Non resident Tax Withholding Select Payments Key Propositions

Question 1:

What is the purpose of section 195(1) of the Act?

Answer

- *Non resident transient connection*
- *Potential Difficulty in Recovery having little/no assets in India*
- *To Avoid Hassles of recovery from Non resident*
- AAR in 238 ITR 575 & CBDT Circular of 1974

Question 2

What are salient difference in section 195 of the Act and other TDS provisions u/ch XVII-B of the Act?

Answer

- Unlike personal payments exempted in section 194C etc; no exclusion for the same in section 195 (all payments covered *excl salaries* provided chargeability there) eg payment to foreign architect for residential house construction etc
- Unlike threshold criteria specified in section 194C etc, no basic limit in section 195 even Re 1 payment is covered
- Unlike other provisions in Chapter XVII (TDS provisions), section 195 uses a special phrase "chargeable to tax under the Act"

- All payers covered irrespective of legal character HUF; Indl etc
- Multi-dimensional as involves understanding of DTAA/Treaty

Question 3:

What are the possible consequences for non/short deduction of tax at source?

Answer

- *Demand u/s Section 201; Interest of 201(1A)*
- *Penalty u/s Section 221 &/or 271C*
- *Prosecution u/s Section 276B*
- *Disallowance of expense u/s Section 40(a)(i)*

Question 4:

What are the pre-requisites for application of section 195(1) of the Act?

Answer

Firstly the payee should be non resident under section 6 of the Act and secondly the sum should be chargeable to tax in India (including Double taxation avoidance agreement).

That is, character of payee and nature of sum are two pivotal factors for application of section 195(1) of the Act.

Eg: Payment by Indian person to foreign branch of Indian resident bank will be covered u/s 194A (subject to conditions therein) and not u/s 195 of the Act;

Eg: Payment in Indian currency and in India is irrelevant for application of section 195(1) of the Act.

Eg After finance act, 2012 even payment by one non resident to other non resident is covered u/s 195 of the Act subject to *chargeability of the sum* being taxable in India.

Eg payment in India by Indian person to agent of foreign principal is covered u/s 195(1) of the Act (but not the onward remittance payment by agent to foreign principal) subject to *chargeability of the sum* being taxable in India.

Interesting Madras high court order

Chennai Port Trust : Tax Case No. 1409 to 1412 OF 2005 High Court of Judicature at Madras

Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that the joint venture of H.C.C. Ltd and Van Oord ACZ (VOACZ) is not an Association of Persons and the payment made to the joint venture should be treated as a payment made to the foreign company and tax deducted at source on that basis?

3. It is seen from the documents placed before this Court that the foreign company Van Oord ACZ BV moved the Advance Ruling Authority under Section 245D for a decision as to its status in the context of the joint venture agreement vis-a-vis the agreement granted to the joint venture by Chennai Port Trust. The contract by the Port Trust was awarded on 22.08.1997. The foreign company Van Oord ACZ BV sought for a ruling as to whether the joint venture would constitute Association of Persons (AOP) within the meaning of Section 2(31)(v) so as to become liable for tax under the Income Tax Act, 1961 or each party of the joint venture is liable to tax on its own profits. By order dated 14.09.2000, the Advance Ruling Authority held that the status of the joint venture was not that of AOP and that the foreign company was liable to be assessed on its own profits.

4. Pursuant to the said order, the said foreign company made an application before the Deputy Commissioner of Income Tax dated 16th October 2000 and pointed out to the order of the Advance Ruling Authority that in view of the said decision, 10% of the receipt, payable as per Section 44BBB of the Act was offered as taxable income and that flat rate of 15% was chargeable on the interest earned on the Fixed Deposit as per Article 11 of the DTA between India and Netherlands. They also pointed out that the Chennai Port Trust had withheld the income tax under Section 194C from all the payments made, which included the portion of work carried out by the foreign company. Hence, it was entitled to claim credit of the proportionate share of the TDS made in the status of consortium. The original certificates, hence, would be filed along with the return of Hindustan Construction Company Limited who was entitled to 80% of the TDS. After claiming credit, the company had also remitted the balance tax.

5. While the matter stood thus, the assessee was stated to have been served with a show cause notice on 10.10.2000, taking the view that the deduction of tax under Section 194C on the payment made to the joint venture as though it was an AOP was incorrect. Hindustan Construction Company Ltd. being an Indian company, tax was to be deducted at the rate of 2% as per Section 194C. Considering the decision of the Advance Ruling Authority holding that the joint venture is not AOP, Chennai Port Trust was liable to deduct tax at source on the payment made to the foreign company as per Section 195(1); thus in respect of the clear terms of the joint venture agreement between the two companies, Chennai Port Trust had failed to deduct tax as per Section 195(1); applying the decision of the Advance Ruling Authority that the joint venture was not AOP, there was a shortfall of deduction for the assessment years 1998-99, 1999-2000 and 2000-2001. Thus, the assessee was treated as one in default and hence, interest was levied under Section 201(1)(a) of the Income Tax Act.

6. The assessee objected to these proceedings, contending that going by the terms of the joint venture agreement between the companies and the award of contract under the agreement between the assessee company and the joint venture, the status of the joint venture was that of an AOP; hence, tax was also deducted on that basis. The Assessing Officer, however, rejected the proceedings and confirmed the levy of interest under Section 201(1)(a) of the Income Tax Act.

7. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who confirmed the order of the Assessing Officer. The assessee went on further appeal before the Tribunal, which, once again, confirmed the lower authorities' view. Hence, the present appeals. ….*It was submitted that going by the understanding of the terms of the joint venture agreement between the companies and the contract awarded to the joint venture, the assessee entertained a bona fide belief that it was only a joint venture; hence, to be assessed as an Association of Persons, a course of action which could not be taken exception to. Even going by the order of the Tribunal, we see that much of a discussion was as to whether the joint venture could be taken as an Association of Persons or not. The assessee pointed out that at least till the Advance Ruling Authority passed an order, the Department itself did not deem it fit to reject the assessee's claim that the payments were made under Section 194C, treating the joint venture as Association of Persons. In the background of these circumstances, we hold that the reliance placed on the decision of the Apex Court reported in (2010) 232 CTR 317 (Commissioner of Income Tax Vs. British Airways) in almost similar circumstances, comes to the aid of the assessee herein.*

13. It is a matter of record that the foreign company had remitted tax as per Section **44BBB at 4.8% and had also sought for refund therein. In the light of the said decision, we hold that the assessee cannot be mulcted with any liability by way of interest to be charged under Section 201(1A). Thus, applying the decision reported in (2010) 232 CTR 317 (Commissioner of Income Tax Vs. British Airways), considering the consistent stand taken by the assessee and the parties to the agreement that the status of the joint venture was only Association of Persons, we hold that there could be no case for levying interest under Section 201(1A).**

Question 5

What is the approach to be followed for determining chargeability to tax in India.?

<u>Answer</u>

Section 4(1) : Charging provision of Income

Section 5(2): Scope of Total income of *non resident*

Section 9: Deemed accrual

Section 90: Double taxation avoidance agreements

Step 1: Make the classification of transaction (eg whether covered u/s 9(1)(vii) or u/s 9(1)(i) resp. dealing with Fees for technical services and Business transaction in general etc)

Step 2: Check the taxability under Income Tax Act

Step 3: If Above is in affirmative, Check as per treaty entitlement and DTAA (if any), taxability under DTAA

Nature of Income	Act (apart from section 5 where-ever applicable)	Treaty/DTAA
Business/Profession	Section 9(1)(i): Concept of Business Connection	Article 5;7; 14: Concept of Permanent Establishment/PE or Fixed Base
Salary Income	Section 9(1)(ii)	Article 15
Dividend Income	Section 9(1)(iv) and section 115A	Article 10
Interest Income	Section 9(1)(v) and section	Article 11

	115A	
Royalties	Section 9(1)(vi) and section 115A	Article 12
Fees for technical services/FTS	Section 9(1)(vii) and section 115A	Article 12
Capital Gains	Section 9(1)(i) and section 45	Article 13

Question 6: Whether for every payment it is required that payer obtains NOC/order from AO u/s 195(2)/195(3)/197 of the Act?

Answer :

Section 195(7) specified payments to be *adjudicated from AO* (till now no payment is prescribed)

Hence:

- *SC GE case on above phrase: 234 CTR 153*
  - *Gives reasonable autonomy to payer to decide sum chargeable and its amount*
  - *Magnatise: Provision of Section 4;5;9 and 90(2)/Treaty Provisions ; 195 to be read with Charging provisions*
  - *Unique from other sections of TDS*

- *SC views in Eli Lily 312 ITR 225:*

  The purpose of TDS provisions in Chapter XVII B is to see that the sum which is chargeable under Section 4 for levy and collection of income-tax, the payer should deduct tax thereon at the rates in force, if the

> *amount is to be paid to a non-resident.* ***The said TDS provisions are meant for tentative deduction of income-tax subject to regular assessment****. (see Transmission Corporation of A.P. Ltd. and Anr. v. CIT reported in [1999] 239 ITR 587 at p. 594).*

Payments for which stand can be taken on chargeability point by payer itself, without approaching AO/TDS u/s 195(2):

- ***Payments for capital account: loans; their repayment, gift remittance etc***
- ***Payment for revenue account: Simpliciter raw material import***
- ***Payment expressly exempt under the Act eg section 10***

M/s.Chennai Metropolitan Water Supply and Sewerage Board Sec. 195 International Taxation: TDS Composite contract Payer liability u/s 195 r.w.s 201(1); 201(1A) ETC Madras High Court

The assessee herein is Chennai Metropolitan Water Supply and Sewerage Board, who had engaged the services of a Malaysian Company to carry out certain works. The assessee deducted tax at source at the rate of 2% while making payment to the Malaysian Company. As the rate at which tax was to be deducted was 40%, the Assessing Officer raised a demand on account of shortfall in TDS under Section 201 of the Income Tax Act as well as consequential demand of interest under Section 201(1A) of the Income Tax Act. 5. On the second question raised as to whether regards the assessee was justified in deducting tax at a lower rate without getting an authorisation or certificate under Section 195(2) of the Income Tax Act, the same is no longer res integra, by reason of the decision of the Apex Court reported in (1999) 239 ITR 587 (Transmission Corporation of A.P. Ltd., and another V. Commissioner of Income-Tax), wherein, it was held that in the absence of any certificate obtained as given under Section 195(2) on the composite amount made by the assessee to the payee, TDS ought to have been made on the entire amount. Hence, the said question stands answered in favour of the Revenue.

6. Learned counsel appearing for the assessee submitted that TDS has to be done only on the income chargeable under the Act. The payee being a loss making company and that the payment made was a composite amount covered under the DTAA, the question of there being any shortfall did not arise. We do not agree. Going by the decision of the Apex Court on Section 195(2) of the Income Tax Act that even in a case of composite amount payment, unless the assessee had approached the Officer for a certificate under Section 195(2) for applying the doctrine of proportionality, the entire amount has to suffer for deduction under Section 195(1) of the Income Tax Act. Consequently, the second question is answered against the assessee and in favour of the Revenue.

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12. We do not think that such a contention could be entertained, having regard to the scheme of TDS. A reading of Section 195 of the Income Tax Act reveals that a person responsible for making payment to a non-resident has to deduct income tax at the time of credit of the said amount to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier. The only condition insisted under Section 195 of the Income Tax Act is that the amount paid must be a sum chargeable under the provisions of the Act. Section 195(2) of the Income Tax Act enables an assessee to file an application before the

Assessing Officer to determine the appropriate proportion of the sum chargeable under the Act and upon such determination, tax has to be deducted under sub-section (1) on that proportion of the sum which is so chargeable...

As such, the loss return filed by the payee company cannot be treated as a circumstance to be taken in in favour of the assessee company from not applying the provisions of Section 201(1A) of the Income Tax Act. On the facts herein, the only reasonable interpretation one can give to the provision under Section 201(1A) as regards the terminal point upto which interest has to be calculated would be the date on which the return has to be filed by the payee, so that the calculation of interest under Section 201(1A) of the Income Tax Act in such case would really be meaningful.

M/s.Star Cruises (India) P. Limited **DATE : 1st July, 2011.** IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION Whether the Income Tax Appellate Tribunal was justified in holding that the assessee was liable to deduct tax at source under Section 195 of the Income Tax Act, 1961 as per the provisions of Section 44B of the Act is the question raised by the Revenue in all these appeals. The assessment years involved herein are assessment years 200607, 200708
And 200809. Perusal of the order passed by the Tribunal shows that in the present case, the cruise conducted by the assessee consists of taking the passengers from Mumbai to various places and back. The Tribunal has recorded a finding of fact that the assessee is also offering one way cruise. There was no restriction that a passenger taking round trip ship cruise should disembark at Mumbai only. The Tribunal has held that merely because some entertainment programmes were made available on the board the cruise and the passengers were required to pay additional amount in respect thereof, it cannot be said that the assessee was not engaged in the shipping business involving carriage of passengers from Mumbai and back. The Tribunal has held that the business carried on by the assessee as agent of the nonresident constitutes shipping business as contemplated under Section 44B of the Act.

1. *Hyd bench ITAT classic order on deputation arrangement of employees and technical service argument in case of M/s Bhagyanagar Gas Ltd ITA No. 588 and 589/HYD/2012 Assessment Year: 2007-08 and 2008-09*

8. We have heard the arguments of both the parties and perused the record. The assessee is a Joint Venture Company promoted by GAIL & HPCL for distribution and marketing of CNG, Natural Gas, LPG, Auto LPG etc. They had entered into a MOU in connection with the promotion of the JV company viz., the Assessee herein. Under Article 4 of the agreement GAIL and HPCL will contribute management and technical skill in the respective areas of expertise, management support by way of secondment / deputation on request of JVC and enter into the gas purchasing agreement with HVC etc. In short the two companies have undertaken to provide all necessary assistance to the assessee-JV Company. 9. Under Article 14 GAIL and HPCL had agreed to bear the cost of incorporation as well as expenses relating to the business activity except man power cost, administration cost of the employees. However after incorporation of the JVC, all such expenses shall be reimbursed by JVC to the parties with interest. From the above, it can be seen that GAIL and HPCL had agreed to support the assessee in carrying on its business. 10. As part of this agreement GAIL and HPCL deputed their personnel to work for the JVC. Employees so deputed worked for the JVC. The JVC is liable to pay salaries to the deputed personnel. However for administrative convenience,

GAIL and HPCL had paid the salaries to the deputed employees and the Assessee reimbursed the amount paid by GAIL and HPCL 11. GAIL and HPCL deputed their personnel who worked under the control and management of JVC. The employees were carrying out the work of the Assessee as its employees not carrying out the work on behalf of GAIL or HPCL. Salary, cost of these employees are a charge on the profits of the Assessee. Payment by way of salary would not constitute Fees for technical services. Nor can the transaction be viewed as a works contract performed by GAIL and HPCL. Merely because the companies had in an agreement agreed to depute their employees would not mean that it is a works contract. This can be viewed as a financial arrangement under which GAIL and HPCL pay to the deputed employees on behalf of the Assessee and the Assessee reimburses the same. It is a reimbursement of amount spent by GAIL and HPCL in payment of persons in the employ of the Assessee and payment for any services rendered by GAIL and HPCL 12. In our opinion such payment cannot be considered as payment towards work executed by GAIL and HPCL in the course of work contract

IN THE HIGH ORDINARY ORIGINAL CIVIL JURISDICTION INCOME TAX APPEAL LODGING NO. 2026

COURT OF JUDICATURE AT BOMBAY OF 2012 OCB Engineers **7th March, 2013** So far as question (a) is concerned, the respondent assessee was interalia engaged in the business of execution of contracts for erection and commissioning of plants. *The Assessing officer disallowed an amount of Rs.16.86 lacs paid by way of reimbursement to sister concerns for payment of salaries to their employees as they were deputed to the respondent assessee. This was disallowed under Section 40(a)(ia) of the Income Tax Act, 1961 ("the Act") for failure to deduct tax* . In appeal, the CIT(A) upheld the order of the Assessing officer. *On further appeal the Tribunal by the impugned order has rendered a finding of fact that the payments made by the respondent assessee to its sister concerns was reimbursement for the salaries of the employees who have been deputed by the sister concerns to work with the respondent assessee. The impugned order records that it is not the case of the revenue that the assessee had made any payment for consideration extraneous to the cost of the employees deputed to the assessee nor is there any allegation that the amounts paid to its sister concerns were over and the above the salaries due to the employees. In the circumstances, the Tribunal concluded that the expenditure was incurred for salaries and thus no occasion to invoke Section 40(a)(ia) of the Act can arise.* . Since the decision of the Tribunal is essentially based on a finding of fact we see no reason toentertain question

M/s.Petroleum India International INCOME TAX APPEAL NO.3653 of 2009 IN THE HIGH COURT OF JUDICATURE AT BOMBAY 3. The respondent – assessee is an Association of Persons consisting of nine public sector oil companies as its members. The respondent – assessee is engaged in doing business abroad and for that purpose deploys trained manpower to foreign companies at contracted rate. (i) The trained manpower deployed abroad is drawn for the employees of its member companies. **However, such deployed manpower continue to be the employees of its member companies but are seconded to the projects abroad by the respondent assessee company**. In the assessment year under consideration, the assessee had claimed an amount of Rs.3.93 crores as expenditure being the overseas compensation paid to the employees of the oil companies seconded abroad under the head 'seconded personnel expenses'. *The assessing officer by his order dated 29th March 2000 disallowed the amount of Rs.3.93 crores paid to seconded employees on account of its failure to deduct tax at source under Section 192 of the Income Tax Act, 1961.Therefore, the payment was hit by Section 40(a)(iii) of the Act*

In appeal, both the Commissioner of Income Tax (A) as well as the Income Tax

Appellate Tribunal have recorded a finding of fact that these seconded personal continue to be the employees on the roll of the member oil companies even during the period of secondment. These seconded employees continue to receive their salaries and emoluments from the member oil company of which they are employees. Therefore, not being employees of the respondent – assessee, the overseas allowances cannot be subject to deduction of tax at source. (iii) Consequently, in view of the finding of fact arrived at that the seconded personnel are not the employees of the respondent – assessee, the amount paid as foreign allowances to the seconded personal is not liable for deduction of tax. In vie w thereof, the occasion to apply Section 40(a)(iii) of the Act does not arise. Consequently, question (a) in this appeal cannot be entertained.

Re. : question (b) (i) The respondent assessee paid taxes of Rs.82 lacs in Kuwait on the income earned in Kuwait by it during the period relevant to the present assessment year. In view thereof, the respondent assessee sought benefit of deduction from the tax payable in India under Section 91(1) of the Act. The assessing officer denied the benefit of Section 91(1) of the Act on the ground that payment of taxes in Kuwait was not made in previous year relevant to the present assessment year (iii) The only issue to be considered is whether or not the income arising abroad in the previous year has suffered tax abroad. The case of the appellant – Revenue that the benefit of Section 91(1) of the Act would be available only when payments of taxes have been made in the previous year relevant to the assessment year under consideration. We find that the Tribunal correctly held that such a requirement is not found in Section 91(1) of the Act.

53 SOT 401 bangalore ITAT on secondment agreement detailed analysis : TDS implication u/s 195 (reimbursement issue) 18.07.2012 order in Abbey Business Services (section 9(1)(vii) issue)

Gist

14.1 In the light of our findings above that the payments made by the assessee to Abbey National Plc., UK were in the nature of reimbursement of salary and other costs, the issue for consideration now is whether reimbursement of expenses can be regarded as income chargeable in the hands of the non-resident i.e. Abbey National Plc., UK ?

14.2 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.

14.3 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.

14.4 The Authority for Advance Ruling in Cholamandalam MS General Insurance Co. Ltd. (supra) held that reimbursement of salary costs to foreign company under a secondment agreement has no income or profit element and therefore does not constitute income chargeable to tax in India.

14.5 The jurisdictional High Court in the case of Karnataka Urban Infrastructure Development Finance Corporation Vs CIT (2009) 308 ITR 297 held that reimbursement of expenditure incurred towards accommodation and conveyance of employees of non-resident consultant companies is not liable for TDS under section 195 of the Act.

14.6 The 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.

Any payment, in order to be brought within the scope of income by way of fees for technical services under section 9(1)(vii), should be or have atleast some element of income in it. Such payment should involve some compensation for the rendering of any services, which can be described as income in the hands of the recipient. In other words the component of income must be present in the total amount of fees paid for technical services to constitute as an item falling under section 9(1)(vii). When the expenditure incurred is reimbursed as such without having any element of income in the hands of the recipient, it cannot assume the character of income deemed to accrue or arise in India."

14.7 In the case of IDS Software Solutions India (P) Ltd (supra), the co-ordinate Bench of the Tribunal held that reimbursements made to foreign company under the secondment agreement are not liable for deduction of tax at source. The above decision was followed by the coordinate bench of the Tribunal in the following cases :
(i) Cerner Healthcare Solutions Pvt. Ltd v ITO Bangalore ITAT
(ii) Caterpillar India P Ltd v DDIT – Bangalore ITAT - I.T.A. No.630(Bang.)/2010
(iii) Caterpillar India P Ltd v DDIT – Bangalore ITAT - I.T.A. No. 607(Bang.)/2010
(iv) Caterpillar India P Ltd v DDIT - Bangalore ITAT I.T.A. No.149(Bang.)/2010
(v) Caterpillar India P Ltd v DDIT - Bangalore ITAT I.T.A. No.629(Bang.)/2010
(vi) Caterpillar India P Ltd v DDIT - Bangalore ITAT I.T.A. No. 606(Bang.)/2010
(vii) ITO v M/s Ariba Technologies India Pvt. Ltd ITA No. 616/Bang/2011 dated 4.4.2012
14.8 In view of the above, we are of the considered opinion that reimbursement of salary

costs and other expenses made by the assessee to Abbey National Plc, UK under the secondment agreement cannot be regarded as income chargeable in the hands of Abbey National Plc, UK.

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15.1 The next issue for consideration is whether the reimbursement of salary costs and other administrative expenditure made by the assessee to Abbey National Plc, UK constitute 'fees for technical services' (herein after referred to as FTS).

1*5.3 Section* 9(1)*(vii) of the Act is attracted if there is a rendering of service for which a consideration should follow. In the instant case, it was specifically agreed by the parties that Abbey National Plc, UK would only second staff to the assessee as per the secondment agreement. No services were rendered by it to the assessee. 'Fees for technical services' as per section 9(1)(vii) means any 'consideration' for rendering of managerial, technical or consultancy services (including the provision of services of technical or other personnel). Consideration means something given in return for obtaining OR getting a thing As the reimbursement to Abbey National Plc, UK did not result in any profit or gain or income to it, these reimbursements cannot be treated as 'consideration.'*

15.4 The reimbursement made to Abbey National Plc, UK also cannot be regarded as 'provision of services of technical or other personnel.' The use of the words 'services of' in the above expression u/s.9(1)(vii) of the Act mandates the rendering of some sort of work through the act of the services of technical on other personnel

Hence (ITAT) we are of the considered opinion that the reimbursement of salary costs and other administration expenses made by the assessee cannot be categorized as 'fees for technical services' u/s.9(1)(vii) of the Act

2. Procurement Assistance Services by Adidas Sourcing Limited Hong Kong to Adidas India Marketing Private Limited) not Technical Managerial and Consultancy under 1961 Act : Comprehensive order with earlier orders on issue Holds Delhi ITAT in ITA No. 5300/Del/2010

Managerial : the Delhi High Court in the case of J.K. (Bombay) Ltd. vs. CBDT & Anr. (1979) 118 ITR 312 (Del) referred to an article on 'Management Sciences' in Encyclopedia 747, wherein it is stated that the management in organizations include at least the following: (a) discovering, developing, defining and evaluating the goals of the organisation and the alternative policies that will lead towards the goals; (b) getting the organisation to adopt the policies; (c) scrutinizing the effectiveness of the policies that are adopted and (d) initiating steps to change policies when they are judged to be less effective than they ought to be. Management thus pervades all organizations.

Technical : In the case of Skycell Communications Ltd. vs. DCIT (251 ITR 53) (Madras), the Hon'ble High Court has held that the popular meaning associated with the word 'technical' is 'involving or concerning applied and industrial science'.

Consultancy : consultancy is generally understood to mean an advisory services. Further, it may be fair to state that not all kind of advisory could qualify as technical services. For any consultancy to be treated as a technical services, it would be necessary that an technical element is involved in such advisory. Thus, the consultancy should be rendered by someone who has special skills and expertise in rendering such

CLSA Ltd vs. ITO

Month-Year :	Apr - 2013
Author/s :	[2013] 31 taxmann.com 5 (Mumbai-Trib) [BCAJ]
Title :	CLSA Ltd vs. ITO

Details :

Facts

The taxpayer was a company incorporated in Hong Kong. It was a member of a group of companies having global presence. During the year, the Indian group company ("IndCo") of the taxpayer had made certain payments to the taxpayer which were recorded by IndCo as recovery of overhead expenditure. IndCo had also withheld tax from the payments.

The taxpayer contended that the payments were referral fees for referring overseas institutional clients to IndCo and hence, were not FTS in terms of section 9(1)(vii) of I-T Act. Consequently, they were not chargeable to tax.

The issue before the Tribunal was: whether the referral fees constitute FTS in terms of section 9(1)(vii)?

Held

The Tribunal observed and held as follows.

The Tribunal referred to Advance Ruling in *Cushman and Wakefield (S) Pte Ltd.*, *In re* [2008] 305 ITR 208 (AAR) wherein, on similar facts, the AAR had held that the referral fees was not FTS[1]. Following the AAR ruling, the Tribunal held that the referral fees received by the taxpayer were not FTS u/s. 9(1)(vii) of I T Act.

3. **151 TTJ 126** M/s. BHEL-GE-Gas Turbine Servicing (P)Ltd., Hyderabad IN THE INCOME TAX APPELLATE TRIBUNAL HYDERABAD BENCH 'A', HYDERABAD Date of Pronouncement 31.7.2012: *16. The above activities involve assembly, disassembly, inspection, reporting and evaluation. CIT(A) examined every activity enlisted above and came to the conclusion that none of the above works involve services of technical nature. The discussion given by the CIT(A) in para 5.4.2 is relevant. We agree with the same considering the settled legal position that routine maintenance repairs are not FTS/technical services;*

PUNE BENCH "A", PUNE ITA No. 1357/PN/2010 and ITA 1358/PN/2010 Bharat Forge Ltd 31st day of January, 2013.

In the preceding paragraphs we have already noted that the explanation to section 194J(1) defines professional service means the service rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board. The nature of expenditure made by the assessee towards payments made to various persons as mentioned in the bills, in our opinion, cannot be considered as payment for technical consultancy. **The Pune Bench of the Tribunal in the case of Glaxosmithkline Pharmaceuticals Pvt. Ltd. (Supa) has held that any**

payment for technical services in order to cover u/s.194J should be a consideration for acquiring or using technical know-how simplicitor provided or made available by human element. There should be direct and live link between the payment and receipt/use of technical services/information. If the conditions of section 194J r.w.s 9(1), explanation 2 clause (vii) are not fulfilled, the liability under this section is ruled out. We, therefore, hold that the payments made by the assessee in the instant case towards testing and inspection charges cannot be construed as payments towards professional service as per the provisions of section 194J and the assessee has rightly deducted the tax u/s.194C.

The learned counsel for the assessee reiterated the same arguments as made before the Assessing Officer and the CIT(A). He submitted that it is not a case of simple hiring of crane. The crane owner provides the operator and is also responsible for the day-to-day maintenance and its operational costs. Relying on the following decisions he submitted that payment made for the use of cranes or for hiring of tankers is covered u/s.194C and not u/s.194I *1. Swayam Shipping Services (P) Ltd. reported in 339 ITR 647 (Gujarat) 2. Shree Mahalaxmi Transport Co. reported in 339 ITR 484 (Gujarat) 3. Indian Oil Corporation (marketing Division) reported in 12 ITR 79 (Delhi)* The only dispute to be decided in the instant ground is regarding the applicability of provisions of section 194C or 194I on account of payments for hiring of cranes for loading and unloading of material at its factory when the cranes are provided by the parties along with driver/operator and all expenses are borne by the owners only Since the facts in the instant case are identical to the cases decided by Hon'ble Gujarat High Court, therefore, respectfully following the same we hold that provisions of section 194C are only applicable for such payments and not provisions of section 194I. We find in the instant case the learned CIT(A) while holding that provisions of section 194C are applicable for payments towards windmill operation and maintenance has followed the decision of Hon'ble Madras High Court and the decision of ITAT, Ahmedabad Bench in the case of Gujarat State Electricity Corporation (Supra). The learned Departmental Representative could not distinguish the decisions relied on by the learned CIT(A). In absence of any contrary material brought to our notice against the order of the CIT(A) and since the learned CIT(A) while deciding the issue has relied on the decision of Hon'ble Madras High Court and the ITAT Ahmedabad Bench, therefore, we find no infirmity in the same and uphold the order of the learned CIT(A) on this issue. **After hearing both the sides, we find the Ahmedabad Bench of the Tribunal in the case of Nuclear Corporation of India Ltd. Vs. ITO reported in 2011-TIOL-659-ITAT-Ahmedabad has held that payments made for AMC of Telephone exchange and computer cannot be considered as fees for technical services within the meaning of section 194J**. Since in the instant case the assessee has made payments to various parties for AMC, therefore, respectfully following the decision of the Ahmedabad Bench of the Tribunal cited (Supra) and in view of answer to Question No.29 in CBDT Circular No.715 dated 08-08-95 we hold that the assessee has rightly deducted tax at source u/s.194C on account

of payments for annual maintenance charges **In our opinion, the payments made to various organisations towards attending seminars by the employees of the assessee company cannot be considered as towards rendering of professional services by those training institutes as per the provisions of section 194J.** We, therefore, agree with the findings given by the learned CIT(A) that training and seminar expenses of the nature under consideration in the instant case do not fall under the category of services rendered u/s.194J and the assessee has rightly deducted tax u/s.194C and there is no short deduction of tax. The ground raised by the revenue is accordingly dismissed.

4. M/s.UPS SCS (Asia) Limited **IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES "L", MUMBAI 22nd day of February, 2012.** *ITA No.2426/Mum/2010*

4. We have heard the rival submissions and perused the relevant material on record in the light of precedents cited. The entire dispute centers around the taxability of the amount received by the assessee from Menlo India in respect of services performed outside India on the export consignments of Menlo India originating from India. There is no quarrel over the nature of services for which the above referred amount has been paid to the assessee being, freight and logistics services such as transport, procurement, customs clearance, sorting, delivery, warehousing and pick up services. Now the primary question which arises for our consideration is as to whether the payment in respect of these services can be held as `fees for technical services' within the meaning of section 9(1)(vii).

17. Thus it can be noticed that the payment made to the assessee in question is not a consideration for managerial or technical or consultancy services. That being the position, it cannot fall within the ambit of section 9(1)(vii). 19. It is, therefore, patent that the payment received by the assessee neither falls u/s 9(1)(i) nor u/s 9(1)(vii). Since the income cannot be described as deemed to accrue or arise in India and there is no doubt about such income having not been received or deemed to be received or accruing or arising in India, the taxability of such income fails. We, therefore, overturn the impugned order and hold that the amount in question cannot be charged to tax.

5. *Mumbai Bench in* TUV Bayren (India) Limited, **ITA No.4944/Mum/2002**. TUV Management Services GmBH 6th July, 2012 The FTS has been defined as the payment of any amount in consideration of service for 'managerial' or 'technical' or 'consultancy' in nature, which is quite similar to definition given in *Explanation* 2 to Section 9(1)(vii). Looking to the nature of services provided by the assessee as has been described above, it is amply evident that it is mostly in the nature of 'audit work' wherein the auditors of the assessee visit the sites of the client's and evaluate the clients quality system as prescribed in International Standard for ISO 9001/2, ISO 14001, QS 9000 etc. Based on this audit work, a report is prepared which is sent to certification body to the assessee company in Munich, Germany, which provides a certificate for a certain period, after reviewing the report and several stages of audit work which has been carried out for this purpose. Nowhere from such services, it can be inferred that the assessee has been providing technical, managerial or consultancy services. Technical services require expertise in technology and providing the client such technical expertise which in this case no technology is transferred. Managerial services is used in the context of running and management of the business of the client, which herein this case, there is no management of client's business, but evaluation of standards as per international guidelines. Consultancy is to be understood as advisory services wherein necessary advise and consultation is given to its clients for the purpose of client's business. In an audit work there may be some incidence of advise at the timeof evaluation but certainly it cannot be termed as pure consultancy services as in the audit work the auditor has to only evaluate the quality system and environmental system. ....*Thus, the entire nature of services and activities carried out by the assessee comes within the realm of 'professional services' and not within the meaning of 'FTS' as provided in the Article 12(4) and Section 9(1)(vii). Accordingly, we hold that services rendered by the assessee company are not covered under 'fees for technical services' under Article 12 of Indo-German DTAA*

Payments towards professional fees is not royalty and hence there was no requirement to deduct tax under Section 195

The taxpayer was engaged by a client to provide consultancy services in connection with the sale of its energy business and separately for retail oil marketing and other related services. The taxpayer in turn engaged two entities, one Dallas based firm (resident in the US) and a Canada based entity, for consultancy services in relation to sale of the energy business and in relation to retail oil marketing and other related services, respectively. The AO held the payments by the taxpayer to both the entities to be royalty under Section 9(1)(vi) and Article 12 of the respective Tax Treaties and hence, the taxpayer was required to deduct tax at source on payments made under Section 195, failing which the expenditure was disallowed under Section 40(a)(i). On appeal, the CIT(A) ruled in favor of the taxpayer, agreeing that the payments were not royalty either under Section 9(1)(vi) or under the relevant Tax Treaties. On further appeal, the Tribunal upheld the order of the CIT(A), stating that the payments made were purely for a professional service for consultancy, rendered outside India, and nor for supply of scientific, technical, industrial or commercial knowledge or information. Accordingly, the Tribunal held that since the payments are not covered under Article 12 of the respective Tax Treaties, the taxpayer was not required to deduct tax at source under Section 195.

DCIT v KPMG India Private Limited (2012-TII-61-ITAT-MUM-INTL) (Mumbai Tribunal)

Amount received by an international reinsurance intermediary for services rendered to an originating insurer in the process of re-insurance of risk placed by the originating insurer would not amount to FTS

The taxpayer, an international reinsurance intermediary received commission from the Indian insurance company ('originating insurer') for onward transmission of reinsurer's information. The originating insurer in India contacted an individual who was licensed to transact in the insurance business in India for placing identified risks with international reinsurers. The individual, in turn, contacted the taxpayer, requesting proposals from the international reinsurers. The taxpayer further linked other primary

brokers in the Lloyds market for competitive proposals. Based on the offers of the taxpayer, the individual presented various options to the originating insurer who made the final decision. The reinsurance premium, net of commission of 10 percent, was remitted by the originating insurer to the taxpayer for onward transmission to the reinsurers in the Lloyds market. The AO and the CIT(A) treated the above commission as FTS, under Section 9(1)(vii) and also under Article 13(4)(c) of the India-UK Tax Treaty. The Tribunal, however observed that according to Article 13(4)(c) of the Tax Treaty, FTS means payments in consideration for rendering any technical or consultancy services which, inter alia, makes available technical knowledge, experience, skill, know-how or processes, or consists of the development and transfer of a technical plan or technical design. Since none of the above is made available by the taxpayer to the originating insurer, the payment does not amount to FTS.

DIT v Guy Carpenter & Co Ltd (2012-20-Taxman-807) (Delhi Tribunal)

6..	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 INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCH "J", MUMBAI Dynamic Courses and Career Pvt. Ltd., Date of Pronouncement: 21.11.2012 The Ld. CIT(A) committed a gross error of law and fact in confirming the disallowing Rs.2133358/- made by the Assessing Officer u/s.40(a)(i) of the I. T. Act, 1961. 2. The Ld. CIT(A) grossly erred in not appreciating that the provisions of Sections 40(a)(ia) rws 195 is not attracted to the impugned transaction in as much as the aforesaid sum is not chargeable under the provisions of the Act. 3. The Ld. CIT(A) erred in not appreciating that the impugned amount is remitted outside India in the individual names of students on account of Registration Fee, Examination fee and Kit Materials fee payable to the Foreign institutions. 4. The Ld. CIT(A) erred in failing to appreciate that the appellant is acting merely as a conduit in facilitating the remittance of the fees to the Foreign Institution on behalf of if student, as a service to the students without any profit element or motive." The points for consideration in this appeal are:- i) Whether the fees paid to IATA and VIASINC are income of these organizations; ii) Whether the income of the said organizations are taxable in India iii) Who is the person responsible to pay the fee iv) Whether the assessee is liable to deduct tax at source while making remittance of fee to the above non resident organizations. As regards the point No.1, it is to be noted that every fee or every receipt will not amount to income. The receipt of any

amount has to be pursuant to any services being rendered by the said organizations in India. The
organizations do not have any permanent establishment in India. They are only the accrediting institutions granting the certificate to the students, who get the
training from the institutes such as the assessee. Therefore, It can not be said that these organizations are rendering any services in India and therefore, the fees paid to these organizations for granting the certificate would not amount to the income arising or accruing to them in India during the relevant assessment year. 7. As regards point No.2, it is settled position that in the absence of any permanent establishment in India or any business connection in India, the income of these
organizations are not taxable in India. As regards Point No.3, the tax is to be deducted at source by the person responsible to pay the amounts to the non-resident. Section 204(iii) of the I.T. Act defines the person responsible for paying of any other sum other than those specified in clause (i) (ii) (iia), under the provisions of I. T. Act's, as the payer himself, or if the payer is a company, the company itself including the principal officer thereof. In this case, the assessee is not the person responsible for paying the fees to the non-resident organization. It is the students, who are responsible to pay the fee to the accrediting organizations and the assessee is only an agent of the students. The next question that arises for consideration is whether the students are liable to deduct tax at source while making payments to these organizations? As We have held in point No.1 above, every receipt is not income and the payment of fee can not be held as the income of the international organizations and the students are not liable to deduct the tax at source. When the principal, i.e. students are themselves are not liable to deduct tax at source, the
agent of the students i.e. assessee herein have no liable to do so. In these circumstances, we are unable to sustain the additions made by the Assessing Officer as confirmed by the CIT(A). Consequently, we delete

the additions made by them and the assessee's grounds of appeal No.1 to 4 are allowed."

(Same order of Mumbai bench ITAT in Euro RSCG Worldwide 27/11/2012 the appellant maintains communication channel between ERAPL and its clients the client coordination fees paid to the appellant cannot be termed as Royalty because it is not a consideration for the use of right or to use any of the specified terms mentioned in the definition of Royalty under Article 12 of Indo US DTAA. The observation of AO that the client coordination services rendered by the appellant involve the use of a plan, secret formula, or process by ERAPL is without any basis. The client coordination fees can be taxed as business profits only. Since the appellant admittedly does not have a permanent establishment India, the question of taxability of the impugned amount in India would not arise in the absence PE, as provided for in Article 7 of DTAA. In view of these facts, this ground of appeal is decided in favour of the appellant".

7. Delhi High Court Nokia case Software Royalty:

Revenues submitted that the question of "copyrighted article" or actual copyright docs not arise in the context of software both in the DTAA and in the Income Tax Act since the right to use simpliciter of a software program itself is a part of the copyright in the software irrespective of whether or not a further right to make copies is granted. The decision of the Delhi Bench of the ITAT has dealt with this aspect in its judgment in *Gracemac Co.* v. *ADIT* 134 TTJ (Delhi) 257 pointing out that even software bought off the shelf, does not constitute a "copyrighted article" as sought to be made out by the Special Bench of the ITAT in the present case. However, the above argument misses the vital point namely the assessee has opted to be governed by the treaty and the language of the said treaty differs from the amended Section 9 of the Act. It is categorically held in *CIT* v. *Siemens Aktiongesellschaft,* 310 ITR 320 (Bom) that the amendments cannot be read into the treaty. On the wording of the treaty, we have already held in *Ericsson* (*supra*) that a copyrighted article docs not fall within the purview of Royalty. Therefore, we decide question of law nos.1 & 2 in favour of the assessee and against the Revenue.

Mumbai bench ITAT in Sonic Biochem Extractions (P) Date of Pronouncement: 20/03/2013 ITA Nos.8136, 8138 & 8137/Mum/2011 20.2 We were surprised about the action of AO and also the CIT (A). First of all mere purchase of software, a copy righted article, for utilization of computers cannot be considered as purchase of copy right and royalty. Assessee has purchased a sort of asset and capitalized it to the computers a/c and claimed depreciation. Assessee has not purchased any copy right or royalty nor claimed any depreciation on royalty as intangible asset. Assessee does not acquire any rights for making copies, selling or acquiring which are generally meant to be considered within the definition of 'royalty'. The explanation 2 of

Sec 9(1)(vi) can not be applied to purchase of a copyrighted software, which does not involve any commercial exploitation of the same. It is simply the product available on hard disk etc, for utilization in the day today operations of assessee. It is a copyrighted one but not one involving acquisition of copy rights. Just because in the above case of Samsung, purchase of software products and distribution in Indian market was contested and Hon'ble Karnataka High Court confirmed that software purchase of software is to be considered as 'royalty', it does not mean that the legal principles established therein will apply to all other cases and all situations. In this case assessee simply purchased software delivered along with computer hard ware for utilization in the day to day business. There is no intangible asset involved in this and assessee's claim of depreciation cannot be disallowed under section 40(a)(ia). As per section 40(a)(ia,) if at all applicable, disallowance is only with reference to the claim made in the Profit & Loss A/c towards Revenue expenditure. In our view, purchase of asset and consequent claim of depreciation can not be considered under that section. We have no hesitation in disapproving the action of AO and the CIT (A). AO is directed to allow the depreciation as claimed. 21. In the result, appeal is allowed

"Mumbai bench ITAT in B4U International Holdings Ltd. vs DCIT 148 TTJ 237; **Yahoo India Ltd ruling relied upon 140 TTJ 195;**

(also refer P&H high Court in Mark Auto Industries case Date of Decision: 8.10.2012 (Whether on the facts and in the circumstances of the case Ld. ITAT is right in law in upholding the order of Ld. CIT(A), that the provision of Section 40(a)(i) of Income Tax Act, 1961 are not applicable to payments of Technical know-how, simply because only part of it is written off by the assessee, each year by way of depreciation u/s 32 of Income Tax Act, 1961? Thus, both the questions are answered against the revenue and in favour of the assessee.)

Payment received by Sandvik Australia from Indian group companies for rendering IT support services not 'royalty' under Article 12 of DTAA or IT Act; Services included IT help desk services relating to problems faced in usage of Lotus Notes i.e., Notes Domino Administration; Services though 'technical', assessee did not 'make available' any technical know-how for solving group companies' IT related problems; Karnataka HC ruling in De Beers relied on : Pune ITAT

Delhi high court: Hire Charges to Swiss Resident in absence of PE and business connection held non taxable under DTAA/Act CALCUTTA TEST HOUSE PVT LTD 08.11.2012

Gist of the order ***The assessee had, during the relevant period, covered by assessment year 2000-01, hired machinery from foreign company based in United Kingdom and paid the latter hiring charges. The Assessing Officer was of the opinion that the United Kingdom company had business connected with the assessee and therefore felt that in view of Section 195 read with Section 40(a)(i), the assessee was under a responsibility to deduct tax from the hiring charges i.e. `38,26,696/- paid to the foreign company The omission by the assessee in doing so resulted in the disallowance of that amount and it has been added back as income in the assessee?s hands. The assessee?s appeal was allowed by the Commissioner of Income Tax (A) by the order dated 14.2.2011.***

This Court is of the opinion that since the finding of fact as to whether the foreign company did or did not have a permanent establishment in India and whether its relationship with the assessee was on the basis of a business connection or not, has been held against the revenue concurrently, and such findings of the fact, in the circumstances of the case have not been shown to be arrived at in an unreasonable manner having regard to the record. Consequently, no substantial question of law arises for consideration; the appeal, therefore, fails and is dismissed.

152 TTJ 145 IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES "L", MUMBAI ITA No.8621/Mum/2010 M/s.WNS North America Inc **Date of Pronouncement : 14.12.2012** The contention of the ld. DR is two-fold. First, that any retrospective amendment to the provisions of the Act is relevant for determining the taxability or deductibility of an amount even under the provision of the DTAA and second, the amount in question, when examined in the light of Explanation 5 to sec. 9(1)(vi) inserted retrospectively clearly, brings it in the scope of `royalty 3.5. We espouse the first segment of the contention of the ld. DR that the retrospective amendment to the provisions of the Act *per se* should be considered for

determining the taxability of the amount even under the DTAA. Coming back to our context, if the retrospective amendment is in the realm of a provision of which no contrary provision is there in the Treaty, then such amendment will have effect even under the DTAA and *vice versa.* 3.10. Reverting to the facts of the extant case, we observe that the term "royalty" has been defined in the DTAA as per Article 12(3). Such definition of the term "royalty" as per this Article is exhaustive. Pursuant to the insertion of *Explanation (5)* by the Finance Act, 2012, no amendment has been made in the DTAA to bring the definition of royalty at par with that provided under the Act. Subject matter of the Explanation is otherwise not a part of the definition of Royalty as per Article 12. As such, it is clear that the contention of the learned Departmental Representative that the retrospective insertion of Explanation 5 to section 9(1)(vii) should be read in the DTAA also, cannot be countenanced.

In other words, the lease line services were availed by WNS India from MCI WorldCom etc., for which the assessee originally made the payment to such operators on behalf of WNS India and subsequently recovered the same from WNS India at cost without any mark up. The question is whether under these circumstances it can be said that the assessee got this consideration of `6.41 crore in the nature of royalty? The case of the learned Departmental Representative rests on clause (iva) of *Explanation (2)* to section 9(1)(vi) along with *Explanation (5).* It has been contended that the amount be considered as royalty in the hands of the assessee because it is for allowing the use of equipment. We are unable to comprehend this point of view for the reason that such charges were not recovered by the assessee because of providing any access to lease lines owned or held by it.

Different consequences follow in the hands of the payer and payee for making a claim of reimbursement of expenses having profit element; or treating a part of contract value as reimbursement of expenses even without any mark-up. Whereas

in some cases such claim for reimbursement may be tax neutral, while in others it may have bearing on tax liability. From the angle of payee, it will be tax neutral if there is question of computing business profits as per Article 7 because of computation of such income on net basis. But, it will affect tax liability, if the tax is to be computed as per Article 12 by treating the amount as Royalty or Fees for technical services wherein the tax liability is determined on the gross amount itself. In the hands of non-resident payer, the claim for treatment of head office expenditure as reimbursement of expenses shall have bearing on the computation of deduction of head office expenditure as per section 44C of the Act. In the like manner, there are several provisions including Chapter X, which affect the amount of total income or the tax liability by wrong treatment of payment of expenses as reimbursement of expenses. The crux of the matter is that the payment of expenses is to be distinguished from and not intermingled with the reimbursement of expenses in the hands of payer as well as payee. In fact, it is the substance of the transaction which matters. The real character of a transaction cannot be cloaked under some superficial name. Once it is held that there is no profit element in such reimbursement it becomes manifest that the gross income of `6.14 crore recovered by the assessee from WNS India is equal to the same amount paid by it to MCI WorldCom etc., thereby leaving no surplus liable to tax under Article 7 of the DTAA. This issue is decided in assessee's favour and the consequential ground is allowed.

DIT vs Sahara India Financial Corpn. Ltd. 321 ITR 459

Royalty Tile sponsorship for Cricket tournament High Court of Delhi 6. We have also examined the terms of the agreement between the respondent/assessee and IMG Canada. It is clear that what has been paid for by the respondent/assessee is the right of title sponsorship and the benefits connected therewith,

which have been set out in the Schedule to the said agreement and to which we have already referred to above 4. The Schedule to the said agreement specifies the details of the Title Sponsor Package, which included the right that all the matches and the tournaments would be referred to as "Sahara Cup". It also provided for incorporation of the Sahara name and logo as the official tournament logo. The said Sahara name and logo was to be prominently displayed at either ends of the cricket ground on the outfield as also prominently displayed on the stumps and the score boards. The players clothing was also required to display the Sahara logo. Apart from these rights, certain other rights, such as provision for certain number of VVIP tickets, VIP tickets and season tickets were also part of the Title Sponsor Package. The official awards and trophies were also required to carry the Sahara name and/or logo.

7. The learned counsel for the revenue contended that the expression "payment of any kind including rentals", has a very wide meaning and, therefore, it includes the payment for "any" rights. Such a contention is not tenable in view of the fact that the payment, which may be of any kind and which may include rentals, has to be in connection with the right to use any of the rights specified in the three categories mentioned above.

(a) any patent, trademark, design or model, plan, secret formula or process;

(b) industrial, commercial or scientific equipments or information concerning industrial, commercial or scientific experience; and

(c) any copyright of literary, artistic or scientific work cinematographic films and films or tapes for radio or television broadcasting.

It is apparent that unless and until the payment is in connection with the right to use or is by way of consideration for the right to use any of the aforesaid three categories, the payment cannot be termed as a "royalty".

8. It is apparent that the categories (a) and (b) obviously do not arise. It is for this reason that the Commissioner of Income Tax (Appeals) sought to include the payment made by the assessee to IMG Canada under the third category, that is, Article 13 (3)(c) of the said DTAA. *Unfortunately, what the Commissioner of Income Tax (Appeals) failed to notice was that before any payment could be termed as a "royalty" under Article 13(3)(c), it would have to be either as consideration for the copyright or for the right to use a copyright in any of the four categories of works mentioned therein, namely*,

(i) literary; (ii) artistic; (iii) scientific work; and (iv) cinematographic films and films or tapes for radio or television broadcasting. *What the Commissioner of Income Tax (Appeals) failed to note was that there was no transfer of a copyright or*

the right to use the copyright flowing from IMG Canada to the respondent/assessee and, therefore, any payment made by the respondent/assessee to IMG Canada would not fall within Article 13(3)(c) of the said DTAA. The reference in Article 13(3)(c) is to "any copyright" and it is not a reference to "any right".

ACIT vs Anchor Health and Beauty Care (P) Ltd. 143 TTJ 566 Royalty-Accreditation certificate ITAT, Mumbai

The assessee before us is engaged in the business of manufacturing and trading of tooth powder, tooth paste, tooth brush and other health care products. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has paid a sum of Rs 11,71,826 as accreditation panel fees to British Dental Health Foundation UK, but has not deducted tax at source from the same 6. However, while on this issue, it is also necessary to consider is whether the assessee indeed had an obligation to deduct tax at source from the remittance of Rs 11,71,826 to British Dental Health Association UK.

7. The assessee had made the payment of Rs 11,71,826 to British Dental Health Association towards accreditation panel fees. BDHF is a UK based registered charitable institution. This Foundation is stated to, inter alia, "evaluate consumer oral health care products to ensure that manufacturers' product claims are clinically proven and not exaggerated" and "an independent panel of internationally recognised dental experts" is stated to "study all the claims carefully to make sure they are true, and backed up by reliable scientific evidence". As a result of the accreditation granted by the BDHF, the assessee is allowed to use this fact of BDHF

approval in the marketing of its products. The question that we actually need to decide is whether the amount so received by BDHF, in consideration of the accreditation, can be brought to tax in India?

. While clause (b) of the definition of clearly inapplicable on the facts of this case as this clause deals with the equipment leasing only, clause (a) also does not deal with a situation in which the accreditation or approval granted by a resident is used, in another country, for promoting the sales. This accreditation does not allow the accredited product to use, or have a right to use, a trademark, nor any information concerning industrial, commercial or scientific experience - or, for that purpose, use or right to use of anything falling in any other category of clause (a). An accreditation or approval by a reputed body may give certain comfort level to the end users of the product, and thus may constitute a USP (i.e. unique selling proposition) to that extent, but it may also be, therefore, used for the purposes of marketing of the products, but, legally speaking, the payment made for such an accreditation is not covered the definition of 'royalty' as set out in Article 13(3) of India UK tax treaty. Learned Departmental Representative's argument is that in substance the payment for BDHS accreditation is nothing but a royalty to use their name for marketing, and, therefore, this payment should be treated as a payment of royalty. We see no substance in this simplistic plea. When an expression has been defined in law, and the impugned payment is not covered by such a specific definition, it cannot be open to us to look at normal connotations of this expression in business parlance. Simply because assessee is benefited by this accreditation, and the assessee uses the same for its marketing purposes, the character of payment cannot be classified as 'royalty'. The expression 'royalty' is neatly defined under Article 13(3) of Indo UK tax treaty, and unless the payment fits into the description set out in Article 13(3), it cannot be termed as 'royalty' for the purposes of examining its taxability under the tax treaty

IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION **INCOME TAX APPEAL NO.239 OF 2011** Ishikawjima Harima Heavy Inds. Company Limited The dispute in the present case relates to the taxability of the off shore services and offshore supply made by the assessee during the assessment year in question. The Income Tax Appellate Tribunal following the decision of the Apex Court in the assessee's own case reported in (2007) 288 ITR 408 (SC) has held that the amount receivable by the assessee in respect of offshore supply of equipments and offshore services cannot be taxed under Section 9(1) of the Act According to the Revenue in view of the explanation, added to Section 9 by Finance Act, 2010 with retrospective effect from 1st June 1976, the assessee is liable to pay tax in respect of the offshore supply of equipments and offshore services. It is relevant to note that the Apex Court in the aforesaid assessee's own case has held that apart from nonapplicability of Section 9(1) of the Incometax Act, 1961 in the present case Article 7 of the DTAA between India and Japan is also applicable and, hence, the income arising on account of offshore services and offshore supply of equipments would not be taxable. If the assessee is not liable to tax in view of the Article 8 of DTAA between India and Japan, then, irrespective of the amendment to Section 9(1) of the Act, the assessee would not be liable to tax.

8. *Taj Leather Works* IN THE INCOME TAX APPELLATE TRIBUNAL, **KOLKATA 'B' BENCH, KOLKATA** I.T.A. No.: 1686 and 1687/Kol/2011 Assessment year 2007-08 and 2008-09 Date of pronouncing the order : May 31 ,2012

9. We have also noted that it is not even the revenue's case that the amounts paid to foreign airlines, on account of airfreight payments, are taxable in India, and quite rightly so, because, as the provisions of all the respective tax treaties clearly provide, the profits from operations of ships and aircrafts in the international traffic are taxable only in the state in which the respective enterprise are fiscally domiciled and not in the source state. This rule, howsoever devoid of paradigm justification as it may appear to many of us, is one of the fundamental rules followed in almost all the tax treaties and our tax treaties with UK, UAE, Singapore and Germany are no exception to this general rule. It is only elementary that a tax deduction at source under section 195 is only a vicarious liability inasmuch as when recipients of income,

i.e. the airlines concerned, have no primary liability to pay tax, there cannot be any vicarious liability to deduct tax from payments in which such income is embedded.

10. In view of the above discussions as also bearing in mind entirety of the case, we are of the considered view that the assessee did not have any obligations to deduct tax at source – whether under section 194 C or under section 195 – from payments made to the foreign airlines for airfreight. In this view of the matter, the impugned disallowances under section 40(a)(ia) are devoid of any merits, nor can these disallowances be made under section 40(a)(i) either – as alternatively suggested by the authorities below. We, accordingly, direct the Assessing Officer to delete the impugned disallowances. The assessee gets the relief accordingly

Jetways Travels Pvt. Ltd ITA No. 3447/Del/2010
Assessment Year: 2007-08 Delhi ITAT

The case of the assessee is that it has received charges from the customers for providing hotel booking services and not received any commission from the hotels. It has pointed out to the Assessing Officer that it is not working as an agent of the hotels. The controversy can be appreciated by simple example, namely ,A & B are two resident Indians want to travel Singapore. A made a booking directly and remitted the foreign exchange on his own behalf. B took the help of assessee who booked the hotel on his behalf and collected the booking amount remitted by the assessee in foreign exchange plus services charges. Can the Assessing Officer say that A ought to have deducted the tax while booking the hotel because the amount paid to the hotel is taxable in India. In our opinion, the reply to this question would be "no" because the foreign hotels were not providing any services to "A" in India or it has no business connection within the territory of India and it is a "A" who wants to avail the hotel facility outside the Indian territory. If for the sake of argument, we accept the case of the Assessing Officer then all facilities availed by Indian Residents outside India ought to be brought in the tax net.

Sandoz Private Limited (formerly known as Novartis Enterprises Pvt. Ltd.,) ITA Nos.2193/Mum/2003: Assessment Year: 1998-1999 ITA Nos.2194/Mum/2003:

Assessment Year: 1999-2000 IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH 'L' BENCH Date of pronouncement: 9. .5. 2012 : 11. Firstly, we consider the first aspect as to whether the said amount remitted by the assessee aggregating to Rs.1,57,18,000 towards advertisements in Russia through advertising agencies who are admittedly non-resident is assessable as an income in the hands of those companies being the income accrued in India. There is no dispute to the fact that assessee remitted the amount towards expenses to the advertising agencies of Russia such as M/s. Haile Corporation Ltd., M/s. Headway Express Ltd., M/s. Sandoz Pharma Services (subsequently renamed as M/s. Novartis Pharma Services Inc) through its parent company NPS which is a resident of Switzerland. There is no dispute to the fact that the entire advertisement activity had been carried out outside India. There are no facts brought on record that NPS has a PE in India. Considering above facts and also the fact that there is a DTAA agreement between India and Switzerland and also between India and Russia, the said amount remitted by the assessee towards advertisements even if assessable could be assessed as business profits as per section 9 of the Act but having regard to the fact that these non-resident companies i.e. recipients and/or advertising companies have no PE in India, we agree with ld A.R. that the said amount could not be taxed in India under section 5(2) of the Act.

Hence, the authorities below were not justified to deny the claim of the assessee u/s.40(a)(i) of the Act as the assessee has not committed any default in not deducting TDS u/s.195 on the amount of Rs.1,57,18,000 remitted by it to NPS in respect of advertisement campaign launched in Russia

9. M/s Bhagiradha Chemicals & Industries Ltd., Hyderabad THE INCOME TAX APPELLATE TRIBUNAL HYDERABAD BENCH "A", HYDERABAD 09/05/2012

5. We have heard arguments of both the parties, perused the record and gone through the orders of the authorities below. In the case of foreign agents who procure orders for exports to Indian Assessees, services are rendered by the agents outside India and the remuneration for such services will constitute business profits of the foreign

agents. They are not rendering technical services for procuring orders and hence remuneration for procuring orders cannot be considered as fees for technical services. As the agent did not have any permanent establishment in India no part of the commission payable for procuring export orders is taxable in India. **Recently, the Hon'ble High Court of Delhi in the case of CIT Vs EON Technology reported in 246 CTR 40** has held that payment of sale commission to non resident cannot be disallowed under Section 40(a)(i). Respectfully following the decision of the Delhi High Court(supra), we uphold the order of the CIT(A) in this regard and dismiss the ground of appeal of the revenue

Refer: a) Jaipur bench ITAT in Modern Insulator case 140 TTJ 715 b) Delhi high court in Guy Carpenter (reinsurance commission)

IN THE INCOME TAX APPELLATE TRIBUNAL 'D' BENCH, CHENNAI M/s. Faizan Shoes Pvt.Ltd Date of Pronouncement : 23rd April, 2013 The only grievance of the Revenue in this appeal is that the Commissioner of Income Tax (Appeals) erred in deleting the disallowance under section 40(a)(i) of the Act holding that the assessee is not liable to deduct tax at source on the commission payments made to non-residents under section 195 of the Act On going through the order of the Commissioner of Income Tax (Appeals), we find that the non-residents are only procuring orders for the assessee and following up payments, no other services are rendered other than procuring the orders and collecting the amounts. The non-residents are not providing any technical services to the assessee. The commission payment made to non-residents also does not fall under the category of royalty or fee of technical services, therefore the Explanation to sub-section (2) of section 9 has no application to the facts of the assessee's case. We see that this case is squarely covered by the decision of the Supreme Court in the case of GE India Technology Cen. P.Ltd. Vs. CIT (327 ITR 456) wherein the Hon'ble Supreme Court held that the assessee is not liable to deduct TDS when non-residents provided service outside India . It

was held that when the services are provided outside India, the commission payments made to non-residents cannot be treated as income deemed to accrue or arise in India, therefore, the provisions of section 195 has no application. In order to invoke the provisions of section 195 of the Act, the income should be chargeable to tax in India. Here the commission payments to non-residents are not chargeable to tax in India and therefore the provisions of section 195 are not applicable. In the circumstances, we sustain the order of the Commissioner of Income Tax (Appeals) in deleting the disallowance made under 40(a)(i) of the Act.

IN THE INCOME TAX APPELLATE TRIBUNAL BENCH 'C' CHENNAI M/s. Leaap International P. Ltd., Once it is found that the payments have been made to foreign companies for their services rendered outside India and that such foreign companies do not have any branch or place in India, then the income of such foreign companies would obviously not be taxable in India. If the income of the foreign company is not taxable in India, then as per the provisions of sec. 195 as the sum is not chargeable under the provisions of this Act the said section cannot have an application This view of ours finds support from the decision of the Hon'ble Supreme Court in the case of G.E. India Tech reported in 327 ITR 456 (SC)... In the circumstances, respectfully following the principles as laid down by the Hon'ble Supreme Court, as it is found that the payments made by the assessee being to a foreign company for services rendered outside India and the foreign company having no branches or business place in India, the payments made by the assessee to the foreign companies are not liable for deduction at source u/s 195 of the Act. (It was the further submission that the finding of the learned CIT(A) that all the freight payments or clearing and forwarding charges, payments have been received abroad and the real work of transportation or clearing and forwarding by the non-resident have been done abroad only, has not been disputed by the Revenue)

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH- "A" CALCUTTA Smt. Sudha Devi SarafDate of Pronouncement: 14-02-2013 We have considered the rival submissions. A perusal of the facts in the present case shows that the assessee has made the payments towards shipping business of the non-residents through shipping agents. Special procedures are provided u/s. 172 of the Act for payment of taxes in case of any shipping owners or charters by non-resident, which carries passengers, live stock material or goods shipped at a port of India. The Board Circular No. 723 dated 19-09-1995 (supra) clarifies both the provisions of

section 172 and 194C of the Act. It has been provided that in such a case the provisions of section 172 would apply and no deduction of tax is required to be made as per provision of section 194C of the Act. The AO has not made out any case that the assessee has paid any amount to the residents. In the circumstances, we are of the view that the finding of the learned CIT(A) on this issue is on a right footing and does not call for any interference. The same is hereby upheld. This ground of revenue's appeal is dismissed. 13. We have considered the rival submissions. A perusal of the assessment order clearly shows that the AO has accepted that Shri Omar Chirabi is a non resident, who has rendered his services out side India. A perusal of the order of the learned CIT(A) as also the reply of the assessee before the AO clearly show that the payment to Shri Omar Chirabi has been made outside India. In the circumstances, we are of the view that the income of Shri Omar Chirabi is not taxable in India in view of the said CBDT Circulars (refer to supra) as also the said decision of the Hon'ble Supreme Court in the case of G.E India Technology Centre Pvt. Ltd (refer to supra). In the circumstances, we are of the view that the finding of the learned CIT(A) on this issue is on a right footing and does not call for any interference. We uphold the same. This ground of revenue's appeal is dismissed. (refer delhi bench ITAT in Angelique International Ltd ITA No.4085/DEL/ 2011 ; ITO vs. M/s Planet Herbs Life Science", order of the Delhi Tribunal dated 25.05.2012, ITA No. 522/Del/2011; & Hyd bench ITAT in M/s Bhagiradha Chemicals & Industries Ltd., Hyderabad)

10. Gujarat High Court in VENKATESH KARRIER LTD TAX APPEAL No. 172 of 2011 20/03/2012

3. The only question that falls for determination in all these appeals is whether the Tribunal committed substantial error of law in holding that the assessee was not liable to tax in India as per Article 8 of the Double Taxation Avoidance Agreement [for short, DTAA hereafter] between India and UAE and accordingly was justified in deleting the tax levied by the Assessing Officer. At this stage, it will also be profitable to refer to the provisions contained in Circular No. 333 dated February 2, 1982 issued by the Board which states that the provisions made in DTAA would prevail over the general provisions of the Act. Circular No. 732 dated December 20, 1995 further clarifies that if ships are owned by an enterprise belonging to a country, with which India has entered into an agreement of avoidance of double taxation, and the agreement provides for taxation of shipping profits only in the country of which the enterprises is a resident, no tax is payable

by such ships at the Indian ports. 10. After taking into consideration the above circulars issued by the Board and also the provisions contained in Article 8 of the DTAA, we find that both the Tribunal below and the CIT [Appeals] rightly held that in such a situation, the owner of the ship being admittedly a resident of UAE, there was no scope of taxing the income of the ship in any of the ports in India. The agreement between the two countries has ousted the jurisdiction of the taxing officers in India to tax the profits derived by the enterprise once it is found that the ship belongs to a resident of the other contracting country and such position has also been clarified by the Circulars issued by the Board as indicated above. (applied and referred by Delhi High Court UAE Shipping case)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD TAX APPEAL No. 12 of 2012 MITSUTOR SHIPPING AGENCY PVT LTD.

3.2 In the proceedings of appeal, upon an application by the respondent, the appellate commissioner permitted production of certain documents by the assessee. He was of the view that due to short time the assessee could not produce the same before the Assessing Officer. ***Copies of certificate of incorporation in Netherlands, certificate of residence, minute of the Annual General Meeting etc. were produced by the respondent assessee***. These evidences were sent to Assessing Officer for his comments and the Assessing Officer submitted his remand report. **From the material documents allowed to be produced, the assessee could satisfy the Commissioner (Appeals) that the place of effective management of its enterprises was situated at Netherlands and thus, the requirement of condition in Article 8A of DTA agreement was met with. The Tribunal has rightly confirmed the decision of the Appellate Commissioner holding the assessee to be eligible for benefits of DTAA. While confirming the findings of the Commissioner, the Tribunal also observed that Revenue had failed to point out any contrary material either from the record or at the time of hearing before it. 6.1 The Commissioner (Appeals) as well as the Tribunal, have concurrently arrived at the findings that the assessee is eligible for the benefit. The**

finding arrived at by the Tribunal is based on material before it and was based on the reading of the documents submitted by assessee whereby it was pointed out that necessary requirement about place of effective management under the relevant clause of agreement was satisfied. No substantial question arises for consideration of this Court

IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTIONChiron Bearing Gmbh & Co. a) Whether on the facts and in the circumstances of the case and in law was the Tribunal correct in holding that the respondent can be considered to be a tax resident of Germany? Mr. Pinto in support of the appeal submits that the respondentassessee is limited partnership and cannot be considered to be a taxable unit in Germany for the purposes of the DTAA. In support of the aforesaid submission reliance is placed upon the order dated 28.03.2005 of the Assessing Officer wherein on the basis of OECD publication the Assessing Officer has held that limited partnership in Germany are not liable to tax As against the above, Mr. Irani for the respondent-assessee points out that the respondent assessee is a taxable entity under the German Law as is evident from the certificate dated 18.03.2005 issued by the German Authorities. Further, in terms of Article 2(3) of the DTAA is applicable even in respect of payment of Trade Tax in Germany. Consequently, in his submission the order of the Tribunal dated 04.07.2008 calls for no interference. The term 'resident' in terms of Article 4 of the DTAA means “any person who, under the laws of Germany is liable to tax therein by reason of his domicile, residence, place of management or any criterion of a similar nature”. We find that both the CIT(A) and the Tribunal has on examination of records found that respondent assessee is filing Trade Tax Return in Germany and therefore is paying tax to which the DTAA applies. Further, the Tax Resident Certificate dated 18.03.2005 issued by German Authorities evidences the fact that the respondent assessee is considered as a taxable unit under the

taxation laws of Germany. Therefore, the DTAA is applicable to the respondent assessee and in particular the benefit of Article 12(2) thereof cannot be denied. We do not find merit in the submission of the Revenue that the respondent assessee cannot be considered as a taxable entity in view of the OECD commentary. This is for the reason that entire issue is governed by the DTAA and on the basis of evidence. led before the authorities. In these circumstances, it is not open to deny the benefit of the DTAA on the basis of the OECD commentary.

M/s. Universal International Music B.V. **IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION** INCOME TAX APPEAL NO.1464 OF 2011 **08TH FEBRUARY, 2013.** The case of the revenue is that the respondent assessee is not entitled to concessional rate of tax provided in Article 12 of DTAA on the ground that it is not the beneficial owner of the musical tracks in respect of which the royalty income was earned. Thus, not entitled to concessional rate of tax at 10% under DTAA as held by the Assessing officer In Appeal, the CIT(A) and the Tribunal arrived at a finding of fact on the basis of the evidence in the form of certificate dated 25/7/2003 from revenue authorities in Netherlands certifying that the respondent assessee was a beneficial owner of the royalty received in respect of musical track given to M/s. Universal Music Pvt. Ltd. Besides, reliance was placed by the Tribunal upon the CBDT Circular No.789 dated 13/4/2000 that certificate from revenue authorities is sufficient evidence of beneficial ownership. On these findings of fact the Tribunal upheld the order of CIT(A) and held that the respondent assessee is entitled to benefit of Article 12 of DTAA. The respondent has not been able to show anything on record to controvert the finding of fact arrived at by the CIT(A) and the Tribunal that the respondent assessee is the beneficial owner of the royalty received on the musical tracks given to Universal Music Private Limited. In view of the above, the decision of the Tribunal being based on a finding of fact, no occasion to entertain the proposed question of law can arise

11.. ADIT vs Krupp UHDE GMBH Mumbai ITAT:German case: erection and commissioning contract (refer AP 262 ITR 110);

1. We have heard the parties. The A.O himself admitted that the stay of the personnel of the assessee company in India was less than 75 days and hence, it cannot be said that there was a P.E. in India. As per the new treaty, the income from supervisory activity like construction and installation of the project is to be treated as income of the P.E. provided that the said activity continues for a period exceeding six months as per article 5(2)(i) of the DTAA as it is the admitted factual position that, the supervisory activity of each project was for less than 75 days and hence, the income from the supervision and installation of the plant cannot be treated as income of the P.E. As the income as admitted by the A.O. that there is no P.E. of the assessee, there is no question for treating the income towards supervision, erection and commissioning of the plant as an income of the assessee taxable in India

DCIT vs. Dodsal Pvt. Ltd (ITAT Mumbai)
Installation & commissioning services are an integral part of supply and not assessable as "fees for technical services" despite seperate contract
Though there was a seperate contract for supply and a seperate one for installation and commissioning services, the said services had to be treated as "ancillary and subsidiary as well as inextricable and essentially linked to the sale/supply of the equipment" and, therefore, was not chargeable to tax in India in the hands of the Canadian company as "fees for included services". Consequently, the s. 40(a)(i) disallowance was not sustainable.
Channel Guide India Ltd vs. ACIT (ITAT Mumbai)
S. 40(a)(i) disallowance cannot be made on basis of retrospective law
At the time the payments were made, the rentals for user of satellite were not chargeable to tax as "royalty" u/s 9(1)(vi) as per **Asia Satellite** 332 ITR 340 (Del) & **B4U International** and so there was no obligation of TDS. The retrospective amendment by FA 2012 cannot create an obkligation for TDS because the law cannot possibly compel a person to do something which is impossible to perform

11. Bombay High Court In Diamond Service International 304 ITR Pg 201 : Grading report; Royalty definition India Singapore DTAA (Ass fav)

12. Supreme Court on reimbursement in Emron GLOBAL EXPORATION & PRODUCTION 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. (underlying HC order at 327 ITR 626)

13. Mumbai ITAT theory of severe impracticability immunes from default consequences of Section 195 National Aviation case 137 TTJ 662

14. Bombay High Court Import of Business Information Reports Not Royalty simply business income Dun and Bradstreet 338 ITR Pg 95

M/s.Pidilite Industries Limited **DATE : 6th March 2013** *agk* IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION In so far as questions (ii) is concerned, the Tribunal by the impugned order upheld the finding of the Commissioner of Income Tax (A) and held that the disallowance of the freight paid as a part of purchase bill in the absence of Tax Deducted at Source was not justified. This is so as the Tribunal has recorded a finding of fact that there was no independent contract between any transporter and the respondent – assessee. The contract entered into by the respondent – assessee was a contract for supply of raw material and packing material. It was a composite contract and it was not the obligation of the respondent – assessee to pay freight for carriage of the goods. The seller of goods who charged a consolidated price engaged a transporter and paid the freight. In these circumstances, there would be no occasion for the respondent – assessee to deduct tax at source. In view of the above, the Tribunal concluded that the amount of freight paid could not be disallowed under Section 40(a)(ia) of the Income Tax Act, 1961. Since the decision of the

Tribunal is based on finding of fact, we see no reason to entertain question (ii).

In so far as questions (vi), (vii) and (viii) are concerned, they deal with the purchases (both local as well as import) made by the respondent – assessee. The Tribunal upheld the order of the Commissioner of Income Tax (A) and on examination of record has held that these were contracts of purchases which are distinguishable from contract which are in the nature of works contract. In respect of these purchases, the Tribunal recorded a finding that all statutory levies on purchase of the goods were paid by the respondent – assessee to its seller. In the present case, when there was purchase of goods, no occasion to deduct tax at source would arise as the transaction was on principal to principal basis. Since the decision of the Tribunal upholding the order of the Commissioner of Income Tax (A) is based on finding of fact, we see no reason to entertain questions (vi) to (viii).

15. **Payment in relation to foreign Permanent Establishment: Karnataka high court: CIT vs Infosys Technologies Ltd. 206 Taxman 247** : The first appellate authority by order dated 3.2.2003 confirmed the order of the assessing officer. Further, since it was found that the deduction under Section 40(a)(i) of the Act was not permissible and as no deduction has been made under Section 195 of the Act, a show cause notice was issued to the assessee. In pursuance of which the assessee appeared before the first appellate authority and explained that no part of the said payment pertaining to services rendered for permanent establishment at USA was chargeable to tax in India and therefore, there is no obligation to deduct tax under Section 195 of the Act. However, the first appellate authority held that in view of the provisions of Section 195(1) of the Act it is mandatory in respect of every payment made outside India to make deductions at source unless a certificate of exemption has been obtained under Section 195(2) of the Act and accordingly, negated the contention of the assessee and enhanced the assessment by Rs.17.35,363/- as payment

made to non-resident company. Being aggrieved by the said order the assessee preferred ITA. No. 627/2003 before the Income-tax Appellate Tribunal (hereinafter called as the 'ITAT'), Bangalore.

4. The ITAT by the impugned order dated 9.9.2005 held that the reasoning given by the first appellate authority for not making deduction under Section 195(1) of the Act without obtaining an exemption certificate under Section 195(2) of the Act or a declaration obtained that no income is chargeable to tax in India, the deduction is ought to have been made, is erroneous. The Tribunal further held that payments were made to overseas consultants for the professional services rendered by them and these payments were made from the permanent establishment outside India and such payments were made out of sources of income generated outside India. Hence, the same income could not be deemed to accrue in India and therefore, not chargeable to tax in India and the assessee is justified in not making deductions under Section 195 of the Act.

Held

The material on record would clearly show that the question about non-deduction under Section 195 of the Act in respect of the payments made in a sum of Rs.17,35,363/-to Powersolve Corporation USA was raised by the first appellate authority and a show cause notice was also issued to the assessee. The same has been explained by the assessee saying that the said payment do not attract payment of tax in India and wherefore, there was no liability to tax in India on the said payment and question of deduction would not arise. The reasoning assigned by the first appellate authority that on payments made to the non-resident deduction should be made under Section 195(1) unless an exemption certificate has been obtained under Section 195(2) of the Act, is clearly

erroneous. The said contention has been considered and rejected by the Hon'ble Supreme Court in the decision cited by the learned Senior Counsel appearing for the respondent. Further, the material on record would clearly show that the said payment of Rs.17,35,363/- paid to the Powersolve Corporation USA was for the services rendered abroad to their office in USA, which is a permanent establishment in DTAA and hence there is no liability to tax in India and even as per the DTAA tax was paid in USA and no amount out of the said payment was chargeable to tax in India and wherefore, the question of applying Explanation (Explanation to Section 9(2)) relied upon by the learned Counsel appearing for the appellant would not arise ***((2) Whether the finding of the Tribunal that disallowance made under Section 40(a)(i) of the Act by the assessing officer for non-deduction of TDS under Section 195 of the Act in respect of amount paid towards consulting services rendered abroad, is not correct, is justified? we answer the 2nd substantial question of law in favour of the assessee and against the revenue)***

<u>the Delhi Bench of Income-tax Appellate Tribunal in the case of Qualcomm</u> *Incorporated held that the royalty received for licensing of patents, by a foreign company to another foreign equipment manufacturer, used for manufacture of CDMA technology enabled handsets and equipments for sale to Indian telecom service providers is not taxable in India under the Income-tax Act, 1961.*

Thus to tax the royalty income earned by Qualcomm from OEM's located outside India, under the deeming provision of S. 9(1)(vi) (c) of the Act, the burden is on the Revenue to prove that the OEMs carry on business in India and that they have used Qualcomm's patents for the purposes of, such business in India; or that they have used Qualcomm's patents for the purpose of, making or earning income from a source in India. Thus we agree with the arguments of the Ld.Counsel for the Appellant that the burden of proof when it falls within the exceptions to S. 9(1)(vi)(b) is on the assessee and on the contrary the burden is on the Revenue when they chose to invoke S.9(1)(vi)(c). This

proposition was also accepted by the Revenue.

176. Coming to the argument that the Indian telecom operators in India constitute a source for the OEMs, the Privy Council in the case of Rhodesia Metals Limited Vs. CIT (Supra) and the jurisdictional High Court in the case of CIT Vs. Havells India Limited [ITA No.55/2012, ITA 57/2012] have laid down that the source is the activity that gives raise to income. In the present case, the right property or information licensed to OEMs relates to the manufacture of the products and hence the source of royalty is the activity of manufacturing. Though cited by the Revenue, Rhodesia Metals in our view entirely supports the Appellant's case. In that case, Rhodesia Metals Ltd. carried on the business of developing mines in Southern Rhodesia and then selling rights therein. The head seat and directing power of the company was situated in England, the contracts of purchase and sale of the mining rights were entered into in England and the consideration for sale of the mining rights was received in England (paragraph 2 at Page 50 of the order). Despite all this, the Privy Council upheld the contention of the company that the amount earned on sale of such mining rights was not chargeable to tax in England since the source of income was the development of the mines, which activity was carried out in Southern Rhodesia. Applying this principle to the facts of the case at hand, it becomes clear that the source of the royalty is the place where patent (right property or information) is exploited, viz. where the manufacturing activity takes place, which is outside India. Hence, we are unable to accept the contention that Indian telecom operators would constitute source of income for the OEMs.

16.

17. IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH, CHENNAI I.T.A. Nos. 532 to 537/Mds/2012 Assessment Years : 2004-05 to 2009-10Shri V. Deenadayalavel The cheques and drafts are negotiable instruments facilitating the transfer of funds from one person to another. Telegraphic transfer is a transmission device which helps transactions of funds from one place to another with precision and safety. In the modern digital world at present, almost all transactions of funds all over the world are made by bank transfers. Therefore, that method of transaction of funds by itself does not decide whether the income was received by the assessee in India or not. We have to see the first point of landing of the brokerage and ommission transmitted to India throughTTs. They are first landed in the accounts of the foreign correspondent banks. They are landed

in other countries. The Hon'ble Supreme Court in the case of CIT v. Ogale Glass Works Ltd. (25 ITR 529) has held in a case where the cheques were posted in Delhi, in law, it amounted to payment in Delhi. In the light of that decision, when the funds covered by TTs first landed in the accounts of foreign correspondent banks outside India, it is to be seen that the assessee received his brokerage and commission outside India. It is only after receiving those brokerage and commission outside India that the corresponding funds were transferred to the assessee's Indian bank account by TTs. Therefore, the Commissioner of Income-tax(Appeals) has rightly held that the amounts received by TTs are the income earned by the assessee outside India and, therefore, not exigible to Indian taxation. In this case, the right to receive the brokerage and commission always remained outside India and what was received by the assessee in his Indian bank account is a subsequent remittance of funds from foreign accounts to Indian accounts. As far as the assessee is concerned, the right to receive the income did not arise in India. Therefore, we find that the above judgment (Authority of Advance Rulings rendered in the case of SKF Boilers & Driers (P) Ltd. reported in 68 DTR (AAR) 106) .relied on by the Revenue is not applicable to the present case It is seen that the assessee does not have any permanent establishment in India or any business connection and, therefore, there is no need to expand the scope of enquiry

18. IN THE INCOME TAX APPELLATE TRIBUNAL 'D' BENCH, CHENNAI M/s Apollo Hospital Enterprises Ltd., **I.T.A. Nos. 1505 & 1506/Mds/2010** Assessment Years : 2006-07 & 2007-08 We have perused the orders and heard the rival submissions. There is no dispute that assessee is a resident of India as per Incometax Act. Assessee had capital gains which arose in Sri Lanka. Such capital gains arose on account of sale of shares of one company which was incorporated in Sri Lanka. Such sale of shares effected in Sri Lanka was subjected to share transaction levy imposed in that country, as per Finance Act 5 of 2005 of that country. It is also not disputed that under Section 13(t) of Inland Revenue Act No.10 of 2006 of that country,

profits and income derived from sale of any share on which share transaction levy was charged, was exempt from income-tax. The question to be resolved is whether in such a situation, based on the DTAA between India and Sri Lanka, the capital gains arising to the assessee on account of sale of such shares, could be considered as part of its income for the purpose of Income-tax Act or whether it was to be excluded in toto. As pointed out by the learned A.R., in the case of business income, there is a possibility that the income could be taxed in both Contracting States vide Article 7. In such a situation, Article 24 would apply and will call for application of Tax Credit Method for avoiding double taxation. Assessing Officer himself had admitted that only two methods were available for elimination of double taxation – (i) Income Exclusion Method, and (ii) Tax Credit Method. According to him, there is nothing whatever in the treaty for applying an Income Exclusion Method, since Article 24 thereof dealt with only Tax Credit Method. In our opinion, this view of the Assessing Officer was incorrect. It is for the reason that such exclusion is built-in to the words “may be taxed” appearing in Article 13(4) of the DTAA. When there is total exclusion, it would not be necessary to have a separate article prescribing a method for avoiding double taxation. That when there is abeneficial provision available to an assessee under a treaty, it could rely on such provision is a position of law which stands more or less accepted though various rulings which now have attained finality. 16. Now coming to Notification No.90 of 2008 (supra) relied on by the learned D.R., the term “may be taxed” of course has been interpreted in such notification. When a notification is issued exercising the powers conferred under sub-section (3) of Section 90A of the Act, it can have effect only on those types of agreement mentioned in sub-section (1) thereof. If such a notification goes beyond that mandate, it will have to be ignored to the extent it goes overboard. Even if the term “may be taxed” has been given a meaning by the Government through a Notification No.90A(3) of the Act, so as to extend such meaning to terms used in a Double Taxation Avoidance Agreement, it will have to be ignored. We are, therefore, of the opinion that the said Section 90A cannot come to the aid of the Revenue in any manner at all.

19. 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.

Keeping in view the said decision of Hon'ble Bombay High Court, we accept the contention raised on behalf of the assessee that the amounts payable by BAH India to three group entities in Germany, India and Panama (SE Asia) did not constitute their income chargeable to tax in the year under consideration as there was no accrual of income in the absence of permission obtained from RBI as required by FERA.

We have considered the rival submissions and also perused the relevant material on record. It is observed that although the amounts payable by BAH India to the overseas group entities in Germany, Indonesia and Panama (SE Asia) were debited by BAH India to the profit & loss account and were also claimed as expenses, no RBI approval was obtained for remitting the said amounts in foreign exchange as required by relevant provisions of Foreign Exchange Regulation Act during the year under consideration. In our opinion, the judicial pronouncements discussed above clearly support the stand of the assessee that income on account of the amounts payable by BAH India to the overseas group entities could be said to have accrued to the said entities only on receipt of the required approval from RBI and there being no such approval received during the year under consideration, the same could not be taxed as income in that year. It is observed that the learned CIT(Appeals), however, has not accepted this stand relying on the decision of Hon'ble Supreme Court in the case of LIC of India vs. Escorts Ltd. (supra) wherein it was held that permission granted by the RBI is to be construed to mean both permission granted previously or obtained subsequently. As rightly contended by the learned counsel for the assessee, the said decision, however, was not rendered by the Hon'ble Supreme Court in relation to income-tax proceedings and there was no issue of accrual of income involved in that case. Moreover, the said decision was

rendered in the context of section 29 of Foreign Exchange Regulation Act under which permission of Reserve Bank of India in regard to the establishment of business in India was was required to be obtained subsequently within a period of six months from the date of establishment of business in India and in these facts and circumstances, it was held by the Hon'ble Supreme Court that the permission obtained subsequently from the Reserve Bank of India should be treated as having retrospective effect. The decision of the Hon'ble Supreme Court in the case of LIC vs. Escorts Ltd. (supra) thus was rendered in a different context and in a different set of facts and the same in our opinion, cannot support the stand of the Revenue in the present case.

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

We have considered the rival submissions and also perused the relevant material on record. It is observed that the amounts in question payable by BAH India to the three overseas group entities in Germany, Singapore and U.K. were not paid during the year under consideration and there is no dispute about the same. The said amounts payable to the concerned overseas group entities have been brought to tax in India in their hands by the Revenue authorities as fees for technical services. As per the relevant provisions of the Double Taxation Avoidance Treaty between India and the three concerned States, the term "fees for technical services" as used in the relevant treaties is defined to mean "Payments of any amount in consideration for the services of managerial, technical or consultancy nature including the provision of services of technical or other

personnel." In the case of Seamens Aktiengesellschaft (supra), a similar language was employed in the relevant provisions of DTAA between India and Germany and keeping in view the language so employed, the Tribunal held that royalty andfees for technical services should be reckoned for taxation only when it is actually received by the assessee and not otherwise and this decision of the Tribunal was upheld by the Hon'ble Bombay High Court observing that the assessment of royalty or any fees for technical services should be made in the year in which the amounts are received as per the relevant provisions of the DTAA and not otherwise. The coordinate bench of this Tribunal at Delhi in the case of CSC Technology Singapore Pte. Ltd. (supra) has also taken a similar view holding that royalty/FTS which had accrued as income to a foreign company, could not betaxed in the source country (being India) unless this amount had been received by the foreign company.. Ground No. 7 of ITA No. 4502, 4506 and 4508/Mum/2003 is accordingly allowed

20. *ITAT Mumbai Bench Today's order on Article 7(3) Allowability of expenses vs Restriction of Domestic Law Section 43B held in absence of specific restriction sec. 43B do not apply to Article 7; Term not defined in DTAA meaning; Treaty comparison ITA No.2254 & 3005/Mum/2005 M/s.State Bank of Mauritius Ltd.* 03rd day of October, 2012. Assessment Year : 1999-2000 It is manifest that difference between the full or partial deductibility of any expenditure is due to the absence or presence of the restrictive clause in the treaty. But for such restrictive clause, any expenditure incurred by the assessee for the purposes of the business of the permanent establishment becomes deductible in full as per the first part of para 3 of Article 7. It is only due to the occurrence of such restrictive clause that the otherwise full allowability of deduction as per earlier part of the para 3 of Article 7, gets restricted to the extent of deductibility as per the provisions of the Act. The nutshell is that if there is no restrictive clause in the treaty, then the expenditure incurred for the purposes of the business of permanent establishment has to be allowed in full. If, however, there is a restrictive clause in the treaty, then the otherwise full

deductibility gets reduced in accordance with the provision of the Act 4.

It is pertinent to note that we are dealing with the Indo- Mauritius DTA. As can be seen from the phraseology of para 3 of Article 7 of the DTA, reproduced above, that there is no restrictive clause therein. It indicates that both the countries have decided to allow expenses incurred for the purpose of business of the permanent establishment in full, without any limit as may be set out in sections of the Act. So long as an expense is incurred for the purpose of the business of the permanent establishment, the same has to be allowed as deduction in full as per the prescription of Article 7(3) As we are dealing with the Indo-Mauritius DTA, which does not expressly contain any restrictive clause in this regard, contrary to the presence of such clause in certain Conventions including Indo-US DTAA, it becomes perceptible that *ex facie* restrictive provisions of the Act including section 43B cannot be read into Article 7.

Clearly the disallowance of bonus as per section 43B, cannot be characterized as "any term not defined" as per Article 3(2). In our considered opinion the contention raised on behalf of the Revenue that section 43B should be read into Article 7 by means of Article 3(2), deserves the fate of rejection. It is trite that a definition provision is ordinarily different from a substantive or machinery provision. Whereas, Article 3 is only a definition clause, para 1 of Article 7 is a substantive clause and para 3 of Article 7 is a machinery clause. We are unable to appreciate as to how Article 3(2) helps the Revenue in importing the mandate of section 43B in Article 7(3).

4.16. The learned Departmental Representative then focused his attention on para 1 of Article 23 to bolster his submission that the

restriction u/s 43B should be read in to Article 7(3). Para 1 of Article 23 provides that : "*The laws in force in either of the*

Contracting States shall continue to govern the taxation of income in the respective Contracting States except where provisions to the contrary are made in this Convention" Thus the general rule contained in the first part of para 1 of Article 23, being the applicability of the domestic law, has been eclipsed by any provision to the contrary in the DTA. In case there is no contrary provision in the treaty, then it is the domestic law which shall apply. If however, there is some provision in the DTA contrary to the domestic law then it is such contrary provision of the DTA which shall override the provision in the domestic law in the computation of income as per the DTA. In both the cases, that is, under the Act as well as the DTA, the subject matter under consideration is same, being, the granting of deductions in the computation of business profits of the permanent establishment of a foreign enterprise. When there is a specific provision as per Article 7(3) of the DTA providing for the deductibility of all expenses incurred for the purpose of permanent establishment, we fail to comprehend as to how Article 23(1) can be applied to invoke disallowance u/s 43B. This contention of the ld. DR, being devoid of any merit, is thus jettisoned. 4.21. *We can support our above conclusion from one more angle. If, for a moment, we accept the contention of the ld. DR that Article 23(1) is an authority for importing the provisions containing disallowances under the Act, in the DTA, then absurd results will follow.*

It is important to highlight the fundamental distinctionbetween disallowance under section 14A on one hand and other sections providing for disallowances, such as section 37, 40, 43B and 44C on the other. This position u/s 14A is in sharp contrast to other sections as discussed above, such as 37, 40, 43, and 44C. Whereas these later sections apply to take away the deduction of expenses, which are otherwise allowable and have entered into the basket of deductible expenses , section 14A restricts the entry of certain expenses into the basket of deductible expenses. This is the underlying distinction between section 14A and the other set of sections providing for disallowance. 5.10. At this stage, it may

be relevant to note para 4 of Article 7 as per which : `No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.' As per this para, no profits can be attributed to a PE in respect of purchase of goods for the general enterprise. The pertinent question which arises is that when no profits can be attributed to the PE in respect of such purchases, is it permissible to include expenses in relation to such purchase in the total expenses of the PE for claiming deduction in determination of its business profits? The answer is obviously in negative. The reason for such negative answer is that when no income in respect of such purchases can be included in the `business profits' of the PE, then naturally, no expenses in relation to such purchases can be allowed as deduction in computing the business profits of the PE. The same logic applies for not allowing deduction for any expenses in relation to an income, which does not constitute part of the `business profits'. As the interest income from tax free bonds *per se* is not includible in the `business profits' of the permanent establishment and further the assessee has also claimed exemption in that regard which has been rightly granted as well, the expenses incurred in relation to such interest income cannot equally be allowed as deduction.

21. Chennai Port Trust : Tax Case No. 1409 to 1412 OF 2005 High Court of Judicature at Madras

Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that the joint venture of H.C.C. Ltd and Van Oord ACZ (VOACZ) is not an Association of Persons and the payment made to the joint venture should be treated as a payment made to the foreign company and tax deducted at source on that basis? *3. It is seen from the documents placed before this Court that the foreign company Van Oord ACZ BV moved the Advance Ruling Authority under Section 245D for a decision as to its status in the context of the joint venture agreement vis-a-vis the agreement granted to the joint venture by Chennai Port Trust. The contract by the Port Trust was awarded on 22.08.1997. The foreign company Van Oord ACZ BV sought for a ruling as to whether the joint venture would constitute Association of Persons (AOP) within the meaning of Section 2(31)(v) so as to become liable for*

tax under the Income Tax Act, 1961 or each party of the joint venture is liable to tax on its own profits. By order dated 14.09.2000, the Advance Ruling Authority held that the status of the joint venture was not that of AOP and that the foreign company was liable to be assessed on its own profits.

4. Pursuant to the said order, the said foreign company made an application before the Deputy Commissioner of Income Tax dated 16th October 2000 and pointed out to the order of the Advance Ruling Authority that in view of the said decision, 10% of the receipt, payable as per Section 44BBB of the Act was offered as taxable income and that flat rate of 15% was chargeable on the interest earned on the Fixed Deposit as per Article 11 of the DTA between India and Netherlands. They also pointed out that the Chennai Port Trust had withheld the income tax under Section 194C from all the payments made, which included the portion of work carried out by the foreign company. Hence, it was entitled to claim credit of the proportionate share of the TDS made in the status of consortium. The original certificates, hence, would be filed along with the return of Hindustan Construction Company Limited who was entitled to 80% of the TDS. After claiming credit, the company had also remitted the balance tax.

5. While the matter stood thus, the assessee was stated to have been served with a show cause notice on 10.10.2000, taking the view that the deduction of tax under Section 194C on the payment made to the joint venture as though it was an AOP was incorrect. Hindustan Construction Company Ltd. being an Indian company, tax was to be deducted at the rate of 2% as per Section 194C. Considering the decision of the Advance Ruling Authority holding that the joint venture is not AOP, Chennai Port Trust was liable to deduct tax at source on the payment made to the foreign company as per Section 195(1); thus in respect of the clear terms of the joint venture agreement between the two companies, Chennai Port Trust had failed to deduct tax as per Section 195(1); applying the decision of the Advance Ruling Authority that the joint venture was not AOP, there was a shortfall of deduction for the assessment years 1998-99, 1999-2000 and 2000-2001. Thus, the assessee was treated as one in default and hence, interest was levied under Section 201(1)(a) of the Income Tax Act.

6. The assessee objected to these proceedings, contending that going by the terms of the joint venture agreement between the companies and the award of contract under the agreement between the assessee company and the joint venture, the status of the joint venture was that of an AOP; hence, tax was also deducted on that basis. The Assessing Officer, however, rejected the proceedings and confirmed the levy of interest under Section 201(1)(a) of the Income Tax Act.

7. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals), who confirmed the order of the Assessing Officer. The assessee went on further appeal before the Tribunal, which, once again, confirmed the lower authorities' view. Hence, the present appeals. ….*It was submitted that going by the understanding of the terms of the joint venture agreement between the companies and the contract awarded to the joint venture, the assessee entertained a bona fide belief that it was only a joint venture; hence, to be assessed as an Association of Persons, a course of action which could not be taken exception to. Even going by the order of the Tribunal, we see that much of a discussion was as to whether the joint venture could be taken as an Association of Persons or not. The assessee pointed out that at least till the Advance Ruling Authority passed an order, the Department itself did not deem it fit to reject the assessee's claim that the payments were made under Section 194C, treating the joint venture as Association of Persons. In the background of these circumstances, we hold that the reliance placed on the decision of the Apex Court reported in (2010) 232 CTR 317 (Commissioner of Income Tax Vs. British Airways) in almost similar circumstances, comes to the aid of the assessee herein.*

13. It is a matter of record that the foreign company had remitted tax as per Section **44BBB at 4.8% and had also sought for refund therein. In the light of the said decision, we hold that the assessee cannot be mulcted with any liability by way of interest to be charged under Section 201(1A). Thus, applying the decision reported in (2010) 232 CTR 317 (Commissioner of Income Tax Vs. British Airways), considering the consistent stand taken by the assessee and the parties to the agreement that the status of the joint venture was only Association of Persons, we hold that there could be no case for levying interest under Section 201(1A).**

Refer Allahabad high Court Jagran Prakashan 345 ITR 288

22. **Delhi high court on Sec. 9(1)(ii) non resident's salary vs. retirement benefits recd. in India;**

IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Decision : 24th April, 2012. SHRI ANANT JAIN "a) Whether ITAT was correct in law in deleting the addition of Rs.37,44,026/- made by the Assessing Officer treating the same as profit in lieu of salary under Section 17(3)(i) of the Act? b) Whether proviso to Section 5(1) would apply to the amount of Rs.37,44,026/- received by the assessee so as to exclude the same from the total income of the assessee?" is clear from the factual findings recorded by both CIT(Appeals) and the Tribunal that the payment in question was received towards retirement benefit/severance/vacation engagement from the erstwhile employer on termination of employment in November, 1999. The erstwhile employer was based in USA and services were

rendered to the erstwhile employer in USA. In view of the aforesaid factual position, elucidated and accepted by both the CIT(Appeals) and the Tribunal, we do not think the said amount can be taxed in India, as the status of the respondent-assessee during the year in question was that of “not ordinary resident”. The said income did not accrue or arise in India. The tribunal has rightly held that in terms of Section 6 and Section 9(1) (ii) of the Act, the amount/income had not accrued/deemed to be accrued /paid in India The questions of law are accordingly answered in the affirmative, that is, against the Revenue and in favour of the assessee. The appeal is dismissed with no order as to costs.

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(refer to same effect: **Respondent :- M/S Jai Prakash Industries Ltd Allahabad High Court scope of salary taxation of Non resident employees (sec. 9(1)(ii))**

Shri S.D. Singh, on the other hand, states that under Section 40 (a) (iii) of the Act expenses could be disallowed only if the income was chargeable to tax. He submits that there is no doubt that the employees of the assessee-company were non-resident Indians and their income was credited to their NRE accounts. There is no dispute that they worked in Iraq and earned their income in Iraq for which permission was taken from RBI for payment of 30% in Iraqi Dinar and 70% in US dollars which could be repatriated by them, on their discretion… He has relied upon Sections 4, 9 (2) and Section 15 of the Act to support his argument that unless the salaries were earned by the NRI employees of the assesseecompany in India, the income from such salary was not taxable and thus the assessee-company was not required to make deductions under Section 192 of the Act. He submits that in the circumstances one of the essential conditions in Section 40 (a) (iii) namely that the income was chargeable to tax in India was not satisfied to deny the deductions… **We do not find that the Tribunal committed any error in allowing the appeal of the assessee-company against the order of the CIT (A). The Tribunal in our opinion correctly found, that unless the salary was subjected to tax in India, there is no question of deductions of TDS. UPHELD ITAT order as to**:

Once the alleged *salary* had been subjected to Iraqi income-tax, it cannot be taxed again in India. This is why the very Income-tax Act provides that a nonresident Indian, who had rendered services outside India and has also earned there, and if he repatriates part of his earnings to India, then the said earnings will not be subjected to Indian Income-tax Act again as it will amount to double taxation. Hence, in view of the above discussion, we are of the opinion that the alleged disallowance u/s 40 (*1*) (iii) has been made by completely going on a wrong premise or law and without taking into consideration the basic ingredients that the alleged amount of *salary* was not chageable to tax in India)

(Also refer in above connection: **Mother Dairy Fruit, Vegetable (P) Ltd. vs CIT** 198 Taxman 33; 315 ITR 195 **CIT vs ICL Shipping Ltd. Karnataka High Court Dylan George Mith; Advance ruling in Anurag Chowdhary ca)**

23. Misc.Developments: M/s. Barwil Forbes Shipping Services Ltd INCOME TAX APPEAL NO.1703 OF 2011 IN THE HIGH COURT OF JUDICATURE AT BOMBAY The dispute in this case is whether the tribunal was justified in upholding the order of the CIT(A), that when income from operation of ships is taxed in the hands of the Principal i. e. M/s. Delmas France, then the same income cannot be taxed in the hands of the Agent i. e. the RespondentAssessee under Section 163 of the Income Tax Act, 1961. 3 The RespondentAssessee is an agent of M/s. Delmas Francea Nonresident shipping company which is assessed in India. The Assessee collects freight in India and remits the same to its Principal without deduction of agent commission. The Tribunal held that the Principal has already accepted the taxability of the income earned from its shipping operations from India after considering the provisions of DTAA between India and France. In the impugned order, the Tribunal has held that once the income is assessed to tax in the hands of the Principal M/s. Delmas France, it not open to tax the same income once again in the hands of the Agent

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES "K", MUMBAI BEFORE SHRI R.S. SYAL (A.M.) AND SHRI VIVEK VARMA (J.M.) DHL Danzas Lemuir P. Ltd 12-12-2012 We have heard the rival submissions and perused the material available on record. There is no discussion in the orders of the authorities below about the relation of such parties with the assessee with whom the assessee shared the revenues of freight and such transactions have been processed under Chapter X. It appears that these outside entities are otherwise unrelated parties. Because of their respective agreements with the assessee's AE in this regard, these entities and transactions of assessee with such entities have assumed the character of deemed international transactions and associated enterprises in terms of section 92B(2). 6. The short controversy before us is to determine the ALP in respect of transactions between the assessee and its AEs towards receipt/payment of freight. The assessee shared profit in the ratio of 50:50 both on the payments made by it and the receipts of freight from its AEs. We have perused the submissions and the finding of the ld. CIT(A) on the functions performed, assets employed and risk undertaken by both the AEs in such transactions. The ld. DR could not controvert such finding that the functions performed, assets employed and risk undertaken in both the AEs is same. The assessee paid certain sum to its AEs abroad for doing the work similar to which it did for which it received freight revenue from its AEs. The crux of the matter is

that in both the situations, the total receipts are taken on one hand, from which all the expenses incurred in connection with the transportation of cargo in both the countries are excluded The remaining amount is distributed between the entity of origin country and the entity of destination country in equal share. As the assessee has earned/paid revenue from/to its AEs in the same proportion, in our considered opinion, the transactions have been recorded at arm's length price and there was no justification for making such addition. We do not see any reason to interfere with the impugned order. (Tribunal in the case of ACIT vs. M/s Agility Logistics Pvt. Ltd. for assessment years 2004-05 to 2006-07.)

OHM LIMITED **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Reserved on: 30th October, 2012 **%** *Date of Decision: 6th December, 2*

The short question which arises in this writ petition is whether the assessee, which is the respondent herein, falls to be assessed under section 44BB of the Income Tax Act, 1961 („Act", for short) as claimed by it or under section 44DA of the Act as claimed by the petitioner which is the Revenue It is a well settled rule of interpretation that if a special provision is made respecting a certain matter, that matter is excluded from the general provision under the rule which is expressed by the maxim "*Generallia specialibus non derogant*". It is again a well-settled rule of construction that when, in an enactment two provisions exist, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This was stated to be the "rule of harmonious construction" by the Supreme Court in *Venkataramana Devaru v. State of Mysore*, AIR 1958 SC 255. If as contended by the Revenue, Section 44DA covers all types of services rendered by the non-resident, that would reduce section 44BB to a useless lumber or dead letter and such a result would be opposed to the very essence of the rule of harmonious construction. In *South India Corporation (P) Ltd. v. Secretary, Board of Revenue Trivandrum*, AIR 1964 SC 207 it was held that a familiar approach in such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific. 12. The second proviso to sub-section (1) of Section 44DA inserted by the Finance Act, 2010 w. e. f. 01.04.2011 makes the position clear. Simultaneously a reference to Section 44DA was inserted in the proviso to sub-section (1) of section 44BB. It should be remembered that section 44DA also requires that the non-resident or the foreign company should carry on business in India through a permanent establishment situated therein and the right, property or contract in respect of which the royalty or fees for technical services is paid should be effectively connected with the permanent establishment. Such a requirement has not been spelt out in Section 44BB; moreover, a flat rate of 10% of the revenues received by the non-resident for the specific services rendered by it are deemed to be profits from the business chargeable to tax in India under Section 44BB, whereas under Section 44DA, deduction of expenditure or allowance wholly and exclusively incurred by the non-resident for the business of the permanent establishment in India and for expenditure towards reimbursement of actual expense by the permanent establishment to its head office or to any of its other offices is allowed from the revenues received by the non-resident. Because of the different modes or methods prescribed in the two sections for computing the profits, it apparently became necessary to clarify the position by making necessary

amendments. That perhaps is the reason for inserting the second proviso to sub-section (1) of Section 44DA and a reference to section 44DA in the proviso below sub-section (1) of Section 44BB. A careful perusal of both the provisos shows that they refer only to computation of the profits under the sections. If both the sections have to be read harmoniously and in such a manner that neither of them becomes a useless lumber then the only way in which the provisos can be given effect to is to understand them as referring only to the computation of profits, and to understand the amendments as having been inserted only to clarify the position. other words, the amendment made by the Finance Act, 2010 w. e. f. 01.04.2011 in both the sections, cannot have the effect of altering or effacing the fundamental nature of both the provisions or their respective spheres of operation or to take away the separate identity of Section 44BB. We do not, therefore, see how these amendments can assist the Revenue"s contention in the present case, put forward by the learned Senior Standing Counsel. We, therefore, agree with the AAR that in the present case the profits shall be computed in accordance with the provisions of section 44BB of the Act and not section 44DA

THE HIGH COURT OF DELHI AT NEW DELHI % Judgment delivered on: 25.02.2013 **SURESH NANDA** The main issue that is sought to be raised in these appeals is with regard to the residential status of the respondent/assessee . That leaves us with the issue with regard to the residential status of the respondent/assessee. Section 6 of the said Act, so far as it is relevant, reads as under:- 9. Whether we take the computation of the respondent/assessee or of the assessing officer, it is evident that the respondent/assessee has spent less than 182 days in each of the three years in question, that is, assessment years 2001-02, 2002-03 and 2003-04.

10. We shall now examine the provisions of section 6. It is apparent that section 6(1)(a) makes it clear that an individual would be a resident of India in any previous year if he was in India in that year for a period or periods amounting in all to 182 days or more. The respondent/assessee, clearly, is not such an individual because in none of the years in question did he stay in India for 182 days or more. did he stay in India for 182 days or more.

11. The learned counsel for the appellant sought to argue that the respondent/assessee would fall within section 6(1)(c) read with explanation (b). However, we fail to see as to how that provision would come to aid of the appellant. Section 6(1)(c) applies to citizens of India as well as to persons of Indian origin. It also applies to

foreigners. Insofar as foreigners are concerned section 6(1)(c) has the stipulation of stay in India for a period or periods amounting in all to 60 days or more in the year in question. However, this is in addition to the condition of total stay in the preceding four years amounting in all to 365 days or more. ***But, in the case of citizens of India, the length of stay in India in a particular year has been extended to 182 days as compared to 60 days for foreigners*** 12. In the present case, although, the respondent/assessee has, in the preceding 4 years been in India for a period in excess of 365 days in India, in none of years has he been in India for a period in excess of 182 days. Therefore, the Tribunal is absolutely right in concluding that the respondent/assessee was not a resident of India. This is a pure question of fact based on a plain reading of the provisions of section 6

` DELHI ITAT **MAY'13** ORDER IN CASE OF CONVERGYS

A. Attribution of profits

In view of the CBDT Circular No. 5 of 2004 as well as the judgment of the Supreme Court in Morgan Stanley (292 ITR 416), the Bombay High Court in Set Satellite (Singapore) Pte Ltd. (307 ITR 205), jurisdictional High Court in Rolls Royce Singapore Pvt. Ltd. (202 Taxman 45) (Del.), Director of Income Tax vs. BBC Worldwide Ltd. (203 Taxman 554) (Del.) and the OECD Guidelines, this issue is to be examined. An overall attribution of Profits to the Permanent Establishment is a transfer pricing issue and no further profits can be attributed to a PE once an arm's length price has been determined for the Indian associated enterprise, which subsumes the functions, assets and risk profile of the alleged PE. In this case 81% revenue has been transferred to the India Subsidiary in the assessment year 2006-07. For the assessment year 2008-09 this percentage comes to 90%. 11.12. Ld. CIT(A) has accepted that to the extent of functions, assets and risks are already captured in the transfer pricing analysis of CIS, no further profits can be attributed to such functions, assets and risks in the hands of assessee's PE, but held that further profit was required to be attributed on account of the following:
(i) Certain assets were deployed by the Assessee in India;
(ii) entrepreneurial services to manage risk related to the service delivery were performed in India by the Assessee 11.13. In our considered view the observations of the CIT(A) that further attribution is required to be made on account of the entrepreneurial services to manage risk related to the service delivery performed in India by CMG is completely without any basis and no attribution on these facts is required to be made on these issues

The AO/ CIT (A) for arriving at the revenue of the alleged PE of the assessee has taken the revenue of the assessee company (CMG as a

multi-national enterprise) as the starting point. Hence, the LD. AO/ld. CIT(A) ought to have considered the expenses incurred outside India for arriving at the profit of the assessee company with regard to the contracts wherein services have been procured from CIS. The above expenses have been incurred for carrying on the business of the assessee company outside India and are not related to the PE of the assessee in India. While computing the profit of CMG as a multi-national enterprise, there is no question of applying the provisions of the Act Hence, the AO/ CIT(A) erred in invoking the provisions of section 44C of the Act in attributing the income of the assessee company without allowing the cost incurred to earn the revenue outside India thereby attributing the entire receipts

In our considered opinion, the correct approach to arrive at the profits attributable to the PE should. be as under:

Step 1: Compute Global operating Income percentage of the customer care business as per annual report/10K of the company.

Step 2: This percentage should. be applied to the end-customer revenue with regard to contracts/projects where services were procured from CIS. The amount arrived at is the Operating Income from Indian operations.

Step 3: The operating income from India operations is to be reduced by the profit before tax of CIS. This residual is now attributable between US and India

Step 4: The profit attributable to the PE should be estimated on residual profits as determined under Step 3 above. The attribution of India profit shall be worked out as under, mentioned after the table:

- Total Revenue of CMG as per the Annual Report (A) 1,663,600,000
- Operating Income of CMG as per the Annual Report (B) 175,500,000
- Operating Income as a percentage of revenue earned (C = B/A)

10.55%

- End-customer revenue from Indian operations (D) 138,900,000
- Operating Income from Indian operations (E = C * D) 14,653,950
- Operating Income of CIS (Profit before tax of CIS) (F) 13,800,000
- Profit retained by CMG in the US (G = E – F) Placitum 'X' 853,950

Now the important question that arises is as to how much of the profits shall be attributable to CMG's Indian PE over and above the profits declared by its subsidiary CIS. 11.23. In this backdrop we are reminded of two case laws decided by Hon'ble Supreme Court which have dealt with attribution of the profits to the Indian PEs: (i) Anglo French Textile Company Ltd. vs CIT 23 ITR 101 (SC), in which 10% attribution ha been held to be reasonable. (ii) Hukum Chand Mills Ltd. Vs. CIT 103 ITR 548 (SC), in which 15% attribution has been held to be reasonable.
11.24. These cases decided by the Apex Court though are old, but they still hold the field as they have not been tinkered with. In our considered view, the adoption of higher figure of 15% as held by Hon'ble Supreme Court in the Hukum Chand Mills Ltd. (supra), for attribution of assessee's Indian PE operations will meet the ends of justice. Thus, the attribution of Indian PE income should be made at 15% of profit retained by CMG in the US

B. Software purchase

12. Apropos issue of taxability of PeopleSoft license cost and maintenance charges which is in the nature of reimbursement of payments for software financial reporting packages amounting to Rs. 68,17,878 taxable as "Royalty" under the provisions of section 9(1)(vi) of the Act and Article 12 of the DTAA. This issue is in assessment year 2006-07 only. Assessee demonstrated that these charges pertain to PeopleSoft financial reporting package (PeopleSoft) costs which help in improving the visibility, tracking, and control with a single source of information that provides complete, real-time reporting and reconciliation of

operational and financial data. PeopleSoft is a packaged enterprise application. Out of the total amount incurred by the assessee, a proportion of the license cost and maintenance cost for PeopleSoft was allocated by CMG to CIS which was reimbursed by CIS to CMG. AO in order for assessment year 2006-07 held that the consideration received for licensing of software was taxable as 'Royalty' in terms of section 9(1)(vi) of the Act and Article 12 of the DTAA and accordingly taxed it @15% on gross basis as per Article 12(2) of the DTAA

12.4. Assessee placed reliance on the decision of Hon'ble Delhi High Court in the case of Director of Income Tax v. Ericsson A.B. (ITA No. 504/2007) to contend that the jurisdictional High Court has held that purchase of software would. fall within the category of copyrighted article and not towards acquisition of any copyright in the software and hence the consideration should. not qualify as Royalty. Further reliance is placed on the following judgments, holding that supply of computer software is sale of copyrighted article and not copyright:

Special Bench of Delhi Tribunal in the case of Motorola Inc. v. Dy. CIT (96 TTJ 1) Infrasoft Limited vs. ACIT, Circle 2(2) (ITA No 847 Delhi 2008)
(Delhi)

Lucent Technologies International Inc. vs DCIT (120 TTJ 929)
(Delhi)

LotUS Development Asia Pacific Limited Corporation (ITA No. 564 to 566/Del/05) (Delhi)

Sonata Information Technology Ltd. vs DCIT (2006) (7 SOT 465)
(Mum.)

Sonata Software Ltd. vs. ITO (Int. Tax) (2006) (6 SOT 700)(Bang)

Samsung Electronics Co. Ltd vs. ITO (TDS-1)(2005) (93 TTJ 65)
(Bang)

Hewlett – Packard (India) (P) Ltd vs. ITO (2006) (5 SOT 660)(Bang)

Metpath Software International Limited (ITA No 179) (Delhi)

Velankani Mauritius Ltd. (2010-TII-64-ITAT-BANG-INTL)

M/s Tata Communications Ltd (2010-TII-157-ITAT-MUM-INTL)

DDIT vs. Reliance Industries Ltd (2010-TII-154-ITAT-MUM Allianz SE vs. ADIT (TS-204-ITAT-2012-Pune)

Solid Works Corporation (TS-76-ITAT-2012-Mumbai)

12.5. 12.6. Adverting to the issue of amendments brought in by Finance Act,

2012, we are of the view that even though the Finance Act, 2012 has made an amendment in section 9(1)(vi) of the Act and widened its scope, however, the same does not impact the provisions of DTAA in any manner. In this regard, reliance placed on the recent judgment of ITAT Mumbai, in the case of B4U International Holding (ITA No 3326/Mum/2006) and the Delhi High Court in the case of Nokia Networks OY (ITA No 512 of 2007) is well placed *12.7. After hearing both the parties and perusing the record and in view of the judgment of jurisdiction High Court, we hold that the purchase of software would fall within the category of copyrighted article and not towards acquisition of any copyright in the software and hence the consideration should. not qualify as Royalty. Even otherwise, the payment is in the nature of reimbursement of expenses and accordingly not taxable in the hands of the assessee. This ground is allowed to the assessee*

C. Equipment royalty : link charges

Adverting to the issue of taxability of link charges as 'Equipment Royalty' in terms of Article 12(2) read with Article 12(3)(b) of the DTAA. This issue is common to both assessment year 2006-07 and 2008-09. *In this regard, the ld. AR of the assessee submitted that the link charges pertain to leased lines (under sea cables) that allow a dedicated capacity for a private, secure communication link from India to the US which enables CIS to communicate with the customers. The assessee makes payment for such link charges to telecom service providers in the USA and cross charges the portion of the cost incurred by it in connection with the India half link to CIS, which is accordingly reimbursed by CIS to CMG. Ld. counsel also*

referred to the invoice of raised by the assessee on CIS on Page 349 of paper book volume I and the basis of cross charged at page 828 of paper book volume III and placed reliance on the decision of the Hon'ble Delhi High Court in the case of Expeditors International India (P) Ltd. (209 Taxman 18) on reimbursement of common expenses incurred by the parent company.

13.5. In view of the foregoing observations we hold that there is no transfer of the right to use, either to the assessee or to CIS. The assessee has merely procured a service and provided the same to CIS, no part of equipment was leased out to CIS. Even otherwise, the payment is in the nature of reimbursement of expenses and accordingly not taxable in the hands of the assessee. Therefore, it is held. that the said payments do not constitute Royalty under the provisions of Article 12 of the tax treaty and the ground is allowed in favour of assessee.

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH
ITA No. 57 of 2009
Date of Decision: 8.10.2012 M/s Mark Auto Industries Ltd. Learned counsel for the revenue was unable to substantiate
that in the absence of any requirement of law for making deduction of tax
out of the expenditure on technical know how which was capitalized and
no amount was claimed as revenue expenditure, the deduction could be
disallowed under Section 40(a)(i) of the Act. Accordingly, no infirmity
could be found in the order passed by the Tribunal which may warrant
interference by this Court. Thus, both the questions are answered against
the revenue and in favour of the assessee. *(Whether on the facts and in the circumstances of the case Ld. ITAT is right in law in upholding the order of Ld. CIT(A), that the*

provision of Section 40(a)(i) of Income Tax Act, 1961 are not applicable to payments of Technical know-how, simply because only part of it is written off by the assessee, each year by way of depreciation u/s 32 of Income Tax Act, 1961?)

Pfizer Ltd., Pfizer Centre IN THE INCOME TAX APPELLATE TRIBUNAL

"C" Bench, Mumbai ITA No.1667/Mum/2010

(Assessment year: 2007-08) Mumbai, dated 31st October, 2012

12. As already explained and evidenced from the computation of income as well as the orders of AO in the assessment proceedings, the entire provision has been disallowed under section 40(a)(ia) and section 40(a)(i). Once the amount has been disallowed under the provisions of section 40(a)(i) on the reason that tax has not been deducted, it is surprising that AO holds that the said amounts are

subject to TDS provisions again so as to demand the tax under the provisions of section 201 and also levy interest under section 201(1A). We are unable to understand the logic of AO in considering the same as covered by the provisions of section 194C to 194J. Assessee as stated has already disallowed the entire amount in the computation of income as no TDS has been made. Once an amount

was disallowed under section 40(a)(i)/(ia) on the basis of the audit report of the Chartered Accountant, the same amount cannot be subject to the provisions of TDS under section 201(1) on the reason that assessee should have deducted the tax. If the order of AO were to be accepted then disallowance under section 40(a)(i) and 40(a)(ia) cannot be made and provisions to that extent may become otiose. In

view of the actual disallowance under section 40(a)(i) by assessee having been accepted by AO, we are of the opinion that the same amount cannot be considered as amount covered by the provisions of section 194C to 194J so as to raise TDS demand again under section 201 and levy of interest under section 201(1A). Therefore assessee's ground on this issue are to be allowed as the entire amount has been disallowed under the provisions of section 40(a)(i)/(ia) in the computation of income on the reason that TDS was not made. For this reason alone assessee's grounds can to be allowed. Considering the facts and reasons stated above assessee's grounds are allowed

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.3648 OF 2009 M/s.Aafloat Textile (India) Limited **7th January 2013** It is not in dispute that in the regular assessment, the assessingofficer has accepted the method of computation of total income made by the assessee. Once it is accepted in the regular assessment that interest paid by the assessee was not the debenture interest, it was not open to the Income Tax Officer (TDS) to treat that interest paid were debenture interest and pass an order under Section 201(1) /201(1A) of the Income Tax Act, 1961 on the ground that the assessee has failed to deduct tax at source while paying the

debenture interest to the assessee. 8. In these circumstances, no fault can be found with the decision of the Income Tax Appellate Tribunal in setting aside the order passed by the Income Tax Officer (TDS) under Section 201(1) / 201(1A) of the Income Tax Act, 1961. The appeal is accordingly dismissed with no order as to costs.

High Court of Karnataka **CIT vs Bovis Lend Lease India (P) Ltd.** 208 Taxman 168 17. Therefore, the entire proceeding initiated on that basis is unsustainable, illegal and the Tribunal was justified in setting aside the same. In fact, the Tribunal while coming to the said conclusion has taken, note of the fact that the Assessing Authority while passing an assessment order did not find fault with the assessee in not complying with the requirement of Section 195 and consequently, did not disallow the said expenditure. In fact, the Assessing Authority accepted the case of the assessee that the said consideration represents reimbursement of the actual expenditure and granted the said benefit. The jurisdictional Commissioner did not initiate any revisional proceedings to interfere with the said order. It is in that context the Tribunal was justified in holding that the left hand does not know what the right hand is doing. Therefore, in the facts of the case, the authorities were estopped from initiating proceedings under Section 201 of the Act. Therefore, the

substantial questions of law are answered in favour of the assessee and against the revenue.