IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI /ITA NO.2603/Mum/2011 Assessment year:- 2005-06 7-8-2013 M/s Pipavav Shipyard Ltd, We have perused the records and considered the rival contentions carefully. The dispute is regarding treating the assessee in default u/s 201 (1) and consequential levy of interest u/s 201 (1A) for failure to deduct TDS in respect of amounts payable to M/s Overseas Shipbuilding Cooperation Centre in connection with consultancy work (The services rendered pertained to consultancy advice given towards construction, supervision work in connection with ship building and dismantling yard being put up by the assessee company. Therefore, it was argued that the same was excluded from the definition of fees for technical services) The actual payment of the amount was dependent on certain regulatory compliances and approvals which were ultimately not received. The payment had also not been made. Therefore in such a situation no income on account of such payment could said to have been accrued to the non resident. The assessee had neither made the payment nor had claimed any revenue expenditure. Therefore only on the basis of entry in the books of accounts, the assessee could not be held liable for deduction of tax at source when ultimately the amount was found not payable nor it was paid, income therefore had not accrued to the Overseas Shipbuilding Cooperation Centre. The said company had also no PE in India nor had any business connection in India. There is no material placed on record before us to controvert the claim of the assessee that the assessee had no PE in India nor any business connection in India. The income on this account even if paid is not taxable in India. Therefore no tax was required to be deducted. Considering the facts and circumstances of the case, we see no infirmity in the order of CIT(A) canceling order of AO passed u/s 201(1) 201(1A) and the same is, therefore, upheld.

IN THE INCOME TAX APPELLATE TRIBUNAL IN THE INCOME TAX APPELLATE TRIBUNAL COME TAX APPELLATE TRIBUNAL “”””””L” BENCH, L” BENCH, L” BENCH, MUMBAI /I.T.A. No. I.T.A. No... 2944/Mum/2012 2944/Mum/2012 Assessment Year : 2007-08) 31st July 2013 M/s WNS North America Inc., C/o- WNS Global Services P. Ltd.,

We have considered the rival submissions as well as relevant material on record. There is no dispute that out of total marketing and management fee of ` 8,15,11,339/- received from WNS India only a sum of ` 6,52,13,074/- has been attributed to such PE because the services were rendered in India. The remaining amount of marketing and management fee received by the assessee is regarding the services rendered outside India. The Ld. DR has contended that since the services which were rendered in India and outside India are same or similar in nature and as per the composite agreement therefore, the entire service is attributable to the service PE in India by applying the force of attraction Rule. We do not find merit in the contention of Ld. DR The plain reading of Article 7(1) makes it clear that only in case when enterprise of Contracting State carries on business in the other Contracting State through its PE as well as otherwise and both the activities are of same or similar kind then the business activities carried on not through PE shall also be treated as attributable to the PE and the profit of the enterprise may be taxed in the other State so much of them as its is attributable to PE. There is no scope of any ambiguity as the Article 7(1) gives a clear understanding that the force of attraction Rule applied only in respect of the business carried on by an enterprise of Contracting State in the other Contracting State through PE as well as without involvement of PE. Therefore, the two essential conditions emerge for applying the force of attraction rule are (i) the business activity carried on should be in the other State where the PE is situated (ii) the business activity carried on must be of the same or similar kind as those effected through PE. In the case in hand the condition of business activity carried on in the other State where the PE is situated is not satisfied because the marketing and management services in question are provided by the assessee outside India. Since the said issue of providing the services outside India has been decided time and again by this Tribunal as well as by the Hon’ble High Court in assessee’s own case therefore in view of the

finding on the ground no. 1 to 3 there is no need for further deliberation/discussion on the same. Having held that the marketing and management services in question were rendered outside India and income of such services cannot be said to have accrued or arisen to the assessee or deemed to have accrued or arisen to assessee in India, the existence of service PE in India would not make it taxable under Article 7 of Indo-US DTAA

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCH "L", MUMBAI ITA No. : 4295/Mum/2005

(Assessment year: 2001-02) M/s Credit Agricole Indosuez Date of Pronouncement : 07-08-2013 Briefly stated the facts of the case are that the assessee claimed deduction for Rs. 91,03,072/-, being the data processing costs paid to the head office. The AO treated this amount in the nature of royalty. In the absence of the assessee having deducted tax at source, the AO made disallowance under section 40(a)(i) of the Act. The CIT(A) upheld the assessment order on this point. 18. After considering the rival submissions and perusing the relevant material on record, we find that the action of the revenue authorities on treating the amount being in the nature of royalty and hence not allowable under section 40(a)(i) cannot be allowed. The obvious reason is that the assessee made the payment on account of data processing costs to its head office. By no standard this amount can be considered as royalty as a consideration for the use of the assets specified under Explanation 2 to section 9(1)(vi). This amount is in the nature of head office expenses

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES "L", MUMBAI ITA No.7624/Mum/2010 : Asst.Year 2007-2008 M/s.McKinsey & Company (Thailand) **Date of Pronouncement : 10.**

The only issue assailed in this appeal is against the treatment given to income from borrowed services rendered as `Royalties' under Article 12 of the Double Taxation Avoidance Agreement between India and Thailand (hereinafter called `the DTAA') as against the assessee's claim of `Business profits'. Briefly stated the facts of the case are that the assessee is a foreign company incorporated in and resident of Thailand. The assessee is part of McKinsey group of entities, the primary business of which is to render strategic consultancy services to their clients, which, *inter alia,* include the analysis of performance, developments, strengths and weaknesses of their clients, improving their profitability and productivity and similar other parameters. In order to analyze these parameters, the entities in various countries make use of certain data, information and other support that is provided by the assessee. The receipts amounting to `79,99,272 in the instant year for such services rendered by the assessee to its Indian counterpart were claimed as having been performed outside India and since these were rendered in

the ordinary course of business, the same qualified to be a `business

receipt'. In the absence of the assessee having any Permanent Establishment (PE) in India, it was argued that no incidence of tax arose in India on this account.

We have heard the rival submissions and perused the relevant material on record. There is no dispute on the fact that the assessee received `79.99 lakh from its group entity in India. It is further not disputed that the assessee has no PE in India. It is clearly borne out from the facts recorded in the assessment order that the assessee is in the business of rendering strategic consultancy services to their clients. Under such circumstances, the question arises as to whether

the said receipt of `79.99 lakh is covered under Article 22 of the DTAA as held by the DRP or under Article 12 of the DTAA as held by the Assessing Officer in the final order or under Article 7 as claimed by the assessee.

The effect of para 7 of Article 7 is that if

there is a `Business income' which is of the nature as covered under separate Articles such as `Shipping and air transport' under Article 8 or `Royalties' under Article 12, then such income would move out of Article 7 and be considered only under the specific Articles. The position which conversely follows is that if there is an income from the carrying on of the business by the assessee, which does not fall

into any of the specific Articles, then it would remain included under Article 7.

6. Article 22, which has been taken note of by the DRP, provides that : “Items of income of a resident of a Contracting State, wherever arising, not expressly dealt with in the foregoing Articles may be taxed in that State. Such items of income may also be taxed in the Contracting State where the income arises”. A bare perusal of Article 22 makes it abundantly clear that it deals with residual items of income which are not covered in any of the earlier Articles of the Treaty. To put it differently, if an income is covered under one of the Articles then application of Article 22 is ousted on such income.

Presently we are dealing with a situation in which the assessee earned income by rendering the services which are in the course of its business. Ordinarily, such income would remain under Article 7, unless specifically dealt by other Articles. The case of the AO is that Article 12 is applicable. We have noticed that such Article deals only with `Royalties’ and not `Fees for included services’. Obviously, the application of Article 12 is ruled out. In that view of the matter, such income would remain included under Article 7 and will not move in the lap of Article 22, which deals with items of income not expressly

dealt with in the other Articles of the DTAA. As the nature of the extant income is such which is otherwise specifically covered under Article 7, it cannot be considered in the residual provision of Article 22. Whichever way we may view the income, the opinion of the authorities below of including it under Article 12 or under Article 22 is not sustainable. The amount falls under Article 7 as `Business profits' and is hence not chargeable to tax because of the absence of any PE in India. We, therefore, hold that the amount of `79.99 lakh falls under Article 7 and not under Article 12 or Article 22 of the DTAA.

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES "L", MUMBAI ITA No.8986/Mum/2010 : Asst. Year 2007-2008 Sargent & Lundy, LLC, USA, Date of Pronouncement : 24.07.2013 Briefly stated the facts of the case are that the assessee was incorporated in and is tax resident of USA. It is a consulting firm engaged in providing services to the power industry by providing diverse services such as operating power plants, decommissioning consulting, project solutions and other engineering based services. In the previous year relevant to the assessment year under consideration, the assessee received a sum of Rs.2,22,16,154/- from L&T Limited for rendering consulting and engineering services in relation to Ultra Mega Power projects in Mundra and Sesan. he only controversy is as to whether such technical services can fall within the scope of the DTAA. Article 12 of the DTAA, inter alia, deals with `fees for included services'. Para 4 of the Article defines this expression as : " …….payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services: ……. b. make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design." It is not the case of the assessee that the payment is covered by para 5 of the Article 12, which states that "fees for included services" does not include amounts paid in respect of certain items enumerated therein. A brief resume of the services provided by the assessee to L&T as noticed above makes it abundantly clear that these are in the nature of `technical or consultancy services' as per the main part of para 4 of the DTAA. To this extent the definition of `fees for included services' given under the DTAA matches with that given in Explanation to section 9(1)(vii), which provides that : "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include …..". At the cost of repetition, we mention that that the assessee has not assailed the finding of the AO in treating the amount as covered under `fees for technical services' as per section 9(1)(vii) of the Act. The arguments made before us revolve around the definition of `fees for included services' as per Article 12 of the DTAA. In nutshell, there are two aspects of the definition of `fees for included services' for our purpose, viz., first that there should be rendering of

`technical or consultancy services' and second that such services should be `made available' to the payer of such services. On perusal of the details of the nature of work done by the assessee for L&T, we have held above that the consideration is for the rendition of `technical or consultancy services'. The case of the assessee largely hinges on the second aspect of the definition, being `making available' such technical or consultancy services. The ld. AR argued that the activities done by the assessee did not result into making available such technical or consultancy services to L& *14. Adverting to the facts of the extant case we find that the technical services provided by the assessee in the shape of technical plans, designs, projects, etc. are nothing but blueprints of the technical side of mega power projects. Admittedly such services are rendered at a pre-bid stage. It is quite natural that such technical plans etc. are meant for use in future alone if and when L&T takes up the bid for the installation of the power project. When the otherwise technical services provided by the assessee are of such a nature which are capable of use in future alone, we fail to comprehend as to how the same can be considered as not made available to L&T. In our considered opinion, there is no infirmity in the impugned order holding that the assessee received consideration for `making available' technical services within the meaning of Article 12 of the DTAA. This ground is not allowed..*

N THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH : CHENNAI I.T.A. No. 1774/Mds/2012 Assessment year : 2008-09 Sundaram Asset Management Date of Pronouncement : 19-07-2013 Co. Ltd.,

Dis-allowance u/s. 40(a)(i) Rs. 33,48,666/- on account of non-deduction of tax at source u/s. 195 on the payments made to M/s. Fund Quest a non-resident firm:

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ld. Counsel on ground No. 3 of the appeal submitted that an amount of Rs. 33,48,666/- was paid to M/s. Fund Quest for the services rendered abroad. M/s. Fund Quest does not have PE in India and the services rendered by them were advisory in nature. The Assessing Officer has erred in come into the conclusion that the payment is in the nature of 'Royalty'. The assessee had not obtained any certificate u/s. 197 of the Act as

assessee had no doubt that the payment is for services and not in the nature of 'Royalty'. Since, the said amount is not taxable in India, the provisions of Section 195 are not applicable.. The third ground in the appeal relates to dis-allowance u/s. 40(a)(ia). The assessee is into investment business. The assessee has entered into an agreement with M/s. Fund Quest (France) on 13-07-2007, to provide investment advice for the investments to be carried outside India. M/s. Fund Quest has been providing advisory services. For the services rendered, the assessee paid fee in accordance with mutual agreement. In the course of providing advisory services, M/s. Fund Quest is providing certain data of the companies which facilitates the assessee to make investment decisions. The information provided to the assessee by Fund Quest in the form of database is published information which is available in public domain. M/s. Fund Quest has merely compiled the information and transmitted the same to assessee. The authorities below termed the payments made by the assessee to M/s. Fund Quest for the services and data provided as 'Royalty' We are of the considered opinion that such payments cannot be termed as 'Royalty' as defined under the provisions of the Act. The term 'Royalty' has been defined in Explanation (2) to Section-9, Sub-section-1, Clause-(vi) which is re-produced here in below.. Thus, a perusal of the term of 'Royalty' as defined in the Act shows that it does not include any information provided in the course of advisory services. We do not agree with the findings of the CIT(Appeals) on the issue. Since, payments made to M/s. Fund Quest are not in the nature of 'Royalty' and the services were rendered abroad, no part of income had accrued or arisen in India. The assessee is not liable to deduct tax at source on the payments so made. The findings of the CIT(Appeals) on this issue are set aside and this ground of appeal of the assessee is allowed.

IN THE INCOME TAX APPELLATE TRIBUNAL, AHMEDABAD 'B' BENCH, AHMEDABAD I.T.A. No.: 1406/Ahd/2009 Assessment year: 2008-09 Veeda Clinical Research Pvt Ltd The short issue that we are required to adjudicate in these appeals is whether or not the learned CIT(A) was justified in holding that the assessee did not have any obligations to deduct tax at source under section 195 in respect of payments of GBP 35,600, made to Veeda Clinical Research Ltd UK, for providing in-house training of its employees, and of GBP 8,500, made to Steve Matheson UK, for providing marke t awareness and development training to its employees. The law is by now settled so far as the connotations of 'make available' clause in the definition of fees for technical services in the contemporary tax treaties are concerned. It is held to be a condition precedent for invoking this clause that the services should enable the person acquiring the services to apply technology contained therein. There are at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi High Court in the case of DIT Vs Guy Carpenter & Co Ltd (346 ITR 504) and Hon'ble Karnataka High Court in the case of CIT Vs De Beers India Pvt Ltd (346 ITR 467) in support of this proposition, and there is no contrary decision by Hon'ble jurisdictional High Court or by Hon'ble Supreme Court. We, therefore, hold that unless there is a transfer of technology. involved in technical services extended by the UK based company, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under Article 13(4)(c) of India UK tax treaty. No doubt, as pointed out by the learned Assessing Officer, there can indeed be situations in which technical training is imparted resulting in transfer of technology, even consideration for rendering of training services will be covered by the definition of 'fees for technical services' but what is really the decisive factor is not the fact of training services per se but the training services being of such a nature that it results in transfer of technology. In the present case, the training services rendered by the service provider are general in nature as the training is described as 'in house training of IT staff and medical staff' and of 'market awareness and

development training'. Clearly this training does not involve any transfer of technology. In any case, in order to successfully invoke the coverage of training fees by 'make available' clause in the definition of fees for technical services, the onus is on the revenue authorities to demonstrate that these services do involve transfer of technology. That onus in not at all discharged by the Assessing Officer, or even by the learned Departmental Representative.

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES "L", MUMBAI M/s. Marriott International

Licensing Company BV, C/o- Deloittee Haskins & Sells ITA No.416/Mum/2008 : Asst. Year 2004-2005 **Date of Pronouncement : 17 .07.2013** A conjoint reading of the definitions of the expressions `International Marketing Activities' and `International Marketing Fund' along with clause 3.2 of the Agreement makes it manifest that AHL agreed to contribute at the rate of 1.5% of its gross revenue on quarterly basis to the assessee for `International Marketing Activities', which are in the nature of purchase of advertising space in magazines, newspapers and similar printed media etc., direct advertising, marketing, promotional, public relations and sales campaigns etc, designated by Marriot. 12. In the backdrop of such circumstances the primary question which arises for our consideration is as to whether the contribution of 1.5% made by AHL can be characterized as 'Royalties' under Article 12 of the DTAA. 13. A perfunctory look at the definition of term 'royalties' as

per the para 4 of the Article 12 of the DTAA makes it palpable that it represents payment received as a consideration `*for the use of or the right to use*' any copyright of literary, artistic or scientific work including cinematograph films, patent, trade mark or design etc. The crucial words used in para 4 of the Article 12 of

the DTAA are, the `*consideration for the use of or right to use …..*'. It

therefore, becomes vivid that in order to cover any amount within the purview of "royalties" as per Article 12 (4) of theDTAA, it is imperative that the payment must be a consideration for use or right to use any copyright of the literary artistic work etc. or any patent, trademark etc. (collectively referred to as the `defined property'). Payment can be made as a consideration for the use or right to use of the defined property only when such property is in existence at the time of use. If a property does not pre-exist or is likely to come into existence because of the given payment, the

same cannot qualify as `royalties' because it would, in such

circumstances, lack the condition of `use or right to use'. In

other words, the term `royalties' as per article 12(4) contemplates a consideration for the use of or right to use of the defined property which is already in existence and the payment is agreed for its use or right to use. If the payment made is of such a nature which helps in the creation of the defined property, that cannot fall within the ambit of Article 12(4) of the DTAA.

In order to claim any reimbursement of expense as immune

from taxation, the burden of proof is always on the assessee

to establish beyond a shadow of doubt that there is no profit

element in such reimbursement The assessee before us is a tax resident of Netherlands. Its business profits are otherwise chargeable to tax in Netherlands. However, the taxability will be attracted in India if assessee carries on business in India through a permanent establishment situated in India. Such taxability

will be restricted to the profits of the permanent establishment subject to the other provisions of the DTAA. As we have set aside the view taken by the Assessing Officer about the treatment of

this amount as `royalties' under article 12 and also that of the

ld. CIT(A) in treating the amount as `Reimbursement of expenses', the natural corollary which follows in the present

circumstances is that the taxability of this amount is required

to be determined in terms of Article 7. We, therefore, setaside

the impugned order and remit the matter to the file of the AO for considering the facts on the touchstone of Article 7 of theDTAA.

N THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH : CHENNAI EIH Associated Hotels

Limited I.T.A. No. 1503/Mds/2012 Assessment year : 2008-09 Date of Pronouncement : 17-07-2013

11. Ground No.2 of the appeal of the Revenue relates to disallowance made u/s. 40(a)(i) on the overseas payments amounting to Rs. 12.29 Lakhs made by the assessee. The said payments have been made by the assessee towards c., The payments have been made either towards reimbursement of expenses or for rendering services outside India. Since the payments have been made to non-residents for rendering services out-side India, the same do

not fall within the ambit of income accrued or arised in India as envisaged u/s. 9(1) of the Act. Therefore, no tax is to be deducted on such payments. The CIT(Appeals) in his order has categorically stated that the Assessing Officer in the remand proceedings has examined the same and had not

offered any remark on the above expenditure. The order of the CIT(Appeals) on this issue is well reasoned, accordingly, the same is confirmed. This ground of appeal of the Revenue is dismissed being devoid of merits

ITA Nos. 507 to 510/Bang/2009

Assessment years : 2004-05, 2005-06, 2006-07 & 2006-07 IN THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH : BANGALORE BIOCON Biopharmaceuticals

Private Ltd Date of Pronouncement : 19.04.2013

12. According to the assessee, the consideration paid by it to CIMAB was for transfer of capital asset viz., "technology", which would be income chargeable under the head 'capital gains' falling within the exception contemplated by Explanation 2 to section 9(1)(vi) of the Act. The assessee's further contention was that even capital gains is not chargeable

to tax in India because the transfer of the capital asset viz., the technology took place outside India and therefore section 45 of the Act read with sections 4 & 5 of the Act was not attracted. Hence there was no obligation to deduct tax at source.

13. According to the Revenue, the value of the shares issued by the assessee to CIMAB is nothing but consideration paid by a person resident in India in respect of any right, property or information used or services utilized for the purpose of business carried on by such person in India and therefore constitutes 'royalty' within the meaning of section 9(1)(vi)(b) read with Explanation 2 to section 9(1) of the Act. The AO accordingly passed orders treating the Assessee as an Assessee in default u/s.201(1) of the Act for taxes not deducted at source and also directing Assessee to pay interest u/s.201(1A) of the Act on taxes not deducted at source from the date on which tax ought to have been deducted at source till the date on which taxes are paid to the Government.

16. The main issue that arises for consideration in these four appeals is as to whether there was an obligation on the part of the assessee to deduct tax at source, when the shares were issued to CIMAB u/s. 195 of the Act. India does not have a treaty for

avoidance of Double Taxation with Cuba. Therefore, if income accrues to CIMAB in India under the Act, then the same would be taxable in India. The case of the revenue is that the receipt

in the hands of CIMAB is "royalty" within the meaning of the Act, which has accrued and arisen to CIMAB in India and therefore taxable in India.

18. ***ISSUE NO.1****: Whether the provisions of Sec.195(1) of the Act are*

not applicable when shares are issued to a Non-resident (which is a

foreign company in the present case) because it cannot be said to be a

payment of "any other sum chargeable under the provisions of this Act"

within the meaning of the said expression used in Sec.195(1) of the Act? As rightly contended by the learned DR, the expression "any other

sum chargeable under the provisions of the Act" used in the earlier part of

Sec.195(1) of the Act has to be read in conjunction with the words "at the

time of credit of such income to the account of the payee or at the time of

thereof in cash or by issue of a cheque or draft or by any other mode".

Thus payment in terms of the money is not the only mode contemplated

under the provisions of Sec.195(1) of the Act. The use of the expression

"or by any other mode" in Sec.195(1) of the Act, makes the intention of the

legislature clear that those provisions are attracted even to cases where

payment is made otherwise than by money. We are therefore of the view

that the argument canvassed by the Assessee cannot be accepted. Thus

Issue No.1 is held against the Assessee

ISSUE NO.2: *Whether the issue of shares by the Assessee on*

30.3.2004 and 30.9.2004 can be said to be covered by the order of nondeduction of tax at source issued by the AO in his order dated 22.2.2005 and therefore in respect of issue of shares on the above two dates the Assessee cannot be proceeded against u/s. 201(1) & 201(1A) of the Act? We are of the view that the contentions put forth on behalf of the assessee cannot be accepted. In this regard, we find that in the application filed by the assessee on 13.01.2005 u/s. 195(2) of the Act, there is no reference to the shares having already been issued by the assessee to CIMAB on 30.03.2004 and 30.09.2004. The order u/s. 195(2) of the Act does not grant immunity to the shares which are already issued prior to the date of application u/s. 195(2) of the Act by the assessee. The order, if at all, can be valid for issue of shares between 22.02.2005 [the date of order u/s. 195(2) of the Act] and 31.03.2005. Admittedly, during the above period, the assessee had not issued any shares to CIMAB, therefore it cannot be said that the assessee cannot be treated as an assessee in default in respect of issue of shares to CIMAB for failure to deduct tax at source.

30. Apart from the above, we also find that u/s. 195(2) of the Act, the power to make an application in respect of payments to a non-resident is where the payer considers that the whole of the payment will not be income chargeable in the case of the recipient. The payer can only call upon the AO to determine the appropriate proportion of sum chargeable to tax in India and the tax that the payer has to deduct on that proportion which is

chargeable to tax in India

As we have already noticed, in the present case, the assessee has made an application for NIL deduction of tax at source. Such application can be made only by a payee u/s. 195(3) of the Act. When an application is made u/s. 195(2) of the Act, the AO cannot assume jurisdiction to hold that the entire payment is not chargeable to tax and the payer need not deduct tax at source. The question for consideration would be as to what is the effect of the order dated 22.02.2005 passed by the Assessing Officer u/s. 195(2) of the Act holding that no tax is deductible by the payer. In our view, when there is no power u/s. 195(2) of the Act to hold that no tax is deductible at source, on an application filed by the person making payment to a nonresident,

the order passed by the AO holding that no tax is deductible at source would be non est in law. It is thus clear from the aforesaid observations of the Hon'ble

Supreme Court in the case of GE India Technology

Centre Pvt. Ltd., 327 ITR 456 (SC), that the payer cannot ask for a non-deduction of tax at

source u/s. 195(2) of the Act.

***ISSUE NO.3:** Whether the Revenue is precluded from proceeding*

against the Assessee for failure to deduct tax at source u/s.201(1) of the

Act, in respect of issue of shares made on 30.9.2005 and 31.3.2006 by

reason of the application of principle of estoppel? Alternatively, can it be

said that because the Revenue did not dispose the application of the

Assessee u/s.195(2) of the Act, within a reasonable time, the permission

prayed for is deemed to have been granted? As already stated the order dated 22.2.2005 is not in accordance

with law because that order which was passed u/s.195(2) of the Act, was in response to an application by the person responsible for making payment in which the dispute can be only with regard to the rate of tax and not the question whether tax at all is deductible at source or not, which remedy is available only to the recipient of the payment u/s.195(3) or 197 of the Act. Law is well settled that there cannot be an estoppel against a statute. 39. For all the above reasons, we reject the arguments put forth by the ld. counsel for the assessee on issue No.3 and hold against the Assessee on the said issue.

ISSUE NO.4: *Can it be said that proceedings u/s.201(1) & 201(1A) of the Act are not valid on the application of the principle "Actus Curle Neminem Gravabit", which means "an act of Court shall prejudice no man".? We have considered the above submission and are of the view that the same cannot be accepted. It is well settled that Tax and equity are strangers. In interpreting tax legislations or determining tax liability equitable considerations have no role to play. The provisions of Sec.195 of the Act are clear and are not ambiguous. As already stated the order u/s.195(2) dated 22.2.2005 operated only for a limited period. Fortunately for the revenue during that period, the Assessee made no issue of shares to CIMAB. The provisions of law are clear that each of the payments to non-resident or foreign company requires specific order, unless there is any other general order operating for an indefinite period of time. We therefore*

reject the arguments advanced on this issue and hold against the

Assessee on issue No.4.

ISSUE NO.5: *Whether the issue of shares by the Assessee to*

CIMAB would constitute a payment of "Royalty" by the Assessee to CIMAB which can be said to accrue or arise in India to CIMAB and therefore

taxable in the hands of CIMAB in India and consequently the Assessee be

held as liable to treated as an Assessee in default u/s.201(1) of the Act?

44. Another issue that may require consideration as an alternate to the

above issue will be as to whether CIMAB is liable to tax on capital gain on

transfer of technology. Consequently, whether assessee can be said to be

'an assessee in default' to the extent of tax on capital gain? 57. We should keep in mind that there can be mixed contract for supply

of know-how and technical services in consideration of lump sum payment.

The lump sum consideration must be broken down into parts and that part

of the consideration attributable to know-how has to be brought to tax as

'royalty' assuming that the consideration paid is for imparting of any

information concerning technical, industrial, commercial or scientific knowledge, experience or skill. That part of the consideration attributable

to providing 'technical services' has to be brought to tax as fees for

technical services rendered. Such apportionment has to be on the basis of

the information specified in the contract itself or on some other reasonable

basis. If, however, one element constitutes 'by the principal purpose of the

contract' and the other element is "only of an ancillary and largely

unimportant character", the whole amount paid should be treated as

relating to the primary element. 58. Keeping in mind the observations in the earlier paragraphs, let us

see as to whether in the case of the assessee, there was a "transfer of

know-how" which would be chargeable to tax as capital gain (subject to

fulfillment of other conditions mentioned in section 45 of the Act) or only a

"right to use know-how" falling within the definition of Explanation 2 (iv) of

section 9(1)(vi) of the Act or a mixed contract where there is right to use

know-how as well as technical services rendered. In pith and substance, the Agreement gives only a right to use the know-how, though the nomenclature used in the Agreement is 'transfer of technology'. Nomenclature used to describe an agreement will not be decisive and we have to decide in substance what is the right transferred. It is thus clear

from the terms of this Agreement that the assessee did not acquire the know-how through a transfer within the meaning of section 2(47) of the Act from CIMAB and therefore the arguments of the assessee on the arguments resulting in a transfer of know-how deserve to be rejected. The JVA read together with the JVA contains two parts. The first part transfers

right to use know-how. This part is a separate contract and the right to use know-how so transferred was "Royalty" within the Explanation 2(iv) to section 9(1)(vi) of the Act. The second part is the mode of payment of the consideration payable under the JVA & TTA for providing technology by CIMAB to the assesse (right to use the know-how) which is in the form of issue of shares in the JVC. Accrual of income from the second part of the contract has to be brought to tax subject to fulfillment of conditions specified in section 9(1)(vi) of the Act. The fact that the consideration payable under the Agreement is discharged by issue of shares in a JVC will have no effect on accrual of income in India and its taxability in India.

THE INCOME TAX APPELLATE TRIBUNAL

"A" BENCH : BANGALORE ITA No.592/Bang/2012

Assessment year : 2005-06 Success Apparels Pvt. Ltd We have heard the submissions of the ld. DR who relied on the order of the AO. It is clear from the order of CIT(A) that there was an order u/s. 197 of the Act permitting payments without deduction of tax at source. That certificate was issued on 12.08.2004. The total contractual payments made by the assessee to NEL was Rs.539 lakhs during the previous year. The AO held that payments made till 12.08.2004 which is a sum of Rs.1,14,37,755 had to be disallowed because during that period the assessee did not have a certificate u/s. 197 of the Act and that the certificate operates only prospectively. The CIT(A), however, found that the certificate for non-deduction of tax was for the whole financial year and therefore no disallowance could be made by the AO. The AO himself admits that the certificate u/s.197(1) of the Act was valid for payments during the previous year. There is no basis on which he could hold that in respect of payments made during the previous year which were prior to the date of the certificate u/s.197(1) of the Act, TDS ought to have been made by the Assessee. The stand taken by the Assessing Officer is contrary to the certificate issued u/s.197(1) of the Act. We are therefore of the view that the order of the CIT(A) on this issue s just and appropriate and calls for no interference.

N THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCH "A", MUMBAI M/s K S Aiyar & Co., /Date of Pronouncement : 19-06-2013 29. Ground no. 5 pertains to disallowance of Rs. 2,17,594/- u/s 40(a)(i) for non deduction of TDS, as per the provisions of section 195. 30. The facts, as reproduced in the assessment order are that the assessee paid Rs. 2,17,594/- as membership fee to Baker Tilly International (BTI), located in England, whose membership is restricted to professional firms worldwide, practicing profession of

accountancy. According to the submissions of the assessee recorded by the AO, BTI is a non business & non profit making organization, who circulates to its members, information relating

to professional education and updates on the happening in the profession, worldwide. Since it is non business & non profit making organization, it neither receives any income from business connection in India nor it receives

any technical fee, as contemplated u/s 9 of the IT Act. In fact, BTI does not render any technical consultancy to anybody world over, which includes its members in India (which includes the assessee). As explained by the assessee to the AO, BTI does not render any services, which could be rendered as business connection and even in the

accounts, the only transaction recorded by the assessee was payment of subscription fee. Since, the expense does not involve any business consideration, and since it does not culminate into an element of profit to the recipient, the payment falls outside the scope of section 195. It was also submitted before the AO that deduction of TAS arises only if the payment is chargeable to tax in India. Since there was no part of this payment culminating in India, no tax was deductible u/s 195, as also clarified by the Board Circular No. 786, dated 07.02.2001. 33. The AO, therefore, disallowed the subscription payment of Rs. 2,17,594/- paid to BTI. 34. Aggrieved, the assessee approached the CIT(A), before whom it reiterated its submissions made before the AO. The CIT(A) took into consideration the order of the AO and the submissions made and concluded, "I have considered the rival submissions and the materials on record. The appellant is clearly a member of the BTI and has paid the membership fees. The decision of the Tribunal in the case of Arthur Anderson & Co. ITA No. 9125/Mum/1995 AY 1994-95 dated 29/7/03 is squarely applicable in this case. The Tribunal had extensively dealt

with the principle of abundant caution in the context of tax deduction at source. THE AO in my opinion, was justified in holding that in terms of the said decision of the Tribunal, the appellant had to make the said TDS. Consequently, Ground No. … deserves to be rejected". 35. He, therefore, sustained the disallowance of Rs. 2,17,594/-

made by the AO. 36. The assessee is now before the ITAT consideration the order of the AO and the submissions made and concluded, "I have considered the rival submissions and the materials on record. The appellant is clearly a member of the BTI and has paid the membership fees. The decision of the Tribunal in the case of Arthur

Anderson & Co. ITA No. 9125/Mum/1995 AY 1994-95 dated 29/7/03 is squarely applicable in this case. The Tribunal had extensively dealt with the principle of abundant caution in the context of tax deduction at source. THE AO in my opinion, was justified in holding that in terms of the said decision of the Tribunal, the appellant had to make the said TDS. Consequently, Ground No. … deserves to be rejected".

35. He, therefore, sustained the disallowance of Rs. 2,17,594/- made by the AO.

36. The assessee is now before the ITAT 39. The AR, pleaded that since no part of the payment made by the assessee to BTI, generated any income to the recipient, i.e. BTI, which is a non resident and payment having made to a non resident, out side of Indian tax regime, there was no liability on the assessee to deduct tax at source and, therefore, the assessee did not contravene

the provisions of section195 of the Income Tax Act, 1961. When we read the relevant provisions, along the Circular, and the relevant clauses of the agreement, we find that no part of the payment made as subscription to BTI has resulted in income in its hands. Court explains the applicability of expression "The expression "chargeable under the provisions of the Act" in section 195(1)

shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. If tax is not so assessable, there is no question of tax at source being deducted". In the present context, we find that none of the conditions gets fulfilled herein, in which case, the case, as cited, is in effect, in favour of the assessee.

43. In these circumstances, we set aside the orders of both the revenue authorities and direct the AO to delete the disallowance of Rs. 2,17,594/- made to BTI.

64. We have heard the arguments and have perused the relevant provision, which prescribed TDS on payments made to professionals. In its submissions, all along, the assessee has been praying that the payments had been made to non professional who are contracted for 3–4 months to do and learn the basic concepts of profession of

accountancy. The persons are students who are perusing their accountancy degree/diploma or even as interns. The concept of internship during college days has caught the fancy of students and employees alike, because, the students perusing their formative degree/diplomas are in a lookout of internship to get the knowledge of

the field and they are paid, which is good enough for their pocket money. It is economical for the employees to engage such persons, who would come, do the basic work of a paid employee, prepare some details/reports and go in 3-4 months time. On going through the submissions as reproduced by both the revenue authorities, we find

that assessee has made payments to such students or small time accountants, who take up office job work at certain period of times. 65. In these circumstances, we feel that these payments shall not attract deduction of tax at source and hence would not be hit by section 40(a)(ia).

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI M/s. Sun Pharmaceutical Industries Ltd., I.T.A. No.6100/Mum/2011 I.T.A. No.6100/Mum/2011 The facts in the case are that assessee remitted a sum of US$ 4,00,000 to M/s. Scandinavian Health of Taiwan on 01-06-2006 on 01-06-2006 on account of consulting charges/fees. However, the assessee did not deduct tax at source u/s. 195 of the Act, therefore, AO passed an order u/s 201 and 201(1A) of the Act on 4.12.2006 and raised a total demand of Rs. 24,08,536/-. After considering the submissions and perusing the material on record Ld. CIT(A) found that the contract agreement with a Taiwan Company, Scandinavian Health Ltd.(HSL) has been cancelled. Cancellation of contract was also filed. Reliance was placed on the Board Circular No.7 of 2007 dated 23.10.2007. The CIT(A) found that since the contract has been cancelled therefore, there was no point to deduct the TDS. Accordingly, the matter was sent back to the AO to verify the contention laid down in Circular No. 7 of 2007 for a refund of tax already collected and refund the tax so collected if any to the assessee. Now the department is in appeal before the Tribunal. The Ld. DR stated that the AO was correct in holding that there is no apparent mistake

in the order passed u/s 143(3) stated that certain new evidences were filed before Ld. CIT(A) and AO was not granted any opportunity. On the other hand, the Ld. AR stated that the CIT(A) has allowed the appeal of the assessee subject to verification of the details and Board Circular, therefore, it is wrong to suggest that AO was not allowed any opportunity The above findings are self explanatory which does not require any interference, Ld. CIT(A) has allowed the issue in favour of assessee subject to verify the contention laid down under Board Circular and other details. Therefore, it cannot be said that AO was not allowed any opportunity as the AO has to verify the details before granting any

refund of tax if any. Accordingly, we confirm the order of the CIT(A).

1. TDS

Whether disallowance u/s 40(a)(i)/40(a)(ia) automatically exclude the invocation of section 201 proceedings (for payer in default) That is whether disallowance of expense and its treatment as assessee's income exclude operation of section 201 of the Act?

Whether AO's acceptance of assessee's explanation that NO tds was required on a expense during completed scrutiny proceedings (hence no disallowance u/s 143(3) order) has any impact to rule out applicability of section 201 of the Act?

Whether CIT-A can set aside proceedings u/s 201 of the Act despite amendment in section 251 of the Act? That is whether proceedings u/s 201 of the Act are different from assessment proceedings?

Whether on genuine reversal of transaction (credit entry) there can be any possible/potential TDS liability in hands of person who has first credited the amount and then reversed the said entry due to genuine reasons (like wrong punching at first instance?)

Whether onus u/s201(1) is on revenue to prove that they are not able to recover the tax from payee before approaching payer for TDS demands?

Whether penalty u/s 271C (or section 221) of the Act can be imposed for delayed payment of TDS specially where during TDS survey assessee suo motto accepted stated default and paid necessary amounts immediately after TDS survey?

In respect of the personnel expenses. assessee and S Limited recognized that they would require certain common human resources. Assessee agreed that instead of these individuals being duly employed, S Limited would employ them. However, the services of these employees would be availed by both the entities on need basis and costs expenses in respect of these employees (including salary,incentives based on terms of appointment, mobile phone expenses) were initially disbursed by S Limited after deducting appropriate taxes. However, to the extent that these persons rendered services to it. ASSESSEE have reimbursed the costs to S Limited at actuals (cost to company basis) without any mark-up. S Limited did not make available, supply or furnish the services of these personnel to us. While working with us, the employees were working under the

direct supervision and control for their work and the intention of S Limited was never to provide any services to us. Whether revenue can insist assessee deduct TDS u/s 194J on payment to S Limited?

With respect to the contract work receipts, TDS was done but the assessee claimed credit of the tax mentioned in the said TDS certificates , the assessing officer , in the assessment orders of both the firm and the company, refused to give credit on the ground that some of the TDS certificates belong to the joint venture and some other TDS certificates are in the name of Directors and do not relate to the assessee firm/company. Aggrieved thereby, the present appeals under Section 260-A of the Income Tax Act, 1961 have been filed contending:

a) that the credit for TDS given on the TDS certificates produced in the names of the Joint Venture is not in accordance with Rule 37-B A of the Rules framed under the I.T. Act.

b) The assessee is not eligible for TDS credit on the certificates produced in the names of the Directors when the same is not in accordance with Rule 37-B A of the above Rules

Whether revenue is right?

Whether for purposes of TDS u/s 195 of the Act, professional service rendered by foreign professional (independent person/individual) say from Hongkong (where no DTAA is there) are these services different from *technical services for purposes of taxation u/s 9(1)(i) of the Act* so as to be taxed on basis of professional connection in India?

Whether for purposes of TDS u/s 195 of the Act, where DTAA benefit is given by payer to payee at TDS stage, Tax residency certificate under rule 21AB is must (section 90(4) of the Act?

Whether for purposes of TDS u/s 195 of the Act, for purposes of taxation u/s 9(1) of the Act, what shall be the treatment of following services:

a) Procurement assistance services ; referral fees; commission for procurement of orders;
b) assembly, disassembly, inspection, reporting and evaluation of plant & machinery;
c) Lab testing;
d) Arbitration fees paid to overseas business chamber

Whether for payment to Non resident seller of immovable property for which capital gains is taxable in India (as property is in India) can seller take into consideration cost and indexation factors in hands of seller for computation of requisite TDS u/s 195 of the Act without approaching AO u/s 195(2) of the Act?

Whether for approaching CIT u/s 248 for declaration of TDS it is must that there is first hand adjudication by AO u/s 195 of the Act or straightway a payer can go to CIT u/s 248 on fulfillment of given conditions?

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 (**2013 55 SOT 277)**

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.

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, CHENNAI **I.T.A. No. 1339/Mds/2013**
(Assessment Year : 2009-10) M/s Mahindra Holidays & Resorts India Ltd., **Date of Pronouncement : 26.09.2013**

53. Now before us, learned D.R. submitted that the payment of commission to franchisee at Dubai fell within the definition of technical services" given in Explanation 2 to Section 9(1)(vii) of the Act. According to him, "technical services" included rendering of any managerial, technical or consultancy services. The franchisee at Dubai and other places abroad were rendering consultancy and managerial services to the assessee, when they were canvassing clients for the time shares marketed by the assessee. As per learned D.R., such services fell within the definition of "technical services". In view of Explanation to Section 9(2) of the Act, added with retrospective effect from 1.6.1976 by Finance Act, 2010, it was not necessary for the non-resident to have a residence or a place of business or a business connection in India. It was also not necessary for a non-resident to have rendered service in India. Further, as per learned D.R., decision of co-ordinate Bench of this Tribunal in the

case of Prakash Impex (supra) was not accepted by the Department and the Department had moved in appeal before Hon'ble jurisdictional High Court.

There can be no doubt that if the payment was a fee for technical services, then no matter whether the non-resident was having a residence or a place of business or business connection in India, it would be chargeable to tax in India by virtue of Section 9(1)(vii) read along with Explanation 2 to Section 9(2) of the Act. However, as per assessee, canvassing of time shares done by the franchisee were not in the nature of any managerial, technical or consultancy services, and hence would not fall within the definition of "fee for technical services" given in Explanation 2 to Section 9(1)(vii) of the Act. ***Even if we consider that services rendered by the franchisee did fall within the definition of "fee for technical services", we are still of the opinion that clause (b) of Section 9(1)(vii) will save the assessee.***

Income by way of fees for technical services would not be considered so, if such fees were payable in respect of services utilized in a business or profession carried on by such persons outside India, or for the purpose of earning income from any source outside India. When assessee is marketing its time share unit abroad, without doubt, the business is being carried on outside India in respect of such time share units and the income earned is also from a source outside India*. Franchisees are also earning their income by virtue of marketing the time share units of the assessee abroad The franchisees were also therefore, earning income in the course of their*

business or profession carried abroad. Thus, whether we consider "such persons" to be the non-resident entity or to be the assessee in India, it means that as long as the fees were for service utilized in a business or profession, carried outside India, it could not be treated as income chargeable to tax

57. Vide its ground No.5, grievance of the Revenue is that professional charges of ` 92.58 lakhs disallowed by the A.O. relying on Section 40(a)(i) of the Act, was allowed by the CIT(Appeals). 58. Facts apropos are that assessee had paid a sum of ` 92,58,638/- to a Dubai entity for certain professional services. Assessee had not deducted tax at source on such payments. A.O. was of the opinion that assessee, if it was not sure about the necessity to withhold tax, ought have obtained certificate under Section 195(2) of the Act. Therefore, according to him, assessee failed to deduct tax at source as required under the Act. A disallowance of ` 92,58,638/- was made

62. Per contra, learned A.R. submitted that similar issue had come up before this Tribunal in assessee's appeal for assessment year 2008-09. Learned A.R. submitted that this Tribunal had held at para 14 of its order dated 17th October, 2012, as under:-

"14. The next ground raised by the Revenue is that the Commissioner of Income Tax (Appeals) has erred in deleting the disallowance under Section 40(a)(i) in respect of consultancy charges paid to various persons outside India. The Commissioner of Income Tax (Appeals) has rightly observed that the disallowance under Section 40(a)(i) can be made only if taxes are not withheld on income chargeable to tax in India. In the present case there is no acquisition of technical knowledge which could be independently applied by the assessee. Therefore, the payment could not be construed as if for technical services. The entire services were rendered outside India. There is no permanent establishment for the non resident in India. In these circumstances the Commissioner of Income Tax (Appeals) has

rightly deleted the disallowance of ` 18,99,269/-. This ground of the Revenue is dismissed."
63. We find that the Tribunal had given the above finding on similar payment effected by the assessee for assessment year 2008-09. Said decision was given by the Tribunal when Explanation to Section 9(2) was already there in the statute. It is, therefore, not possible for us to come to a conclusion that the said explanation was not considered by the Tribunal. Similarly, we cannot also say that the Tribunal was not aware about the existence of any Double Taxation Agreement between India and Dubai. We are therefore inclined to follow the order of the Tribunal mentioned above

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, CHENNAI **I.T.A. No. 637/Mds/2013**
(Assessment Year : 2009-10) M/s Edac Engineering Limited, **Date of Pronouncement : 23.09.2013** 41. We have perused the orders and heard the rival submissions.
There is no dispute that the original work order was given by the assessee to M/s Gulf Spic Engineering (LLC), Dubai. It is also an admitted position that the work was eventually done by two Indian concerns, namely, M/s Fairline Shipping Services Ltd. and M/s AMS Enterprises. M/s Gulf Spic Engineering (LLC), Dubai had themselves asked the assessee to identify persons in India for doing the work. Assessee had accordingly identified two India's concerns and placed work order on them. Revenue has not disputed the contention of the assessee that when payments were effected by it to M/s Fairline Shipping Services Ltd. and M/s AMS Enterprises, tax was deducted at source in accordance with Section 194C of the Act. Assessing Officer had fastened a disallowance under Section 40(a)(i) by relying on Section 195 of the Act. At this juncture, a reading of Section 195 is required. Section 195 is reproduced hereunder..

The said Section can be applied only on a person responsible for paying to a non-resident any sum which is chargeable under the Act. Here, admittedly, assessee had not directly paid any amount to the non-resident. Payments were effected by the assessee only to the two Indian concerns. When such payments were effected, assessee had indeed deducted tax at source as mentioned under Section 194C of the Act. Section 194C applied to payments made to a resident

contractor. When the assessee never effected any payment to M/s Gulf Spic Engineering (LLC), Dubai and had under their instruction given work orders to two Indian companies, and made payments directly to such Indian concerns, after deducting tax at source, we cannot say that assessee had failed to deduct tax at source. Assessee had effected deduction of tax as stipulated under Section 194C and remitted it to Government Account. This has not been disputed. There is no finding by any of the lower authorities that M/s Gulf Spic Engineering (LLC), Dubai had done any work for the assessee, for which assessee was obliged to make any payments. In any case, in such circumstances, assessee had reasonable grounds to have a bonafide belief that the payments effected to M/s Fairline Shipping Services Ltd. and M/s AMS Enterprises did not attract Section 195 of the Act. It could not be faulted for failure to deduct tax at source as mentioned in Section 195 of the Act, since the work was done only by M/s Fairline Shipping Services Ltd. and M/s AMS Enterprises and not by M/s Gulf Spic Engineering (LLC), Dubai. We are, therefore, of the opinion that assessee could not be held liable for any failure for non-deduction of tax at source.

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, CHENNAI **I.T.A. No. 851/Mds/2013**
(Assessment Year : 2008-09) M/s Sify Communications Limited, **Date of Pronouncement : 04.10.2013 We** have heard conte ntions of both the parties. On Revenue's
appeal for assessment year 2002-03, this Tribunal in I.T.A. No. 1084/Mds/2012 dated 20.11.2012 had held at para 13 of its order, as under:- *The Assessing Officer has, therefore, taken the following arguments for raising the impugned demands.*
(1) The service provided by the Telecommunication service Provider in the case is different from that provided by the nonresident companies in the present case.
(2) Telephone is fundamentally different from a bandwidth service.
(3) The bandwidth service is not a specified service.
(4) Equipment of the nonresident company through which connectivity is provided is used by the assessee the requisite bandwidth along with equipments is for exclusive for the assessee which cannot be used by others nor by the nonresident company; on termination of the agreement the

assessee must cease to use the service and all equipment of the non-resident company. Thus the payment by the assessee can be treated as royalty for use of equipment. The ITO further argued that case has to be distinguished from the case of BSNL and Others Vs. Union of India (Supreme Court). In that case the Supreme Court dealt with the issue of using standard facility provided to an average householder or consumer whereas in the present case it dealt with payment for use of equipment.

6:4. In view of these facts and In the circumstances of the case and the position of law set out above, it is held that the transactions in respect of which the impugned payments were made was purely on account of services and there is no transfer of right to use the goods. In the result, it is held that the Assessing Officer was not justified in treating the payment as royalty and invoking the provisions of sec. 195 for both the assessment years. Consequently, the impugned order u/s, 195 r.w.s. 201(1) and 201(1A) dated 21-03-2006 for A.Ys. 2002-03 and - 2003-04 is cancelled." The fact situation being the same, we are of the opinion that that
CIT(Appeals) was justified in deleting the disallowance for similar costs for impugned assessment year also.

IN THE INCOME TAX APPELLATE TRIBUNAL —L|| BENCH, MUMBAI I.T.A. No.7696/M/2010 (AY: 2005-2006) /Date of Pronouncement : 25.9.2013 **M/s. VSNL BroadBand Ltd**

11. **Allowability of the payments of Rs 8,96,147/- towards such repairs:**
As discussed in the paragraphs of this order where the arguments of the AR are discussed, it is the case of the assessee that the payments for the repairs should not be subjected to TDS as the said payments outside the scope. We have examined the cited decision of the Tribunal in the case of M/s. BHEL-GE-Gas Turbine Servicing (P) Ltd (supra) and find such payments do not constitutes FTS and relevant paragraph 16 is reproduced here as under:
—16……Thus, the above decisions of the Tribunal are relevant for the proposition that the routine repairs do not constitute _FTS' as they are merely repair works and not technical services. Technical repairs are different from _technical services'. Thus, the payments made for _technical services' alone attract the provisions of section 9(1)(viii) of the Act and its

Explanation 2. Further, it is also a settled issue at the level of the Tribunal that every consideration made for rendering of services do not constitute income within the meaning of section 9(1)(viii) of the Act and for considering the same, first of all the said consideration is for the FTS. Therefore, considering the above decision of Delhi Bench of the Tribunal, which explained the scope of the provisions, we are of the view that the impugned orders of the CIT (A), for the years under consideration, on this aspect of the matter, do not call for interference. Accordingly, the grounds raised in these appeals of Revenue are dismissed.‖

12. Therefore, so far as the repairs related payments are concerned, the claim of the assessee needs to be **allowed** and in favour of the assessee.