippines which applies to business income of non-residents i.e T.V.

Arts and submitted that tax was not deducted as it was not taxable. This was accepted. Non-liability to TDS was not because of lack of article for FTS in DTAA, as presumed in the appellate order, but because of application of Article 7. The Grounds of Appeal is therefore clearly untenable. We uphold the order of CIT(A) and dismiss the grounds

The law is by now settled so far as the connotations of '**make available'** clause in the definition of fees for technical services in the contemporary tax treaties are concerned. It is held to be a condition precedent for invoking this clause that the services should enable the person acquiring the services to apply technology contained therein refer:

Hon'ble Delhi High Court in the case of *DIT Vs Guy Carpenter & Co Ltd (346 ITR 504)* and Hon'ble Karnataka High Court in the case of *CIT Vs De Beers India Pvt Ltd (346 ITR 467)*

Delhi high court in EON technologies 246 CTR Page 40 which states as under:
Ay-2007-2008. The commission was paid to non-resident agent for sales abroad. No income to non-resident accrued in India. the commission paid could not be disallowed for want of DTS under s. 195 Payment received in India- Mere book- entery did not mean that payment was received in India. Business connection- The non-resident agent operated abroad. There was no business connection. No income to non-resident accrued in India. Ss.5(2), 9(i)(i), 40(a)(i) and 195 of the Income Tax Act 1961
The term "business connection" has been interpreted by the Supreme Court to mean something more than mere business and is not equivalent to carrying on business, but a relationship between the business carried on by a non-resident, which yields profits and gains and some activities in India, which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in India [***CIT Vs. R.D. Aggarwal and Company*** (1965) 56 ITR 20 (SC), ***Carborandum & Co. Vs. CIT*** (1977) 2 SCC 862 and ***Ishikawajma-Harima Heavy Industries ltd. Vs. Director of income Tax, Mumbai*** (2007) 3 SCC 481]

Judgement	Last Updated on: **09 Mar 2012**	LexDoc Id: **427400**
Category - Direct Tax **Issuing Authority/Forum:** ITAT **(Delhi)** **Hughes Escort Communications Ltd. vs DCIT** **Citation** 2012 51 SOT 356		

Distinguished	Transmission Corporation of A. P. Ltd and Another vs CIT

	[1999] 105 Taxman 742 Transmission Corporation of A. P. Ltd and Another vs CIT 239 ITR 587 GE India Technology Centre (P) Ltd. vs CIT 193 Taxman 234; 234 CTR 153; 327 ITR 456; LexReported
Followed	**ACIT vs NIIT Ltd.** **[2008] 23 SOT 44 (approved by delhi high court in 318 ITR 289)**

Topic	Royalty vis-à-vis Sharing of fees
Sub Topic	Affiliate agreement
Summary	The assessee entered into an affiliate agreement with 'C' of USA, for:- Promoting and marketing product and providing ancillary services. The 'C' a university of USA provided distance learning courses to students in India. The fees was shared by both. The payment made to 'C' of USA was not royalty. S. 9(1)(vi) of the Income Tax Act, 1961. Art. 12 of the DTAA with USA.

Income Tax Appellate Tribunal – Delhi Hero Honda Motors Ltd., New Delhi vs Assessee on 11 June, 2013 156 TTJ 139

53.38. Applying the propositions laid down in these case laws to the facts of the case, we are of the considered view that the claim of the assessee that the payment was purely for advertisement and publicity of the brand name of the assessee and for promotion of its product during the Cricketing events of ICC and not the payment of royalty as defined used in para 3 of Article 12 of DTAA between India and Singapore has much force. The agreement in question includes sponsorship rights like advertising on bill boards, advertisement in official brochure, Web site of ICC etc., which is purely incurred for the promotions, advertisement and publicity of the assessee's brand name and products. If incidentally, the proprietary trade mark or logo of ICC is put alongside the assesssee's logo it is only incidental to the main services obtained by the assessee. The ratio of the Judgment in the case of Sheraton International Inc .(supra), and the judgment of Sahara India Financial Corporation (supra), in our view squarely apply to the facts of the case. Thus the amount in question paid to Nimbus Sports International and GCC PTE Ltd., Singapore is not royalty as the payment was not for use of any trade mark, brand name. As both these organizations do not have any P/E in India the income is not taxable in India and consequently there is no requirement of deduction of tax at source.

Section 9(1)(i): Income deemed to accrue or arise in India – Business connection – Service rendered abroad – Deduction at source – DTAA-India-UK-Poland-Brazil-Canada-Australia – Business profit – Assessee was not liable to deduct tax at source from said payments and Assessing Officer was not liable to deduct tax at source, hence the assessee cannot be treated as in default under section 201. (Ss.9(1)(vii), 195, 201)

Assessee company was engaged in business of production of films, shooting of which was often done outside India. For shooting films outside India, its production unit used to go abroad and services required in connection with work of shooting abroad were availed from various overseas providers. The assessee made payment to five such overseas service providers for services availed in connection with shooting of different films. It was held that the services rendered by overseas service providers would not fall within ambit of technical services as given in Explanation 2 to section 9(1)(vii) instead they were in nature of commercial services and amount received for such services constituted business profit. (A.Y. 2005-06 & 2006-07) *Yash Raj Films P. Ltd. v. ITO (IT) (2013) 140 ITD 625/23 ITR 125 (Mum.)(Trib.)*

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCHES : "A" NEW DELHI

ITA nos. 1124 & 1125/Del/2014

Assessment Years : 2004-05 and 2010-11

Aspect Software Inc.

18th May, 2015.

In view of the above, respectfully following the decision of Hon'ble Jurisdictional High Court in the case of Ericsson A.B. (supra) and Infrasoft Ltd. (supra), we hold that the consideration received by the Assessee for supply of product along with license of software to End user is not royalty under Article 12 of the Tax Treaty. Even where the software is separately licensed without supply of hardware to the end users (i.e. eight out of 63 customers), we are of the view that the terms of license agreement is similar to the facts of Infrasoft Ltd (Supra). Accordingly, we hold that there was no transfer of any right in respect of copyright by the assessee and it was a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article. Hence, the payment for the same is not in the nature of royalty under Article 12 of the Tax Treaty. The receipts would constitute business receipts in the hands of the Assessee and is to be assessed as business income subject to assessee having business connection/ PE in India as per adjudication on Ground No 5.

Supreme Court reimbursement not income

In the case of CIT Vs. Tejaji Farasram Khanwala Ltd (1968) 67 ITR 95 (SC), the Hon'ble Apex Court held that to the extent the receipt represented reimbursement of expenses, the same was not taxable, it is only when there was a surplus, that this surplus should be taxed. This decision of the Hon'ble Apex Court laid down the position of law that reimbursement of expenses does not constitute income in the hands of the payee.

The Hon'ble Apex Court in the case of TISCO Vs Union of India (2001) 2 SCC 41 held that –

(i) in common parlance the word reimbursement would mean and imply to pay back or refund;
(ii) it denotes restoration of something paid in excess
(iii) 'reimbursement' has to mean and imply restoration of an equivalent for something paid or expended and
(iv) 'reimbursement' pre-supposes previous payment.

Thus reimbursement follows the incurrence of expenditure by replacing the quantum of disbursement. It does not have the potential of earning gains for the payee or the potential of generating a surplus. 'Income' on the other hand would, as per the definition under section 2(24)(i), mean profit or gain.

T**he Special Bench of the ITAT, Mumbai in the case of Mahindra & Mahindra Ltd Vs. DCIT (2009) 313 ITR (AT) 263** held "when a particular amount of expenditure is incurred and that sum is reimbursed as such, that cannot be considered as having any part of it in the nature of income.

S U P R E M E C O U R T O F I N D I A order on case of ASSTT.COMMNR.OF I.T., DEHRADUN Petitioner(s) VERSUS M/S

EMRON **GLOBAL EXPORATION & PRODUCTION Date: 19/08/2010 Petition(s) for Special Leave to Appeal (Civil)**

No(s).21069/2010 holding that:

"In view of the concurrent findings, namely, that the expenditure incurred as per the Debit Notes tallied with the consideration received from EOGIL amounting to Rs.16,90,76,542.00 and also the finding to the effect that consideration of Rs.16,90,76,542.00 received by the assessees constituted only re-imbursement, particularly based on returns filed by the employees who worked on the

Indian Project, Section 44BB of the Income Tax Act, 1961, had no application on the facts of this case as rightly held by the High Court. The special leave petitions are, accordingly, dismissed." ***(from order of The HIGH COURT OF UTTARANCHAL AT NAINITAL: underlying order at 327 ITR 626/195 Taxman 342***

IN THE INCOME TAX APPELLATE TRIBUNAL PUNE BENCH "B", PUNE **ITA No.792/PN/2013 (Assessment Year : 2011-12) Dy. Director of Income Tax (IT-II), Pune. .... Appellant Vs. Serum Institute of India Limited, Date of pronouncement : 30-03-2015**

In our considered opinion, it would be quite incorrect to say that though the charging section 4 of the Act and section 5 of the Act dealing with ascertainment of total income are subordinate to the principle enshrined in section 90(2) of the Act but the provisions of Chapter XVII-B governing tax deduction at source are not subordinate to section 90(2) of the Act. Notably, section 206AA of the Act which is the centre of controversy before us is not a charging section but is a part of a procedural provisions dealing with collection and deduction of tax at source. *The provisions of section 195 of the Act which casts a duty on the assessee to deduct tax at source on payments to a non-resident cannot be looked upon as a charging provision.* In-fact, in the context of section 195 of the Act also, **the Hon'ble Supreme Court in the case of CIT vs. Eli Lily & Co., (2009) 312 ITR 225 (SC)** observed that the provisions of tax withholding i.e. section 195 of the Act would apply only to sums which are otherwise chargeable to tax under the Act. **The Hon'ble Supreme Court in the case of GE India Technology Centre Pvt. Ltd. vs. CIT, (2010) 327 ITR 456 (SC)** held that the provisions of DTAAs along with the sections 4, 5, 9, 90 & 91 of the Act are relevant while applying the provisions of tax deduction at source.

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

ITA Nos. 2110 & 2111/PN/2012
Assessment Year : 2009-10
M/s. Bramhacorp Hotels &
Resorts Ltd.,

Date of pronouncement : 19-06-2015

Shri Kishor Phadke appearing on behalf of the assessee submitted that the Commissioner of Income Tax (Appeals) has erred in coming to the conclusion that the services rendered by Andy Fisher Workshop Pte. Ltd. and FBEYE International Pte. Ltd., Singapore are taxable in India under the head 'fees for technical services'. The ld. AR contended that the Singapore parties have not transferred any technical know-how or technical designs to the assessee. The architectural designs provided by the foreign companies are project specific. There has been no transfer of "make available" technical know-how. Therefore, the payments made do not fall under the category of payment of royalties or fees for technical services. The ld. AR further placed reliance on Article 12 of the India-Singapore DTAA. The ld. AR in support of his contention placed reliance on the following case laws:

i. Bangkok Glass Industry Co. Ltd. Vs. Assistant Commissioner of Income Tax reported as 257 CTR (Mad) 326.

ii. Romer Labs Singapore Pte. Ltd. Vs. Assistant Director of Income Tax (International Taxation) reported as 22 ITR (Trib) 224 (Delhi).

iii. Bharat Petroleum Corpn. Ltd. Vs. Joint Director of Income Tax (International Taxation) reported as (2007) 14 SOT 0307.

iv. Assistant Commissioner of Income Tax Vs. Viceroy Hotels Ltd. reported as 18 ITR (Trib) 282 (Hyderabad).

We have heard the submissions made by the representatives of

rival sides and have perused the impugned order. We have also examined the decisions on which the ld. AR has relied. We will first take up the appeals of the assessee. The Commissioner of Income Tax (Appeals) has held that the payments made to Singapore parties fall within the ambit of 'fees for technical services'. The Singapore parties have transferred architectural designs to the assessee. The Singapore parties also permited the assessee to apply technology of whatever nature contained in designs and plans. The payments are covered and taxable under second limb of Clause (c) of Article 12(4). The Commissioner of Income Tax (Appeals) has also drawn support from India-USA DTAA which is similar to India-Singapore DTAA. Before we proceed with the issue it would be essential to examine Article 12(4) & (5) of India-Singapore DTAA. The same is reproduced here-in-under:

4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services : (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or

(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or

(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

For the purposes of (b) and (c) above, the person acquiring the service shall be deemed to include an agent, nominee, or transferee of such person.

5. Notwithstanding paragraph 4, "fees for technical services" does not include payments :

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3 (a) ;

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic ;

(c) for teaching in or by educational institutions ;

(d) for services for the personal me of the individual or individuals making the payment;

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14 ;

(f) for services rendered in connection with an installation or structure used for the exploration or exploration of natural resources referred in paragraph 2(j) of Article 5;

(g) for services referred to in paragraphs 4 and 5 of Article 5. ***7. The main emphasis of the Revenue is that the transfer of architectural designs and plans by the Singapore parties amounts to transfer of technical know-how technology to the assessee. The assessee has placed on record the agreement entered between the assessee and Andy Fisher Workshop Pte. Ltd., Singapore. The said agreement gives the detail of scope of work, schedule of payment of fees, responsibilities of the parties, pre-conditions for termination of agreement, general conditions, copyrights etc. According to the agreement, the Singapore firm has to make concept design. On approval of the concept design the consultant has to commence with schematic design. The next stage is detailed designing of the project. At the time of execution, the consultant would review the construction for material selection and ensure design intent is maintained. The fees is to be paid to the consultant based on completion of work stage. The consultant would visit the site for meetings, presentations and review of the projects. The Clause 15 of the agreement speaks about copyright. A perusal of Clause 15 clearly shows that the copyright of all documents and drawings prepared by the overseas consultant will remain with the consultant. In the case of termination of agreement, upon payment and settlement of fees the assessee is at liberty to utilize drawings/information with respect to the project on the site. Thus, the designs and plans made by the consultant are projects specific. Therefore, in our considered view there is no transfer of any technology, technical know-how or technical designs which the assessee can utilize subsequently in other projects. The Architectural design/drawings are project specific. The assessee cannot take advantage of same in other projects.***

The assessee in support of his contention placed reliance on the judgment of Hon'ble Madras High Court and various decisions of the Tribunal. The issue whether the payment made to the consultant par take the character of 'fees for technical services' depends on facts and circumstances of each case. Where in rendering of any service there is no transfer of technology, technical know-how or any technical knowledge or skill that assessee cannot apply in furtherance of his business objects, the payments for same in our opinion does not fall within the scope of 'fees for technical services'. Once, the payments are held not to be in the nature of 'fees for technical' services there is no point in travelling to the next step to ascertain whether they are exempt in view of DTAA between the two countries or not. Since, we have held that the payments made to Singapore parties are not in the 'nature of royalties or fees for technical services', we are of the opinion that no purpose would be served by referring to Article 12 of India-Singapore DTAA to see whether such payments are taxable or exempt. In view of the above, both the appeals filed by the assessee are allowed.

241 CTR 305 R.R. Donnelley India Outsource (P) Ltd., In re

The applicant has entered into a data processing services agreement with RR Donnelley Global Document Solutions Group Limited (RRD,UK) effective from 14.11.2006 for efficient discharge of its services to the customers. RRD, UK is a foreign company and is a tax resident of UK. It is engaged in the business of communications management – delivering creative and presentation services, pre-media, print management, transactional print and mail, warehousing, logistics and distribution, and data processing. The learned counsel for the applicant argues that the question is whether the payment given to RRD UK for such services is for technical and managerial service and chargeable to tax in India. According to the learned counsel, the payment given is not for technical services and as such not exigible to tax in India. Further, he has also quoted Article 13 of the Indo-UK DTAA (make available argument) *Invensys Systems Inc. (317 ITR 438) and (ii) Intertek Testing Services India P. Ltd. (2008) 307 ITR 418.* All these services do not speak of rendering any managerial, technical or consultancy services. In the written submission the applicant has said that these are in the nature of routine data entry, application sorting, document handling and data capturing services and do not involve the usage of any sophisticated technology. We are therefore of the view that under no stretch of imagination it can be said to be technical, managerial or consultancy services and hence the consideration received for such services do not come within the purview of definition given in the Act. So we are of the firm view that the services rendered by the RRD UK are not tantamount to any managerial, technical or consultancy services. Hence the consideration received for such services are not taxable

une ITAT on section 195 detailed principles on taxability of design and drawing whether and where royalty or business income (HP HIGH COURT in 190 Taxman 382 analysed)

IN THE INCOME TAX APPELLATE TRIBUNAL

PUNE BENCH "A", PUNE ITA No.350 & 351/PN/98

(Assessment Year: 1995-96) Finoram Sheets Ltd,

(Citation : 152 ITD 77)

We have carefully considered the rival submissions. The sum and substance of the dispute revolves around the liability of the assesses to deduct tax at source on the remittances to its foreign collaborator i.e. Paltough, in terms of a Technology License Agreement dated 30-06-1994. Broadly speaking, the agreement envisages payment for providing design engineering services and technical know-how for erection of plant; providing of commercial services; and, providing of technical and process know-how to enable assessee to manufacture the products. In this context, it would be appropriate to peruse the various clauses of the agreement which brings out the scope of the work which is rendered by the foreign collaborator, Paltough. As per the assessee, what it has acquired in terms of the payment in Clause 1(v) is the Plant know-how, which is covered in the definition of 'Plant' following the judgment of the Hon'ble Supreme Court in the case of Scientific Engineering House (P) Ltd. (supra). On this aspect, a reference has been made to the judgment of the Himachal Pradesh High Court in case of MAGGRONIC Devices (supra). In the case before the Hon'ble Himachal Pradesh High Court, the payment related to the services rendered by the foreign recipient for technical and engineering design, drawings, data for erection of Plant for undertaking manufacture of the product. The question which arose before the Hon'ble High Court was as to whether the agreement to transfer all such know-how falls within the meaning of Royalty under section 9(1) (vi) or it was an outright sale of 'plant.' The Hon'ble High Court upheld the stand of the assessee that such payment was not in the nature of 'Royalty' as per Section 9(1) (vi) of the Act. Notably, the Hon'ble High Court noticed a clause in the agreement

whereby the know-how delivered to the assessee therein was to remain its property for its full and free use thereof. In the present case also, as per Clause 2(a) of the Agreement assessee is granted a permanent right to use and exploit the design engineering, which is qua the services provided in Clause 1(v) of the agreement. Therefore, to the extent that the agreement in question envisages payment for obtaining plant know-how i.e. designing, characterization of plant and machinery, etc. the same cannot be considered as payments falling within the purview of 'Royalty', as per the ratio of the judgment of the Hon'ble Himachal Pradesh High Court in case of Maggronic Devices Pvt. Ltd. (supra).

So however, in so far as the Technical and Process know-how services provided under the agreement are concerned, the same are clearly covered by the definition of 'Royalty' under the Act and therefore the CIT(A) made no mistake on this count. The learned representative for the assessee has also conceded the said position. The amounts which are payable on account of acquisition of Plant know-how towards erection of plant and machinery to manufacture a licensed product, the same shall not be subject to tax at source in India as per judgment of the Hon'ble Court of Himachal Pradesh in case of Maggronic Devices Pvt. Ltd. (supra). On the contrary, the payments made for technical Product know-how or Process know-how, the same are liable to be considered for deduction of tax at source; and, such services have been rightly considered by the CIT(A) to be in the nature of 'Royalty

Hon'ble High Court of Himachal

Pradesh in the case of CIT vs Maggronic Devices Pvt. Ltd. 190 Taxman 382

(HP).

Also refer: **[2015] 54 taxmann.com 377 (Ahmedabad – Trib.) ITO vs. Heubach Colour Pvt. Ltd**

In the High Court of Judicature at Madras

Date : 14.07.2015

T.C.A. No: 398 of 2007

M/s. Anusha Investments Ltd.

The assessment year in question is 2002-2003. The cause of action

for the present appeal is purchase of shares by the assessee / appellant

from M/s.Suzuki Motor Corporation, Japan, who sold the same in dollar terms in a sum of US $ 18,83,239 equivalent to Rs. 9 crores. M/s. Suzuki

Motor Corporation, Japan, invested in the shares of M/s. TVS Suzuki Ltd., an

Indian Company, in the years 1983 and 1987, for a value of US $ 50,21,054

equivalent to Rs. 6 crores. Due to the sale by M/s. Suzuki Motor

Corporation, Japan, in favour of the assessee appellant, the Japanese

Company incurred a Capital Loss in US $ 31,37,815 equivalent to Rs. 14.99

crores. This transaction, according to the Department, would attract the

provisions of Section 195 of the Income Tax Act, and, therefore, the first

assessment order was passed by the Assessing Authority on 25.04.2003.

This was objected to by the assessee by way of appeal before the

Commissioner of Income Tax (Appeals), Though the order in paragraph 24 as above appears to be misplaced, the

effect of the order is that the Assessing Officer should first re-compute the

liability of the assessee in terms of Sec. 201 (1) whereby the tax liability of

the deductee should be determined and thereafter, if there is an element of

tax liability, the provisions of Sec. 195 will come into effect; as a result,

Section 201 (1) will apply and in default thereof, Sec. 201 (1A) will apply. But in the present case, when there is no tax liability on the

purchase of shares, the question of deduction of tax at source will not arise

and consequently, payment of interest in terms of Sec. 201 (1A) would not

arise is the contention of the assessee appellant. Aggrieved against paragraph 24.1 of the Order of the

Commissioner of Income Tax Appeals, the assessee approached the Tribunal

by way of an appeal. The Tribunal, in its order dated 29.09.2005, took a stand that irrespective of the fact whether the Japan Company suffered a loss or gain on the sale of shares, a duty is cast on the assessee to deduct the tax whenever it made payment to the non-resident. It, further, went on to hold that not only is the assessee liable to deduct the tax at source, but it also has to pay the tax to the exchequer so collected. The Tribunal held that the assessee neither deducted the tax, nor paid the tax to the Government and therefore, the assessee is in default in respect of the tax not deducted or paid to the exchequer and once, it is found that the assessee is in default, the interest under Section 201 (1A) is mandatory.

6. Assailing the said order, the assessee has preferred this appeal which was admitted on the following questions of law :-

" 1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the appellant is liable to pay interest under Section 201 (1A) without appreciation that the Department has already accepted that the appellant is not liable to deduct tax under Section 201 (1) in the transaction ?

2. Whether on the facts and circumstances of the case, the Tribunal was right in holding that the Appellant was an assessee in default and hence liable to pay interest under Section 201 (1A), even though the appellant did not have any liability to deduct tax at source in the transaction under Section 201 (1) ?

3. Whether on the facts and circumstances of the case, the Tribunal was right in confirming the computation of levy of interest under Section 201 (1A) on the basis of notional rate of tax on the entirety of sale consideration and computed till

date of the order passed by the assessing officer totally ignoring the provsions of Section 201 (1A) ? " A reading of Section 195 of the I.T. Act makes it clear that any person responsible for paying to a non – resident shall, at the time of credit of such income to the account of the payee or at the time of payment thereof, whichever is earlier, deduct income tax thereon at the rates in force. This provision came to be interpreted by the Supreme Court of India, in the case of GE India Technology Centre P. Ltd. vs. Comissioner of Income Tax and another, reported in 2010 (327) I.T.R. 456 (S.C.)\\

The Order of the Income Tax Officer dated 12.08.2004,

giving effect to the order of the C.I.T. (Appeals) dated 30.01.2004, is in consonance with the decision of the Supreme Court. In the present transaction, admittedly there is no liability to tax. As a result, the question of deducting tax at source and the assessee violating the provisions of Section 195 does not arise and therefore, the assessee cannot be treated as an assessee in default. The Supreme Court has clearly held that the provisions relating to TDS would apply only to those sums which are chargeable to tax under the Income Tax Act and also has clearly held that in a transaction of this nature, the assessee was entitled to take a plea that there arises no tax liability and therefore, the provisions of Sec. 195 do not get attracted. Once we hold that there is no tax liability, the question of deduction of tax at source, terming the assessee as ''assessee in default" will not also arise and the resultant question of levy of interest becomes purely academic and the demand unsustainable in law. In the instant case, we hold that the original authority having accepted "Nil" tax liability, the question of levy of interest would not arise. The C.I.T. (Appeals), in paragraph 24.1 of his order dated 30.01.2004, had held that there should

be determination of interest under Section 201 (1A) contrary to his own

findings in paragraph 24.2. The authority has accepted in the second limb that there exists '' no tax liability'' in terms of Section 201 (1) of the I.T.Act.

10. In such view of the matter, the liability to interest does not arise

at all. Even otherwise, by virtue of the ratio of the decision of the Supreme

Court rendered in the case of GE India Technology Centre P. Ltd., cited

supra, the transaction in the present case will not fall within the para

meters of Section 195 and 201 (1) of the I.T. Act.

IN THE INCOME TAX APPELLATE TRIBUNAL
Bangalore 'C' Bench, Bangalore (Assessment year: 2012-13)
Sri A. Mohiuddin

Date of Pronouncement: 14/11/2014

The learned DR on the other hand relied upon the assessment order. He pointed out that there is a basic difference between the taxes required to be paid ultimately by an assessee vis-à-vis the income accrued or arising to such an assessee. In the payments made by the assessees, the element of income was very much there. It is a different matter that the vendors have made investment, therefore, that would qualify for exemption under other sections of the Income Tax Act. He further pointed out that, had the vendors have not purchased in the month of May, 2011 and they had intention to purchase in subsequetn year within the limitation provided in section 54, then what would be the situation. The assessee's ought to have deducted the tax in that circumstance. Thus, the assessees ought to have not taken a decision at their own level. They should have approacehd the Income Tax Officer u/s 195(2) or 195(3). We have duly considered the rival contentions and gone through the record carefully. We appreciate the approach of the learned Assessing Officer that ultimate payments of tax by the receipient may not be the criteria for arriving at a conclusion; whether the payments involved element of taxes or not. The ultimate levy of taxes is dependent upon many circumstances such as exemption, deduction etc. However, in the present case when the appellants have made payments, they were sure

because of the facts brought to their notice that these payments does not involve payment of taxes. The vendor is entitled for exemption. There could be a circumstance; where vendors have some other capital gain which could be adjusted against the invesment in house property?, but the vendors are the family members. They have apprised the assessee's about the investment. They must have pointed out that no liablity of taxes would be there. Therefore, no need to deduct the TDS. The facts of the present case ought to be seen by the learned CIT (A) in the light of the circular issued by the Board because before the Assessing Officer the circular was not in the picture.

If we examine the facts of the present case in the light of paragraph No.3 of the circular ("Instruction No. 02/2014, Dated 26.02.2014) then it could indicate that the Assessing Officer is required to determine the appropriate proportion of the sum chargeable to tax as mentioned in subsection (1) of section 195 to ascertain the tax liability on which the deductor shal be deemed to be an assessee in default u/s 201 of the Act and the appropriate proportion of the sum will depend on the facts and circumstances of each case. In the present case from the date of the payment vendees were aware that the amount will qualify for exemption u/s 54 because the vendors has already made investment in purchase of the house property. She has represented these facts to the assessee. The above facts indicate that from the date of payments, parties were aware that these payments would not be subject to taxes, because of exemption. Therefore, there was no need to deduct the taxes. In view of the above facts, we allow all the three appeals and hold that the appellants cannot be treated as assessee in default u/s 201. Consequently no interest u/s 201(1A) will be imposable upon them.

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCHES : I : NEW DELHI

ITA No.945/Del/2915

Assessment Year : 2010-11

Mitsubishi Corporation India Pvt Ltd

Date of Pronouncement : 26.05.2015

Section 40 of the Act begins with a non-obstante clause *qua* sections 30 to 38 of the Act and provides that no deduction shall be allowed in computing the income chargeable under the head 'Profits and gains of business or profession' in respect of the items set out in the provision. Clause (a)(i) of section 40 provides that no deduction shall be allowed in case of any assessee, *inter alia,* on *'other sum chargeable under this Act*' which is payable outside India or in India to a non-resident, not being a company or to a foreign company on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200. Thus, in order to invoke the provisions of section 40(a)(i), it is essential that the amount payable by the assessee to a foreign company etc. should be chargeable to tax under this Act in the hands of such foreign company etc. The AO has pressed into service the provisions of section 195 of the Act for treating the failure of the assessee in making deduction of tax at source from the payments made to the non-residents AEs. Sub-section (1) of section 195 states that any person responsible for paying to a non-resident, not being a company, or to a foreign company, any payments specified in the provision `*or any other sum chargeable under the provisions of this Act*' 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. Thus deductibility of tax at source pre-supposes the chargeability of income under the Act and disallowance u/s 40(a)(i) follows from non-deduction/payment of tax at source by the person responsible on such payments. In other words, unless income from the transaction is chargeable to tax under the Act in the hands of non-resident etc., there can be no question of deduction of tax at source and the consequential disallowance u/s 40(a)(i) of the Act cannot follow.

13. It, therefore, becomes essential to first determine if the nonresident AE sellers were liable to tax in India for the goods sold by them to the assessee in India. As against a resident chargeable under the Act in respect of his world income, a non-resident as per section 5(2) of the Act is chargeable only in respect of income from whatever source derived, which is received or is deemed to be received in India or accrues or arises or is deemed to accrue or arise to him in India. Section 9(1) of the Act provides that all income accruing or arising, whether directly or indirectly, through or from any business connection in India, etc., shall be deemed to accrue or arise in India. Explanation 1(a) to this provision states that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under clause (i) to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. The effect of this provision is that all income accruing or arising to a non-resident from any business connection etc. in India, to the extent of the operations

of such business carried out in India, shall be deemed to accrue or arise in India and the provisions of section 5(2) shall be magnetized. Per contra, if the business operations are not carried out in India, but, still a non-resident earns income from any business connection in India, that income shall not be deemed to accrue or arise to him in India in terms of section 9(1)(i) of the Act and will get immunity from Indian taxation. The Hon'ble Supreme Court in *CIT vs. R.D. Aggarwal & Co. and Another (1965) 56 ITR 20 (SC)* considered a case in which the assessee obtained orders from dealers in Amritsar. Such orders were accepted by non-resident. Price was received and delivery was given outside India. No operations, such as, procuring of material or manufacture of finished goods, took place within India. It was held that no business connection was there and, in the absence of the non-resident having any place of business in India, the case was not covered within the provision analogous to section 9(1)(i) of the Act. Similar view has been reiterated by the Hon'ble Supreme Court in *CIT vs. T.I & M Sales Ltd. (1987) 166 ITR 93 (SC)* and more recently in *GVK Industries Ltd. And Another vs. ITO and Another (2015) 371 ITR 453 (SC).* It, *therefore, follows that when a non-resident makes offshore supply of goods to an Indian enterprise, without performing any activity in India, no income accrues or arises to him in India. If, however, some activity is done in India or some operations are performed in India, then, the income attributable to such operations is chargeable to tax under the Act. The absence of a Permanent Establishment of a non-resident in India ordinarily implies that no business operations were carried out by him in*

India. The existence of a PE in India may require examination as to whether such PE was involved in specific transactions between non-resident and an unrelated Indian enterprise. In case there is no PE of the foreign enterprise in India and the goods are directly sold offshore by such non-resident enterprise without performing any operations in India, then, no income can accrue or arise or deemed to accrue or arise to him in terms of section 9(1)(i) of the Act.

When we examine the TDS provisions, it is noticed that no provision under the Chapter XVII of the Act stipulates for deduction of tax at source from payment made for the purchases made from an Indian resident. This position when contrasted with purchases made from a non-resident, imposes liability on the purchaser for deducting tax at source under section 195, subject to the fulfilment of other conditions. When we compare an Indian enterprise purchasing goods from an Indian party *vis-a-vis* from a Japanese party, there is possibility of an obvious discrimination in terms of disallowance of purchase consideration under section 40(a)(i) in so far as the purchases from a Japanese enterprise are concerned. It is this discrimination which is sought to be remedied by para 3 of Article 24. The effect of this Article is that in determining the taxable profits of an Indian enterprise, the provisions of the Act, including disallowance u/s 40(a)(i), shall apply as if the purchases made from a Japanese enterprise are made from an Indian enterprise. Once purchases are construed to have been made by an Indian enterprise from another Indian enterprise, not requiring any deduction of tax at source from the

purchase consideration and consequently ousting the application

of section 40(a)(i), the non-discrimination clause shall operate to

stop the making of disallowance in case of purchases actually

made from a Japanese enterprise, which would have otherwise

attracted the disallowance. Thus, it is evident that para 3 of

Article 24, without considering the effect of Article 9 and other

Articles referred to in the beginning of this para, rules out the

making of disallowance u/s 40(a)(i) of the Act. The foregoing discussion divulges that there existed no

liability on the assessee to deduct tax at source from the payments made by it to the above listed seven foreign AEs, either

because of non-chargeability of income under the Act from sale

of such goods to the assessee or because of the application of

non-discrimination clause. The natural corollary which follows

is that the provision of section 195 cannot apply and, resultantly,

there can be no disallowance u/s 40(a)(i) of the Act. We,

therefore, order for the deletion of this disallowance. This ground

is allowed

also refer:

Mitsubishi Corporation India (P.) Ltd. vs. DCIT

Month-Year :	Dec - 2014
Author/s :	[2014] 50 taxmann.com 379 (Delhi - Trib.)
Title :	Mitsubishi Corporation India (P.) Ltd. vs. DCIT

e-Funds IT Solutions/ e-Funds Corp vs. DIT (Delhi High Court)

Entire law on taxability of Permanent Establishment under DTAA, impact of Mutual Agreement Procedure (MAP) and computation of profits attributable to PE explained

eFunds Corporation, USA and eFunds IT Solutions Group Inc, USA entered into contracts with their clients for providing certain IT enabled services. The same contract was either assigned or sub-contracted to eFunds India for execution. The AO, CIT(A) & Tribunal (**42 SOT 165**) held that from the Function performed, Assets used and Risks assumed (FAR analysis) by assessee and eFunds India, it was clear that eFunds India was not having requisite software and database needed for providing IT enabled services independently and that they were made available by the assessee to eFunds India free of any charges. It was also held that eFunds India did not bear any significant risk as the ultimate responsibility lay with the assessee. It was also noted that the sales team of the assessee undertook marketing efforts for its affiliates including eFunds India. It was accordingly held that the entire activities of the assessee in India were carried out by eFunds India Ltd (an agent) and said agent had not been remunerated on arm's length price basis, it was to be held that the assessee had a Permanent Establishment ("PE") in India in respect of back office operation and software development services being carried out by its subsidiary. It was also held that the

assessee's income was liable to tax in India in respect of operations performed by subsidiary company on its behalf. On appeal by the assessee to the High Court HELD allowing the appeal:

(i) **Re Whether a subsidiary can be a Permanent Establishment**: While under Article 5(6), a holding or a subsidiary company by themselves would not become PE of each other, a subsidiary can become a PE of the holding company if it satisfies the requirements of Article 5. Accordingly, any premises belonging to the subsidiary that is at the disposal of the parent (the "*right-to-use test*") and that constitutes a fixed place of business (the "*location test*" and the "*duration test*") through which the parent carries on its own business (the "*business activity test*"), gives rise to a PE of the parent under Art. 5(1). In addition under Art. 5(5) of the OECD Model, a subsidiary constitutes an agency PE of its parent if the subsidiary has the authority to conclude contracts in the name of its parent and habitually exercises this authority, unless these activities are limited to those referred to in Art. 5(4) or unless the subsidiary does not act in the ordinary course of its business as an independent agent within the meaning of Art. 5(6);

(ii) **Re Location or fixed place PE under Article 5(1) and (2) of DTAA**: The word "*permanent*" refers to some degree of permanency and not a mere transitory nature of the business in the other State. The expression "*fixed place of business*" refers not only to physical location in the form of immovable property or premises but in certain instances can mean machinery and equipment. The word "*fixed*" refers to a distinct place with some or certain degree of permanence. The carrying on of "*business*" should be "*through*" the fixed place of business. The fixed location test may be in form of a legal right or can be inferred from the facts when the foreign establishment and its employees are allowed right to use the place of business belonging to a subsidiary, a third party. The term "*through*" postulates that the taxpayer should have the power or liberty to control the place and hence the right to determine the conditions according to its needs;

(iii) **Re What constitutes a "Service PE" under Article 5(2)(l) of the DTAA**: Article 5(2)(l) and (k) defines what can be called service PE. Sub-clause (l) requires furnishing of services within the second contracting State by a foreign enterprise through its employees or other personnel. But a PE is created only if activities of that nature continue for a period or periods aggregating more than 90 days in 12 months period or under clause (ii) services are performed within that State for a related enterprise as defined in Article 9 paragraph 1. For application of clause (ii) no time period stipulation is postulated. Sub-clause (l) would apply only if the foreign enterprise or the two assessees had performed services in India through their employees or personnel, i.e., personnel engaged or appointed by the foreign assessee. The employees and other personnel must be of the non-resident assessee to create a service PE. Any other interpretation or treating employees of the Indian entity, i.e., e-Fund India as "other personnel" of the foreign assessee would lead to incongruities and irrational result, for every subsidiary which engages an employee, would always become a PE of the controlling foreign company. This would be contrary to the overriding mandate of Article 5 paragraph 6;

(iv) **Re Impact of Article 5(3) and its over-riding effect and consequences**: Article 5 (3) contains a list of negative activities which are deemed not to create PE. First and foremost, Article 5(1)/(2) should be applicable but then if the activities fall within parameters of paragraph 3, PE is not created for imposing tax in the second state. It does not follow that if activities are not covered in the negative or exclusions set out in paragraph 3, a PE is established or deemed to be established under paragraphs 1 or 2 of Article 5;

(v) **Re What is "Agency PE" under Article 5(4) and (5) of DTAA**: A dependent agency is one which is bound to follow instructions and is personally dependent on the enterprise he represents. Such dependency must not be isolated or once in a while transaction but should be of comprehensive nature. The "*dependency test*" requires examination and answer whether the business interest of the principal and the agency have merged. When there is evidence of merging of interest, then power to instruct the agent exceeds a certain level. In such cases the Principal regularly participates in the process of settling current business problems or exercises discretionary power in the said respects. The OECD Commentary does not accept dependency based on financial support, supply of patents etc. as itself creating agency PE. Interdependence must exist in both legal and economic respects but the independence is the main criteria;

(vi) **Re Relevance of Mutual Agreement Procedure**: The MAP procedure and agreement is no doubt relevant but cannot be determinative or the primary basis to decide whether the assessee had PE in India. Whether or not PE exists is a matter of law and fact and there has to be determination of the said issue on merits. A decision on merits will normally be "*persuasively*" conclusive for subsequent or other assessment years, unless there are good and sufficient reasons to take a contrary or divergent view. However, a concession on point of law, is not binding for other assessment years or a different assessee. It is always open to the competent authorities of the two countries to enter into an agreement for avoidance of double taxation and bring a litigation/dispute to an end.

(vii) **Re Facts**: On facts, there is no material to hold that the two assessees had a fixed place of business in India through which the business of the enterprise was wholly or partly carried on. It has not been stated that the premises of e-Fund India were at the disposal, legally or otherwise, of the two assessees. The "*right to use test*" or "*disposal test*" has not been or applied nor is there any finding to the said aspect. In the absence of any such finding Article 5(1) cannot be applied. The fact that e-Fund India provides various services to the assessee and was dependent for its earning upon the two assessees is not the relevant test to determine and decide location PE. The fact that the subsidiary company was carrying on core activities as performed by the foreign assessee does not create a fixed place PE. The allegation that e-Fund India did not bear sufficient risk is irrelevant when deciding whether location PE exists. The other circumstances such as reimbursement of costs etc were also irrelevant;

(viii) **Re Computation, apportionment or accumulation of income/profit**: Article 7(5) states that the profits attributed to the PE in Article 7(1)(a) shall only include profits derived from assets and activities of the PE. The determination should be by the same method from year to year unless there are good and sufficient reasons. Only the assets and activities of the PE i.e. "e-Fund India" can be taken into consideration for attribution of profits to the two assessees, if it is assumed that e-Fund India was PE of the assessee. The activities, which were not undertaken by e-Fund India and the assets of the two assesses outside India, cannot be taken into account or attributed for earning/income of the two assessees. This is subject to the limited force of attraction principle, which in the present case is not applicable. The method of apportionment has to be fair, rational and logical. If the transfer pricing analysis includes and takes into account risk taking functions of the PE enterprise, nothing further would be attributable to the foreign or non-resident enterprise. However, if the transfer pricing computation does not adequately reflect the functions performed and risk assumed by the Indian enterprise, there is need to attribute profits for those functions or risks which have not been considered. Data placed by the taxpayer which is examined and considered in transfer pricing analysis is, therefore, of importance and has to be examined in each case (**Morgan Stanley** 292 ITR 416 (SC) & commentaries by **OECD**, **Klaus Vogel**, **Phillip Baker** & **Arvid A. Skaar** referred)

Information based royalty important decisions

Refer

1. ***M/s. McKinsey & Co. (Thailand) v/s DDIT, ITA no.7624/Mum./2010, order dated 10th July 2013***
2. ***DDIT v/s Preroy AG, [2010] 39 SOT 187 (Mum.)***
3. ***Diamond Services International Pvt. Ltd. v/s UOI & Ors., [2008] 304 ITR 201 (Bom.)***
4. ***JDIT v/s Harvard Medical International, USA, [2012] 13 ITR (Trib.) 623 (Mum.)***
5. ***Spice Telecom v/s ITO, [2008] 113 TTJ 502 (Bang.)***
6. ***KPMG India Pvt. Ltd., v/s DCIT, [2012] 17 ITR (Trib.) 569 (Mum.)***
7. ***Bharati AXA General Insurance Co. Ltd. In re, [2010] 326 ITR 477 (AAR)***
8. ***Anapharn Inc., In re, [2008] 305 ITR 394 (AAR)***
9. ***Kotak Mahindra Primus Ltd. v/s DDIT, [2006] 105 TTJ 578 (Mum.)***
10. **DDIT(IT) v/s Euro RSCG Worldwide Inc. [2013] 153 TTJ 378**

(Mum.).

11. TS-482-ITAT-2014(Mum) GECF Asia Limited vs. DDIT

Other Royalty related decisions

- **DIT vs Sahara India Financial Corpn. Ltd.** 321 ITR 459
- **ACIT vs Anchor Health and Beauty Care (P) Ltd.** 143 TTJ 566 Royalty-

Errection and Commissioning : refer Birla Corporation Limited vs. ACIT (ITAT Jabalpur)

Section 2(28A) related decisions

- ***Idea Cellular Limited, IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI I .T.A. No. 1619/Mum/2011 Date of pronouncement 10-06-2015***
- ***Credit Lyonnais (supra)*** reported in [**2013] 35 taxmann.com 583 (Mumbai – Trib)** ***; Abu Dhabi Commercial Bank Ltd****. (supra),* **Reported in [2013] 37 taxmann.com 15 (Mumbai-Trib).**
- **M/S.BEACON PROJECTS PVT.LTD IN THE HIGH COURT OF KERALAAT ERNAKULAM TUESDAY, THE 23RD DAY OF JUNE 2015**

56 SOT 96 **IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCH "L", MUMBAI** Booz. Allen & Hamilton Asstt. Director of (India) Ltd. & Co. Kg., **Vs.** Income-tax, As an agent of Booz. Allen (International Taxation)-1(1), & Hamilton, Mumbai. Germany, Indonesia, S.E. Asia, Singapore, Hong Kong, U.K. Date of pronouncement : 21-12-2012.

In our opinion, the issue thus is squarely covered in favour of the assessee by the decision of Hon'ble Bombay High Court in the case DIT (International Taxation) vs. Siemens Aktiengesellschaft (supra) (I.T. Appeal No. 124 of 2010 dated 22nd Oct., 2012) as well as the decisions of the Tribunal in the case of DCIT vs. UDHE GmbH 54 TTJ 355 (supra) and in the case of CSC Technology, Singapore Pte. Ltd. vs. ADIT 50 SOT 399. (supra) and respectfully following the said judicial pronouncements, we hold that the amounts payable by BAH India to the three overseas group entities in Germany, Singapore and U.K. could not be brought to tax in India during the year under consideration as fees for technical services as per the relevant provisions of the DTAAs since the same had not been paid to the said entities

Chennai ITAT bench important decisions:

a) **M/s Kamil Leathers: This Tribunal is of the considered opinion that mere communication of latest trend/fashion prevailed in a particular country cannot amount to providing technical service.**

b) **M/s.Myrind School of Catering & Computer Management (P) Ltd.,** The dispute in the appeal relates to the payment of `48,64,161/- by assessee to the overseas institution without deduction of tax at source as envisaged u/s.195 of the Act. The contention of the assessee is that the payments are made towards the cost of books and study material whereas, the stand of the Revenue is that the payment is in nature of technical fees.From the conjoint reading of Article 2 & 3, it is evident that the fees is paid towards the study curriculum which includes teachers textbooks, teaching aids, associated marketing tools and materials etc. There is no transfer of any technical know-how or technical services. The Revenue has not been able to substantiate its plea, as to how the amount paid falls in the category of technical fee. We do not find any infirmity in the impugned order.

c) **M/s Cosmic Global Ltd .:** A bare perusal of Explanation 2 to Section 9(1)(vii), which explains "fees for technical service" and the dictionary meaning of the word "technical" makes it unambiguously clear that translation services rendered by the assessee are not technical services. Therefore, the payment made by the assessee to the non-resident translators would not fall within the scope of "fees for technical, managerial or consultancy service" as detailed in Explanation 2. In our considered view, the CIT(Appeals) has travelled beyond the definition of "fees for technical service" to bring the translation services within the compass of the term "fees for technical services". In our considered opinion, the payments made by the assessee to non-residents on account of translation services do not attract the provisions of Section 194J

IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

/I.T.A.No.1513/Mum/2014

Assessment Year :2010-11)

IMG Media
Limited,
Date of Pronouncement : 26.8.2015

The assessee is aggrieved by the decision of ld. DRP/AO in holding that the amount received by the assessee from Board of Control of Cricket in India (BCCI) is assessable to tax as "Fee for technical services" and alternatively as "Royalty" also. According to the agreement, the assessee shall produce the feed and deliver the same to the broadcasters, who are called licensees. Thus, it is noticed that the job of the assessee shall come to an end, once the feed is produced and delivered to the licensed broadcasters in the form of digitalized signals. As per the agreement, the BCCI shallsupply the equipments like cameras, microphones etc. of the required quality to the assessee. 5. The question that arises is as to whether such kind of production of feeds would result in provision of technical services by the assessee to BCCI in terms of Indo-UK DTAA?. The Ld A.R submitted that the technology should be made available in order to constitute a payment as "Fee for technical services. He further placed reliance on the following decision in support of his contentions :- (a) De beers India Minerals (P) Ltd (2012)(346 ITR 467)(Kar) (b) Raymond Ltd Vs. DCIT (2003)(86 ITD 791)(Mum) (c) Guy Carpenter and Co. (346 ITR 504)(Del) The Ld A.R submitted that the principle of „make available" has not been defined in the India-UK DTAA, but the same has been explained in the Protocol to the India-US DTAA. He

submitted that the concept or principle of "Make available" can be conveniently applied in the case of India-UK DTAA also. Accordingly he submitted that the assessee herein did not "make available" any technology/know how relating to the production of live coverage of audio-video visuals of the cricket matches, but only supplied the "program content" produced by it. Accordingly he submitted that the amount received by the assessee from BCCI cannot fall under the category of "Fee for technical services" in terms of Article 13(4)(c) of India-UK DTAA. 6. We notice that the Article 13(4)(c) of the India-UK DTAA also uses the expression "make available". Though the said expression has not been explained in the context of India-UK DTAA, it is the plea of the assessee that the principle or concept of „make available" explained in the India-US protocol should also be applied in respect of India-UK treaty also. Before us, the revenue could not submit any other decision or material to oppose the above said plea of the assessee. Since the India-UK DTAA and also India-US DTAA uses the same expression, i.e., "make available" in the context of "Fee for technical services", we are of the view that the principle or concept of „make available" explained in the context of India-US DTAA can be imported to understand the provisions of Article 13(4)(c) of the India-UK DTAA also.

7. Now we shall examine the question on the basis of discussions made in the earlier paragraphs. We notice that the assessee produces the feed (program content) of live coverage of audio-video visuals of the cricket matches by using its technical expertise. After that it delivers the feed (program content) in the form of digitalized signals to the licensees (broadcasters). There should not be any dispute that the licensees (broadcasters) receive the feed on behalf of the BCCI. We notice that what is delivered by the assessee is a "final product in the form of program content" produced by it by using its technical expertise, i.e., the assessee does not deliver or make available any technology/ knowhow to the BCCI. There should not be any dispute that the production of "program content" by using technical expertise is altogether different from the provision of technology itself. In the former case, the recipient would receive only the product and he can use the product according to his convenience, where as in the later case, the recipient would get the technology/knowhow and hence he would be able to use the technology /knowhow on his own in order to produce any other program content of similar nature. In the later case, the technology/knowhow would be "made available" to the recipient, in which case the payment given would fall under the category of "Fee for technical services". However, in the former case, there is no question of making available of any technology/knowhow and hence the payment given would be in the nature of payment made for production of "Program content or live feed" and not for supply of technology. We notice that the revenue has not established that the broadcasters (who are acting on behalf of the BCCI) or the BCCI itself has acquired the technical expertise from the assessee which would enable them to produce the live coverage feeds on their own after the conclusion of IPL 2008 and IPL 2009 cricket matches. In that case the essential condition of "make available" clause fails and hence the amount received by the assessee cannot be considered as "Fee for technical services" in terms of Article 13(4)(c) of the DTAA entered between India and UK. 9. The ld DRP has observed that the live coverage of cricket matches involve instant and continuous production and broadcasting of live matches. The existing program would keep merging with the new work. Further, the broadcasters are able to split the program content in order to insert advertisements. All these aspects, in our view, would not bring the payment under the category of "Fee for technical services". It only shows the technical expertise of the assessee to produce a flexible program content to give enhanced quality of viewing the live matches. Since the amount received by the assessee is held to be not in the nature of "Fee for technical services" as per the definition of Article 13(4)(c) of the India-UK DTAA, in our view, there is no necessity to examine about its taxability u/s 9(1)(vii) of the Income tax Act, 1963. The AO/Ld DRP have also expressed the view that the payment received by the assessee would fall under the category of "Royalty" also. In the instant case, we have noticed that the BCCI becomes the owner of the program content produced by the assessee. The job of the assessee ends upon the production of the program content and the broadcasting is carried out by some other entity to which license was given by the BCCI. Hence, in our view, the question of transfer of all or any right does not arise in the facts and circumstances of the instant case. Hence, we are of the view that the payment received by the assessee cannot be considered as „royalty" in terms of the India-UK DTAA. Though, it is not necessary to examine about the applicability of provisions of sec. sec. 9(1)(vi) of the Act, yet the facts discussed above would show that the payment received by the assessee cannot fall within the purview of sec. 9(1)(vi) of the Act also.

IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

M/s. Skill Infrastructure

Ltd.,

I.T.A. Nos.865 to 867/Mum/2011

Date of Pronouncement :29.07.2015

The contract value in Great Britain Pounds (GBP) 88,950

in respect of following services:

a. A global market survey to determine demand for repairs

conversions and new builds.

b. To determine the short/medium/long term business prospects

at Pipavav.

c. To determine a strategy for manning and training personnel.

d. Estimation of cash flows, capital requirements, financial

structure and pay-back period.

e. Provide report on the above.

The point of dispute

is on payment of GBP 88,950. On the second set of services on which

the assessee has not deducted tax at source and according to the AO,

these services also fall within the definition of fees for technical services.

Thus, the entire dispute revolves around the fact that whether the services

rendered by M/s. Appledore International Ltd., come within the purview of Article 13(4)(c) of the DTAA between India and UK as technical

services. It is further contended that the services cannot be even taxed

under Article-7 read with Article-5 of the DTAA in the absence of PE of

M/s. Appledore International Ltd. We find that the AO has rejected the

claim of the assessee and held that the services rendered by M/s.

Appledore International Ltd., are in the nature of technical services.

7.3. Services can be said to "make available" technical knowledge etc,

where such technical knowledge is transferred to the person utilizing the service that is the assessee in the present case and such person is able to make use of the technical knowledge etc by himself in his business or for his own benefits and without recourse to the performer of service in the future. We find that on the second set of services M/s. Appledore International Ltd., has merely provided services for global market survey to determine demand for repairs, conversions , new builds and to determine the short/medium/long term business prospects at Pipavav. To determine a strategy for manning and training personnel an estimation of cash flows and capital requirements, financial structure and pay-back period and provide report for the same. These services by M/s. Appledore International Ltd., were not given towards imparting any technical knowledge or experience to the assessee that could be used by the assessee independently in its business and without recourse to M/s. Appledore International Ltd. These services were neither geared to nor did they "make available" any technical knowledge, skill or experience to the assessee or consisted of development and transfer of a technical man or technical design to the assessee. For this proposition, we draw support from the decision of the Tribunal in Nokia India Pvt. Ltd. 59 Taxman.com 120 (Delhi). Considering the aforementioned services in totality, in our understanding M/s. Appledore International Ltd., in the second set of services is not responsible for preparation of any design, diagram etc. for the assessee and accordingly on the second set of services provided by M/s. Appledore International Ltd., does not involve development and transfer of a technical man or technical design to the assessee. Accordingly, we hold that the payments made by the assessee to M/s. Appledore International Ltd., on the second set of services for which payment has been made GBP 88950 do not qualify as FTS under the

provisions of Indo-UK Tax treaty. Further, as per the provisions of Indo-UK Tax Treaty where the services do not qualify as FTS, Article 13 would not be applicable to M/s. Appledore International Ltd and its taxability would need to be examined as per Article-7 read with Article-5 of the Indo-UK tax treaty. Business profits earned by M/s. Appledore International Ltd., is taxable in India only if that enterprise carries on business in India through PE in India. Moreover, this is not the issue before us therefore, we decline to interfere with the findings of the Ld. CIT(A). All these appeals by the Revenue are accordingly dismissed

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCHES : "E" NEW DELHI

ITA No:1941/Del/2012

Asstt. Year : - 2006-07

Nokia India Pvt. Ltd

Date of pronouncement : 8.7.2015

8. We have heard the rival submissions and perused the material on record. The undisputed facts of the case are that the nature of services rendered by Olof Granlund Finland to the assessee respondent company are as under :-

a) Review of systems description, diagrams, cost estimates, building designs etc.

b) Review of preliminary system design and quality control

c) Review of equipment list/selections, lay out proposals, conducting inspections etc.

9. Now we are called upon to examine whether the nature of above

services fall within the scope of the ‘fees for technical services’.

Undisputedly the recipient of the payment is a resident of Finland. And

therefore he is entitled to be governed by the provisions of DTAA of

India with Finland. In order to determine whether payments made to Olof Granlund fall

under Article 13(4)(c), it is imperative to determine whether these

services ‘make available’ any technical knowledge, experience, skill, etc.

to the recipient of the service or involves development and transfer of

technical plan or design to the recipient of services.

The India-Finland tax treaty does not specifically define the term ‘ make

available’. Accordingly, in absence thereof reliance may be placed on the

meaning assigned to the said term under the MoU to India-USA DoubleAvoidance Agreement (hereinafter referred to as India-US

Treaty), which serves as an official guide to interpreting India-US tax

treaty and reflects the policies, understanding reached with respect to

the application and interpretation of India-USA Treaty.

In this regard, it is pertinent to mention the Mumbai Tax Tribunal in the

case of Raymond Limited Vs Deputy Commissioner of Income-tax

reported in 80 TTJ 120 (Mum), has clarified that meaning of the term

'make available' under India-UK Double Taxation A voidance Agreement

may be inferred from the MoU to India-US Treaty. This equally and

expressly follows that the Honorable Tribunal has accepted the concept

of parallel treaty interpretation. The ITA T held as under:

"The MOU appended to the DTAA with USA and the Singapore DTAA

can be looked into as aids to the construction of the UK DTAA. They deal with the same subject (fees for technical services, referred to in the US agreement as "fees for included services"). As noted earlier, it cannot be said that different meanings should be assigned to the US and UK agreements merely because of the MOU despite the fact that the subject-matter dealt with is the same and both have been entered into by the same country on one side (lndia). The MOU supports the contention of the assessee regarding the interpretation of the words "make available ". The portions of the MoU explaining para 4(b) of the relevant article, which we have extracted earlier in our order while adverting to the contentions of the assessee, fully support its interpretation. Example (4) given in the MOU also supports it. This is of a US company manufacturing wellboard for the assesee using assessee's raw material but using its own Plant. No technical knowledge, experience, skills, plan or design is held to have been made available in such a case. However, in contrast, example (5) is of a US company rendering certain services in connection with modifying the software used by the Indian company to suit particular purpose. A modified computer software programmme is supplied by the US company to the Indian company. It is, therefore, held that there is a transfer of a technical plan (i.e., computer software) which the US company has developed and made available to the Indian company. The fees are chargeable. These examples affirm the position taken by the

assessee-company before us as to the interpretation of the words "make

available".

In fact, it has been held by various courts that the principle of parallel

treaty interpretation is permissible where language of the two treaties is

similarly worded and one treaty clarifies meaning of the terms (orlanguage) used. The above view has been affirmed by the subsequent

pronouncements in the following cases:

(a) National Organic Chemicals Industries Ltd vs DCIT (96 TTJ

765) (Mumbai IT AT)

(b) CESC vs CIT(80 TTJ 806) (Calcutta ITAT).

(c) DDIT v Preroy A.G. (2010) 39 SOT 187 (Mum)

(d) Intertek Testing Services India (P) Ltd., In re (2008) 307 ITR

418 (AAR)

The term ‘make available’ had come for interpretation before Hon’ble

Jurisdiction High Court in the case of Director of Income Tax vs. Guy

Carpenter & Co. Ltd. ITA No. 202/2012 dated 23.4.2012; Even Hon’ble Karnataka High Court in the case of CIT vs. De Beers

India Minerals (P) Ltd. (2012) 346 ITR 467 (Kar.) had interpreted the

term ‘make available’; In view of the above, it can be concluded that rendering of technical

services leads to transfer/ imparting of technical knowledge, experience,

skill, know-how, or processes to the recipient which enables the

recipient to apply the same on his own. In other words, the recipient

acquires a means to an end, i.e he acquires the technical knowledge,

experience, skills, know-how or processes from the provider which acts as a means and enables him to use the same for achieving a further end. In a service which does not qualify as technical services, the services itself serves as an end for the recipient since he does not any technical knowledge, experience, skill, know-how, or processes from the service provider.

In light of the judicial pronouncements highlighted above (which have affirmed the principle of parallel treaty interpretation, especially as regards the meaning of the term 'make available'), considering the interpretation provided in the MoU to India-US tax treaty,services can be said to 'make available' technical knowledge etc, where such technical knowledge is transferred to the person utilizing the service (Le the appellant in the instant case) and such person is able to make use of the technical knowledge etc, by himself in his business or for his own benefit and without recourse to the performer of services (i.e OlofGranlund) in the future. The mere fact that provision of service may require technical knowledge by the person providing the service would not per se mean that knowledge has been made available. Further, the term 'make available' in the context of consultancy services has been subject matter of consideration before various appellate authorities, which have concurred with the above position. In this regard, the reliance can be made on the following decisions, which are squarely applicable to the case on hand:-

• Mckinsey and Co. Inc. and Ors. Vs ADIT reported in 99 IT])

549 (Mumbai)

In the above case as well, Mckinsey and Co Inc was engaged

in providing strategic consultancy services, the Honorable

Tribunal has held as under: -

"Merely because the assessee have rendered certain

consultancy services to the McKinsey India does not by itself

can be reason enough to conclude that the consideration

(or such consultancy services is taxable in India under art.

12(4)(b) as 'fees for included services".

" ... generally speaking. technology will be considered 'made

available' when the person acquiring the service is enabled

to apply the technology and various Benches of the Tribunal

have consistently taken that view of the matter. "

"..... When a patient visits a doctor and doctor advices him to

undergo various tests. The patient does so. In the course of

performing the scan tests, the scan centre used certain

equipment. The scan centre actually provided the service. The

patient, is interested in the end result i. e. report of the testand not in technical know-how that is used in the scan report.

Such technical knowledge is not passed on to the patient. If

the patient requires the scan report again, he would require to

get the report done once again and he cannot do it by himself.

Technical skill, knowledge, know-how or experience is not

passed on, though it is utilized in preparing the report. "

The above propositions have been reiterated in the following cases also

:-

• CESC Ltd Vs DCIT reported in 275 ITR 15 (Cal);

• Raymond Ltd Vs DCIT reported in 86 ITD 761 (Mumbai);

• Deputy Commissioner of Income Tax vs Boston Consulting

Group Pte Limited (93 TTJ 293), Mumbai ITAT;

• JCIT vs Essar Oil Limited (7 SOT 216), Mumbai ITAT; and

• National Organic Chemical Industries Ltd vs DCIT reported in

96 TT J 765

Additionally, it can be seen that under the provisions of Article 13 of

India-Finland tax treaty, provision of services shall qualify as FTS where

the same consist the development and transfer of a technical plan or

technical design to the recipient of the services. For the services to

qualify as FTS the provider must itself develop the technical plan or

design and then transfers the same to the recipient of the services. As extracted above , in the instant case, Olof Granlund merely provided

services to ensure that the HV AC, Electrical and Fire Protection systems

to be installed at the respondent's factory in Chennai are of the right

design and quality. The scope of work performed by Olof Granlund

clearly lays down that Olof Granlund shall be responsible for providing

following quality and design control services to the appellant:

a) Review of systems description, diagrams, cost estimates,

building designs etc;

b) Review of preliminary system design and quality control;

c) Review of equipment list/. selections, layout proposals,

conducting inspections etc;

and

d) Holding meetings in India and Finland, in connection with the

above.

As is evident from the above, Olof Granlund's services to the respondent

were not driven towards imparting any technical knowledge or

experience to the appellant that could be used by the respondent

independently in its business and without recourse to Olof Granlund.

These services were neither geared to nor did they 'make available' any

technical knowledge, skill or experience to the respondent or consisted

of development and transfer of a technical plan or technical design to

the appellant. Accordingly, we hold that the payments made by the respondent to

Olof Granlund do not qualify as FTS under the provisions of India-

Finland tax treaty.

Further, as per the provisions of India-Finland tax treaty, where the

service do not qualify as FTS, Article 13 would not be applicable to thFinnish enterprise and its taxability would need to be examined as per

Article 7 (read with Article 5) of the India-Finland tax treaty. Accordingly, Olof Granlund Oy did not have a PE in India under the

provisions of Article 5 of the India-Finland tax treaty during the subject

period. Certificate obtained by the respondent from Olof Granlund in

this regard is on record.

Now the issue that comes up for consideration is when the payment made by respondent-assessee is not taxable under the provisions of Income Tax Act 1961, whether he is still required to deduct the tax at source on such payments. The issue is no more res integra and covered by the decision of Hon'ble Supreme Court in the case of GE India Technology Centre P. Ltd. Vs. CIT and another 327 ITR 456 (SC) wherein the Hon'ble Supreme Court held that if payment is not assessable to tax there is no question of tax at source being deducted.