IN THE INCOME TAX APPELLATE TRIBUNAL,
AHMEDABAD I BENCH, AHMEDABAD

[Coram: Pramod Kumar AM and S S Godara JM]

I.T.A. No. 48/Rjt/2015
Assessment year: 2010-11

Deputy Commissioner of Income Tax
(International Taxation), Ahmedabad **.....Appellant**

Vs

Welspun Corporation Limited **.....Respondent**
Welspun House, 7th floor
Senapati Bapat Marg, Lower Parel (West)
Mumbai 400 013 [PAN: AAACW0744L]

ITA No. 249/Ahd/15
Assessment year 2010-11

Welspun Corporation Limited **.....Appellant**
Welspun House, 7th floor
Senapati Bapat Marg, Lower Parel (West)
Mumbai 400 013 [PAN: AAACW0744L]

Vs

Deputy Commissioner of Income Tax
(International Taxation), Ahmedabad **.....Respondent**

Appearances by
S T Bidari *for the revenue*
S N Soparkar *for the assessee*

Order reserved on : October 04, 2016
Order pronounced on : January 03, 2017

O R D E R

Per Pramod Kumar, AM:

1. These cross appeals are directed against the order dated 5th November 2014 passed by the learned CIT(A), Gandhinagar, in the matter of tax withholding demands raised on the assessee under section 201 r.w.s 195 of the Income Tax Act, 1961, for the assessment year 2010-11.

2. We will first take up the appeal filed by the Assessing Officer.

3. In the first ground of appeal, the Assessing Officer has raised the grievance that ñ***the Ld. CIT(A) erred in law and on facts in directing the A.O. that the assessee is not in default under section 201(1) & 201(1A) of the Act for not deducting tax while making remittance to non-residents under section 195 of the Act***"

4. Learned representatives fairly agree that this ground is somewhat general in nature and does not require any specific adjudication.

5. Ground no. 1 is thus dismissed.

6. In grounds of appeal numbers 2, 3, 4 and 5, which we will take together and which deal with the core issue requiring our adjudication in these cross appeals, the Assessing Officer has raised the following grievances:

> ***(2) The Ld. CIT(A) erred in law and on facts in directing the AO that commission paid to export commission agents viz.***
>
> ***(i) Abu Muneer Al- Hashmi Trading LLC***
> ***(ii) Afras Ltd.***
> ***(iii) Bumi Flow Technologies (M) SdnBhd.***
> ***(iv) CGH Ltd.***
> ***(v) Chosamentinkausomas***
> ***(vi) Dynacoral Oil & Gas Sdn Bhd***
> ***(vii) Global Synergy International Ltd.***
> ***(viii) GMS Interneer Co. Ltd.***
> ***(ix) M&M OCTG Venezuelen Distributor CA***
> ***(x) Narfoamkarjit***
>
> ***is not fees for Technical Services (FTS) both under section 9(1)(vii) as well as the relevant article of the DTAA.***
>
> ***(3) The Ld. CIT(A) erred in law and on facts in directing the A.O. that the commission paid to such export sales commission agents ought to have been characterized as business income in the hands of such agents u/s. 9(1)(i) of the Act as well as the relevant provision of the corresponding DTAA.***
>
> ***(4) Ld. CIT(A) erred in holding that withdrawal of circular should not make the commission paid taxable in India in absence of their business connection or a permanent establishment in India.***
>
> ***(5) The Ld. CIT(A) erred in law and on facts in directing the AO that it is not necessary to make application u/s. 195(2) of the Act***

for each and every remittance because whenever the assessee is in doubt he must approach the AO u/s, 195. Ld. CIT(A) himself has confirmed the addition made on account of commission payment made to Borneo Abadi Trading Corporation, Belize in A.Y. 2012-13 & 2013-14, which shows that certain payment were chargeable to tax and accordingly the assessee should have made an application u/s. 195 to the A.O.

7. In substance, the core issue requiring our adjudication is whether or not, on the facts and in the circumstances of the case, the learned CIT(A) was deleting the demands raised on the assessee under section 201 r.w.s 195 in respect of non-deduction of tax at source from certain payments, as detailed above, made on account of commission paid to non-resident "export commission agents". All other issues raised in the above grounds of appeal are simply the arguments in support of this core grievance.

8. While dealing with this grievance, it is necessary to appreciate that the commission agents employed by the assessee, as we find from the material on record, can be subdivided in three broad categories – (a) residents of the tax jurisdictions with which Indian does not have any tax treaties at all; (b) residents of the tax jurisdictions with which Indian has tax treaties and such tax treaties have a specific article dealing with taxability of "fees for technical services" on the conventional pattern without a "make available" clause; and (c) residents of the tax jurisdictions with which Indian has tax treaties but these treaties have no specific article dealing with the taxability of "fees for technical services". This categorization is important since the legal principles governing the taxability of amounts received by the export commission agent in these three categories will be quite different and distinct. In the present year, the recipients of the commission can be divided in these categories as follows:

(a) residents of the tax jurisdictions with which Indian has tax treaties but these treaties have no specific article dealing with the taxability of 'fees for technical services':

GMS Interneer Co. Ltd.	Thailand
Afras Ltd.	UAE
Narfoamkar JLT	Iran

(b) residents of the tax jurisdictions with which Indian has tax treaties and such tax treaties have a specific article dealing with taxability of 'fees for technical services' on the conventional pattern without a 'make available' clause:

Dynacoral Oil & Gas Sdn Bhd	Malaysia
Abu Muneer Al-Hashmi Trading Llc	Oman
Bumi Flow Technologies (M) Sdn Bhd	Malaysia
CGH Ltd	Trinidad & Tobago

(c) residents of the tax jurisdictions with which Indian does not have any tax treaties:

Chosamentin Kauomas	Algeria
Global Synergy International Ltd.	Algeria
M&M OCTG Venezuelan Distributors CA	Venezuela

9. Before we come to the core issue, i.e tax withholding requirements in respect of payments to export commission agents on the facts of this case, and consequences of failure, if any, in respect of the same, let us take note of some undisputed facts of this case. The assessee before us is, as the Assessing Officer puts it in the impugned order, a ñglobal manufacturer of steel pipes, offering the highest quality LSAW, HSAW and ERW pipes ranging from 0.5 inch to 129 inches, alongwith specialized coating, double jointing and bendingò On 19th July 2012 a survey under section 133A was carried out at the premises of the assessee so as to examine its compliance with its tax withholding obligations. During the course of this survey, it was noticed that the assessee is not deducting tax at source from various remittances abroad, including remittance for payment of export sale commission. The Assessing Officer was of the view that the assessee was required to withhold tax from these commission payments, and, to justify this stand, the Assessing Officer discussed facts of each of these cases.

10. As we proceed to discuss taxability of export sale commission payments made by the assessee to its non-resident agents, let us take note of some general observations made by the Assessing Officer about the nature of this activity. The Assessing Officer, in this regard, has *inter alia*, observed as follows:

The assessee company Welspun Corp. Ltd. is engaged in the business of manufacturing of steel pipes, plates and coils. The manufacturing activities performed by the company are highly technical in nature and require highly skilled labour, technology and scientific knowledge. The products of Welspun include longitudinal submerged Arc welded pipes, Helical submerged Arc welded pipes, and High frequency Electric Resistance welded pipes. The pipes manufactured by the assessee are pipes of finest grades and international standards as assessee itself claimed. The pipes, plates and coils manufactured by the assessee are

used in highly engineered and technical projects like, metro rail projects, international airport projects, water, oil and gas pipeline project. Wind power projects, off shore wind towers projects etc. The company claimed to manufacture and supply its technical products to most critical pipelines in the world in India and abroad. The company has supplied pipes for the world's deepest pipeline project Independence Trail (Gulf of Mexico), highest pipeline project (Peru LNG) longest pipeline (Canada & US) and the heaviest pipeline (Persian Gulf). The company claimed to have esteemed clientele which include TransCanada Enterprise, Kinder Morgan, Texas Gas, Hunt Oil, Saudi Aramco, Elpaso, Exxon Mobil, PTTEP, Quatar Petroleum and DOW to name a few.

It is evident from the brief profile narrated above that the manufacturing of specialized pipe is highly technical activity involving very technical complex exercise of technology and skilled labour and finest grade of raw material. Obviously to procure orders the company will do need specialist agents who can understand the technical nitty- gritty of the assessee's business and can demonstrate the assessee's business profile and quality of the products of the assessee to the potential clients to convince them to enter into in contract with the assessee company for supply of the pipes etc. and other allied works. In view of this, it is a very technical exercise to obtain the contracts since it involves a complex process requiring elaborate discussion, technical expertise and presentation of complex technical presentation on behalf of the assessee which can only be done by specialist in this field so as to convince the clients about Welspun's suitability to the contract to which it carries considerable amount.

11. Coming to the specific cases, the first set of cases of residents of the tax jurisdictions with which Indian has tax treaties but these treaties have no specific article dealing with the taxability of ófees for technical servicesô So far as this set of cases is concerned, the Assessing Officer noted that the assessee has, *inter alia*, made payments of Rs 1,06,251 to a Thailand based entity by the name of GMS Interneer Co Ltd (GMS, in short), Rs 35,73,878 to a UAE based entity by the name of Afras Limited (Afras, in short) and Rs 12,05,96,574 by the name of a Iran based entity by the name of Narfoamkar JLT (NJ-Iran, in short). The Assessing Officer then examined the contracts under which these payments were made. As regards the contract with GMS, he noted that the contract is with respect of a particular project, namely PTTEPI, but then there is also another entity, based in Belize, is also associated with the same project and for the same purpose. He further noted that the obligation of the agent, as evident from a plain reading of the agreement, is to

develop, expand and promote diligently the sales and marketing for assesseeôs products with its best endeavours and facilities- a function which could not be discharged unless the agent has the expertise, technical skills and ample knowledge of highly technical products of the assessee. It was also noted that the agent was also required to make market plans and establish marketing network of representatives to help and promote Welspun products. This work, according to the Assessing Officer, required expertise, technical skills and knowledge of highly technical products. It was the noted that the agentôs work included providing information such as market development, activities of competitors, intentions and plans of clients and financial information on clients. This work further included, as noted by the Assessing Officer, providing advanced information about the tenders, gathering technical specifications of project and work incidental thereto. The agent was also expected to assist the assessee in identification of sub-contractors and logistic service provider, such as shippers and cargo handling agencies, so ensure smooth execution of contracts. The Assessing Officer further took note of the role of the agent in keeping the assessee abreast of ñall relevant political and economic changesò which would affect business. So far as contract with Alfras was concerned, the Assessing Officer noted that the assesseeôs contention that it did not have any specific provision for rendition of services, on the same lines as GMS, but then he rejected this contention and observed that the agreement clearly states that it is a service agreement, that the agent is a well established marketing and trading company having significant experience in handling this kind of a work, that the technical knowledge so acquired by the Alfras has been shared by the assessee, and that the services are of the same nature as rendered by GSM, and hence these are technical services in nature. As regards the contract with N-JLT, it was noted that the though the assessee has made payments in different jurisdictions, since the recipient entity is tax resident of Iran, only the provisions of Indo Iran DTAA are applicable. It was also noted that the agent is a well established marketing and trading company having significant experience in handling this kind of a work, that the technical knowledge so acquired by the N-JLT has been shared by the assessee, and that the services are of the same nature as rendered by GSM and Alfras, and hence these are technical services in nature. It was also noted that under article 6 of the agreement the agent was to allow use of information concerning industrial and commercial experience. It was also noted that the agreement was in the nature of the service agreement and the payment was not in the nature of sale commission.

12. As regards taxability of the amounts so paid to these three entities, the Assessing Officer took note of the contentions of the assessee (a) that Export Commission per se is not a services; (b) that if at all they are being construed as services the same being rendered outside India the same are not taxable in India as per section 5(2) of the Act (c) That, without prejudice to the above since the

agents does not have any business connection in India the same are not taxable in India in light of the section 9(l)(i) of the Act; (d) That, without prejudice to the above the same is not FTS in light of the section 9(l)(vii) of the Act as the same neither qualifies as Managerial, technical or consultancy services; (e) that further the same does not accrue or arise in India as the same are incurred for earning from a source outside India as per section 9(l)(vii) of the Act; (f) That, without prejudice to the above if the same are even considered as FTS as per the Act the same cannot be treated as FTS in light of India-UAE DTAA and India Thailand DTAA; and (g) that in any case, the remittance neither accrues nor arises in India and the same cannot be deemed to accrue or arise in India, the same cannot be taxed in India and accordingly tax was not withheld in the light of section 195 of the Act.

13. None of these submissions, however, impressed the Assessing Officer.

14. The Assessing Officer was of the view that to understand the character of income one has to look at the agreement and appreciate the nature of work done in consideration of which the income is received. He was of the view that the related agreement clearly showed that these were services agreements and the actual consideration for which these services are rendered are rendition of technical services. The responsibilities of the agents, under these agreements, showed that the agents are required to render the technical services, allow the use of information containing industrial, commercial and technical experience which was made available to the assessee, and that the consideration received for these services was nothing but fees for technical services. These payments, according to the Assessing Officer, were taxable under section 9(1)(vii) of the Income Tax Act, 1961. The assessee was, accordingly, held to be responsible for deduction at source from these payments under section 195 of the Act. The assesseeôs failure to do so, as held by the Assessing Officer, was to be visited with, *inter alia,* consequences set out in section 201 r.w.s.195 of the Act. As regards the treaty protection sought by the assessee, the Assessing Officer observed that the assessee has not furnished tax residency certificates. In any event, according to the Assessing Officer, the India Thailand and India UAE tax tretaies did not have any specific clause dealing with the fees for technical services, and, in the absence of such a provision, this income was required to be taxed as ótherincomeôunder article 22 of the respective tax treaties, which, in turn, required it to be taxed as per domestic tax law of the jurisdiction in which the income has arisen. As regards, the India Iranian tax treaty, it was noted that it was a limited treaty which did not deal with the fees for technical services, and, accordingly, in this case also the domestic law is to apply. The Assessing Officer thus held the assessee liable to deduct tax at source from these payments @ 20%, and raised tax withholding demands under section 201 r.w.s 195, for not deducting the tax at source.

15. The next set of cases are the cases of residents of the tax jurisdictions with which Indian has tax treaties and such tax treaties have a specific article dealing with taxability of ófees for technical servicesô on the conventional pattern without a ómake availableô clause. As for these cases, the observations of the Assessing Officer were as follows. The Assessing Officer noted that the assessee had made payment of Rs 2,67,042 to Dynacoral Oil & Gas Sdn Bhd (Dynacoral, in short), a Malaysian entity, Rs 2,61,38,662 to Abu Muneer Al Hashmi Trading LLC (Abu Muneer, in short), an Oman based entity, Rs 3,52,02,917 to Bumi Flow Technologies (M) Sdn Bhd (Bumi Flow, in short), a Malaysia based entity and Rs 2,96,57,252 to CGN Limited, an entity based in Trinidad & Tobago. So far as the work done by these entities is concerned, broadly speaking, the stand of the Assessing Officer was the same as for the earlier set of entities. Once again, the Assessing Officer was of the view that the services were rendered by these entities was in the nature of rendition of technical services. The argument of the assessee that the payment did not involve any income taxable in India was again rejected for these cases as well. It was held that the amounts received by these entities were taxable as fees for technical services in India, under section 9(1)(vii). It was also held that even in terms of the provisions of the tax treaties, the fees for technical services was taxable and the definition of fees for technical services was broad enough to cover any consideration for services of managerial, technical or consultancy nature. On the basis of this line of reasoning, the Assessing Officer once again held that withholding demands under section 201 r.w.s 195, for not deducting the tax at source.

16. The third category of cases, i.e. the cases of residents of the tax jurisdictions with which Indian does not have any tax treaties, did not have any different treatment either. The Assessing Officer noted that the assessee had payments of Rs 93,88,514 to an Algeria based entity by the name of Chosamentin Kauomas, of Rs 11,58,53,913 to another Algeria based entity by the name of Global Synergy International Ltd, and of Rs 1,40,83,539 to a Venezuela based entity by the name of M&M OCTG Venezuelan Distributors CA. Once again the assessee discussed the agreements entered by the assessee with these entities. It was noted that ñconvincing and negotiating with the client and passing on specific information about requirements of the prospective clients would indeed be in the nature of technical services and not an item in the course of normal agency activityò It was also noted that the agreement itself notes that ñthe agent will provide all necessary services to Wellspun Corp Ltdò The AO was also of the view that ñmanufacturing of specialized pipe was a highly technical activity involving very complex technical exercise of technology and skilled labour and finest grade of raw materialò and that ñobviously, to procure the orders, the assessee company will need specialist agents who can understand the nitty gritty of the assesseeôs business and can demonstrate the assesseeôs business profile and quality of products of the assessee to the potential clients to convince them to enter into a contract with the assessee companyò It was then concluded that ñin view of this, it is a very technical exercise to obtain the

contracts since it involves complex process requiring elaborate discussion, technical expertise and present of complex technical presentation, on behalf of the assessee, which can only be done by a specialist in this field so as to convince the clients about Welspunøs suitability to the contractò It was also observed that ñit is clear that the agent was not merely procuring orders for the assessee company in foreign territory, rather it can be concluded from the agreement that following technical services are entailed by the said agentsò The services so said to have been involved were set out as follows:

(i) **The obligation of the agent was to develop, expand and promote diligently the sales and the marketing for the products with its best endeavours and facilities. This function could not be performed unless the agent have expertise, technical skills and ample knowledge of the highly technical products of the assessee i.e. pipes of international standard,**

ii) The agent was also required to make market plans and establish the marketing network of representatives to help/promote Welspun products. Again, this function is not possible, without expertise, technical skills and knowledge of the highly technical products of the assessee i.e. pipes.

iii) Providing information such as market development, activities of competitors intentions and plans of clients.

iv) Providing financial information relating to the client.

v) Providing information about market condition and possibility of developing business activity.

vi) Providing advanced information regarding tenders, purchasing tenders, and relating documents, enquiries of the project, gathering for technical specification of the project etc. this activity of the agent is not an activity usually found in normal commission agents. The agent is an entity having ample knowledge and expertise, technical skills and knowledge for understanding the highly technical projects of the clients vis-a-vis highly technical products manufactured by the assessee. It is not much difficult to understand in view of this, that the services rendered by the agent is not just for export sales commission but in fact much more than that and falls within the ambit of rendering technical services.

vii) The agent was also required to assist the assessee in identification of sub contractors like logistics, Shippers, cargo

handling agencies for the smooth execution of its contracts with the clients.

viii) The agent was also required to apprise the assessee of all relevant political, economic changes which would affect the business. Again, this is a technical service; no normal commission agent can perform this task. For understanding the political and economic changes of a country, it requires a great knowledge and technical skill to interpret the politics, economics and geography of the particular region.

ix) One to one interaction with the client wit regard to the business of the assessee, distribute the information and documentation relating to the products on behalf of the assessee thus rendering significant and complex technical exercise for the assessee.

17. The Assessing Officer then proceeded to analyze the provisions of Section 9(1)(vi) to hold as follows:

(i) since the assessee had engaged these consultants not merely for sale of his products outside but to utilize the acumen and expertise of the outsiders/non-resident during the course of his business activity, the consideration for which was termed as 'commission'; the payment thus made by the assessee was nothing, but a fee paid by the assessee to the outsiders/non-residents for the 'managerial, technical and consultancy services' rendered and it amounted to fee for technical services;

(ii) As per the agreement, Global Synergy and Chosamentin Kaumas is required to be paid for further services which relate to its report on modalities of implementation the project to the satisfaction of the principal. It also includes information on technical capabilities of the subcontractors to the main contract so as to ensure efficient completion of the project,

(iii) the exporter or the assessee, in this case, has thus utilized significant information, data and know how, as gathered by these agents to further his activities related to this contract; that it was, thus, presumed that there is an element of consultancy, technical and managerial services, for which the commission in question was paid for services rendered regarding the nature of products and inspection, timing and prices of products and detailed technical and other formalities;

> **(iv) thus, the provisions of Section 9 of the Act would come into play as soon as any export commission was paid or became due; that as per Section 195 (1) of the Act, TDS is to be deducted on any interest or any some chargeable under the Act, which is payable to the non-resident; that according to Section 195 (2) of the Act; when the payer considers that the whole of such sum would not be income chargeable in the case of the recipient, then, the issue is to be decided by the Assessing Officer on an application by the assessee/payer; that a similar application of making the obligation on the payee is cast pay Section 195(3) of the Act, for non-deduction of TDS, or lesser deduction of TDS; that as such, there is no provision in the Act for making the payment to non-residents without deduction of TDS, in the absence of any decision/no objection certificate from the assessing authority u/s 195(2) of the Act; that hence, the commission paid by the assessee company to the non-resident was income due to accrue or arise in India within the meaning of Section 9 of the Act; that the assessee was liable to deduct TDS on the service charges paid by it to the non-resident**

18. The above observations were made in the case of Alegria based entities but then the same observations were reiterated and referred to in the case of entity based in Venezuela as well. The Assessing Officer also relied upon the Hon'ble Delhi High Court's judgment in the case of CIT Vs Sara International Limited [(2008) 8 DTR 309 (Del)] and a decision of the coordinate bench in the case of ITO Vs Device Driven India Pvt Ltd [(2014) 159 TTJ 1 (Cochin)]. It was also noted that the amounts so paid by the assessee were liable to be taxed in India under section 9(1)(vii) and the assessee had an obligation to withhold these tax liabilities under section 195 of the Act. The demands @ 20% were, accordingly, raised under section 201 r.w.s. 195 in respect of these amounts as well.

19. Aggrieved by the stand so taken by the Assessing Officer, assessee carried the matter in appeal before the CIT(A). Learned CIT(A), for the detailed reasons set out in his order, concluded that the payments made by the assessee for the services rendered by the agents cannot be held to be fees for payment for technical services and that these payments were in the nature of commission earned from services rendered outside India and which had no tax implications in India. While doing so, the CIT(A), *inter alia*, held as follows:

> **4.8 On perusal of the definition of 'Managerial Services' as defined by Black's Law Dictionary, various ITAT rulings as well as Hon'ble Delhi**

High Court in the case of Panalfa Autoelektrik Ltd, (supra) and the commentary of OECD, I am inclined to agree with the submissions of the appellant that managerial activity imports critical functions such as planning, laying down policies, standards and procedures and then evaluating the performance in light of the procedures so laid down. In absence of any of the above critical functions it cannot be said that the service provider is rendering managerial services. Therefore, if the agent carries out routine administrative functions devoid of any critical functions as discussed above, the agents cannot be considered to have rendered managerial services. In the facts of the case, it is the appellant company which handles the critical issues relating to production, pricing, sales, strategy and scheduling delivery of goods. It would be worthwhile to refer to a simple example quoted by the Hon'ble ITAT in the case of M/s. Credit Lyonnais, 35 taxmann.com 583 which is "If execution of sub-activities of the overall activity are considered as managing the activity independently, then even a peon carrying cheque for deposit in bank would also claim that he also rendered the managerial services because it was he who planned and then executed the safe deposit of cheque into bank." It would also be worthwhile to refer to the discussion of Hon'ble Delhi Court wherein their lordships have vide para 14 stated that act of Managing includes controlling, directing and administering the business. Nonresident agents whose service is limited to procurement of orders cannot be treated as management services. Therefore, execution of small part of an overall activity independently cannot be considered as rendering of managerial services.

4.9 On perusal of the definition of term "Consultancy Services" as defined by the Black's Law Dictionary, and the decision of the ITAT Mumbai in the case of UPS SCS (Asia) Ltd., 50 SOT 268 as well as Hon'ble Delhi High Court in the case of Panalfa Autoelektrik Ltd. (supra), I am inclined to agree with the contention of the appellant that providing of consultancy services would mean giving consultation by some professional having special qualifications. Further, the term "consultancy" excludes actual execution of work. In the facts of the case the Non-resident entities are not appointed by the appellant company to provide consultancy services. The AO has not brought on record any facts that the agents are providing strategic opinions or rendering advices to the appellant in the above payments. It is also not the case that the agents appointed were specialized professionals like engineers, architects, lawyers etc. who can render advices and provide opinions. The AO also has not brought anything on record to prove his contention that any of above recipients are technical experts in their respective fields. Therefore, I agree with the submissions made by the appellant that routine administrative work and coordination services cannot be included within the scope of 'consultancy services' as carried out by the above common agents as above.

4.10 On perusal of definition of the term "Technical Services" would mean to apply science, craftsmanship etc. Rendering engineering services would constitute technical services. In the facts of the case the services rendered by the Non-resident entities are not in relation to craftsmanship or engineering. The term 'Technical' as defined by the Hon'ble Madras High Court in the case of Skycell Communications 251 ITR 53, means "involving or concerning applied and industrial science". Nothing has been brought on record to show that the services rendered by the Non-resident entities are in relation to 'applied and industrial science'. It would also be worthwhile to note that Hon'ble Delhi HC in the case of Panalfa as discussed above has also extensively relied upon the decision of SkyCell Communications of Madras HC to arrive at the conclusion that services rendered by Non-resident commission agent cannot be termed as technical services. Therefore, the services rendered by the above agents cannot be termed as Technical Services'.

4.11 Therefore, it is not the case of the AO that mere export sales commission would tantamount to FTS as per section 9(I)(vii) of the Act. The AO has held that the services rendered by the Non-resident agents have an element of consultancy, technical and managerial and hence tax withholding was required as per section 195. The appellant in his rebuttal against the above observations reproduced a chart in its further submissions dated 22.5,2014 citing series of decisions wherein the courts/ tribunals have after taking into consideration the scope of services of export sales commission agent have discussed the applicability of Section 195. The appellant has also compared the scope of services prevalent in the cases relied upon with the scope of services rendered by above commission agents appointed by it The chart is being reproduced hereunder, for better appraisal of the facts:

Contention of Assessing Officer	**Decision relied upon by the appellant in its submissions made before AO, where the scope of the services provided by the assessee are similar to the scope services provide to WCL and referred by AO in the order u/s. 201(1) & 201(1A) of the Act, and the courts have ruled in favor of the appellant.**
i) The obligation of the agent was to develop, expand and promote diligently the sales and the marketing for the products with its best endeavors and facilities. This function could not be performed unless the agent has expertise, technical skills and ample knowledge of the highly technical	***• Armayesh Global v. ACIT [51 SOT 564] (Scope of activities performed by the commission agents which corresponds to the observations of the learned AO on the left column of the table)*** ***(i) Procuring the export orders;*** ***(ii) Providing confirm export order;***

products of the assessee i.e. pipes of international standards. ***&*** ***ii) The agent was also required to make plans and establish the marketing network of representatives to help/promote WCL products. Again, this function is not possible, without expertise, technical skills and knowledge of the highly technical products of the assessee i.e. pipes***	***(iii) Providing the information regarding respective customer, getting the export order executed;*** ***(iv) Negotiating with all parties in territory; (v) Regularly visit the customer;*** ***(vi) Assist principle in collecting outstanding payments;*** ***(vii) give information on the economic development and market conditions;*** ***(viii) observation on the activities of competitors;*** ***(ix) Agent shall report immediately on Particular profitable business possibilities and extraordinary events;*** ***(x) Agent is authorized to accept notification of defects by a customer;*** ***• CIT v. EON Technologies Ltd. [343 ITR 366]*** ***(i) Marketing on behalf of assessee engaged in business of development and software,*** ***(ii) To invest in and operate the sales and marketing operations from UK.*** ***• CIT v. Toshoku Ltd. [125 ITR 525] (SC)*** ***• ACIT v. Modern Insulators Ltd. [10 ITR (Trib.) 147]*** ***(i) The agent was to ensure timely payment to the principal. M/s. Sinotruck-Ural Ltd.,*** ***(ii) Mutual promotion of the product of the assessee-company in the Russian and CIS market. The responsibility of the agent was to promote goods of the assessee-company.***
iii) Providing information such as market development, activities of competitors, intentions and plans of clients ***&*** ***iv) Providing financial information relating to client*** ***&*** ***v) Providing information about market condition and possibilities of developing business activities.***	***• Armayesh Global v. ACIT [51 SOT 564]*** ***(i) Assist principle in collecting outstanding payments;*** ***(ii) give information on the economic development and market conditions;*** ***(iii) observation on the activities of competitors;*** ***(iv) Agent shall report immediately on particular profitable business possibilities and extraordinary events;*** ***(v) Agent is authorized to accept notification of defects by a customer.***

	• CIT v. EON Technologies Ltd. [343 ITR 366] ***(i) Marketing on behalf of assessee engaged in business of development and software;*** ***(ii) To invest in and operate the sales and marketing operations from UK.*** ***The non-resident agents in the above cases helped the assessee in getting the detailed information about the prevailing market conditions in the territory.***
Providing advanced information regarding tenders, purchasing tenders and relating documents.	***The agent neither takes any decision regarding participating in tenders not prepares and copies documentation relevant to the tender. Further it has been specifically mentioned in the agreement that it is in principal's scope to make the offer and to provide all informative data, catalogues and technical material regarding the principal's product and to provide competitive prices as far as possible to enable the sale of product.***
vii) The agent was also required to assist the assessee in identification of sub contractor like logistics, shippers, cargo handling agencies for the smooth execution of its contract with the client.	***• SPAHI Projects Pvt. Ltd. [315 ITR 374]*** ***The South African company 'Z'' was appointed to promote and market the products in South Africa. The scope of the services includes:*** ***i) Follow up regarding LC opening, shipment and payment, attending to queries regarding shipments.***
viii) The agent was also required to apprise the assessee of all relevant political, economic changes which would affect the business. Again, this is a technical service, no normal commission agent can perform this task. For understanding the political and economic changes of a country, it requires a great knowledge and technical skill to interpret the politics, economic and geography of particular region.	***This is an integral part of the gamut of activities to be performed by the agents. One such clause cannot be read out of context to bring the appellant under the tax net as not such information has been provided by the appellant during the tenure of the agreement.***
ix) One to one interaction with the client with regards to the business of the assessee, distribute the information and documentation relating to the products on behalf of the assessee thus rendering significant and complex technical	***• SPAHI Projects Pvt. Ltd. [315 ITR 374]*** ***The South African company 'Z' was appointed to promote and market the products in South Africa. The scope of the services includes:***

exercise for the assessee.	***i) To procure the orders from different buyers,*** ***ii) To negotiate the prices, other terms and intimate to the applicant,*** ***iii) To re-negotiate the terms if necessary based on instruction of applicant,*** ***iv) Follow up in getting purchase order from customer and forward the same to applicant,*** ***v) Follow up regarding LC opening, shipment and payment, attending to queries regarding shipments.***

4.16 I have also perused the case laws relied upon by the AO vide para 3.18 of the order and the submissions dated 22nd May 2014 and 15th July 2014 made by the appellant to distinguish them. The AO has applied the ruling of Sara International Ltd. 8 DTR 309 (Delhi HC). Against which the appellant has submitted that the ruling was delivered by Hon'ble Delhi HC has finally ruled that the relationship between Sara International and PEC (its agent) was that of a principal and agent and that on analysis of the contract it became clear that M/s PEC was not rendering technical, consultancy and/or managerial services as defined under the Act. Hon'ble Delhi HC also held that all major work was carried out by Sara International and that M/s PEC was just a facilitator in transferring certain contracts of supply of goods. The case law relied by the AO is in fact misplaced and inappropriate. I have also perused the ruling of ITAT in the case of Cochin Device Driven (Cochin ITAT). The ITAT in the said case has made following important observations:

- That the commission agent being a director of the company having vast experience and knowledge in the field of the software was managing existing clients and soliciting for business as well; It appears that Mr. Bala was a marketing director of the company.

- That the software installation unlike other commodities requires the agent to ample knowledge to persuade the prospective clients'

- Further the activities to be performed were multifold including evaluation of business perspective; reviewing proposals and provide advice and assistant, and to hold periodic assistance to track project progress and status.

I am inclined to agree with the submissions made by the appellant that the above case law relied by the AO do not apply to the facts of the case because

marketing director of the company was residing abroad and rendering technical services which are in the nature of technical, consultancy and managerial in nature. Nothing has been brought on record by the AO either in the order or further submissions made by it that the Non-resident commission agents were in fact rendering technical services the appellant company and in fact the commission agents are not directors of the appellant company and/or they are also not authorized to fix prices, submit tenders without prior approval and authority of the appellant company. I have also perused the decision of the International Hotel Licensing (IHL) relied upon by the AO. In the said case IHL was engaged in the business of conducting international advertising, marketing and sales program for Marriott group of hotels. Conducting such programs require technical skill, knowledge and expertise. In the facts of the case, none of the agents are authorized to carry out marketing and sales program outside India. Therefore, this case law relied upon by the AO is not applicable to the facts of the case. I have also perused the decision of Endemol India 40 taxmann.com 345. This case is also not applicable to the facts of the present case because Endemot India had appointed its holding company to render highly technical services viz. legal and tax advisory, management of human resources, managing international operations, consulting for corporate development, mergers and acquisitions etc. Therefore, in light of these peculiar facts the AAR had termed the above services as "Consultancy Services' under the Act as well as DTAA. In the facts of the case the Non-resident agents do not render any type of same or similar services. Therefore the above rulings relied upon by the AO are not applicable to the facts of the case of the appellant.

4.17 The appellant has also relied on Circular No.23 dated 23rd July 1969 and Circular No.786 dated 7/2/2000 and submitted that the payments made to Non-resident commission agents could not be taxed in India in absence of the Permanent Establishment/business connection of those agents under Section 9(1)(i) of the Act. The appellant also submitted that the withdrawal of above circulars does not change the provisions of the Act and therefore commission payments can be taxed as business income of the Non-resident entities only. In this respect reliance was placed on the decision of Gujarat Reclaim and Rubber Projects Ltd, (35 taxmann.com 587) and Delhi HC in the case of CIT v/s. Angelique International Ltd. (359 ITR 9) wherein it has been held withdrawal of circular does not change the legal provision Section 5,9 and 195 of the Act Nowhere has the AO held that the Non-resident commission agents have a fixed place of business in the form of a PE in India. Therefore I am inclined to agree with the submissions made by the appellant. Respectfully following the above case laws, I hold that withdrawal of the circular should not make the commission paid taxable in India in absence of their business connection or a "permanent establishment in India."

4.18 The AO is also not justified in holding that obtaining no TDS certificate was a mandatory obligation on the part of the appellant u/s. 195(2) of the Act.

Relying on the ruling of the Apex Court as submitted by the appellant in the case of G.E. Technology Centre Pvt. Ltd., 327 ITR 453 appellant contended that obtaining no TDS Certificate was not a mandatory obligation under the provisions of the Act. The Apex Court has held that if any assessee has any reason to believe that the payment made to Non-resident is not taxable in India then there would be no need for making an application before the AO u/s.195(2) of the Act. Therefore, I reverse the finding of the AO holding that obtaining a certificate u/s.195(2) is sine qua non to every payment made to a Non-resident.

20. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

21. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

22. So far as the first category of cases are concerned, i.e. payments to the residents of the tax jurisdictions with which Indian has tax treaties but these treaties have no specific article dealing with the taxability of ófees for technical servicesô, are concerned, it is important to note that India does not have a comprehensive double taxation agreement with Iran. The India Iran Double Taxation Avoidance Agreement [Indo Iranian tax treaty, in short; (1973) 91 ITR (Stat) 31] is a limited agreement for avoidance of double taxation of income of enterprise operating aircraft, and its benefit, therefore, is restricted to this category of enterprise. Given this fact, nothing really turns on Indo Iranian tax treaty not having a specific provision for taxation of income by way of fees for technical services. All other incomes, except for the income of enterprise operating aircraft, continue to be covered by the domestic taxation laws in entirety. In this view of the matter, so far as payment of Rs 12,05,96,574 to NJ-Iran is concerned, we will take it up alongwith the cases in respect of which are covered only by the domestic law. That leaves us with the cases of payment of Rs 1,06,251 to a Thailand based entity GMS- Thailand and of Rs 35,73,878 to Afras-UAE in this category.

23. There is no dispute that there is no specific provision for taxation of fees for technical services in India Thailand tax treaty and India UAE tax treaty. There is also no dispute that GMS-Thailand and Afras-UAE did not have any permanent establishments in India. Clearly, therefore, income in the hands of the recipients of this income could neither be taxed in as business income or under the head fees for technical services.

24. The stand of the Revenue, however, is that the income embedded in the amounts received by the assessee could anyway be taxed as óother incomeôunder the respective tax treaties. There is a decision of a coordinate bench of this Tribunal, in the case of **DCIT VS TVS Electronics Ltd [(2012) 52 SOT 287**

(Chennai)], which support this school of thought and holds that ñ**Admittedly, Chapter III of DTAA between India and Mauritius did not provide for taxing any fees paid for technical services. Only for a reason that DTAA is silent on a particular type of income, we cannot say that such income will automatically become business income of the recipient. In our opinion, when DTAA is silent on an aspect, the provisions of the Act has to be considered and applied**.ò This school of thought did not find favour with the very jurisdictional High Court of this coordinate bench. In the case of **Bangkok Glass Industries Pvt Ltd Vs ACIT [(2013) 257 CTR 356 (Mad)]**, Hon'ble Madras High Court rejected this school of thought and dealing with India Thailand tax treaty, which does not have FTS clause, rejected the claim of the revenue that even though the Thai entity did not have any PE in India and, for that reason this amount could not have taxed in India under article 7, FTS could be taxed as óother income'under article 22. Their Lordships, in this context, also observed that, ñ**Since the said income does not fall as miscellaneous income, the same cannot be brought under art. 22**.ò As we deal with this aspect of the matter, and to explain the same principle in little more detail, let us first take a look at the relevant treaty provisions. The relevant treaty provisions are as follows:

<u>India Thailand tax treaty</u>

ARTICLE 22- Other income

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.

<u>India UAE tax treaty</u>

ARTICLE 22- Other income

1. Subject to the provisions of paragraph 2, items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing articles of this Agreement, shall be taxable only in that Contracting State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State

independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply

25. To understand the scope of these treaty provisions, which are broadly in *pari materia* with the provisions of article 21 of UN Model Convention, we find guidance from the OECD Model Convention Commentary which states that ñ**The Article covers income of a class not expressly dealt with in the preceding articles *(e.g. an alimony or a lottery income)* as well as income from sources not expressly referred to therein (*e.g. a rent paid by a resident of a Contracting State for the use of immovable property situated in a third State)*. The Article covers income arising in third States as well as income from a Contracting State**ò In other words, an income is of such a nature as, on satisfaction of conditions specified in the related provision, could be taxed under any of these specific treaty provisions, cannot be covered by this residuary clause. Take for example, income earned by a resident of a contracting state by carrying on business in the other contracting state. When, for example, article 5 provides that the income of resident of a contracting state, from carrying on business in the other contracting state, cannot be taxed in the source state unless such a resident has a permanent establishment in the other contracting state, i.e. source state, it cannot be open to the tax administration of source state to contend that even if it cannot be taxed as business income, it can be taxed as ótherwise incomeô nevertheless. It is important to bear in mind the import of expression ónot expressly dealt with in the foregoing articlesô Similarly, if independent personal services cannot be taxed in the source state as minimum threshold limit of fixed base is not satisfied, such a treaty concession cannot be nullified by invoking article 21. When a particular nature of income is dealt with in the treaty provisions, and its taxability fails because of the conditions precedent to such taxability and as specified in that provision are not satisfied, that is the end of the road for taxability in the source state.

26. It is also important to bear in mind the fact that article 21 states that it applies to the **"items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing articles of this Agreement".** Therefore, it is not the fact of non taxability under the operative articles (i.e. article 6 to 20) which leads to taxability under residuary clause in article 22, but the fact of income of that nature being covered by those articles which can lead to taxability under article 22. There could be many such items of income which are not covered by these specific treaty provisions, such as alimony, lottery income, gambling income, rent paid by resident of a contracting state for the use of an immoveable property in a third state, and damages (other than for loss of income covered by specific provisions of the treaty) etc. This is how UN Model Convention Commentary,

which is referred to earlier in this order, also explains the scope of this article. In our humble understanding, therefore, article 21 does not apply to items of income which can be taxed in any situations under article 6-20 whether or not such an income is actually taxable under these articles.

27. The question then arises whether income earned by the recipients in question, i.e. Afras UAE and GMS Thailand, can be said to in the nature of an income which is not expressly dealt with by other operative articles (i.e. article 6 to 20) of the treaty. The income earned by these entities was in the regular course of their business, and there is no dispute about this fundamental aspect. There cannot also be dispute about the fact that in the event of these entities satisfying the conditions regarding existence of permanent establishment in India, the amounts so received by these entities would have been taxable as business income. The income in question is thus clearly dealt with by article 7 read with article 5 and the reason why it has not been taxed is that the entities concerned did not have permanent establishments in India.

28. As we hold so, we are alive to the fact that there is no specific taxability provision, under India Thailand tax treaty or, for that purpose, under India UAE tax treaty, with respect to taxability of fees for technical services. Profits earned by rendering fees for technical services are only a species of business profits just as the profits any other economic activity. However, without the character of such receipts in the nature of business receipts being altered, the fee for technical services is dealt with separately in some treaties for the reason because, under those treaties the related contracting states proceed on the basis that even in the absence of the permanent establishment or fixed base requirements, the receipts of this nature can be taxed, on gross basis, at the agreed tax rate, and, to that extent, such receipts does not fall in line with the scheme of taxation of business profits under art. 7 and professional income under 14. It is interesting to note that the moment the threshold limits for permanent establishment or fixed base, as the case may be, is satisfied, the taxability shifts on net basis as business profits or professional (independent personal services) income. The business receipts or professional receipts thus cannot be seen in isolation with the fees for technical services. Its only the fact of, and mode of, taxation in the absence of PE or fixed base, which gets affected as a result of the fees for technical services. When there is an FTS clause, the FTS gets taxed even in the absence of the PE or the fixed base, but the character of FTS receipt is the same, i.e. business income or professional (independent personal) income, in the hands of the same. When there is no FTS clause, this sub categorization of income becomes irrelevant, because FTS or any other business receipt, the income embedded in such receipts gets taxed only if there is a permanent establishment or fixed base- as the case may be. The scope of business profit and independent personal service completely covers the fees for technical services as well. With FTS article or without FTS article, the income by way of fees

of technical services continues to be dealt with the provisions of articles relating to business profits, independent personal services, and additionally, in the event of existence of an FTS article, with the article relating to the fees for technical services.

29. In view of the above discussions, in our considered view, even if the receipts in question are in the nature of fees for technical services in the hands of Afras UAE and GMS Thailand, these receipts are not taxable in the hands of these entities, in terms of the respective tax treaties, in India. It is only elementary that under article 90(2) where the Government has entered into a tax treaty with any tax jurisdiction, in relation to the assessee to whom such treaty applies, ñ**the provisions of this** *(Income Tax)* **Act shall apply to the extent they are more beneficial to that assessee**ò Quite clearly, when there is no taxability under the respective treaty provisions, there cannot be any taxability under the provisions of the Income Tax Act either.

30. As regards the remaining cases, in category (b) and in category (c) as also in the case of JT-Iran, the provisions of the tax treaties donot come to the rescue of the recipients, and, therefore, the taxability in these cases is to be decided on the basis of the provisions in the domestic law.

31. The scheme of taxability in India, so far as the non residents, are concerned, is like this. Section 5 (2), which deals with the taxability of income in the hands of a non-resident, provides that ñ**the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which— (a) is received or is deemed to be received in India in such year by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to him in India during such year**ò There is no dispute that since no part of the operations of the recipient non-residents is carried out in India, no income accrues to these non-residents in India. The case of the revenue hinges on income which is ñdeemed to accrue or arise in Indiaò Coming to the deeming provisions, which are set out in Section 9, we find that the following statutory provisions are relevant in this context:

> Section 9- Incomes deemed to accrue or arise in India
>
> (1) The following incomes will be deemed to accrue or arise in India:
>
> (i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India,

Explanation: For the purpose of this clause *[i.e. 9(1)(i)],*

(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;

*(b) (c) (d)…..**

(vii) income by way of fees for technical services payable by-

(a) é é é é ..*

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

(c) é é é é *

Explanation 1-é é é é .*

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

** Not relevant for our purposes*

32. So far as deeming fiction under section 9(1)(i) is concerned, it cannot be invoked in the present case since no part of the operations of the recipient's business, as commission agent, was carried out in India. Even though deeming fiction under section 9(1)(i) is triggered on the facts of this case, on account of commission agent's business connection in India, it has no impact on taxability in the hands of commission agent because admittedly no business operations were carried out in India, and, therefore Explanation 1 to Section 9(1)(i) comes into play.

33. There are a couple of rulings by the Authority for Advance Ruling, which support taxability of commission paid to non-residents under section 9(!)(i), but, neither these rulings are binding precedents for us nor are we persuaded by the line of reasoning adopted in these rulings. As for the AAR ruling in the case of SKF Boilers & Driers Pvt Ltd [(2012) 343 ITR 385 (AAR)], we find that this decision merely follows the earlier ruling in the case of Rajiv Malhotra [(2006) 284 ITR 564] which, in our considered view, does not take into account the impact of Explanation 1 to Section 9(1)(i) properly. That was a case in which the non-resident commission agent worked for procuring participation by other non-resident entities in a food and wine show in India, and the claim of the assessee was that since the agent has not carried out any business operations in India, the commission agent was not chargeable to tax in India, and, accordingly, the assessee had no obligation to deduct tax at source from such commission payments to the non-resident agent. On these facts, the Authority for Advance Ruling, inter alia, opined that ñno doubt the agent renders services abroad and pursues and solicits exhibitors there in the territory allotted to him, but the right to receive the commission arises in India only when exhibitor participates in the India International Food & Wine Show (to be held in India), and makes full and final payment to the applicant in Indiaò and that ñthe commission income would, therefore, be taxable under section 5(2)(b) read with section 9(1)(i) of the Actò The Authority for Advance Ruling also held that ñthe fact that the agent renders services abroad in the form of pursuing and soliciting participants and that the commission is remitted to him abroad are wholly irrelevant for the purpose of determining situs of his incomeò We do not consider this approach to be correct. When no operations of the business of commission agent is carried on in India, the Explanation 1 to Section 9(1)(i) takes the entire commission income from outside the ambit of deeming fiction under section 9(1)(i), and, in effect, outside the ambit of income ódeemed to accrue or arise in Indiaôfor the purpose of Section 5(2)(b). The point of time when commission agentôs right to receive the commission fructifies is irrelevant to decide the scope of Explanation 1 to Section 9(1)(i), which is what is material in the context of the situation that we are in seisin of. The revenueôs case before us hinges on the applicability of Section 9(1)(i) and, it is, therefore. important to ascertain as to what extent would the rigour of Section 9(1)(i) be relaxed by Explanation 1 to Section 9(1)(i). When we examine things from this perspective, the inevitable conclusion is that since no part of the operations of the business of the commission agent is carried out in India, no part of the income of the commission agent can be brought to tax in India. In this view of the matter, views expressed by the Hon'ble AAR, which do not fetter our independent opinion anyway in view of its limited binding force under s. 245S of the Act, do not impress us, and we decline to be guided by the same. The stand of the revenue, however, is that these rulings, being from such a high quasi-judicial forum, even if not binding, cannot simply be brushed aside either, and that these rulings at least have persuasive value. We have no quarrel with this proposition. We have, with utmost care and deepest respect, perused the above rulings rendered by the Hon'ble Authority for

Advance Ruling. With greatest respect, but without slightest hesitation, we humbly come to the conclusion that we are not persuaded by these rulings

34. Coming to Section 9(1)(vii)(b), this deeming fiction- which is foundational basis for the action of the Assessing Officer, *inter alia*, provides that the income by way of technical services payable by a person resident in India, except in certain situations- which are not attracted in the present case anyway, are deemed to be income accruing or arising in India. Explanation 2 to Section 9(1)(vii) defines ófees for technical servicesô as ñ**any consideration** *(including any lumpsum consideration)* **for the rendering of any managerial, technical or consultancy services** *(including the provisions of services of technical or other personnel)* but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head óSalariesô[Relevant portion highlighted by underlining]ò

35. In the light of the above legal position, what we need to decide at the outset is whether the amounts paid by the assessee to the non-resident agents could be termed as ñconsideration for the rendering of any managerial, technical and consultancy servicesò As we do so, it is useful to bear in mind the fact that even going by the stand of the Assessing Officer, at best services rendered by the non-resident to the agent included technical services but it is for this reason that the amounts paid to these agents, on account of commission on exports, should be treated as fees for technical services. Even proceeding on the assumption that these non-resident agents did render the technical services, which, as we will see a little later, an incorrect assumption anyway, what is important to appreciate is that the amounts paid by the assessee to these agents constituted consideration for the orders secured by the agents and not the services alleged rendered by the agents. The event triggering crystallization of liability of the assessee, under the commission agency agreement, is the event of securing orders and not the rendition of alleged technical services. In a situation in which the agent does not render any of the services but secures the business anyway, the agent is entitled to his commission which is computed in terms of a percentage of the value of the order. In a reverse situation, in which an agent renders all the alleged technical services but does not secure any order for the principal i.e. the assessee, the agent is not entitled to any commission. Clearly, therefore, the event triggering the earnings by the agent is securing the business and not rendition of any services. In this view of the matter, in our considered view, the amounts paid by the assesse to its non-resident agents, even in the event of holding that the agents did indeed render technical services, cannot be said to be ñ**consideration for** rendering of any managerial, technical or consultancy services (Emphasis by underlining supplied by us)ò The services rendered by the agents, even if these services are held to be in the nature of technical services, may be technical services, but the amounts paid by the assessee are not for the rendition of these technical services nor the quantification of these

amounts have any relation with the quantum of these technical services. The key to taxability of an amount under section 9(1)(vii) is that it should constitute ñconsiderationò for rendition of technical services. The case of the revenue fails on this short test, as in the present case the amounts paid by the assessee are ñconsiderationò for orders secured by the assessee irrespective of how and whether or not the agents have performed the so called technical services.

36. Let us sum up our discussions on this part of the scheme of Section 9, so far as tax implications on commission agency business carried out by non-residents for Indian principals is concerned. It does not need much of a cerebral exercise to find out whether the income from the business carried on by a non-resident assessee, as a commission agent and to the extent it can be said to directly or indirectly accruing through or from any business connection in India, is required to be taxed under section 9(1)(i) or under section 9(1)(vii), of the Income Tax Act, 1961. The answer is obvious. Deeming fiction under section 9(1)(i) read with proviso thereto, as we have seen in the earlier discussions, holds the key, and lays down that only to the extent that which the operations of such a business is carried out in India, the income from such a business is taxable in India. When no operations of the business are carried on India, there is no taxability of the profits of such a business in India either. The question then arises whether in a situation in which, in the course of carrying on such business, the assessee has to necessarily render certain services, which are of such a nature as covered by Explanation 2 to Section 9(1)(vii), and even though the assessee is not paid any fees for such services *per se*, any part of the business profits of the assessee can be treated as ófees for technical servicesô and taxed as such under section 9(1)(vii). This question does not pose much difficulty either. In the light of the discussions in the foregoing paragraph, unless there is a specific and identifiable consideration for the rendition of technical services, taxability under section 9(1)(vii) does not get triggered. Therefore, irrespective of whether any technical services are rendered during the course of carrying on such agency commission business on behalf of Indian principal, the consideration for securing business cannot be taxed under section 9(1)(vii) at all. This profits of such a business can have taxability in India only to the extent such profits relate to the business operations in India, but then, as are the admitted facts of this case, no part of operations of business were carried out in India. The commission agents employed by the assessee, therefore, did not have any tax liability in India in respect of the commission agency business so carried out.

37. On a more fundamental note, however, it is also a settled legal position by now that the services of the nature rendered by these commission agents cannot anyway be treated as fees for technical services anyway. Viewed thus, even the discussion on whether the amounts in question could be treated as ñconsiderationô

for technical services, may be rendered academic in effect. Learned CIT(A) has very well summarized the judicial precedents in support of this line of reasoning, and, in an erudite and extended discussion, dealt with each limb of the definition of technical services. These findings are reproduced by us earlier in this order. While, for the sake of brevity, we need to repeat each of these reasons analysed by the learned CIT(A), suffice to say that we approve his well-reasoned findings and line of reasoning, and we will also briefly touch upon this aspect of the matter. Before we do so, we may take note of some of the clauses in a typical commission agreement entered into by the assessee with its commission agents. The key provisions in this agreement, a copy of which is placed before us at pages 103 to 109 of the paper-book, are as follows:

Article 5 - AGENT'S OBLIGATION

The AGENT shall carry out ail the duties normally rendered by an AGENT including but not limited to the following:

5.1 To act exclusively on behalf of the PRINCIPAL and not source, procure or market products of similar type manufactured by competitive companies without prior written consent of the PRINCIPAL.

5.2 To use its best endeavors and facilities to develop, expand and promote diligently, the sale and the market for the Products. The agent will be responsible of making the necessary market plans and establish the marketing network of representatives to help promote Welspun products.

5.3 To provide the PRINCIPAL with information such as marker developments, activities of competitors, intentions and plans of clients to the maximum of his knowledge.

5.4 Endeavor to provide the PRINCIPAL prompt advance information regarding tenders. To forward to the PRINCIPAL tender documents, inquiries etc, with full technical specifications well ahead - as much as he can - of tender closing.

5.5 The AGENT on behalf of the PRINCIPAL, will purchase tender documents and forward the same to the PRINCIPAL well ahead - as much as he can - of tender closing. The cost of purchase of such tender documents shall be reimbursed by the PRINCIPAL to the AGENT.

5.6 To assist for claims and complaints (if say) that may arise from third parties and help to reach appropriate settlement in close co-ordination with the PRINCIPAL.

5.7 The AGENT will not enter into Agreements or Contractual Obligations &. create any financial liabilities on behalf of the PRINCIPAL, without the PRINCIPAL'S prior written consent.

5.8 The AGENT hereby nominates Mr. Hossam Kawash as their contact point who will be totally responsible for the PRINCIPAL'S business for clarity of communication & expeditious action.

5.9 To assist the PRINCIPAL in ail possible way, as and when requested by the PRINCIPAL for the fulfillment of its obligations, in case of a contract within the TERRITORY. It includes assisting the PRINCIPAL in identifying subcontractors like logistics, shippers, cargo handling agencies for smooth execution of such contracts.

5.9a To send the PRINCIPAL periodic reports on business activity.

5.9b To keep the PRINCIPAL continuously apprises of all relevant Political/ Economic changes which would affect tie business,

5.9c To undertake not to divulge sales documents, catalogues, prices etc. to competitors and their agents and associates.

Article 7 – PRINCIPAL'S OBLIGATIONS

During the continuance of this Agreement the PRINCIPAL agrees :

7.1 To give the AGENT full support for promoting and creating market for the products of the PRINCIPAL in the TERRITORY.

7.2 To inform the AGENT on receipt of an inquiry from the TERRITORY requiring direct supply.

7.3 The AGENT shall be entitled to commission as agreed upon in the contract.

7.4 To take into consideration the recommendations made by the AGENT while making the offer.

7.5 To provide all informative data, catalogues and technical material (all in the English Language) regarding the PRINCIPAL'S products and activities and keep the AGENT informed about all relevant charges.

7.6 To offer competitive prices as far as possible to enable the sale of the products as the agent is only entitled for commissions and not fixed salary on his work.

7.7 The PRINCIPAL nominates Mr. Ranjit Lala as the contact person with the AGENT for all correspondences and communications.

Article 9 - TERMINATION.

9.1 This Agreement shall remain valid for a period of One year from the date of signing. The said Agreement can also be terminated by either party anytime giving notice to the other party of at least 90 days in advance by fax and followed by registered letter stating reasons for the termination. The agreement can be reinstated for a further period of two years based on mutual agreement and then after its termination another period of five years.

9.2 In the event of the termination, the AGENT will furnish all the relevant information to the PRINCIPAL and will be responsible for realization of payments outstanding till date within the TERRITORY. Also the AGENT shall return all the customers records and other data relating to the Company's business or Services which may be in his possession.

9.3 In the event of termination, if any contract is concluded after the termination date, but the exercise has commenced prior to the termination date, the agent is entitled for the applicable commissions.

SALES COMMISSION FOR THE SONATRACH GK3 PROJECT

WELSPUN will pay GLOBAL SYNERGY INTERNATIONAL LTD. in its capacity as agent for WELSPUN a sales commission, based on the FOB mill sales price for the GK 3 project equal to:

i) 2% of the FOB Mill value in U.S. Dollars for the ordered quantity.
All sales commissions shall be paid in U.S. Dollars to the bank account to be advised by GLOBAL SYNERGY, details of which will be provided by the agent. The sales commission shall be payable by WELSPUN to GLOBAL SYNERGY INTERNATIONAL LTD. as interim payments on prorate basis after realization of the payments received by the PRINCIPAL within a reasonable time but not exceeding 30 days from receipt of payment by the PRINCIPAL.

SALES COMMISSION FOR THE SONATRACH GK3 PROJECT

By the virtue of this addendum, WELSPUN agree to pay GLOBAL SYNERGY INTERNATIONAL LTD., in its capacity as agent for WELSPUN, a sales commission, based on the FOB mill sales price for the GK 3 project equal to:

i) 4.10% of the FOB Mill value in U.S. Dollar for the quantity shipped is last (18") Shipment.

a) GLOBAL SYNERGY INTERNATIONAL LTD agrees to unconditionally to fulfill the scope set therein by the virtue of this addendum.

b) This commission is over the above the commission payable by Welspun to Global Synergy as specified in Annexure-1 of Agency agreement dated 29th day of June, 2008.

All sales commission shall be paid in U.S. Dollars to the bank account to be advised by GLOBAL SYNERGY, details of which are available with WELSPUN. Unless otherwise agreed, the sales commission shall be payable by WELSPUN to GLOBAL SYNERGY INTERNATIONAL LTD., as interim payments on prorate basis after realization of the payments received by the PRINCIPAL within a reasonable time but not exceeding 30 days from receipt of payment by WELSPUN.

38. As is clear from the above provisions of the agreement, the work that the agent has to done under this agreement, as is stated unambiguously in the agreement itself, is to *"carry out ail the duties normally rendered by an agent" including but not limited* to the activities specified therein. The consideration for which the payment made to the commission agent is obtaining of the orders and not any services *per se*. The consideration is computed on the basis of business procured. Obviously, if there are no business generated for the principal, the agent gets nothing. Quite clearly, what is done by the agent is not a rendition of service but pure entrepreneurial activity. The work actually undertaken by the agent is the work of acting as agent and so procuring business for the assessee but as the contemporary business models require the work of agent cannot simply and only be to obtain the orders for the product, as this obtaining of orders is invariably preceded by and followed by several preparatory and follow up activities. The description of agentõs obligation sets out such common ancillary activities as well but that does not override, or relegate, the core agency work. The consideration paid to the agent is also based on the business procured and the agency agreements donot provide for any independent, standalone or specific consideration for these services. The services rendered under the agreement cannot, therefore, be considered to be technical services in nature or character. The services rendered in the course of rendering agency services are essentially business services and to obtain the business. We have also noted that, so far as rendition of technical services is concerned, one of the main points in the case of the revenue, as evident from a plain reading of the impugned order under section 201, is that ñ**manufacturing of specialized pipe was a highly technical activity involving very complex technical exercise of technology and skilled labour and finest grade of raw material"** and that **"obviously, to procure the orders, the assessee company will need specialist agents who can understand the nitty gritty of the assessee's business and can demonstrate the assessee's business profile and quality of products of the assessee to the potential clients to convince them to enter into a contract with the assessee company**ò Just because a product is highly technical does not change the character of activity of the sale

agent. Whether a salesman sells a handcrafted souvenir or a top of the line laptop, he is selling nevertheless. It will be absurd to suggest that in the former case, he is selling and the latter, he will be rendering technical services. The object of the salesman is to sell and familiarity with the technical details, whatever be the worth of those technical details, is only towards the end of selling. In a technology driven world that we live in, even simplest of day to day gadgets that we use are fairly technical and complex. Undoubtedly when a technical product is being sold, the person selling the product should be familiar with technical specifications of the product but then this aspect of the matter does not anyway change the economic activity. Nothing, therefore, turns on the details of the products being technical. It was also noted that by the Assessing Officer that ñ**it is a very technical exercise to obtain the contracts since it involves complex process requiring elaborate discussion, technical expertise and present of complex technical presentation, on behalf of the assessee, which can only be done by a specialist in this field so as to convince the clients about Welspun's suitability to the contract**ò This at best signifies complexity in the businesses and the need of technical inputs in the process of businesses, particularly when the products being dealt with are technical products, but then merely because technical inputs are needed in carrying out business activity, it does not become a technical service rather than a business activity. At the cost of repetition, we must emphasize the important distinction between a business activity, requiring understanding of related technology, and rendition of technical services *simplictor.* In any case, what has been described as a technical service is the service being rendered to the buyer but the payment received by the commission agents is not for this service *per se* but for generating business orders for the assessee. Generating business or securing orders is an entrepreneurial activity and cannot, by any stretch of logic, be treated as a technical service *per se*. The same is the position with regard to assistance with respect of logistics, such as shipping and handling services, with respect to sale forecasting, with respect to gathering information on markets, business environment and on specific buyers and with respect to development of sales network. All these services are essentially integral part of, and are thus aimed at, developing business for the assessee and securing orders for the assessee from the right persons. Neither these services can be viewed on a standalone basis divorced from the economic activity of securing orders, nor any payment can be said to be for rendition of these services inasmuch as it is not the rendition of these services but securing business of the assessee which triggers the income accruing to the non-resident agents of the assessee and it is securing of business for the assessee which is the proximate cause of the income accruing to the assessee. This issue is also covered, in favour of the assessee, by a coordinate bench decision in the case of DCIT Vs Troikaa Pharmaceuticals Ltd *and vice versa* (ITA No. 2028/ Ahd/13 and CO No 13/Ahd/14) wherein it has been, inter alia, observed as follows:

5. As regards the references to Section 9(1)(vii), as made by the Assessing Officer and the learned Departmental Representative, we find that aspect of the matter is also covered, in favour of the assessee, by a large number of judicial precedents- including Hon'ble Madras High Court's judgment in the case of CIT Vs Farida Leather Co. [(2016) 66 taxmann.com 321 (Madras)], wherein Their Lordships have, inter alia, observed as follows:

> *5. The main contention of the learned counsel for the assessee / respondent is that the agency commission / sales commission paid by the assessee to non-resident agents, for the services rendered by them, outside India, in procuring export orders for the assessee, would not attract or partake the character of "fees for technical services" as explained in the context of 9 (1) (vii) of the Act and therefore, there is no scope for the application of the provisions of Section 195 of the Act (Tax Deducted at Source). It is also contended that as the non-resident agents have neither business connection in India nor they have permanent establishment in India, they are liable to be taxed in India.*
>
> *5.1 Yet another contention of the learned counsel for the assessee is that: (a) the assessee paid the amount by way of commission to foreign agents for the services rendered outside India; (b) the Tax Deduction at Source (TDS) is required to be made on all payments to non-residents, only if such payments are liable to be taxed in India. (c) following the decision of this Court, CIT v. Faizan Shoes (P.) Ltd. [2014] 367 ITR 155/226 Taxman 115/48 taxmann.com 48 (Mad.), the assessee is not liable to deduct tax at source, when the non-resident agent provides services outside India on payment of commission.*
>
> *5.2 The contention of the Revenue is that such services are attracted by Explanation (2) to Section 9 (1) (vii) of the Act and therefore TDS certificate is essential.*
>
> *6. Whether this contention is correct, is the issue to be decided.*
>
> *7. In order to appreciate this contention, it is necessary to consider the relevant provisions of the Act:—*
>
> *(i) Section 40(a)(i) of the Act :—*
>
> *"Section 40 - Amounts not deductible:*
>
> *Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession", —*
>
> *(a) in the case of any assessee —*

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—

(A) outside India; or
(B) in India to a non-resident, not being a company or to a foreign company, on which tax is deductible at source under Chapter XVIIB and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139:
Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation: For the purposes of this sub-clause,—

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9:
(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9:
(ia) thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVIIB and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139.

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub section (1) of section 139 thirty per cent of, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.'

(ii) Explanation 2 to Section 195(1) of the Act :—

'Section 195 - Other sums: (1) Any person responsible for paying to a non-resident not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not

being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O.

[Explanation 1] :.....

[Explanation 2.- For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

(i) a residence or place of business or business connection in India; or
(ii) any other presence in any manner whatsoever in India."
Explanation 4 to Section 9 (1) (i) of the Act:—

"Section 9 - Income deemed to accrue or arise in India —

(1) The following incomes shall be deemed to accrue or arise in India : (i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

** ** **

Explanation 4.- For the removal of doubts, it is hereby clarified that the expression "through" shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of".'

7.1 Section 40 of the Act spells out what amounts are not deductible from the income charged to tax under the profits and gains of business or profession.

7.2 Section 40(a)(i) of the Act deals with interest and other sums payable outside India. The provisions of this sub-clause made applicable to interest have been extended to payment of royalty, technical fees and any other sum

chargeable under this Act. The section provides that the sums covered by the sub-clause, which are chargeable under the Act and are payable outside India, shall not be allowed as an expenditure to the assessee, unless tax is paid thereon or is deducted therefrom under Chapter XVII-B of the Act.

7.3 Section 195(1) of the Act deals with deduction of tax from payment to non-residents and foreign companies. Section 195(1) of the Act comes into play at a stage where the payer, who is enjoined to deduct the tax, either credit such income to the account of the payee or make payment thereof, whether in cash / cheque / draft or any other mode. The taxability of such amount in the hands of the payee or occasioning of the taxable event is alien for the purpose of Section 195(1) of the Act.

7.4 Section 195(2) is an enabling provision, enabling an assessee to file an application before the Assessing Officer to determine the appropriate proportion of the sum chargeable and upon such determination, the tax has to be deducted under Section 195(1) of the Act. The payment is made credited to the account of the payee.

8. The question now is, whether the assessee ought to have deducted tax at source as contemplated under Section 195 of the Act, when the assessee paid commission to foreign agent.

9. This question has been answered by the Hon 'ble Supreme Court, in the case of G.E.India Technology Centre (P.) Ltd. (supra), in which, it is very categorically held that the tax deducted at source obligations under Section 195(1) of the Act arises, only if the payment is chargeable to tax in the hands of the non-resident recipient.

9.1 Therefore, merely because a person has not deducted tax at source or a remittance abroad, it cannot be inferred that the person making the remittance, namely, the assessee, in the instant case, has committed a default in discharging his tax withholding obligations because such obligations come into existence only when the recipient has a tax liability in India.

9.2 The underlying principle is that, the tax withholding liability of the payer is inherently a vicarious liability on behalf of the receipient and therefore, when the recipient / foreign agent does not have the primary liability to be taxed in respect of income embedded in the receipt, the vicarious liability of the payer to deduct tax does not arise. This vicarious tax withholding liability cannot be invoked, unless primary tax liability of the recipent / foreign agent is established. In this case, the primary tax liability of the foreign agent is not established. Therefore, the vicarious liability on the part of the assessee to deduct the tax at source does not exist.

10. Further, just because, the payer / assessee has not obtained a specified declaration from the Revenue Authorities to the effect that the recipent is not liable to be taxed in India, in respect of the income embedded in the particular payment, the Assessing Officer cannot proceed on the basis that the payer has an obligation to deduct tax at source. He still has to demonstrate and establish that the payee has a tax liability in respect of the income embedded in the impugned payment.

11. In the instant case, it is seen, admittedly that the nonresident agents were only procuring orders abroad and following up payments with buyers. No other services are rendered other than the above. Sourcing orders abroad, for which payments have been made directly to the non-residents abroad, does not involve any technical knowledge or assistance in technical operations or other support in respect of any other technical matters. It also does not require any contribution of technical knowledge, experience, expertise, skill or technical know-how of the processes involved or consist in the development and transfer of a technical plan or design. The parties merely source the prospective buyers for effecting sales by the assessee, and is analogous to a land or a house / real estate agent / broker, who will be involved in merely identifying the right property for the prospective buyer / seller and once he completes the deal, he gets the commission. Thus, by no stretch of imagination, it cannot be said that the transaction partakes the character of "fees for technical services" as explained in the context of Section 9(1)(vii) of the Act.

12. As the non-residents were not providing any technical services to the assessee, as held above and as held by the Commissioner of Income Tax (Appeals), the commission payment made to them does not fall into the category of "fees of technical services" and therefore, explanation (2) to Section 9(1)(vii) of the Act, as invoked by the Assessing Officer, has no application to the facts of the assessee's case.

13. In this case, the commission payments to the non resident agents are not taxable in India, as the agents are remaining outside, services are rendered abroad and payments are also made abroad.

14. The contention of the learned counsel for the Revenue is that the Tribunal ought not to have relied upon the decision G.E.India Technology's case, cited supra, in view of insertion of Explanation 4 to Section 9(1)(i) of the Act with corresponding introduction of Explanation 2 to Section 195(1) of the Act, both by the Finance Act, 2012, with retrospective effect from 01.04.1962.

15. The issue raised in this case has been the subject matter of the decision, in the recent case, CIT v. Kikani Exports (P.) Ltd. [2014] 369 ITR 96/[2015] 232 Taxman 255/49 taxmann.com 601 (Mad.) wherein the contention of the

Revenue has been rejected and assessee has been upheld and the relevant observation reads as under:—

'... the services rendered by the non-resident agent could at best be called as a service for completion of the export commitment and would not fall within the definition of "fees for technical services" and, therefore, section 9 was not applicable and, consequently, section 195 did not come into play. Therefore, the disallowance made by the Assessing Officer towards export commission paid by the assessee to the non-resident was rightly deleted.'

16. When the transaction does not atract the provisions of Section 9 of the Act, then there is no question of applying Explanation 4 to Section 9 of the Act. Therefore, the Revenue has no case and the Tax Case Appeal is liable to be dismissed.

6. Clearly, therefore, the payment of commission in the hands of the non-resident agent, as long as such an agent carries out its activities outside India, does not result in taxability in the hands of the agent in India

39. As we deal with this aspect of the matter, we may also take note of the following analysis, in the case of **UPS SCS Asia Limited Vs ADIT [(2012) 50 SOT 268 (Mum)]**, about the scope of managerial, consultancy and technical services which the services rendered must fulfil so as to lead to taxability as fees for technical services:

5. A bare perusal of the above quoted provision indicates that the "fees for technical services" means any consideration for rendering of any "managerial, technical or consultancy services" but does not include the consideration for any construction, assembly etc. The learned CIT(A) has held the services rendered by the assessee as fees for technical services' coming with in the sweep of "managerial, technical or consultancy services". On the contrary, the contention of the assessee has remained before the authorities below as well as us that the such services do not fall within the ambit of any of the categories taken note of by the authorities below. We will examine as to whether the services so provided by the assessee fall within the scope of 'managerial, technical or consultancy services' as per Explanation 2 to section 9(1)(vii).

6. In order to appreciate the nature of services more elaborately, it is relevant to consider the terms of the Agreement entered into between the assessee and Menlo India executed on November 7, 2006 with effect from 1st June, 2005, a copy of which is available on page 1 onwards of the paper book. The scope of services has been given in clause 1.1. In the recital clause it has been provided that the assessee–company may require Menlo India to perform logistics services such as transport, procurement, custom clearance, sorting, delivery, warehousing and picking up services (Local services) within India (Local operating area). It has further been provided that Menlo India may also seek similar services from the assessee–

company such as transport, procurement, customs clearance, sorting, delivery, warehousing and pick up services (International services) outside India. In the present appeal we are concerned with the "International services" provided by the assessee to Menlo outside India. These services comprise of transport, procurement, customs clearance, sorting, warehousing and pick up services on the cargo exported by Menlo on behalf of its customers. Having noted the nature of services provided by the assessee outside India, for which Menlo India made the payment, let us consider if these can be described as managerial or technical or consultancy services.

7. First we will consider the ambit of 'managerial services' to test whether the instant services can qualify to be so called. Ordinarily the managerial services mean managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair. It would mean that the directions of the latter are executed simplicity without there being any planning part involved in the execution and also the evaluation of the performance. In the absence of any specific definition of the phrase "managerial services" as used in section 9(1)(vii) defining the "fees for technical services", it needs to be considered in a commercial sense. It cannot be interpreted in a narrow sense to mean simply executing the directions of the other for doing a specific task. For instance, if goods are to be loaded and some worker is instructed to place the goods on a carrier in a particular manner, the act of the worker in placing the goods in the prescribed manner, cannot be described as managing the goods. It is a simple direction given to the worker who has to execute it in the way prescribed. It is quite natural that some sort of application of mind is required in each and every aspect of the work done. As in the above example when the worker will lift the goods, he is expected to be vigilant in picking up the goods moving towards the carrier and then placing them. This act of the worker cannot be described as managing the goods because he simply followed the direction given to him. On the other hand, 'managing' encompasses not only the simple execution of a work, but also certain other aspects, such as planning for the way in which the execution is to be done coupled with the overall responsibility in a larger sense. Thus it is manifest that the word 'managing' is wider in scope than the word 'executing'. Rather the later is embedded in the former and not vice versa.

8. Adverting to the facts of the instant case it is observed that the assessee performed freight and logistics services outside India in respect of consignments originating from India undertaken to be delivered by Menlo India. The role of the assessee in the entire transaction was to perform only the destination services outside India by unloading and loading of consignment, custom clearance and transportation to the ultimate customer. In our considered opinion, it is too much to categorize such restricted services as managerial services. We, therefore, jettison this contention raised on behalf of the Revenue.

9. Now we take up the next component of the definition of "fees for technical services", being 'consultancy services', which has been pressed into service by the learned CIT(A) to fortify his view that the amount received by the assessee is covered within section 9(1)(vii). The word "consultancy" means giving some sort of consultation de hors the performance or the execution of any work. It is only when some consideration is given for rendering some advice or opinion etc., that the same falls within the scope of "consultancy services". The word 'consultancy' excludes actual 'execution'. The nature of services, being freight and logistics services provided by the assessee to Menlo India has not been disputed by the authorities below. There is nothing like giving any consultation worth the name. Rather such payment is wholly and exclusively for the execution in the shape of transport, procurement, customs clearance, delivery, warehousing and picking up services. That being the position, we opine that the payment in lieu of freight and logistics services cannot be ranked as consultancy services.

10. The only left over component of the definition of "fees for technical services" taken note of by the ld. CIT(A) is "technical services". He observed that the assessee's business structure is time bound service coupled with continuous real time transmission of information by using and also making available its technology in the form of sophisticated equipments and software etc. The learned CIT(A) has held that : "in order to ensure efficient and timely delivery and to provide continuous real time information, the Appellant is required to use sophisticated technology for which the Indian entity is also equally involved and to whom the appellant is committed to providing the requisite software and equipment". The learned CIT(A) has also accentuated on the clause 2 of the Agreement which reads as under:–

"2. Contractor shall separately execute a Technology and Software license agreement for the provision of computer equipment and software supplied by SCS. Contractor shall separately execute a Trademark license agreement for the use of any marks or brands owned by United Parcel Service of America, Inc. The fee payable by Contractor under paragraph 3.1 will not include any royalty amount relating to the use of intangible property or information."

11. On going through clause 2 of the Agreement, it is obvious that Menlo India shall 'separately execute a technology and software license agreement' for the provision of computer equipment and software supplied by the assessee. It is nobody's case that the consideration in question relates to the supply of any computer equipment and software by the assessee to Menlo India. We fail to appreciate as to how this clause 2 makes the services provided by the assessee as "technical". Rather clause 2 mandates to execute a separate Technology and Software license agreement for the provision of computer equipment and software. How is it that the consideration for the services can be attributed to a proposed agreement, which has yet to see the light of the day.

12. The learned CIT(A) has also harped on "transportation of time sensitive packages" with a view to bring the services provided by the assessee within the fold

of "technical services". In reaching this conclusion the learned CIT(A) also relied on the order passed by the Mumbai bench of the Tribunal in Blue Dart Express Limited Vs. JCIT. Let us examine the facts of that case. The assessee there claimed deduction u/s 80–O in respect of its foreign exchange earnings for rendering technical / professional services to a US Multi International company. During the course of assessment proceedings, the A.O. required the assessee to furnish the nature of services rendered and also the calculation of deduction. The assessee did it. On being satisfied the A.O. granted deduction u/s 80–O. By exercising the power u/s 263, the learnedCIT held the assessment order to be erroneous and prejudicial to the interest of the Revenue to the extent of granting deduction u/s 80–0. When the matter came up before the Tribunal, it was observed that the issue is debatable and hence outside the ambit of section 263. Apart from that, it was also observed that the assessee was engaged in integrated air and ground transportation of time sensitive packages to various destinations rendering commercial services. It was in this context that the assessee was held to be eligible for deduction u/s 80–O. At this juncture it will be useful to note that at the material time section 80–O provided for deduction on any 'income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical or professional services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee'. From the above quoted part of sec. 80–O, it can be seen that the deduction at that time was available not only in respect of income as a consideration for the use of 'technical or professional services' but also any 'commercial....knowledge experience or skill'. Theses two sources are distinct from each other as can be seen from the employment of word 'or' between them. In order to qualify for deduction under this section, the income could have resulted from the rendering of 'technical or professional services' or commercial knowledge, experience or skill etc. When the tribunal in Blue Dart Express Limited (supra) held the assessee to be entitled to deduction, it was considering all the species of the services set out in section 80–O and not only 'technical or professional services'. It was in the light of such language of the provision that the Tribunal held the assessee to be eligible for relief u/s 80–O.We are currently dealing with section 9(1)(vii), being the 'fees for technical services' and the definition of such expression is restricted only to 'managerial, technical or consultancy services' and does not have any such elements as are there in section 80–O. The decision in the case of Blue Dart Express Limited (supra) came up for consideration before the Mumbai bench of the tribunal in Dampskibsselskabet AF 1912 Vs. Addl.DIT (International Taxation) [(2011) 51 DTR 148] (to which one of us, namely, the ld. JM is party) in which it has been held that the ratio laid down in that case cannot be universally applied. Due to material difference in the language of sections 9(1)(vii) and 80–O as discussed above, we hold that the decision in Blue Dart Express Limited (supra),can not be held to be supporting the case of the Revenue.

13. The ld. CIT(A) in reaching the conclusion that the assessee rendered 'technical services' also observed that its 'business structure is time bound service coupled with continuous real time transmission of information by using and also making available advanced technology in the form of sophisticated equipment and software.' He was swayed by the contention of the assessee that the Manlo India or the ultimate customer could track the movement of cargo with the help of computers. We have noted supra that the consideration received by the assessee did not include any consideration for the supply of any equipment to Manlo India. Now we will examine as to whether the use of computer in any manner for knowing the location of the cargo at a particular time, can be held as technical service.

14. Explanation to section 9(1)(vii) defines the expression "fees for technical services" as consideration for rendering 'managerial, technical or consultancy services'. It is seen that there is no definition of the term "technical services" in the Act.

15. The principle ofnoscitur a sociis mandates that the meaning of a word is to be judged by the company of other words which it keeps. This rule is wider in scope than the rule ofejusdem generis. In order to discover the meaning of a word which has not been defined in the Act, the Hon'ble Supreme Court has applied the principle ofnoscitur a sociis in several cases including AravindaParamila Works Vs. CIT [(1999) 237ITR 284 (SC)]. As noted above the word 'technical' has been sandwiched between the words 'managerial' and 'consultancy' in Explanation 2 to sec. 9(1)(vii) and no definition has been assigned to the 'technical' services in the relevant provision, we need to ascertain the meaning of the 'technical services' from the overall meaning of the words 'managerial' and 'consultancy' services by applying the principle of nosticur a sociis. It has been held above that the 'managerial services' and 'consultancy services' pre–suppose some sort of direct human involvement. These services cannot be conceived without the direct involvement of man. These services can be rendered with or without any equipment, but the human involvement is inevitable. Moving in the light of this rule, there remains no doubt whatsoever that the technical services cannot be contemplated without the direct involvement of human endeavor. Where simply an equipment or a standard facility albeit developed or manufactured with the use of technology is used, such a user cannot be characterized as using 'technical services'.

16. Coming back to the facts of the present case, even if we accept the learned first appellate authority's point of view that the computer could be used in tracing the movement of the goods, such use of computer, though indirect, remote and not necessary, can not bring the payment for freight and logistics services within the purview of "technical services". The essence of the consideration for the payment is rendering of services and not the use of computer. If incidentally computer is used at any stage, which is otherwise not necessary for rendering such services, the payment for freight and logistics will not partake of the character of fees of 'technical services'. We, therefore, repel this contention raised on behalf of the Revenue.

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).

40. We may also take note of another decision of a coordinate bench dealing with materially similar question dealing with taxability of income in the hands of non resident commission agents, representing Indian principal, in which similar activities were said to have been performed. In the case of **Armyesh Global Vs ACIT [(2012) 51 SOT 564 (Mum)]**, the coordinate bench has, inter alia, observed as follows:

16. We have considered the issue and examined the facts on record. The learned Assessing Officer tried to invoke the definitions of technical services on the commission paid to the foreign company. The reason being that commission payment to non resident is not covered by the provisions of section 40(a)(ia), as it has only applicable to any interest royalty, fees for technical services or other sum chargeable under this act which payable outside India on which tax is deductible at source but has not been deducted. The Assessing Officer made out a case that the commission paid is Tees for technical services' without specifying what are the technical/Managerial services rendered by the said company to the assessee. Assessee indeed entered into an agreement for propagation of its handicraft products with the non resident company. The copies of the agreement have been placed before the authorities. The agreement clearly shows that the non resident company was to get commission for promoting the products of the assessee company and rendering incidental services on sales such as recovery etc. for doing export sales. It is also responsibility of the non resident company to disseminate the information and inquire about various importers in various countries so that assessee exports can be increased. The agreement clearly shows that non resident company was to get the commission for promoting the product of assessee company after sales proceeds are received. The detailed terms of the agreement are as under:

"Agency Agreement

In this Agreement between M/s Armayesh Global, Kamanwala Chambers, 2nd Floor, Sir P.M. Road, Fort, Mumbai 400 001, India hereinafter referred to as "Principal" and Indijack Limited, 99 Breck Nock Road, London N19 5 AB, U.K. — hereinafter referred to as "Agent"— the following is agreed upon: -

Article 1- Object of Agreement

1.1. The principal entrusts the Agent with the non exclusive agency for the following contractual territory (area): Worldwide

1.2. The principal also has the right to operate actively' in he aforementioned territory (area).

1.3. The agency covers the following products:

Hand embroidered products of any and all kinds.

1.4. The Agent covenants and agrees to represent the principal on a commission basis.

Article 2— Duties of the Agent

2.1 It shall be the Agent's duty to negotiate contracts with the overseas party. Furthermore, the Agent shall act on the principal's behalf in conformity with provisions hereinafter enumerated. The Agent shall not be authorized to enter into a contract or otherwise to bind the principal. The principal shall be free to conclude, or to refuse the conclusion of a contract negotiated by the Agent.

2.2 While negotiating contracts of sale the Agent shall act in conformity with all the conditions and particularly of delivery and payment as fixed by the principal.

2.3 The Agent shall be responsible for negotiating with all parties in their territory (area). The Agent shall travel in their territory (area) regularly to visit customers, and is bound to keep concluded contracts secret. The Agent shall always keep the principal informed about their activities and shall supply the principal, at least once every quarter, with reports on economic developments and market conditions in the territory (area) and at the same time, convey to the principal, the Agent's observations with respect to activities of competitors. The Agent shall report immediately on particular profitable business possibilities and extraordinary events.

2.4. The Agent shall abstain from any competition whatsoever against the principal and shall not promote competition by third persons. In particular, the Agent shall not act for competitive firms as a commercial Agent, Commission Merchant or Distributor, nor shall the Agent associate directly or indirectly with competitive firms. The Agent shall not, for all time exploit or disclose to other persons any business and production secrets of the principal that have been communicated to them or which they have otherwise come to know, irrespective of whether or not the contract is still in force.

2.5 The Agent shall observe the rules of fair competition and be responsible for any violation of the same.

2.6 The Agent is not authorized to accept payments directly in their own name but shall assist the principal in collecting outstanding payments. The Agent is also authorized to accept notification of defects by a customer, as well as the statement of a customer that he will the goods at the disposable of the principal or any similar statement by which the customer exercises his rights resulting from defective delivery. The Agent shall immediately ii principal and shall see to it that the necessary evidence in favour of the principal is obtained.

2.7 The Agent shall establish business relations only with such customers whose solvency is satisfactory to the best of the knowledge and belief of the Agent.

17. Thus as can be seen from the above, all the terms do indicate that the said company was only acting as an Agent on commission basis and has not been providing any Managerial/Technical services. Further there is no evidence on record that they are providing any technical/managerial services. The said company was responsible for arranging timely payment from the customers and commission was paid only after the sales amount was received. Since the services were rendered

outside India, the provisions of section 5 cannot be applied to the commission paid so as to make it taxable in India.

18. This aspect can also be examined in another way as already given a finding by the Bench earlier and which is also not in dispute, that the foreign company does not have any PE in India. Therefore, the commission paid to the foreign company which has to be considered as business income and cannot be taxed in India as per the DTAA between India and UK. The definition of 'fee for technical services' between UK and India does not include managerial services. However, neither the Assessing Officer nor the CIT (A) considered the issue of DTAA, even though assessee mentioned the same in its submissions before the authorities. The definition of technical services as per the Income Tax Act is as under:

"9.(1) The following incomes shall be deemed to accrue or arise in India:

(i)...(ii)...(iii)....(iv)...(v)...(vi)
(vii) Income by way of fees for technical services payable by—
(a) the Government; or
(b) a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or
(c) a person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

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

[Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.]

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

19. As can be seen from the above section 9(1)(vii)(b), fee payable for the purposes of making or earning income from any source outside India is not included in the definition. The amount has to be considered as business income. Since the services are rendered outside India, that amount is not taxable as it does not accrue or arise in India. The same view was considered by the Hon'ble Bombay High Court in the case of CEAT International S.A. vs.CIT 237 ITR 859, where certain export commission was paid to a Non Resident Company and it was held that the assessee did not impart any information concerning technical, industrial, commercial or scientific knowledge exports or skill, nor rendered any managerial technical or consultancy services. The commission attributable to the services rendered cannot be regarded as royalty or fees for technical services and it was held that the same

was not taxable under section 9(1)(vii). Similar issue was also considered by the Hon'ble Delhi High Court in the case of Director of Income Tax vs. Sheraton International Inc. 313 ITR 267 where certain payments for advertising, publicity and sales promotion services were considered and held that those payments cannot be considered as either royalty or for technical services. Since the Non Resident does not have any PE in India, such income which is to be considered as business income was not taxable in India.

41. We are in considered agreement with the views so expressed by the coordinate bench. In view of these discussions, as also bearing in mind entirety of the case, we uphold well reasoning findings of the learned CIT(A) that the commission payments made to the non resident agents did not have any taxability in India, even under the provisions of the domestic law i.e. Section 9. Once we come to the conclusion that the income embedded in these payments did not have any tax implications in India, no fault can be found in not deducting tax at source from these payments or, for that purpose, even not approaching the Assessing Officer for order under section 195. In our considered view, the assessee, for the detailed reasons set our above, did not have tax withholding liability from these payments. As held by Hon'ble Supreme Court in the case of GE India Technology Centre Pvt Ltd Vs CIT [(2010) 327 ITR 456 (SC)], payer is bound to withhold tax from the foreign remittance only if the sum paid is assessable to tax in India. The assessee cannot, therefore, be faulted for not approaching the Assessing Officer under section 195 either. As regards the withdrawal of the CBDT circular holding that the commission payments to non resident agents are not taxable in India, nothing really turns on the circular, as de hors the aforesaid circular, we have adjudicated upon the taxability of the commission agent's income in India in terms of the provisions of the Income Tax Act as also the relevant tax treaty provisions.

42. In view of these discussions, we uphold the relief granted by the CIT(A) and decline to interfere in the matter.

43. In the result, the appeal filed by the Assessing Officer is, therefore, dismissed.

44. We now take up the appeal filed by the assessee.

45. Ground nos 1 and 2, as learned counsel fairly agree, need be taken up for specific adjudication. These grounds are as follows:

> *1. On the facts and in the circumstances of the case the Learned CIT(A) has grossly erred in holding the assessee to be 'assessee in default' under section 201(1) r.w.s. 201(1A) of the Income-tax Act, 1961 ('the Act'). The Learned CIT(A) ought to have appreciated that no liability arises under section 195 of the Act to deduct tax on the foreign remittances.*
>
> *2. On facts and in circumstances of the case, the learned CIT(A) grossly erred in dismissing the following ground raised before him by holding it infructuous:*
>
> > *"6. Without prejudice to the above, on facts and in circumstances of the case, the learned AO erred in not appreciating the facts that commission charges paid to export commission agents*

were incurred for the purpose of earning income from source outside India; and therefore in light of section 9(l)(vii)(b) cannot be taxed as FTS."

46. In ground no. 3, the assessee has raised the following grievances*:*

3. On facts and in circumstances of the case, the Learned CIT(A) erred in upholding the findings of the Ld. Assessing Officer that the remittances towards subscription charges paid to:

Metal Bulletin (UK); and
The Datamyne Inc. (USA)

be characterized as royalty u/s 9(1)(vi) of the Act as well as under the applicable article of DTAA.

47. So far as these payments are concerned, there is no dispute that these payments are for subscription fees for specialized database containing copyright material. The AO has held these payments to be in the nature of royalty. In appeal, learned CIT(A) has confirmed the action of the Assessing Officer, and in doing so, followed Hon'ble Karnataka High Court's judgment in the case of CIT Vs Samsung Electronics Ltd [(2012) 345 ITR 494 (Kar)]. The assessee is aggrieved and is in appeal before us.

48. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

50. We find that as the treaty provision unambiguously requires, it is only when the use is of the copyright that the taxability can be triggered in the source country. In the present case, the payment is for the use of copyrighted material rather than for the use of copyright. The distinction between the copyright and copyrighted article has been very well pointed out by the decisions of Hon'ble Delhi High Court in the case of DIT Vs Nokia Networks OY [(20113) 358 ITR 259 (Del)]. In this case all that the assessee gets right is to access the copyrighted material and there is no dispute about. Even during the course of hearing before us, learned Departmental Representative could not demonstrate as to how there was use of copyright. In our considered view, it was simply a case of copyrighted material and therefore the impugned payments cannot be treated as royalty payments. This view is also supported by Hon'ble Bombay High Court's judgment in the case of DIT Vs Sun and Breadstreet Information Services India Pvt Ltd [(2011) 318 IITR 95 (Bom)]. As for the judgment of Hon'ble Karnataka High Court in Samsung's case, we note that it is a non jurisdictional High Court judgment and as there are conflicting decisions of Hon'ble non jurisdictional High Courts, we have adopted the one which is in favour of the assessee. That is the only objective method we find for dealing with conflicting opinions of Hon'ble non jurisdictional High Courts. As we do so, we may also refer to the following observations made by a coordinate bench of this Tribunal in the case of RKP & Co Vs ITO (ITA No 106/Rpr/2016; order dated 24th June 2016):

It is thus evident that views of these two High Courts are in direct conflict with each other. Clearly, therefore, there is no meeting ground between these two judgments. The difficulty arises as to which of the Hon'ble non jurisdictional High Court is to be followed by us in the present situation. It will be wholly inappropriate for us to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoints, as such an exercise will de facto amount to sitting in judgment over the views of the High Courts something diametrically opposed to the very basic principles of hierarchical judicial system. We have to, with our highest respect of both the Hon'ble High Courts, adopt an objective criterion for deciding as to which of the Hon'ble High Court should be followed by us. We find guidance from the judgment of Hon'ble Supreme Court in the matter of CIT vs. Vegetable Products Ltd. [(1972) 88 ITR 192 (SC)]. Hon'ble Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted". This principle has been consistently followed by the various authorities as also by the Hon'ble Supreme Court itself. In another Supreme Court judgment, Petron Engg. Construction (P) Ltd. & Anr. vs. CBDT & Ors. (1988) 75 CTR (SC) 20 : (1989) 175 ITR 523 (SC), it has been reiterated that the above principle of law is well established and there is no doubt about that. Hon'ble Supreme Court had, however, some occasions to deviate from this general principle of interpretation of taxing statute which can be construed as exceptions to this general rule. It has been held that the rule of resolving ambiguities in favour of tax-payer does not apply to deductions, exemptions and exceptions which are allowable only when plainly authorised. This exception, laid down in Littman vs. Barron 1952(2) AIR 393 and followed by apex Court in Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commr. of CT (1992) Suppl. (1) SCC 21 and Novopan India Ltd. vs. CCE & C 1994 (73) ELT 769 (SC), has been summed up in the words of Lord Lohen, "in case of ambiguity, a taxing statute should be construed in favour of a tax-payer does not apply to a provision giving tax-payer relief in certain cases from a section clearly imposing liability". This exception, in the present case, has no application. The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter of State of M.P. vs. Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd. AIR 1972 (SC) 614. Therefore, what follows is that in the peculiar circumstances of the case and looking to the nature of the provisions with which we are presently concerned, the view expressed by the Hon'ble Delhi High Court in the case of Ansal Landmark (supra), which is in favour of assessee, is required to be followed by us. Revenue does not, therefore, derive any advantage from Hon'ble Kerala High Court's decision in the case of Thomas George Muthoot (supra)

51. Ground no. 3 is thus allowed.

52. In ground nos. 4, 5 and 6, which we will take up together, the assessee has raised the following grievance

> *4. On facts and in circumstances of the case, the Ld. CIT(A) erred in concurring with the view of the Ld. Assessing Officer and holding that supervision charges paid to Buck Subish Millan Company Limited (Trinidad)*

as Fees for Technical Services both under section 9(1)(vii) of the Act as well as Article 12(3)(b) of DTAA between India and Trinidad.

5. Without prejudice, the Ld. CIT(A) ought to have appreciated the view of appellant that the payments to Buck Subish Millan Company Ltd. (Trinidad) is made for the purpose of earning income from a source outside India and same cannot be taxed in India in light of section 9(1)(vii)(b) of the Act.

6. On facts and in circumstances of the case, the Ld. CIT(A) erred in upholding the view of Ld. Assessing Officer that testing charges paid to Intercon Holdings Limited (Hongkong) be characterized as FTS under section 9(1)(vii) of the Act.

6.1 Without prejudice to the above the Ld. CIT(A) ought to have appreciated that payment for testing charges to Intercon Holdings Limited (Hongkong) is made for the purpose of earning income from a source outside India and accordingly the same cannot be taxed in India in light of section 9(1)(vii)(b) of the Act.

53. Learned counsel has a very limited argument on this issue as he fairly submits that the issue is covered by decision of a coordinate bench of this Tribunal, in the case of DCIIT Vs Virola International [(2014) 147 ITD 519 (Agra)], to the extent that so far as remittances before 8th May 2010 are concerned, the assessee cannot be expected to deduct tax at source from these payments inasmuch as the amendment under section 9(1)(vii) was effected on that day and the assessee could not be expected to give effect to the law, while discharging his tax withholding obligations, prior to that date. Learned Departmental Representative also fairly accepts this legal position even as he relies upon the stand of the authorities below.

54. In view of the above discussions, we remit the matter to the file of the Assessing Officer for exclusion of the cases, if any, of remittances having been made before 8th May 2010 which shall remain uninfluenced by the amendment in section 9(1)(vii) with effect from this date.

55. Ground nos. 4, 5 and 6 are thus allowed for statistical purposes in the terms indicated above.

56. In ground nos. 7 and 7.1, the assessee has raised the following grievances:

7. Without prejudice to the above, on facts and in circumstances of the case, the learned CIT(A) has erred in dismissing the following ground of appeal raised as infructuous :

"13. Without prejudice to the above, on facts and in circumstances of the case, the learned AO erred in grossing up the amount of remittances made for the purpose of section 195A of the Act by applying the rates mentioned in section 206AA of the Act, as the same is not rates in force as per section 2(37A) of the Act, "

7.1 The CIT(A) ought to have appreciated that for the purpose of section 195A, the rates for grossing up should be the rates in force as per section 2(37A) of the Act as against rates as stipulated u/s 206AA of the Act.

57. Learned representatives agree that both the above issues are covered by the coordinate bench decision in the case of DDIT vs Serum Institute of India Pvt Ltd [(2014) 40 ITR (Trib) 684 (Pune)], even as learned Departmental Representative dutifully relied upon the authorities below.

58. We find that so far as the treaty provisions are concerned, the grossing up does not come into play. There is no dispute or controversy about this position, nor, in a treaty situation, the provisions of the domestic law, unfavourable to the assessee, can be pressed into service- as is the unambiguous legal position under section 90(2) of the Act. The provisions of Section 206AA cannot also be, for the same reasons, pressed into service either. While on this issue, a coordinate bench of this Tribunal, in the case of Serum Institute of India *(supra),* has observed as follows:

7. We have carefully considered the rival submissions. Section 206AA of the Act has been included in Part B of Chapter XVII dealing with Collection and Recovery of Tax – Deduction at source. Section 206AA of the Act deals with requirements of furnishing PAN by any person, entitled to receive any sum or income on which tax is deductible under Chapter XVII-B, to the person responsible for deducting such tax. Shorn of other details, in so far as the present controversy is concerned, it would suffice to note that section 206AA of the Act prescribes that where PAN is not furnished to the person responsible for deducting tax at source then the tax deductor would be required to deduct tax at the higher of the following rates, namely, at the rate prescribed in the relevant provisions of this Act; or at the rate/rates in force; or at the rate of 20%. In the present case, assessee was responsible for deducting tax on payments made to non-residents on account of royalty and/or fee for technical services. The dispute before us relates to the payments made by the assessee to such non-residents who had not furnished their PANs to the assessee. The case of the Revenue is that in the absence of furnishing of PAN, assessee was under an obligation to deduct tax @ 20% following the provisions of section 206AA of the Act. However, assessee had deducted the tax at source at the rates prescribed in the respective DTAAs between India and the relevant country of the non-residents; and, such rate of tax being lower than the rate of 20% mandated by section 206AA of the Act. The CIT(A) has found that the provisions of section 90(2) come to the rescue of the assessee. Section 90(2) provides that the provisions of the DTAAs would override the provisions of the domestic Act in cases where the provisions of DTAAs are more beneficial to the assessee. There cannot be any doubt to the proposition that in case of non-residents, tax liability in India is liable to be determined in accordance with the provisions of the Act or the DTAA between India and the relevant country, whichever is more beneficial to the assessee, having regard to the provisions of section 90(2) of the Act. In this context, the CIT(A) has correctly observed that the Hon'ble Supreme Court in the case of Azadi Bachao Andolan and Others vs. UOI, (2003) 263 ITR 706 (SC) has upheld the proposition that the provisions made in the DTAAs will prevail over the general provisions contained in the Act to the extent they are beneficial to the assessee. In this context, it would be worthwhile to observe that the DTAAs

***entered into between India and the other relevant countries in the present context provide for scope of taxation and/or a rate of taxation which was different from the scope/rate prescribed under the Act. For the said reason, assessee deducted the tax at source having regard to the provisions of the respective DTAAs which provided for a beneficial rate of taxation. It would also be relevant to observe that even the charging section 4 as well as section 5 of the Act which deals with the principle of ascertainment of total income under the Act are also subordinate to the principle enshrined in section 90(2) as held by the Hon'ble Supreme Court in the case of Azadi Bachao Andolan and Others (supra). Thus, in so far as the applicability of the scope/rate of taxation with respect to the impugned payments make to the non-residents is concerned, no fault can be found with the rate of taxation invoked by the assessee based on the DTAAs, which prescribed for a beneficial rate of taxation. However, the case of the Revenue is that the tax deduction at source was required to be made at 20% in the absence of furnishing of PAN by the recipient non-residents, having regard to section 206AA of the Act. In our considered opinion, it would be quite incorrect to say that though the charging section 4 of the Act and section 5 of the Act dealing with ascertainment of total income are subordinate to the principle enshrined in section 90(2) of the Act but the provisions of Chapter XVII-B governing tax deduction at source are not subordinate to section 90(2) of the Act. Notably, section 206AA of the Act which is the centre of controversy before us is not a charging section but is a part of a procedural provisions dealing with collection and deduction of tax at source. The provisions of section 195 of the Act which casts a duty on the assessee to deduct tax at source on payments to a non-resident cannot be looked upon as a charging provision. In-fact, in the context of section 195 of the Act also, the Hon'ble Supreme Court in the case of CIT vs. Eli Lily & Co., (2009) 312 ITR 225 (SC) observed that the provisions of tax withholding i.e. section 195 of the Act would apply only to sums which are otherwise chargeable to tax under the Act. The Hon'ble Supreme Court in the case of GE India Technology Centre Pvt. Ltd. vs. CIT, (2010) 327 ITR 456 (SC) held that the provisions of DTAAs along with the sections 4, 5, 9, 90 & 91 of the Act are relevant while applying the provisions of tax deduction at source. Therefore, in view of the aforesaid schematic interpretation of the Act, section 206AA of the Act cannot be understood to override the charging sections 4 and 5 of the Act. Thus, where section 90(2) of the Act provides that DTAAs override domestic law in cases where the provisions of DTAAs are more beneficial to the assessee and the same also overrides the charging sections 4 and 5 of the Act which, in turn, override the DTAAs provisions especially section 206AA of the Act which is the controversy before us. Therefore, in our view, where the tax has been deducted on the strength of the beneficial provisions of section DTAAs, the provisions of section 206AA of the Act cannot be invoked by the Assessing Officer to insist on the tax deduction @ 20%, having regard to the overriding nature of the provisions of section 90(2) of the Act. The CIT(A), in our view, correctly inferred that section 206AA of the Act does not override the provisions of section 90(2) of the Act and that in the impugned cases of payments made to non-residents, assessee correctly applied the rate of tax prescribed under the DTAAs and not as per section 206AA of the Act because the provisions of the DTAAs was more beneficial. Thus, we hereby affirm the ultimate conclusion of the CIT(A) in deleting the tax demand relatable to difference between 20% and the actual tax rate on which tax was deducted by the* assessee in terms of the relevant DTAAs

59. We are in considered agreement with the views so expressed by the bench. Respectfully following the same, and in the light of our discussions earlier in the order on this issue, we uphold the grievance of the assessee and direct the Assessing Officer to grant the resultant relief.

60. Ground no. 7 and 7.1 are allowed in the terms indicated above.

61. In the result, the appeal of the Assessing Officer is dismissed and the appeal of the assessee is partly allowed. Pronounced in the open court today on the 3rd day of January, 2017.

Sd/-	***Sd/-***
S S Godara	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Ahmedabad, the 3rd day of January, 2017.

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad