IN THE INCOME TAX APPELLATE T RIBUNAL,
CHENNAI D BENCH, CHENNAI

[Coram: Pramod Kumar AM and G Pavan Kumar JM]

I.T.A. Nos. 673 and 840 /Chny/2015
Assessment years: 2011-12 and 2012-13

Dy Commissioner of Income Tax
LTU -II, Chennai **.....Appellant**

Vs

Ford India Limited **.....Respondent**
S P Koil Post, Chengalpattu 603 204
Kanchipuram [PAN: AAACM4454H]

I.T.A. Nos. 748 and 749 /Chny/2015
Assessment years: 2011-12 and 2012-13

Ford India Limited **.....Appellant**
S P Koil Post, Chengalpattu 603 204
Kanchipuram [PAN: AAACM4454H]

Vs

Dy Commissioner of Income Tax
LTU -II, Chennai **.....Respondent**

Date of concluding the hearing : November 2, 2016
Date of pronouncing the order : January 31st, 2017

Appearances by:
R Durai Pandian *for the Assessing Officer*
Raghunathan Sampath and **Prachi Jain** *for the assessee*

O R D E R

Per Pramod Kumar AM:

1. These four appeals, consisting of two sets of cross appeals, pertain to the same assessee, involve some common issues, are directed against consolidated order dated 23rd January 2015 passed by the learned CIT(A), for the assessment years 2011-12 and 2012-13, and were heard together. As a matter of convenience, therefore, all the four appeals are being disposed of by way of this consolidated order.

2. We begin with the appeals for the assessment year 2011-12, and take up the revenue's appeal first.

3. Ground no. 1 is general and does not call for any specific adjudication.

4. In ground no. 2, the Assessing Officer has raised the following grievance:

2. The ld. CIT(A) erred in deleting the tax and interest levied u/s 201(1)/201(1A) of the Income Tax Act 1961 by the assessing officer on account of non deduction of tax at source in respect payments made by the assessee to following parties :-

S.No	*Name of the Party*	*Country*	*Amount (Rs)*	*Nature of service*
1	*Fuji Asia Co Ltd*	*Thailand*	*5,36,550*	*Commissioning charges for tools & dies*
2	*Fuji Asia Co Ltd*	*Thailand*	*2,45,250*	*Commissioning and Blanking die modification charges to add 3 holes*
3	*Auto Alliance Co Ltd*	*Thailand*	*2,12,298*	*Reflash cost for stage 4pcms-Pull ahead - Business income - other than categories*

2.1 The ld. CIT(A) failed to appreciate that the services rendered by the above parties to the assessee falls within the meaning of fee for Technical services(FTS) as per explanation 2 to Sec.9(1)(vii)of Income Tax Act, hence the assessee was liable to deduct tax on the same.

2.2 The ld. CIT(A) erred in holding that Article 12 of DTAA with Thailand provides only for taxation of royalty and the fee for technical services is not defined and therefore same was in the nature of "business profit" falls within the ambit of Article 7 of DTAA as per which business profit can be taxed in India only if the enterprises carries on business in India through PE situated in India and thus the assessee was not liable for deduction u/s.195 in respect of these payments.

2.3 The ld. CIT(A) erred in not considering the Circular No.333 dated 02/04/1982 of the CBDT as per which when there is no specific provision in the agreement, it is basic law i.e. the Income Tax Act will govern the taxation of income.

2.4 The Ld. CIT(A) failed to appreciate that as the services rendered by the non-resident in Thailand fall within the definition of fee for technical

service as per Income tax Act, there is no requirement for PE in India and the same is taxable in India and hence the assessee ought to have deducted TDS on the said payments.

5. The relevant material facts are like this. During the course of scrutiny proceedings before Assessing Officer, it was noticed that the assessee has remitted these sums (i.e. Rs 7,81,800 to Fuji Asia Co Ltd- Thailand, and Rs 2,12,298 to Auto Alliance Co Ltd- Thailand) to Thailand based entities without any deductions of tax at source. The plea of the assessee was that these remittances were payments in the nature of fees for technical services, and since the recipients did not have any permanent establishment in India, the income embedded in these remittances was not taxable in India under the provisions of the India Thailand Double Taxation Avoidance Agreement [(1986) 161 ITR (St) 82; **Indo Thai tax treaty**, in short]. The Assessing Officer, however, rejected this plea. He was of the view that since the Indo Thai tax treaty did not have any specific provision for the taxation of fees for technical services, to that extent, the provisions of the domestic law will apply. The AO thus held that the provisions of Section 9(1)(vii) are applicable on the facts of this case and, accordingly, the assessee ought to have withheld tax at source from these payments. Aggrieved, assessee carried the matter in appeal before the CIT(A). In this brief order, learned CIT(A) referred to various judicial precedents on the issue and concluded that since the related tax treaty does not have any specific provision for taxation of fees for technical services, and since these amounts are not taxable in India as business profits under the said treaty, the income embedded in these payments for fees for technical services is not taxable in India. The Assessing Officer is aggrieved and is in appeal before us.

6. 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.

7. There is no dispute that there is no specific provision for taxation of fees for technical services in India Thailand tax treaty. There is also no dispute that Fuji Asia Co Ltd Thailand and Auto Alliance Co Ltd Thailand did not have any permanent establishments in India.

8. The stand of the Revenue, however, is that the income embedded in the amounts received by the assessee could anyway be taxed as ówther 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 However, nothing turns on this decision as the principle laid down therein find favour with the jurisdictional High Court. In the case of **Bangkok Glass Industries Pvt Ltd Vs ACIT [(2013) 257 CTR 356 (Mad)]**, Honôble 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 incomeô 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 Of course, the question as to what really constitutes miscellaneous income, as visualized by Their Lordships, covered by Article 22 was left open- a question which we will endeavor to humbly address. As we deal with this aspect of the matter, and to explain the related principle in little more detail. Let us first take a look at the relevant treaty provision. The relevant treaty provisions are as follows:

> **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.**

9. 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 ótherincomeônevertheless. 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. 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 21) 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 22 does not apply to items of income which can be taxed in any situations under article 6-21 whether or not such an income is actually taxable under these articles. The question then arises whether income earned by the recipients in question, i.e. Fuji Asia Co Ltd-Thailand ad Auto Alliance Co Ltd-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 21) 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. Clearly, therefore, the income in question is covered by the provisions of the Indo Thai tax treaty but is not taxable on the facts of the case before us as the recipients did not have a PE in India. Once we come to the conclusion that the income embedded in the payments in question is of such a nature which is covered by articles 6 to 21 of the treaty but is not taxable in India as the condition precedent for the taxability under the related article is not satisfied, it is an inevitable corollary of this finding that article 22 cannot be pressed into service in respect of the said income. As we hold so, we are alive to the fact that there is no specific taxability provision, under India Thailand 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.

10. In view of the above discussions, in our considered view, even though the remittances in question are in the nature of fees for technical services in the hands of Thai entities, the income embedded in these remittances is not taxable in India in the hands of these entities, in terms of the provisions of Indo Thai tax treaty. The plea of the Assessing Officer, for invoking the domestic law provisions in respect of fees for technical services, as the Indo Thai tax treaty does not specifically deal with the same, already stands negated by Hon'ble jurisdictional High Court in the case of Bangkok Glass Industries *(supra),* in the context of Indo Thai tax treaty itself. 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** *(i.e. Income Tax)* **Act shall apply to the extent they are more beneficial to that assessee**ò While on this issue, we may also take note of the landmark Special Bench decision in the case of **Motorola Inc. vs. Dy. CIT [(2005) 96 TTJ (Del)(SB) 1]** wherein the Tribunal had, *inter alia,* observed that "**DTAA is only an alternate tax regime and not an exemption regime**" and,

therefore, "**the burden is first on the Revenue to show that the assessee has a taxable income under the DTAA, and then the burden is on the assessee to show that that its income is exempt under DTAA**". 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.

11 Ground no. 2 is thus dismissed.

12. In ground no. 3, the Assessing Officer has raised the following grievance:

3. The ld. CIT(A) erred in deleting the tax and interest levied u/s 201(1)/201(1A) of the Income Tax Act 1961 by the assessing officer on account of non deduction of tax at source in respect payments made by the assessee to following parties :-

S.No	***Name of the Party***	***Country***	***Amount (Rs)***	***Nature of service***
1.	***Ford Motor Company FIPL***	***USA***	***6,19,411***	***Reimbursement of expenses of plant fire protection engineering services fees on cost sharing basis***
2.	***Ford Motor Company FIPL***	***UK***	***92,578***	***Reimbursement of expenses for usage of application sharing system related charges – Data centre charges & fixed assessment charges***

3.1 The ld. CIT(A) failed to appreciate that the assessee has not produced any agreement with parent company for reimbursement and in the absence of an agreement, the above payments have to be treated as fee for annual maintenance charges attracting tax as per explanation 2 to Sec.9(1)(vii) of the Act and the assessee was liable for deduction of tax at source.

3.2 The ld. CIT(A) erred in holding that the remittance by way of reimbursement of expenses, has no 'income' element embedded in it, and therefore does not attract tax deduction at source u/s. 195(1).

3.3 The Ld. CIT(A) erred in not considering the decision of the Hon'ble Kerala High Court in the case of Cochin Refineries Ltd Vs. CIT reported in 222 ITR 354 (Ker) (1996), where the Hon'ble court has held that TDS is applicable even in reimbursement of expenses.

3.4 The Ld. CIT(A) erred in not considering the decision of the Delhi Tribunal in the case of HNS India VSAT Inc. Vs. DDIT, wherein it is held that "in view of the fact, that no application was made by the assessee u/s. 195(2) to Assessing Officer, assessee was under obligation to deduct tax at source from payments made to sub-contractors in terms of Section 195(1), having failed to do so, Assessing Officer was fully justified in making additions",

13. So far as this ground of appeal is concerned, the relevant material facts are like this. The Assessing Officer noticed that the assessee has made foreign remittance of Rs 6,19,411 to Ford Motor FIPL USA and of Rs 92,758 to Ford Motor FIPL Ltd UK. These payments were said to have been made as reimbursement of expenses under the cost sharing arrangement for regular preventive maintenance. The Assessing Officer noted that the payment was made towards ñplant fire protection engineering servicesò, and, as stated in the sworn statement of J Rangharajan CA, the back up documents and allocation of costs were duly examined. The Assessing Officer, however, proceeded to hold that the assessee should have deducted tax at source as these amounts were taxable as fees for technical services under section 9(1)(vii), and, even there was any doubt, the assessee should have filed an application under section 195(2). With this analysis, the Assessing Officer held the assessee liabile to have deducted tax at source, and, accordingly raised a demand under section 201 r.w.s 195. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) upheld the stand of the assessee and deleted the impugned tax withholding demands. Now Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

14. 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.

15. We have noted that even going by the case of the Assessing Officer, it is at best a case of payment of fees for technical services but then it is not even the case of the Assessing Officer that by rendition of these services, there was any transfer of technology in the sense that the recipient of service was enabled to render this service on his own without recourse to the service provider. There is no dispute that the recipient of these amounts are based in USA and UK and are entitled to the benefits of India US Double Taxation Avoidance Agreement [(1991) 187 ITR St 102; **Indo US tax treaty**, in short] and India UK Double Taxation Avoidance Agreement [(1994) 206 ITR (St) 235; **Indo UK tax treaty**, in short]. There is also no dispute that in both of these treaties, there is ómake availableôrequirement in the article dealing with taxation of fees for technical services. These treaty provisions are as follows:

India UK tax treaty

Article 13: Royalty and fees for included services

4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

(c) ***make available*** technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design.

Indo US tax treaty
Article 12- Royalty and fees for included services

4. For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

> (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or
>
> (b) ***make available*** technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.
>
> *[Emphasis by underlining etc supplied by us]*

16. We find that the common thread in both of these tax treaties is the requirement of ómake availableô clause. As learned counsel rightly puts it, its not simply the rendition of a technical service which is sufficient to invoke the taxability of technical services under the make available clause. Additionally, there has to be a

transfer of technology in the sense that the user of service should be enabled to do the same thing next time without recourse to the service provider. The services provided by non residents did not involve any transfer of technology. It is not even the case of the Assessing Officer that the services were such that the recipient of service was enabled to perform these services on its own without any further recourse to the service provider. It is in this context that we have to examine the scope of expression ómake availableô

17. As for the connotations of make available clause in the treaty, this issue is no longer *res integra*. There are at least two non-jurisdictional High Court decisions, namely Honble Delhi High Court in the case of **DIT Vs Guy Carpenter & Co Ltd ([(2012) 346 ITR 504 (Del)]** and Honble Karnataka High Court in the case of CIT Vs De Beers India Pvt Ltd **[(2012) 346 ITR 467 (Kar)]** in favour of the assessee, and there is no contrary decision by Honble jurisdictional High Court or by Honble Supreme Court. In De Beers case *(supra),* Their Lordships posed the question, as to ñwhat is meaning of make availableò, to themselves, and proceeded to deal with it as follows:

> **The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill?, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it.**
>
> **The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.**

18. As we have noted earlier, it is not even the case of the Assessing Officer that the assessee, i.e. recipient of services, was enabled to use these services in future without recourse to the service providers. The tests laid down by Hon'ble Court were clearly not satisfied. For this short reason alone, the amounts in question were not taxable as fees for technical services under the provisions of the respective tax treaties. The law is well settled, we may add at the cost of repetition, 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, "the provisions of this *(i.e. Income Tax)* Act shall apply to the extent they are more beneficial to that assessee". When the amounts are not taxable under the provisions of the respective tax treaties, there cannot be any occasion to deal with the provisions of the Income Tax Act. We, therefore, approve the conclusions arrived at by the CIT(A) on this issue as well, and decline to interfere in the matter.

19. Ground no. 3 is also dismissed.

20. In ground no. 4, the Assessing Officer has raised the following grievance:

> ***4. The ld. CIT(A) erred in deleting the tax and interest levied u/s 201(1)/201(1A) of the Income Tax Act 1961 by the assessing officer on account of non deduction of tax at source in respect payments made by the assessee Ford Motor Company (FIPL) USA of Rs.11,00,000/- on account of insurance brokerage.***
>
> ***4.1 The ld. CIT(A) erred in holding the payment i.e. FIPL's share of brokerage paid to the USA broker, does not fall under the explanation 2 to Sec.9(1)(vii) and also not covered by Article 12 of DTAA between India and USA.***
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> ***4.2 The Ld. CIT(A) failed to appreciate that no detail was produce by the assessee to substantiate their claim that Ford Motor FIPL USA had engaged Marsh USA for the services as claimed and the claim that cost is to be shared by the assessee and thus in absence of the same, the services were to be considered as managerial in nature income i.e. fees for technical services as per explanation (2) to section 9(1)(vii) of Income Tax Act 1961.***
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> ***4.3 The Ld. CIT(A) failed to appreciate that in the case of Cochin Refineries Ltd Vs. CIT reported in 222 ITR 354 (Ker) (1996), the Hon'ble Kerala High Court has held that TDS is applicable even in reimbursement of expenses.***
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> ***4.4 The Ld. CIT(A) erred in not considering the decision of the Delhi Tribunal in the case of HNS India VSAT Inc. Vs. DDIT, wherein it is held that "in view of the fact, that no application was made by the assessee u/s. 195(2) to Assessing Officer, assessee was under obligation to deduct tax at source from payments made to sub-contractors in terms***

of Section 195(1), having failed to do so, Assessing Officer was fully justified in making additions".

21. So far as this grievance of the Assessing Officer is concerned, the relevant material facts are as follows. This amount was paid by the assessee to Ford Motor Co USA and is in the nature of reimbursement of insurance brokerage incurred by the FMC USA who had engaged Marsh to negotiate the insurance premium globally. A copy of the invoice was also placed on record. Yet the Assessing Officer proceeded to treat the payment as payment for managerial fees covered by the scope of fees for technical services under section 9(1)(vii), Aggrieved, assessee carried the matter in appeal before the CIT(A) who upheld the stand of the assessee and concluded that in view of the provisions of article 12(4) unless services satisfy the make available clause, there cannot be taxability in the source jurisdiction and this condition is admittedly not satisfied. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

22. 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.

23. We have noted that it is not even the case of the Assessing Officer, and rightly so, that ómake availableôrequirement in the article dealing with taxation of fees for technical services is satisfied in the present case. In this view of the matter, and for the detailed reasons set out in our analysis dealing with the immediately preceding ground of appeal- which apply mutatis mutandis in this context as well, we uphold the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

24. Ground no. 4 is also thus dismissed.

25. In the result, appeal of the Assessing Officer for the assessment year 2011-12 is dismissed.

26. We now move on to the appeal filed by the assessee for the assessment year 2011-12.

27. Ground no. 1 is general and does not call for any specific adjudication by us.

28. In the ground no. 2, the assessee has raised the following grievances:

2. Installation and commissioning charges paid to non-residents treated as Fees for technical services and consequently held that such payments attract withholding tax liability.

2.1 The learned CIT(A) erred in holding that the following remittances in the nature of installation and commissioning charges qualify as Fees for Technical Services under the provisions of section 9(1)(vii) of the Income -tax Act, 1961 ('the Act'):

	Parties	*Country*	*Amount (in INR)*
a)	*Cinetics Landis Ltd*	*UK*	*1,40,98,343*
b)	*Marposs Ltd*	*UK*	*92,84,969*
c)	*Royal Tool Control Ltd*	*UK*	*75,96,835*
d)	*Movomech International AB*	*Sweden*	*64,43,896*
e)	*Impco Machine Tools*	*USA*	*17,15,746*

2.2 The learned CIT(A) failed to appreciate that installation and commissioning was a part of the composite contract to purchase the imported machineries and the same do not qualify as Fees for technical services/Fees for included services under the respective articles of the Double Taxation Avoidance Agreement ('DTAA').

2.3 Without prejudice to the above grounds, the learned CIT(A) failed to appreciate that the services had not been made available to the Appellant and consequently the charges paid would not qualify as Fees for technical services/Fees for included services under the respective articles of the DTAA.

29. Briefly stated, the relevant material facts are like this. During the relevant previous year, the assessee company made remittances, on account of installation and commissioning charges for different machineries and equipment, of Rs 1,40,98,343 to Cinetic Landis Ltd UK, Rs 92,84,969 to Marposs Limited UK, Rs 64,43,896 to Movomech International AB Sweden, and Rs 17,15,746 to Impco Machine Tools USA. It was contended by the assessee that since these payments are not covered by the definition of fees for technical services under the respective tax treaties, and since the recipients do not have any PE in India, these amounts are not taxable in India. It was also contended that the installation and commissioning charges are integral part of the composite contract for sale of machineries, and not taxable as such. The Assessing Officer, rejecting this plea, observed that ñthe payment is not towards the cost of any machinery as it is only for providing the services of installation and commissioning after the supply of machineryò. He further observed that ña purchase contract terminates when the goods are delivered and the installation/ commissioning takes place after the goods are purchased, and technical skills of the individuals are utilized by the FIPL to install the machinery and its

successful functioning, without imparting the technical knowledge of the functioning of the machinery, the same cannot operated by FIPL and put to use for productionò The Assessing Officer also observed that ñonly because the supplier has agreed to undertake installation of the machinery, the payments cannot taken as towards sale of machineryò Relying upon the ruling given by the Authority for Advance Ruling, in the case of HESS ACC Systems BV, In Re [(2012) 349 ITR 532 (AAR)], the Assessing Officer concluded that ñthe payments made fall under the category ófees for technical servicesôas per Explanation 2 to Section 9(1)(vii), which prevails over the treaty where it is defined the services are inexplicably and essentially linked to the supply of goodsò It was thus concluded that the assessee had an obligation to deduct tax at source from these payments and, accordingly, a tax withholding demand under section 201 r.w.s 195, was raised on the assessee. Aggrieved, assessee carried the matter in appeal before the learned CIT(A) but without any success. Learned CIT(A) held that ñappellant is under an obligation to deduct tax at source in respect of payments made in connection with installation/ erection of machinery etc as installation is ancillary and subsidiary to use equipment or enjoyment of the right for such useò Aggrieved, the assessee is in second appeal before us.

30. 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.

31. We can dispose of this ground on the short point of scope of ómake availableô clause in the respective FTS clauses which is clearly not fulfilled on the facts of this case It is not even the case of the revenue that installation PE threshold time limit is satisfied in this case and for that reason the charges so paid for installation and commissioning must be taxed in the source jurisdiction. Lets deal with this short point first. We find that so far as Indo UK and Indo US tax treaties are concerned, as we have seen earlier, the article dealing with fees for technical services has ómake availableôclause which provides that in order to trigger taxability as fees for technical service under the related treated provision, simply the rendition of a technical service is not sufficient, and, in addition, there has to be a transfer of technology in the sense that the user of service should be enabled to do the same thing next time without recourse to the service provider. Coming to the India Sweden Double Taxation Avoidance Agreement [(1998) 229 ITR (St) 11; **Indo Swedish tax treaty**, in short], while it has its FTS clause on the classical model i.e. without make available clause, but, by the virtue of MFN (most favoured nation) clause in the protocol appended to the Indo Swedish tax treaty, the make available clause stands imported into the treaty provision. The FTS clause in the related tax treaty and MFN clause set out in the protocol to the Indo Swedish tax treaty, i*nter alia*, provides as follows:

Article 12(3)(b)- Fees for technical services

The term 'fees for technical services' means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provisions of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention.

With reference to Articles 10, 11 and 12:

In respect of Articles 10 (Dividends), 11 (Interest) and 12 (Royalties and fees for technical services) if under any Convention. Agreement or Protocol between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply under this Convention

[Emphasis by underlining etc supplied by us]

32. Under the protocol provision, therefore, in case India limits its taxation of fees for technical services to a lower rate or narrower scope with any OECD country, the same lower rate or narrower scope is to apply in respect of Indo Swedish tax treaty as well. It is not even a condition precedent that such a treaty should be a subsequent treaty or that any further steps are required to be taken by the contracting states. There are number of treaties with OECD countries, subsequent to Indo Swedish tax treaty as also prior to Indo Swedish tax treaty, that provide for a narrower scope of taxability by having a ómake available*ô* clause in the FTS provision. Indiaôs Double Taxation Avoidance Agreement with Portuguese Republic (Indo Portugal tax treaty, in short), which is a subsequent treaty, for example, limits the definition of ófeesô of fees for technical servicesôto a narrower scope- as is evident from the definition under article 12(4) and 12(5) of the said treaty. These provisions are reproduced below:

4.For the purposes of this Article, "fees for included services" means payments of any kind, other than those mentioned in Articles 14 and 15 of this Convention, to any person in consideration of the rendering of any technical or consultancy services (including through the provisions of services of technical or other personnel) if such services:

(a)are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received, or
(b) make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or technical design which enables the person acquiring the services to apply the technology contained therein.

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

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property;
(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international craft;
(c) for teaching in or by educational institutions;
(d) for services for the personal use of the individual or individuals making the payment;
(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14;
(f) for services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred to in paragraph 2(g) 1 of Article 5;
(g) for services referred to in paragraph 3 of Article 5.

33. It is also not in dispute that, unlike in many other treaties, such as Indo Swiss tax treaty and Indo Philippines tax treaty, the benefit of MFN clause is not dependent on any other steps required to be taken by the contracting states. The provisions of Indo Portuguese tax treaty must stand imported in Indo Swedish tax treaty as well even without any specific notification to that effect. A coordinate bench of this Tribunal, in the case of **DCIT Vs ITC Ltd [(2002) 82 ITD 239 (Kol)]**, had approved this approach, and, while doing so and speaking through one of us, observed as follows:

……. in our considered view, the benefit of lower rate of or restricted scope of 'fees for technical services' under the Indo-French DTAA is not dependent on any further action by the respective Governments, unlike the situation envisaged in, for example, para 4 of protocol to Indo-Philippines DTAA or para 3 of protocol to Indo-Swiss. We leave it at that.

…….we are of the considered view that the same scope of 'fees for technical services' as provided for in the India DTAAs with UK, USA and Switzerland, which is far more restricted vis-a-vis scope of this expression in Indo-French DTAA, shall also apply under Indo-French DTAA, with effect from the date on which the Indo-French DTAA or such other DTAA enters into force, whichever

enters into force later. As all the three DTAAs discussed above entered into force on a date earlier than the commencement of the previous year 1995-96, the scope of technical services, for the purpose of Indo-French DTAA, cannot be broader than that envisaged in the above DTAAs. In this view of the matter, we hold that the 'fees for services that are ancillary and subsidiary, as well as inextrically and essentially linked, to the sale of property' are outside the scope of technical services so far as Indo-French DTAA is also concerned, even though no such specific exclusion clause is incorporated directly in the treaty itself, right from the time Indo-French DTAA entered into force.

34. The Authority for Advance Ruling, in its ruling in the case of **Steria India Ltd In Re [(2014) 364 ITR 381 (AAR)],** however, touched a different chord. The Authority for Advance Ruling observed that unless a notification specifically provides so, the provisions of the treaty cannot be read down. In effect, thus, it declined to read ómake available ôclause in a treaty because of the MFN clause, and, while doing so, the Authority for Advance Ruling observed as follows:

> What is stated by the Protocol is for India to limit its taxation at source for the detail items mentioned therein. **The restrictions are on the rates and 'make available' clause cannot be read in the items**. On the basis of the Protocol, notification No.9602 [F.No.501/16/80-FTD], dated 6.9.1994 as amended by Notification No. SO 650(E), dated 10.7.2000. was issued by Govt. of India. The said Notification does not include anything about the 'make available' provision. Had the intention of the Protocol or the Government is to include 'make available' clause in the Tax Treaty between India and France, it should have been done so in the said Notification. We have taken note of the Notification issued in the case of India Netherland Tax Treaty whereby the Protocol was given effect to. The changes in the Treaty on the basis of the Protocol were given effect by Notification only. We do not see any reason as to why different treatment will be given in the present case. Tax Treaties are between two sovereign nations and every country has a particular relation with another countries and same treatment are not given to all the countries. Say, for example, definitions of fees for technical services are more restrictive with some countries than the others. Every Treaty has particular purpose depending on the relationship between the two countries. While agreeing with various judgments that ordinary meaning of the Treaties should be given while interpreting the provision of the Tax Treaties and even to the extent of liberal interpretation of the Treaty, we cannot import any clause like 'make available' in the Treaty that is not there so as to change tax complexion of the Treaty provision. Protocol or Memorandum of Association can be made use for interpreting provision of the Treaty, it will not be correct/proper to import words, phrases or clause that is not available into the Treaties between two Sovereign nations, on the basis of Treaties with another countries. In this particular case, it may be stated at the most that India is under obligation as per the terms of the Protocol to limit its tax rate or rate of scope as was done in the notification as mentioned above but such type of action will not be within the purview of this Authority.
>
> 14. The services being accepted as technical services under the Act and the Tax Treaty, the payment for the services will be covered by 'fees for technical services' chargeable under the Act. **The submission of the applicant that the services being managerial which was omitted in the definition of fees for technical services in the revised DTAA between India - UK entered into in the year 1993,**

> **the managerial services rendered by the applicant will also automatically be omitted in the definition of fees for technical services under the Tax Treaty between India-France by application of the Protocol, is also not acceptable for the reasons discussed above regarding application of the Protocol in the Treaty.** The payment for services rendered by the applicant will therefore, falls under the definition of fees for technical services even under the Tax Treaty between India-France. In summary, the payments made by the applicant for the services rendered comes under the definition of fees for technical services both under the Act and the Treaty and is liable to tax in India.
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> *[Emphasis by underlining etc supplied by us]*

35. Hon'ble Delhi High Court, however, did not approve this approach adopted by the Authority for Advance Ruling. When the aforesaid ruling came up for challenge before Their Lordships, in the case of **Steria (India) Ltd Vs CIT [(2016) 386 ITR 390 (Del)],** Hon'ble High Court specifically approved the stand taken by the ITC decision (supra) on this point, and for that reason negated the stand of the Assessing Officer, by holding as follows:

> 18. The Court is, therefore, **unable to agree with the conclusion of the AAR that the Clause 7 of the Protocol, which forms part of the DTAA between India and France, does not automatically become applicable** and that there has to be a separate notification incorporating the beneficial provisions of the DTAA between India and UK as forming part of the India- France DTAA.
>
> 19. The next question that arises is concerning to extent to which the benefit under the India-UK DTAA can be made available to the Petitioner. As already noticed, the definition of 'fee for technical services' occurring in Article 13(4) of the Indo-UK DTAA clearly excludes managerial services. What is being provided by Steria France to the Petitioner in terms of the Management Services Agreement is managerial services. It is plain that once the expression 'managerial services' is outside the ambit of 'fee for technical services', then the question of the Petitioner having to deduct tax at source from payment for the managerial services, would not arise. It is, therefore, not necessary for the Court to further examine the second part of the definition, viz., whether any of the services envisaged under Article 13(4) of the Indo-UK DTAA are 'made available' to the Petitioner by the DTAA with France.
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> 20. Mr Ganesh**, learned Senior Counsel made a reference to the decision of the ITAT in DCIT v. ITC Ltd. (2002) 82 ITD 239 (ITAT Kolkata), where the Protocol separately executed between the India and France which formed part of the DTAA between the two countries was interpreted. It was held by the ITAT, and in the view of this Court correctly, that the benefit of the lower rate or restricted scope of fee for technical services under the Indo-French DTAA was not dependent on any further action by the respective governments.** It was held that the more restricted scope of fee for technical services as provided for in a DTAA entered into by India with another OECD member country shall also apply under the Indo-French DTAA with effect from the date on which the Indo-French DTAA or such other DTAA enters into force.

36. Quite clearly, in the light of the above discussions, even under Indo Swedish tax treaty ómake available ô clause is to be read into. Accordingly, for the detailed reasons set out earlier in this order while dealing with ground no. 3 of the appeal filed by the Assessing Officer for the same assessment year, unless by rendition of the technical services there is a transfer of technology in the sense that the recipient of these services is enabled to perform these services in future without recourse to the service provider, the taxability under FTS does not come into play. As we have noted earlier, it is not even the case of the Assessing Officer that the assessee, i.e. recipient of services, was enabled to use these services in future without recourse to the service providers. The tests laid down by Hon'ble Courts in Guy Carpenter *(supra)* and De Beers *(supra)* were clearly not satisfied. For this short reason alone, the amounts in question were not taxable as fees for technical services under the provisions of the respective tax treaties. It is not, and it cannot be, anybody's case that by rendering installation and commissioning services, the recipient of such services is enabled to perform the same task next time without recourse to the service provider. For this short reason alone, the plea of the assessee merits acceptance. We need not even deal with other contentions raised by the assessee which remain open. In any event, as learned counsel for the assessee rightly submits, this issue is also covered, in favour of the assessee, by a coordinate bench decision in the case of **Birla Corp Ltd Vs ACIT [(2015) 153 ITD 679 (Jab**)] wherein the coordinate bench has, *inter alia*, observed as follows:

> *37. The underlying principle in all the above definition, even as there is a variance on the threshold time limits, is that unless the installation or assembly project or supervisory activities in connection therewith cross the specified threshold time limit, the non-resident enterprise cannot be treated to have a permanent establishment in India. However, as an exception to this general principle in the above cases, in the case of Belgian and UK tax residents, even when threshold time limit is not crossed but where the charges payable for these services exceeds 10% of the sale value of the related machinery or equipment, the profits attributable to this activity can also be brought to tax. As a corollary to this legal position, even in the case of Belgian and UK tax residents, profit relatable to installation or assembly project or supervisory activities connected therewith, which do not cross threshold time limit of six months, cannot be brought to tax unless it is demonstrated that the consideration for such services is more than 10% of the sale value. There is nothing on record to establish, or even suggest, that this condition is satisfied in the cases before us. It is well settled in law, as we have noted earlier in our discussions, that the onus is on the revenue authorities that the conditions for permanent establishment coming into existence are satisfied, and that onus is clearly not discharged. The assessee's contention is that no part of the income embedded in the impugned payments is in respect of the installation, assembly or commissioning activities of the plant, machinery and equipment purchased. There has to be something, apart from shallow prolixity, to even point in the direction that the consideration for installation or assembly project, or supervisory activities connected therewith, exceed 10% of the value of related plant, machinery or equipment.*

40. These provisions with respect to permanent establishment on account on construction, installation and assembly activities, or supervisory activities connected therewith are broadly on the line of the model provisions in the 'UN Model Double Taxation Convention between the Developed and Developing Countries'. While elaborating upon this model provision and recognizing, while rejecting, the legitimate concerns about erosion of tax base by the developing countries, the UN Model Convention Commentary has observed as follows:

> ***10. A few developing countries oppose the six-month (or 183 days) thresholds in subparagraphs (a) and (b) of paragraph 3 altogether. They have two main reasons: first, they maintain that construction, assembly and similar activities could, as a result of modern technology, be of very short duration and still result in a substantial profit for the enterprise; second, and more fundamentally, they simply believe that the period during which foreign personnel remain in the source country is irrelevant to their right to tax the income (as it is in the case of artistes and sportspersons under Article 17). Other developing countries oppose a time limit because it could be used by foreign enterprises to set up artificial arrangements to avoid taxation in their territory. However, the purpose of bilateral treaties is to promote international trade, investment, and development, and the reason for the time limit (indeed for the permanent establishment threshold more generally) is to encourage businesses to undertake preparatory or ancillary operations in another State that will facilitate a more permanent and substantial commitment later on, without becoming immediately subject to tax in that State.***
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> *[@ page 108; emphasis by underling supplied by us]*

*41. The UN's 'Committee of experts on International Cooperation in Tax Matters', which reviews and updates the UN Model Convention Commentary, not only has presence, but also very active and laudable contribution, from India. In this view of the matter, the views so expressed in the UN Model Convention Commentary, particularly in the absence of any specific reservations by India, can be reasonably construed to be acceptable to the Indian tax administration as well. It would, therefore, appear that it is a conscious decision of India, being a party to a double taxation avoidance agreement based on the UN Model Convention, that even though "**construction, assembly and similar activities could, as a result of modern technology,** (may) **be of very short duration and still result in a substantial profit for the enterprise**" and even though "**the period during which foreign personnel remain in the source country is** (perhaps) **irrelevant to their right to tax the income",** the right to tax will not vest in the source country unless time limit threshold is satisfied as **"the reason for the time limit (indeed for the permanent establishment threshold more generally) is to encourage businesses to undertake preparatory or ancillary operations in another State that will facilitate a more permanent and substantial commitment later on, without becoming immediately subject to tax in that State".** In our considered view, therefore, it is plain on principle that as long as threshold time limit for PE is not satisfied, the consideration for such installation or assembly activities, or supervisory*

activities in connection therewith, cannot be brought to tax in the source country. During the course of hearing and at the instance of the bench, learned counsel for the assessee has filed details of the work carried on at the installation and assembly site in respect of all the transactions, as it did take place in the relevant financial period, and, as evident from even a cursory look at these details, in none of these cases the conditions for creation of PE are satisfied.

42. In view of the above discussions, even if a part of the income, embedded in the impugned payments made to non-resident vendors, can indeed be attributed to the installation, assembly or commissioning activities of the plant, machinery or equipment purchased, such an income, on the facts of this case, cannot be brought to tax as business income under article 7 read with article 5 of the respective DTAAs.

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44. One common factor in all the above treaty provisions is that the expression 'fees for technical services', which is also referred to as 'fees for included services' in some the treaties i.e. Indo Swiss and Indo US tax treaties, describes these services in a rather general manner whereas the expression 'construction, installation or assembly project or supervisory activities in connection therewith' find a specific mention in the PE clauses in all the related treaties. Generally speaking, and de hors the restricted meanings assigned by 'make available' clause or exclusion clauses, installation or commission activities are a particular type of technical services. There is thus a general provision for rendering of technical services and a specific provision for rendering of technical services in the nature of construction, installation or project or supervisory services in connection therewith.

45. While on this issue, it is important to bear in mind the fact that when it comes to 'services PE', as in article 5(2)(l) of Indo US tax treaty or article 5(2)(k) of Indo UK tax treaty, any services which can be covered by the FTS or FIS clause in the respective tax treaty are specifically excluded as these clauses refer to "the furnishing of services, other than included services as defined in Article 12 (Royalties and fees for included services), within a Contracting State by an enterprise through employees or other personnel " and "the furnishing of services including managerial services, other than those taxable under Article 13 (Royalties and fees for technical services), within a Contracting State by an enterprise though employees or other personnel" respectively. There is no such exclusion clause in the PE article dealing with construction, installation and assembly activities, including supervision activities relating thereto. It is also not in dispute, as has been stand of the revenue all along, that the construction, installation and assembly activities are de facto in the nature of technical services. To that extent, and unlike in the case of the provisions relating to Service PE, there is indeed overlapping effect of Article 5 and Article 12 or Article 13, so far as such services are concerned. As to what should be done in such a situation, we find guidance from the observations of Hon'ble Supreme Court in the case of ***Union of India vs. India Fisheries (P) Ltd. [57 ITR 331 (1965)]*** *"If there is an apparent*

conflict between two independent provisions of law, the special provision must prevail." This principle is described in Sampat Iyengar's Commentary on Law of Income-tax (9th Edn; Vol. 1, p. 48) as follows:

> ***"The general maxim is generalia specialibus non derogant, that is, general things will not derogate from special things. The maxim is also otherwise expressed as generalibus specialia derogant. A special provision normally excludes the operation of a general provision. ... It can be resorted to for deciding the competing claims of two provisions in the same enactment, one specific and other general with some overlapping between the two. The requisite conditions to attract this principle are: Firstly, both the general enactment and the particular enactment must be simultaneously operative, the general enactment covering larger field and particular enactment covering a limited field out of a larger field covered by the general enactment and, secondly, there must be nothing contained in the general provisions indicating the legislative intent to overrule or set aside the particular provision."***

46. Similar views were also expressed in the case of ***ITO vs. Titagarh Steels Ltd [79 ITD 532 (2001)]****, wherein one of us, while articulating the views of Kolkata C Bench, had observed as follows :*

> ***"It is fairly well-settled in law that general provisions do not override specific provisions, as aptly described by the maxim 'generalia specialibus non derogant.' A special provision normally excludes the operation of a general provision and we are of the view that such a principle governs the instant case also. In the case of South India Corpn. (P) Ltd. vs. Secretary, Board of Revenue AIR 1964 SC 207, Hon'ble Supreme Court had an occasion to consider whether Art. 277 or Art. 372 of the Constitution of India should govern the particular situation involved therein. Their Lordships then pointed out that "a special provision should be given effect to the extent of its scope, leaving the general provision to control cases where specific provisions do not apply."***

47. The same principle must apply in the treaty situations as well. What is the point of having a PE threshold time limit for construction, installation and assembly projects if such activities, whether cross the threshold time limit or not, are taxable in the source state anyway. If we are to proceed on the basis that the provisions of PE clause as also FTS clause must apply on the same activity, and even when the project fails PE test, the taxability must be held as FTS at least, not only the PE provisions will be rendered meaningless, but for gross versus net basis of taxation, it will also be contrary to the spirit of the following observations in the UN Model Convention Commentary, as reproduced earlier in this order in paragraph 40 above. As we have noted so earlier, it appears to be a conscious decision of India, being a party to a double taxation avoidance agreement based on the UN Model Convention, that even though "construction, assembly and similar activities could, as a result of modern technology, (may) be of very short duration and still result in a substantial profit for the enterprise" and even though "the period during which foreign personnel remain in the source country is (perhaps) irrelevant to their

right to tax the income", the right to tax will not vest in the source country unless time limit threshold is satisfied as "the reason for the time limit (indeed for the permanent establishment threshold more generally) is to encourage businesses to undertake preparatory or ancillary operations in another State that will facilitate a more permanent and substantial commitment later on, without becoming immediately subject to tax in that State". If we are to interpret the FTS and FIS clauses overlapping with PE clause in practice, and apply the FTS and FIS clauses when PE taxation cannot be invoked, the very purpose of PE provisions will stand defeated and it will be contrary to the UN Model Convention Commentary quoted earlier in this order, which, as a coordinate bench has held in the case of Graphite India Ltd Vs DCIT [6 ITD 384 (2002)], are in the nature of 'contemporanea expositio'. While holding so, the coordinate bench, speaking though one of us (i.e. the Accountant Member), had observed as follows:

> ***17. The aforesaid interpretation is clearly in harmony with the OECD and UN Model Conventions' official commentaries, as elaborated in paras. 9 and 10 above. As the provisions of art. 15 of Indo-US DTAA, and corresponding provisions in these model conventions, are identical in material respects i.e., are in pari materia, the UN and OECD Model Conventions, and Commentaries thereon, have key role in determining connotations of the expressions employed in art. 15. Hon'ble Andhra Pradesh High Court has, in the case CIT vs. Visakhapatnam Port Trust (1984) 38 CTR (AP) 1 : (1983) 144 ITR 146 (AP), referred to OECD commentaries on the technical expressions and the clauses in the model conventions, and referred to, with approval, Lord Radcliffe's observations in Ostime vs. Australian Mutual Provident Society (1960) AC 459, 480 : (1960) 39 ITR 210, 219 (HL), which have described the language employed in these documents as the "international tax language". In view of the observations of Hon'ble Andhra Pradesh High Court, in Visakhapatnam Port Trust's case (supra), these model conventions and commentaries thereon constitute international tax language and the meanings assigned by such literature to various technical terms should be given due weightage. In our considered view, the views expressed by these bodies, which have made immense contribution towards development of standardization of tax treaties between various counties, constitute 'contemporanea expositio' inasmuch as the meanings indicated by various expressions in tax treaties can be inferred as the meanings normally understood in, to use the words employed by Lord Radcliffe, 'international tax language' developed by bodies like OECD and UN.***

48. When we put it to the learned Departmental Representative as to what is the purpose of an installation PE clause in Article 5, if PE or no PE, the consideration for installation and assembly project, or supervisory activities in connection therewith, are to be taxed anyway as FTS or FIS, he pointed out that the assessee has on its own accepted the taxability under the FTS clause and withheld tax, on that basis, while making specific remittances for independent payments for the installation and commissioning charges. It could thus not be possible for the assessee to take an about turn now and claim that such payments are not taxable anyway. Learned counsel for the assessee, on the other hand, fairly submitted that the taxability of such payments as FTS or

FIS was taken as granted, without appreciating this nuance of the matter, as coming to the light in the course of this hearing, so far as standalone payments for these services were concerned, but neither such a conduct on the part of the assessee can constitute estoppel against the correct legal position nor would it imply that the a part of sale consideration can be fictionally treated as towards such services and then treated as FTS or FIS while the scope of such payments, under the tax treaties, is confined to amounts actually paid as FTS or FIS. We are unable to see legally sustainable merits in the stand of the learned Departmental Representative. The taxability of an income is to be decided on the basis of the provisions of law and not conduct of the parties. Just because the assessee has accepted a taxability in respect of some other transaction, no matter howsoever related, the legal remedies available to the assessee cannot be negated. There cannot be, and there is no, estoppel against the law. In view of the above discussions, in our considered view, in a situation in which there are specific PE clauses in relation to a particular type of services, which are covered in the scope of services covered by the scope of the 'fees for technical services' or 'fees for included services', the taxability of consideration for such services must remain confined to taxability of profits under the relevant specific PE clause. In our humble understanding, the provisions for taxability as FTS or FIS will not come into play in such cases.

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54. We have also further that, in terms of article 12(5)(a) of Indo Swiss tax treaty, the fees for technical services, which is termed as fees for included services in this treaty, does specifically exclude, "amounts paid for … services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of a property", Elaborating upon the scope of this provision, which also finds place in Indo US tax treaty, a coordinate bench of this Tribunal, in the case of ***Hindalco Industries Ltd Vs ACIT [94 ITD 242 (2005)]****, has observed as follows:*

> ***23. The easily discernible common thread in all the transactions visualized in art. 12(3)(a) is that all these transactions are such that when sale takes place by the resident of one Contracting State to the resident of the other Contracting State, consideration of sale is taxable under art. 12 in the source country as well. Article 12(3)(a) and (b) only define as to what constitutes 'royalties' and art. 12(2) provides that 'royalties' and 'fees for included services' arising in a Contracting State and paid to the resident of the other Contracting State may also be taxed in the Contracting State in which they arise, i.e., in the source country, though subject to certain restriction on the rate of tax. It is thus clear that when the principal sale itself is subjected to tax in the source country, the services which are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of a property, are also subjected to tax in the source country. The said principle is also implicit in art. 12(4)(a) which provides that consideration for rendering any technical or consultancy services, where such services are ancillary and subsidiary to the application or enjoyment of the right, property or***

> ***information which is covered by the definition of 'royalty' in art. 12(3), is also includible in the 'fees for technical services' and accordingly liable to be taxed in the source country.***
>
> ***24. The scheme of the tax treaty, so far as royalties and fees for technical services (termed as 'fees for included services' in the India US tax treaty) is clearly like this. When principal transaction itself is such that it involves taxability in the source country, the transactions subsidiary and integral to such a transaction also give rise to the taxability of subsidiary transact ions in the source country. On the other hand, when principal transaction is such that it does not generally give rise to taxability in the source country, the transaction subsidiary and integral to such a transaction also does not give rise to taxability in the source country. In other words, the subsidiary and integral transactions have to take colours from the principal transaction itself and are not to be viewed in isolation. That is the intent and purpose, in our understanding, of the provisions of art. 12(5)(a) ……..***

55. In view of these discussions, in our humble understanding, Installation, commissioning or assembly of a plant, machinery or equipment, or any supervision activity connected therewith, is ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of such a property i.e. plant, equipment or machinery. Therefore, for this short reason, any consideration for installation, commissioning or assembly activities, or supervision services in respect thereof, of a property, which obviously includes a plant, equipment or machinery, cannot be included in fees for included services under the Indo Swiss tax treaty as well. Accordingly, even if there be any income embedded in the impugned payments, in respect of installation, commissioning or assembly activities, or supervisory activities connected therewith, the same cannot be brought to tax, in view of the provisions of Article 12(5)(a) of Indo Swiss tax treaty, in the hands of the Swiss vendors as well. As corresponding provisions also find place in Indo UK [Article 13(5)(a)] and Indo US [Article 12(5)(a)] tax treaties, for this reason as well and for the material facts being similar, the consideration for installation, commissioning or assembly activities, or supervision services in respect thereof, can also not be subjected to tax in India in the hands of the UK and US based vendors either.

56. As evident from a plain look at the language employed in the FTS and FIS clauses of related tax treaties the taxability as FTS or FIS arises at the point of time when the payment is "actually" made "for" technical services "arising in a Contracting State and paid to a resident of other Contracting State". The event triggering the taxability under the tax treaties is the payment and not accrual. In any event, it is also beyond dispute that the provisions of Section 195 come into play at the time of payment or credit, whichever is earlier, and not on the basis of accrual method of accounting- as has been so vigorously canvassed in the orders of the authorities below. Holding so, a co-ordinate bench of this Tribunal, in the case of ***C J International Hotels Ltd Vs ITO [79 ITD 506 (2001)]*** *and speaking through one of us (i.e. the Accountant Member), has observed as follows:*

> ***We find that the lower authorities have proceeded on the fallacy that taxability in the hands of the foreign company and TDS liability of the***

tax deductor are not one and same thing. It is, however, well settled that tax deduction at source is only one mode of recovery of the taxes due on recipient of that income, but it cannot be equated with final determination of tax liability in the hands of the recipient of such income. No doubt, in case of non-resident assessee, it is open to the regular AO to treat person from or through whom such assessee is in receipt of any income, as an agent under s. 163(1)(c) of the Act and, accordingly, assess such person in respect of that income as a 'representative assessee', but the case before us does not relate to such assessment under Chapter XV and we are only in seisin of the issue regarding tax deduction at source liability of the tax deductor company. The only relevant question, therefore, is as to at what point of time tax deduction at source liability under s. 195 crystallises in the present case—at the time of payment of the franchise fees, at the time of crediting the same to the account of M/s Societe Des Hotels Meridien, or, as argued by the Revenue, at the time of the franchise fees accruing to the aforesaid company. The answer to this question is provided by the plain and unambiguous language of s. 195 itself which states that tax is to be deducted "at the time of credit of such income to the account of the payee or at the time of payment thereof.....whichever is earlier". In our considered view, it is not open to the Revenue, for the purpose of determining TDS liability of an assessee tax deductor, to tinker with, or in anyway reject, the method of accounting employed by such assessee tax deductor. The judicial precedents relied upon by the authorities below deal with the issue of taxability in the hands of the foreign company and therefore, in our considered view, these judicial precedents have no bearing on the determination about the point of time when TDS liability under s. 195 crystallises. It is also not in dispute that account of the payee was not credited at the time of accrual of income and the accounting was done on cash basis. On these facts, TDS liability of the assessee cannot be said to crystallize at the time of income actually accruing to the foreign company and Revenue's claim that taxability crystallizes at the time of income accruing to the foreign company is not even relevant for deciding that question. As Rowlatt, J. has said, Cape Brandy Syndicate vs. IRC 1 KB 64, "in a taxing statute, one has to look merely at what is clearly said; there is no room for any intendment...". Since s. 195 specifically provides for deduction of tax at source at the time of payment or crediting the payee's account, whichever is earlier, we are unable to approve the stand of the Revenue regarding deduction of tax at source on the basis of accrual of income. In this view of the matter, we are of the considered opinion that the TDS liability, under s. 195, arises only when the income is credited to the account of the payee or on actual payment of the same, whichever is earlier. We further hold that mere accrual of income in the hands of the foreign company cannot be a sufficient proximate reason for tax deductor's liability under s. 195 of the Act. In view of this legal position, as also bearing in mind the fact that the AO has raised the impugned demand under ss. 201(1) and 201(1A) on the basis of taking TDS liability at the point of accrual of income in the hands M/s Societe Des Hotels Meridien, we cancel the impugned orders, hold that these orders are indeed contrary to the scheme of the Act, and restore the matter to the file of the AO(TDS) for passing fresh orders, if necessary, in accordance

with the law and after giving due opportunity of hearing to the assessee tax deductor.

57. Viewed thus, the FTS or FIS provisions cannot be invoked for taxing a non-resident on the basis of accrual of liability, whether credited or not, or on the notions of fiction of an element of FTS or FIS being embedded in the business receipts for sale of plant, equipment or machinery. The receipts in the hands of the vendors are in the nature of business income, and the deeming fiction, as sought to be canvassed by the revenue, has no application in the matter. The business income can be taxed under article 7 read with article 5, and, as we have seen earlier in this order, the conditions precedent for taxability under article 7 r.w.a. 5 are not fulfilled on the facts of this case. In many of the cases, as noted in the orders of the authorities below, the related installation and commissioning services, and supervision services in connection therewith, have been rendered by the domestic entities and payments made to those entities have already been subjected to tax withholding under other provisions of chapter XVII D but, disregarding this reality, the CIT(A) has proceeded on the basis that "cost of services is also vested in the cost of material" whether such services are performed or not. When admittedly no such services were rendered, there not have been any occasion to bring fictional 'consideration' for those services to tax.

58. In view of the above discussions, in our considered view, under the scheme of allocation of taxing rights under the related tax treaties, India does not have the right to tax income, even if any, in respect of rendition of installation, commissioning or assembly services, embedded in the invoice value of the related equipment, plant or machinery. We, therefore, see no need to address ourselves to the question whether any part of the stated sale consideration for these equipment, plant or machinery can indeed be attributed to such an installation, commissioning or assembly activity. The question as to whether, under the contract, the assessee was separately compensated for the installation, commissioning or assembly activities, or supervisions activities relating thereto, or whether the consideration for such activities was embedded in the sale consideration itself, is, not really to be examined any further, as the scope of taxability under Section 5(2)(b), given the facts of this case, is wholly academic. These provisions could have been pressed into service when these could have been more beneficial to the assessee, but now that these payments have no tax implications at all in India under the scheme of the relevant tax treaties under section 90(2), there is no occasion for the assessee to look at the provisions of the Income Tax Act, 1961, for 'more beneficial' a treatment.

37. The above line of reasoning apart, in Birla Corp's case *(supra)* also, it was noted that so far as treaties with make available clause are concerned, the payments made for installation and commissioning charges, for that reason alone, cannot be taxed as fees for technical services. The income embedded in these payments are thus not taxable as FTS, and it is not even the case of the revenue that the installation period crossed the PE installation threshold limit. These amounts cannot

be taxed as business profits either. There is no other treaty provision under which these amounts can be brought to tax in India under the respective tax treaty. The law is well settled, we may add at the cost of repetition, 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, ñthe provisions of this (i.e. Income Tax) Act shall apply to the extent they are more beneficial to that assesseeò. When the amounts are not taxable under the provisions of the respective tax treaties, there cannot be any occasion to deal with the provisions of the Income Tax Act. We, therefore, disapprove the conclusions arrived at by the CIT(A) and direct the Assessing Officer to delete the related disallowance. Ground no. 2 is thus allowed.

38. In ground no. 3, the assessee has raised the following grievance:

> ***3. Fees for professional services paid to non-residents treated as Fees for technical services and consequently held that such payments attract withholding tax liability.***
>
> ***3.1 The learned CIT(A) erred in law and in facts and circumstances of the case by confirming that the amounts of 1NR 13,76,775 and INR 556.970 paid to Mr. Steve Lazenby, proprietor of Lazenby Construction Safety Services and Mr. Joe Oszvart respectively was in the nature of Fees for technical services and not fees for independent personal services under Article 15 of India-UK and India-US DTAAs.***
>
> ***3.2 The learned CIT(A) erred in law by holding That a tax residency certificate is required to be obtained from the respective revenue authorities of US and UK to demonstrate that the recipients were individuals and tax residents of the said countries.***
>
> ***3.3 Without prejudice to the above grounds, the learned CIT(A) failed to appreciate that the services had not been made available to the Appellant and consequently the charges paid would not qualify as Fees for technical services/Fees for included services under the respective articles of the DTAA.***

39. As regards this ground of appeal, it is sufficient to take note of the fact that the assessee made payment of Rs 13,76,775 to Mr Steve Lazenby, proprietor of Lazeny Construction Safety Services UK and of Rs Rs 5,56,970 to Mr Joe Oszvart USA, for services rendered by them. The assesseeôs claim was that since the recipients of these payments did not have any fixed base in India, and since the payments so made were in the nature of payments for independent personal services, these payments did not have any income tax implications in India. The Assessing Officer did not, however, agree. He was of the view that since these payments are in the nature of fees for technical services, and since, in any event, the assessee did not file residency certificates of these entities, the assessee ought to have deducted tax at source. He also noted that the assessee should have at least approached the

Assessing Officer under section 195(1) of the Act. Aggrieved, assessee carried the matter in appeal but without any success. The assessee is not satisfied and is in further appeal before us.

40. 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.

41. As learned representatives fairly agree, the issue, so far as US based recipient is concerned, in favour of the assessee by a coordinate bench decision in the case of **ITO Vs Susanto Purnamo [(2016) 73 taxmann.com 108 (Ahd)],** even as the learned Departmental Representative nonetheless relied upon the stand of the authorities below. In the case of Susanto Purnamo (supra), the coordinate bench, speaking through one of us, has *inter alia* observed as follows:

> *5. There is no dispute that the assessee before has the protection of Indo-US tax treaty. There is also no, nor there can be any, dispute that in the event of the provisions of the applicable tax treaty being more beneficial to the assessee vis-à-vis the provisions of the Income Tax Act, 1961, the provisions of the Act cannot be invoked; Section 90(2) specifically provides in a situation in which assessee is entitled to a tax treaty protection, "the provisions of this Act (i.e. Income Tax Act, 1961) shall apply to the extent they are more beneficial to that assessee". The short issue that we have to, therefore, examine is whether the assessee is liable to tax under the provisions of the Indo-US tax treaty. While the case of the Assessing Officer is that the assessee is taxable under section 12(4) of the Indo-US tax treaty, learned CIT(A) has granted the impugned relief on the basis that the assessee has rendered professional services which can be taxed, if at all, under article 15, but then since taxability under article 15 fails on the facts of this case, the income in the hands of the assessee cannot be taxed at all. Let us take a look at the relevant treaty provisions, i.e. article 12 and 15, which are reproduced below for ready reference:*
>
> *ARTICLE 12*
>
> *Royalties and fees for included services*
>
> *1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
>
> *2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to*

the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) in the case of royalties referred to in sub-paragraph (a) of paragraph 3 and fees for included services as defined in this Article (other than services described in sub-paragraph (b) of this paragraph):

(i) during the first five taxable years for which this Convention has effect,

(A) 15 per cent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that Contracting State, a political sub-division or a public sector company; and

(B) 20 per cent of the gross amount of the royalties or fees for included services in all other cases; and

(ii) during the subsequent years, 15 per cent of the gross amount of royalties or fees for included services; and

(b) in the case of royalties referred to in sub-paragraph (b) of paragraph 3 and fees for included services as defined in this Article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 3(b) of this Article, 10 per cent of the gross amount of the royalties or fees for included services.

3. The term 'royalties' as used in this Article means :

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; and

(b) payment of any kind received as consideration for the use of, or the right to use, the industrial, commercial, or scientific equipment, other

than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 or Article 8.

4. For purposes of this Article, 'fees for included services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available technical knowledge, experience, skill, know- how, or processes, or consist of the development and transfer of a technical plan or technical design.

5. Notwithstanding paragraph 4, 'fees for included services' does not include amounts paid :

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

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

(c) for teaching in or by educational institutions;

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

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15
(Independent personal services).

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for included services, being a resident of a Contracting State, carries on business in the other Contracting State, in which the royalties or fees for included services arise, through a

permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the royalties or fees for included services are attributable to such permanent establishment or fixed base. In such case the provisions of Article 7 (Business profits) or Article 15 (Independent personal services), as the case may be, shall apply.

7. (a) Royalties and fees for included services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority, or a resident of that State. Where, however, the person paying the royalties or fees for included services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for included services was incurred, and such royalties or fees for included services are borne by such permanent establishment or fixed base, then such royalties or fees for included services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated. right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State.

8. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for included services paid exceeds the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of the Convention.

ARTICLE 15

Independent personal services

1. Income derived by a person who is an individual or firm of individual (other than a company) who is a resident of a Contracting State from the performance in the other Contracting State of professional services or other independent activities of a similar character shall be taxable only in the first-mentioned State except in the following circumstances when such income may also be taxed in the other Contracting State :

(a) if such person has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or

(b) if the person's stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 90 days in the relevant taxable year.

2. The term 'professional services' includes independent scientific, literary, artistic, education or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.

6. A careful look at the above treaty provisions would show that in the event of our coming to the conclusion that the services rendered by the assessee are in the nature of independent personal services under article 15, it is wholly academic whether or not these services are covered by article 12 and satisfy the make available clause. It is so for the reason that (a) it is uncontroverted claim of the assessee that the conditions precedents for taxability under section 15 are not satisfied inasmuch as neither the assessee had any fixed base available to him in India nor the assessee visited India for more than 90 days in the relevant previous year, and (b) under article 12(5), which states that "fees for included services will not include amounts paid…..(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent personal services)", once an amount is found to be of such a nature as can be covered, in an appropriate case, by article 15, the same shall stand excluded from the ambit of article 12. As we take note of this treaty provision, we may mention that the learned CIT(A) has referred to article 12(6) in support of this proposition, and to that extent he is not right because article 12(6) refers to a situation in which the services are rendered through the fixed base or through the permanent establishment, and the consequent taxability arises under article 15 or article 7 respectively. The dispute, in such a situation, is essentially confined to the taxability on under article 12, on one hand, or under article 15 or article 7, on the other hand. That is not an issue which is relevant in the present context. Learned CIT(A)'s reliance on article 12(6) is, therefore, certainly incorrect but his conclusions are correct because of the impact of article 12(5)(e).

7. The crucial question, therefore, is as to what constitutes 'independent personal services' for the purpose of article 15 and whether the services

rendered by the assessee can fall in this category of services. This issue, regarding the scope of article 15 of Indo-US tax treaty, came up for consideration, almost one and a half decade ago, before a coordinate bench of this Tribunal in the case of Graphite India Ltd Vs DCIT [(2002) 86 ITD 384 (Kol)]. Speaking through one of us, i.e. the Accountant Member, the Tribunal had then, inter alia, observed as follows:

> *12. The definition of 'professional services', which are termed as 'independent personal services' in the phraseology employed in tax treaties, is, however, not defined in tax treaties or even official commentaries on UN and OECD Model Conventions. The meaning of this term is illustrated by some examples of typical liberal professions, and this enumeration of professions has only an explanatory character. 'The Law Lexicon' edited by Justice Y.V. Chandrachud (1997 Edition) defines 'profession', inter alia, as involving 'the idea of an occupation requiring either purely intellectual skill or if any manual skill, as in painting and sculpture or surgery, skill controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities'. This definition, barring the words "as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities" is incidentally the same as assigned by Scrutton, LJ in IRC vs. Maxse (1919) 1 KB 647 referred to in L.B. Curzon's Law Dictionary. Referring to Hon'ble Bombay High Court's judgment in the case of Sakharam Naryan Kherdekar vs. City of Nagpur Corporation AIR 1964 Bom 200, at p. 210, the Law Lexicon further states that 'an activity to be profession must be one carried on by an individual by his personal skill, intelligence and dependent on individual characteristics'. Black's Law Dictionary (5th Edition) defines profession as 'a vocation or occupation requiring special, usually advanced, education and skill e.g. in law and medicine' and observes that 'the labour and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual'. The school of thought thus emerging from these deliberations is that, broadly speaking, a profession will imply any vocation carried on by an individual, or group of individuals, requiring predominantly intellectual skills, dependent on individual characteristics of the person(s) pursing that vocation, requiring specialized and advanced education or expertise.*
>
> *[Emphasis, by underlining, supplied by us now]*

8. There is no change in the legal position; nothing contrary to the decision so rendered has been brought to our notice. Viewed in the light, software development service rendered by an individual, which essentially requires predominantly intellectual skill, dependent on individual characteristics of the person pursuing software development, and based on specialized and advanced education and expertise, is also a professional service. As regards the objection of the Assessing Officer that software development is not specifically covered by article 15(2), as evident from the opening words of this provision to the effect "the term 'professional services' includes (emphasis, by underlining, supplied by us)", the specific professions set out therein are only illustrative and not exhaustive. The emphasis is essentially on the nature of services, but then, as we have noted above, that test is satisfied on the facts of this case. While dealing with the scope of services which are covered by article 15, it is important to bear in mind the fact that there could indeed be overlapping effect of the scope of services covered by the other articles but as long as the services are rendered by an individual or group of individuals, generally rendition of such services is covered by article 15. The exclusion clause set out in article 12(5)(e) typically exemplifies this approach. We may, in this regard, also refer to the observations made by a coordinate bench of this Tribunal, in the case of Linklaters LLP Vs ITO [(2011) 9 ITR Tri 217 (Mum)], as follows:

> *105. Learned counsel has also contended that the professional services can only be taxed under the head art. 15 and in case chargeability under art. 15 fails, that is end of the road. It cannot be open to Revenue authorities to tax income from professional services under art. 7. It is contended that art. 15 applies only to individuals. As to the situations in which art. 5 will apply in respect of the professional services and the situations in which art. 15 of the India-UK tax treaty, which is in pari materia with art. 14 of the UN Model Convention, will apply, we find guidance from the following observations made in the UN Model Convention Commentary:*
>
> > *"The Group discussed the relationship between art. 14 and sub-para 3(b) of art. 5. It was generally agreed that remuneration paid directly to an individual for his performance of activity in an independent capacity was subject to the provisions of art. 14. Payments to an enterprise in respect of the furnishing by that enterprise of the activities of employees or other personnel are subject to arts. 5 and 7. The remuneration paid by the enterprise to the individual who performed the activities is subject either to art. 14 (if he is an independent contractor engaged by the*

> *enterprise to perform the activities) or art. 15 (if he is an employee of the enterprise). If the parties believe that further clarification of the relationship between art. 14 and arts. 5 and 7 is needed, they may make such clarification in the course of negotiations."*
>
> *(Emphasis, by underlining, supplied by us)*

106. We are in considered agreement with this analysis in the UN Model Convention Commentary. We are thus of the considered view that, in a situation like the one that we are in seisin of, i.e. in which specific provisions for professional services or independent personal services or included services exist under art. 15, when services are rendered by the enterprise, art. 5(2)(k) will come into play, and when services are rendered by an individual, art. 15 will find application…….

9. The applicability of article 15, therefore, is also substantially influenced by the status of the recipient- i.e. whether he is an individual or whether he is a corporate entity. In the light of all these discussions, in our considered view, the services rendered by the assessee are in the nature of professional services but then since the conditions set out in article 15(1) are admittedly not satisfied on the facts of this case, the taxability under article 15 does not arise. As a corollary to our finding that the services in question are in the nature of professional services, and by the virtue of exclusion clause in article 12(5)(e), which provides that the income from professional services rendered by an individual or group of individuals (other than a company) cannot be subjected to tax under article 15, the consideration for these services cannot be taxed under article 12(4) either. Revenue's case for taxability under article 12(4) is thus clearly unsustainable in law and on the facts of this case. Learned CIT(A) was thus quite correct in this conclusions. We uphold his conclusions and decline to interfere in the matter.

42. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench. Respectfully following the same, we uphold the grievance of the assessee and direct the Assessing Officer to delete the tax withholding demand so far as US based recipient is concerned.

43. The relevant treaty provisions in the Indo UK tax treaty are not any different either. These provisions are reproduced below for ready reference:

Article 13(5) – Fees for technical services

5. The definition of fees for technical services in paragraph 4 of this Article shall not include amounts paid:
é é é é
é é é ....
é é é é ..
(e) to an employee of the person making the payments **or to any individual or partnership for professional services as defined in Article 15 (Independent personal services) of this Convention.**

Article 15- Independent Personal Services

1. Income derived by an individual, whether in his own capacity or as a member of a partnership, who is a resident of a Contracting State in respect of professional services or other independent activities of a similar character may be taxed in that State. Such income may also be taxed in the other Contracting State if such services are performed in that other State and if :

(a) he is present in that other State for a period or periods aggregating to 90 days in the relevant fiscal year ; or

(b) he, or the partnership, has a fixed base regularly available to him, or it, in that other State for the purpose of performing his activities ;

but in each case only so much of the income as is attributable to those services.

2. For the purposes of paragraph 1 of this Article an individual who is a member of a partnership shall be regarded as being present in the other State during days on which, although he is not present, another individual member of the partnership is so present and performs professional services or other independent activities of a similar character in that State.

3. The term "professional services" includes independent, scientific, literary, artistic, educational or teaching activities as well as the independent activities or physicians, surgeons, lawyers, engineers, architects, dentists and accountants**.**

44. As the related provisions are materially similar, even in the case of the UK based person, the payments made for the professional services cannot be taxed as fees for technical services, and these payments cannot be taxed as independent personal services either as the conditions set out in Section 15(2) are not satisfied. As regards the requirement of tax residency certificate, referred to in the impugned order, we are unable to see any legal basis for this observation. We reject the same. In view of these discussions and bearing in mind entirety of the case, we uphold the

grievance of the assessee in respect of UK based receipt as well. The Assessing Officer will delete this tax withholding demand as well.

45. Ground no. 3 is thus allowed.

46. In ground no. 4, the grievance raised by the assessee is as follows:

> ***4 Data processing charges paid to Ford Espana treated as Fees for Technical services and consequently held that such payments attract withholding tax liability.***
>
> ***4.1 The learned C1T(A) erred in law and in facts of the case by confirming that the data processing charges amounting to INR 10.58,295 paid to Ford Espana qualify as Fees Technical services under section 9(1)(vii) of the Act.***
>
> ***4.2 The learned CIT(A) erred in denying the benefit of applying the Most Favored Nation clause under paragraph 7 of the protocol to the India-Spain DTAA, based on which the Appellant had applied the restricted scope of taxation contained in India's DTAA with Portugal or USA or UK. which had come into force after 01 January 1990.***
>
> ***4.3 The learned C1T(A) erred in law by affirming that the protocol governs the rate of taxation and not incidence of taxability.***

47. The relevant material facts are as follows. During the relevant previous year, the assessee made a payment of Rs 10,58,295 to Ford Espana Spain towards payment of data processing charges. The case of the assessee was that in view of the protocol to India Spain Double Taxation Avoidance Agreement [(1995) 214 ITR (St) 197; **Indo Spanish tax treaty**, in short], ómake availableô requirement is to be read into the provisions for taxation of fees for technical services, and that rendition of data processing services do not make available any technical knowledge, skill etc. The Assessing Officer rejected this plea on the ground, inter alia, that óprotocol is not about incidence of taxability but about rate of taxô and also on the ground that, for the purpose of applying protocol benefits, only treaties entered subsequent to the signing of Indo Spanish tax treaty are to be taken into account. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The CIT(A) rejected the plea and reiterated the stand of the Assessing Officer. 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.

49. We consider it appropriate to begin with reproducing the relevant extracts from the protocol to the Indo Spanish DTAA which provides as follows:

> 7. The competent authorities shall initiate the appropriate procedures to review the provisions of Article 13 (Royalties and fees for technical services) after a period of five years from the date of its entry into force. However, if under any Convention or Agreement between India and a third State which is a Member of the OECD, which enters, into force after 1st January, 1990, India limits its taxation at source on royalties or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of incomes, the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this convention with effect from the date on which the present Convention comes into force or the relevant Indian Convention or Agreement, whichever enters into force later
>
> *[Emphasis, by underlining etc, supplied by us]*

50. There is no dispute that in the Indo Spanish DTAA, vide article 12(4), 4.the term "fees for technical services" is defined as ñpayments of any kind to any person other than payments to an employee of the person making the payments and to any individual for independent personal services mentioned in Article 15 (Independent Personal Services), in consideration for the services of a technical or consultancy nature, including the provision of services of technical or other personnelò and this definition is wide enough to cover the data processing charges. However, it is important to bear in mind the fact that by the virtue of the protocol clause reproduced above, in case India enters into any DTAA, coming into force after 1st January 1990, with any OECD Member State which provides for a lower rate or narrower scope than the provisions in the Indo Spanish DTAA, the same rate or the same scope will apply to Indo Spanish DTAA as well. In this light, let us take a look at the definition of fees for technical services in Indo UK DTAA which, inter alia, states as follows:

> 4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which:
>
> (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received ; or
>
> (b are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received ; or

(c) **make available technical knowledge, experience, skill know-how or processes,** or consist of the development and transfer of a technical plan or technical design.

[Emphasis, by underlining, supplied by us]

51. We have noted that this protocol clause does not require any additional steps to be taken by the contracting states to give effect to such lower scope of the fees for technical services. In this view of the matter, and for the detailed reason set out in dealing with ground no. 2 of this appeal in respect of implementation of MFN clause in protocol as also scope of make available clause in tax treaties- which we need not set out again for the sake of brevity, the plea of the assessee indeed merits acceptance. The observations made in paragraphs 31 to 36, earlier in this order, apply here as well. As for the nature of data processing fees, it does not enable the recipient of service to perform the same service again on its own without recourse to the service provider. The ómake availableô clause is thus clearly not satisfied. It cannot also be treated as payment for use of equipment as the payment is for processing of data as a service package and not for the control and use of the equipment on which data is processed- a proposition duly supported by the coordinate bench decision in the case of **Kotak Mahindra Primus Ltd Vs DDIT [(2006) 11 SOT 578 (Mum)].** Accordingly, the tax withholding demand in respect of this payment of Rs 10,58,295 must also stand deleted.

52. Ground no. 4 is thus allowed.

53. In the result, the appeal of the assessee is allowed.

54. We now move to the appeal filed by the Assessing Officer for the assessment year 2012-13.

55. Ground no. 1 is general and does not call for any specific adjudication.

56. In ground no. 2, the Assessing Officer has raised the following grievance:

2. The ld. CIT(A) erred in deleting the tax and interest levied u/s 201(1)/201(1A) of the Income Tax Act 1961 by the assessing officer on account of non deduction of tax at source in respect of payments made by the assessee to following parties :-

S.No.	*Name of the Party*	*Amount*	*Nature of payment*
1.	*Autoconsol (Thailand) Co. Ltd.*	*1,42,98,185*	*Regular preventive maintenance of B517 Sash returnable steel racks*

2.1 The ld. CIT(A) failed to appreciate that the services rendered by the above parties to the assessee fails within the meaning of fee for Technical services (FTS) as per explanation 2 to Sec.9(1)(vii)of Income Tax Act, hence the assessee was liable to deduct tax on the same.

2.2 The ld. CIT(A) erred in holding that Article 12 of DTAA with Thailand provides only for taxation of royalty and the fee for technical services is not defined and therefore same was in the nature of "business profit" fails within the ambit of Article 7 of DTAA as per which business profit can be taxed in India only if the enterprises carries on business in India through PE situated in India and thus the assessee was not liable for deduction u/s 195 in respect of these payments.

2.3 The ld. CIT(A) erred in not considering the Circular No.333 dated 02/04/1982 of the CBDT as per which when there is no specific provision in the agreement ,it is basic law i.e. the Income Tax Act will govern the taxation of income

2.4 The Ld.CIT(A) failed to appreciate that as the services rendered by the non-resident in Thailand fall within the definition of fee for technical service as per Income tax Act, there is no requirement for PE in India and the same is taxable in India and hence the assessee ought to have deducted TDS on the said payments.

57. Learned representatives fairly agree that the material facts and circumstances of the case are the same as of the assessment year 2011-12 and whatever we decide for the assessment year 2011-12 on similar issue will also apply mutatis mutandis for this assessment year as well. Though there is difference in the name of the recipient but the nature of transaction as also the applicable tax treaty are the same. Therefore, following the view taken by us while dealing with similar ground earlier in this order, i.e. ground no. 2 in Assessing Officer's appeal for the assessment year 2011-12, we reject the grievance of the Assessing Officer and confirm the relief granted by the CIT(A).

58. Ground no. 2 is dismissed.

59. In ground no. 3, the Assessing Officer has raised the following grievance:

3. The ld. CIT(A) erred in deleting the tax and interest levied u/s 201(1)/201(1A) of the Income Tax Act 1961 by the assessing officer on account of non deduction of tax at source in respect payments made by the assessee to following parties :-

S.No.	*Name of the Party*	*Country*	*Amount (Rs)*	*Nature of service*
1.	*Ford Corporate & Employee Insurance*	*USA*	*2,27,754*	*Fire protection Engineering services*
2.	*Ford Group Philippines*	*Philippines*	*10,56,462*	*Everest media ride and drive reimbursement of*

				expenses
3.	***Ford Motor Company***	***USA***	***25,97,283***	***Fire protection Engineering services***
4.	***Ford Motor Company***	***USA***	***26,84,142***	***Reimbursement of actual costs on environmental resources management***

3.1 The ld. CIT(A) failed to appreciate that the assessee has not produced any agreement with parent company for reimbursement and in the absence of an agreement, the above payments have to be treated as fee for annual maintenance charges attracting tax as per explanation 2 to Sec.9(1)(vii) of the Act and the assessee was liable for deduction of tax at source.

3.2 The ld. CIT(A) erred in holding that the remittance by way of reimbursement of expenses, has no 'income' element embedded in it, and therefore does not attract tax deduction at source u/s. 195(1).

3.3 The Ld.CIT(A) erred in not considering the decision of the Hon'ble Kerala High Court in the case of Cochin Refineries Ltd. Vs. CIT reported in 222 ITR 354 (Ker) (1996), where the Hon'ble court has held that TDS is applicable even in reimbursement of expenses.

3.4 The Ld. CIT(A) erred in not considering the decision of the Delhi Tribunal in the case of HNS India VSAT Inc. Vs. DDIT, wherein it is held that "in view of the fact, that no application was made by the assessee u/s. 195(2) to Assessing Officer, assessee was under obligation to deduct tax at source from payments made to sub-contractors in terms of Section 195(1), having failed to do so, Assessing Officer was fully justified in making additions

60. In this case also, the line of reasoning adopted by the Assessing Officer was somewhat similar to the issue in ground no. 3 of the Assessing Officerôs appeal for the assessment year 2011-12. The Assessing Officer held these payments as fees for technical service under section 9(1)(vii) and brought them to tax accordingly.

61. Aggrieved, assessee carried the matter in appeal before the CIT(A) and the CIT(A), following his order for the assessment year 2011-12 inn assesseeôs own case, upheld the contentions of the assessee. The Assessing Officer is aggrieved of the relief so granted and is in appeal before us.

62. 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.

63. We find that the Assessing Officer had completely lost sight of the fact that in the Indo US tax treaty there is ómake available" clause in the fees for technical services, which is termed as fees for included services in the said treaty, and it is not even the case of the Assessing Officer that the rendition of services resulted in any transfer of technology in the sense that recipient of service, even if any, as enabled to perform such a service on his own without recourse to the service provider. As for the India Philippines DTAA, we have noted that it does not provide for taxability of fees for technical services. There was thus no occasion to invoke the domestic law provisions as the case of the revenue failed on the treaty provisions itself. In view of these discussions, as also referring to the detailed discussions in respect of ground nos 2 and 3 in Assessing Officer's appeal for the assessment year 2011-12, we uphold the relief granted by the CIT(A) and decline to interfere in the matter.

64. Ground no. 3 is thus dismissed

65. In the result, the appeal of the Assessing Officer for the assessment year 2012-13 is dismissed.

66. We now take up the appeal filed by the assessee for the assessment year 2012-13.

67. Ground no. 1 is general and does not call for any adjudication.

68. In ground no. 2, the assessee has raised the following grievance:

> ***2. Installation and commissioning charges paid to non-residents treated as Fees for technical services and consequently held that such payments attract withholding tax liability.***
>
> ***2.1 The learned CIT(A) erred in holding that the following remittances in the nature of installation and commissioning charges qualify as Fees for technical Services under the provisions of section 9(1)(vii) of the Income-tax Act, 1961 ('the Act')***

	Parties	***Country***	***Amount (INR)***
a)	***CK Industrial Engineers Ltd***	***UK***	***961,709***
b)	***Dominion Technologies***	***USA***	***29,52,620***
c)	***Flow Systems Inc.***	***USA***	***440,252***
d)	***Froude Hofmann Ltd***	***UK***	***22,29,650***
e)	***JW Froehlich (UK) Ltd***	***UK***	***760,274***

f)	***Marposs Ltd***	***UK***	***651,287***

2.2 The learned C1T(A) failed to appreciate that installation and commissioning was a pan of the composite contract to purchase the imported machineries and the same does not qualify as Fees for technical services/Fees for included services under the respective articles of the Double Taxation Avoidance Agreement ('DTAA').

2.3 Without prejudice to the above grounds, the learned CIT(A) failed to appreciate that the services had not been made available to the Appellant and consequently the charges paid would not qualify as Fees for technical services/ Fees for included services under the respective articles of the DTAA.

69. Learned representatives fairly agree that all the material facts and circumstances of this issue are materially the same as in ground no. 2 in assessee's appeal for the assessment year 2011-12, and, therefore, whatever we decide for the assessment year 2011-12 will apply *mutatis mutandis* to this assessment year as well. Vide our order on this issue earlier in this order, and for the detailed reasons set out in this order earlier dealing with scope of make available clause in the related treaties, we uphold the plea of the assessee. It is not even the case of the Assessing Officer that the assessee, i.e. recipient of services, was enabled to use these services in future without recourse to the service providers. The tests laid down by Hon'ble Courts in Guy Carpenter *(supra)* and De Beers *(supra)* were clearly not satisfied. For this short reason alone, the amounts in question were not taxable as fees for technical services under the provisions of the respective tax treaties. It is not, and it cannot be, anybody's case that by rendering installation and commissioning services, the recipient of such services is enabled to perform the same task next time without recourse to the service provider. For this short reason alone, the plea of the assessee merits acceptance. We need not even deal with other contentions raised by the assessee which remain open. The income embedded in these payments are thus not taxable as FTS, and it is not even the case of the revenue that the installation period crossed the PE installation threshold limit. These amounts cannot be taxed as business profits either. There is no other treaty provision under which these amounts can be brought to tax in India under the respective tax treaty. The law is well settled, we may add at the cost of repetition, 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, "the provisions of this (i.e. Income Tax) Act shall apply to the extent they are more beneficial to that assessee". When the amounts are not taxable under the provisions of the respective tax treaties, there cannot be any occasion to deal with the provisions of the Income Tax Act. We, therefore, disapprove the conclusions arrived at by the CIT(A) and direct the Assessing Officer to delete the related disallowance.

70. Ground no. 2 is thus allowed.

71. In ground no. 3, the assessee has raised the following grievance:

> ***3. Modification, installation and commissioning charges paid to non-residents treated as Fees for technical services and consequently held that such payments attract withholding tax liability.***
>
> ***3.1 The learned CIT(A) erred in law and in facts of the case by confirming that the following remittances qualify as Fees for technical services under section 9(1)(vii) of the Act.***

	Parties	*Country*	*Amount (INR)*
a)	*Cinetic Filling*	*France*	*1,18,170*
b)	*Movomech International AB*	*Sweden*	*1,753,857*
c)	*One Too*	*France*	*7,43,938*

> ***3.2 The learned CIT(A) erred in denying the benefit of applying the Most Favored Nation clause as per the protocol to the India-France and India-Sweden DTAAs, based on which the Appellant had applied the restricted scope of taxation contained in India's DTAA with Portugal or USA or UK.***
>
> ***3.3 The learned CIT(A) failed to appreciate that installation and commissioning was a part of the composite contract to purchase the imported machineries and the same does not qualify as Fees for technical services / Fees for included services under the respective articles of the DTAA.***
>
> ***3.4 Without prejudice to the above grounds, the learned CIT(A) failed to appreciate that the services had not been made available to the Appellant and consequently the charges paid would not qualify as Fees for technical services / Fees for included services under the respective articles of the DTAA.***

72. Learned representatives fairly agree that the outcome of this ground will depend on what we decide, on the scope of MFN clause and scope of make available clause in tax treaties, in ground nos 3 and 4 in assesseeôs appeal for the assessment year 2011-12. Both these issues, as concluded earlier in this order, are decided in favour of the assessee. In view of these discussions earlier on the scope of MFN clause in the protocol, and decisions of a coordinate bench dealing with Indo French tax treaty in the case of **DCIT Vs ITC Ltd [(2002) 83 ITD 249 (Kol)]** as also the decision in assesseeôs own case in respect of Indo Swedish tax treaty in

paragraphs 31 to 36 above, we find that the issue is covered in favour of the assessee inasmuch as ómake availableô clause is required to be read into the relevant treaty provision for fees for technical service and since it is not even the case of the Assessing Officer that the rendition of services resulted in any transfer of technology, we uphold the plea of the assessee and direct the Assessing Officer to delete the tax withholding demands in question. The assessee gets the relief accordingly.

73. Ground no. 3 is thus allowed.

74. In ground no. 4, the assessee has raised the following grievance:

> ***4. Payment for advisory services made to Deutsche Bank, Singapore treated as fees for technical services and consequently held that such payments attract withholding tax liability.***
>
> ***4.1 The learned CIT(A) erred in holding that the remittance of INR 1,70,80,437 made to Deutsche Bank, Singapore for advisory services qualifies as Fees for technical Services under section 9(1)(vii) of the Act.***
>
> ***4.2 The learned CIT(A) failed to appreciate that fees paid to Deutsche Bank for their assistance in arranging financial support from various export credit agencies, which is in the nature of normal banking services, is not subject to tax in India.***
>
> ***4.3 Without prejudice to the above grounds, the learned CIT(A) failed to appreciate that the services had not been made available to the Appellant and consequently the charges paid would not qualify as Fees for technical services under the India- Singapore DTAA.***

75. There is no dispute that the assessee had made a payment of advisory fees, for arranging finance, to Deutsche Bank Singapore. The Assessing Officer was of the view that this payment is in the nature of fees for technical services under section 9(1)(vii) and the assessee, therefore, ought to have deducted tax at source from the said remittance. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

76. 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 positon.

77. We find this issue is covered, in favour of the assessee, by a coordinate bench decision in the case of **DCIT Vs Andaman Food Products Pvt Ltd [(2012) 18 ITR Trib 509 (Kol)]** wherein it was, inter alia, observed as follows:

6. There is no, and cannot be any, dispute with the basic legal position, as inherent in the scheme of the Indian Income Tax Act under section 90, that the provisions of a duly notified double taxation avoidance agreement will override the provisions of the Income Tax Act, unless, and to the extent, the latter are beneficial to the assessee. As Late Prof. Klaus Vogel, in his oft referred book 'Klaus Vogel on Double Taxation Conventions', had observed that, "the treaty acts like a stencil that is placed over the pattern of domestic law and covers over certain parts". Dr. Vogel's perception on this issue quite appropriately sums up the legal position in India as well. A tax treaty essentially restricts the rights of the source state on taxation of an income arising therein, inasmuch as residence country generally has unqualified right to tax global income of its tax subjects anyway, and, therefore, it is useful to begin by examining, from a source country's perspective, whether the income in question can at all be taxed in the source state under the applicable tax treaty. Let us, therefore, begin by examining the taxability of consultancy fee paid to GMPL in the light of applicable tax treaty provisions.

7. We find that there is no dispute with the factual position that the GMPL did not have any permanent establishment in India, and with the legal principle laid down in the applicable tax treaty that, in the absence of the PE of GMPL, its business profits could not be taxed in India. The taxability under the source state under Article 7 of the applicable tax treaty, therefore, clearly fails. We further find that so far as taxability under Article 12, i.e. with respect to 'Royalties and fees for technical services' is concerned, we find that Article 12(4) provides that, "The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services : (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or (c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein." A plain reading of this provisions makes it clear that the case of the GMPL could at best fall in 12(4)(b) but, even for this, it is a condition precedent that the services should enable the person acquiring the services to apply technology contained therein, but then it is nobody's case that services rendered by the GMPL were such that the assessee was enabled to apply technology contained therein. The services were simply consultancy services which did not involve any transfer of technology. The amounts received by the GMPL could not be taxed as 'fees for technical services either. As a matter of fact, learned Departmental Representative submits that the CIT(A) was quite justified in holding that the income in the hands of the GMPL is neither taxable as a business income under article 7 of as fees for technical service under article 12, even though learned Director of Income Tax (International Taxation) Shri Sanjay Kumar, who was present in the court room in connection with some other case, immediately got up to disown this argument and submit that the views so expressed by the learned Departmental

Representative are quite at variance with the stand being taken by the directorate of international taxation in all other cases. That does not make any difference to our decision on this issue, because even without this benevolence of the learned Departmental Representative, we will still come to the same conclusion. The reason is this. There are at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi High Court in the case of DIT Vs Guy Carpenter & Co Ltd (2012 TII 14 HC DEL INTL) and Hon'ble Karnataka High Court in the case of CIT Vs De Beers India Pvt Ltd (TS-312-HC-2012), in favour of the assessee, and there is no contrary decision by Hon'ble jurisdictional High Court or by Hon'ble Supreme Court. We bow before higher wisdom of Hon'ble Courts above and hold that unless there is a transfer of technology involved in technical services extended by Singapore company, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under Article 12(4) of India Singapore tax treaty. Learned Departmental Representative, however, proceeds to give a new twist to the case of the revenue. Learned Departmental Representative has now come up with the argument that even if the income embedded in payments to GMPL were not taxable in India under Article 7 (i.e. business profits) or under Article 12, these amounts were taxable under article 23 of the applicable tax treaty. He invites our attention to Article 23 which provides that " (i)tems of income which are not expressly mentioned in the foregoing Articles of this Agreement may be taxed in accordance with the taxation laws of the respective Contracting States." His interpretation of the scope of this provision is that when taxability fails under all articles of the applicable tax treaty, the taxability automatically arises under this provision. In other words, for example, when a business profit is not taxable under Article 7, this non taxability is not the end of the road so far as taxability in the source state is concerned, because, according to the learned Departmental Representative, the taxability of business profit in such a situation, though not taxable under article 7, automatically shifts to the taxability under article 23, effectively under the domestic laws of the source state. He has also filed a note, though more little carefully worded than his arguments in the court room, which also lays lot of emphasis on the scope of article 23, as also the fact that the foreign company should "have approached the authority for advance ruling as per the provisions of sections 245N to 245V of the Income Tax Act, 1961 to be on the right side of the law, instead of failing to fulfil their tax obligations and presuming and assuming non applicability of certain provisions of the Income Tax Act vis-a-vis the DTAA between India and Singapore". Learned Departmental Representative goes on to state that "the assesse has preferred the tortuous (path) over the strai ght". Learned Departmental Representative has also laid lot of emphasis about, what he perceives as, learned CIT(A)'s categorical finding that the payments made to GMPL were in the nature of 'other income' and, therefore, should be taxed under article 23 of the Indo Singapore tax treaty.

8. As for learned Departmental Representative's reference to the alleged finding of the CIT(A) regarding the amount having been paid to GMPL falling within category of the "other sum", it is important to note that the CIT(A) h ad stated that "Section 40(a)(i) of the Income Tax Act provides that in computing income of an assessee under the head 'profits and gains of business', deduction will not be allowed for any

expenditure being royalty, fees for technical services and other sum chargeable under the Act, if it is payable outside India, or in India to a non resident, and on which tax is deductible at source under Chapter XVII B and such tax has not been deducted", and it wa s in this context that the CIT(A) noted that though the fee paid to GMPL was not covered by fees for technical services, it could fall under the head 'other sum' but since the said other sum was not chargeable to tax in India, the assessee did not have any tax withholding obligation. This classification of income was not in the context of treaty classification but in the context of, what he believed to be, two categories of income referred to under section 40(a)(i), i.e. 'royalties and fees for technical services' and 'other sums chargeable to tax'. As the CIT(A) did so, he missed out the expression 'interest' appearing in Section 40(a)(i) but that is hardly material in the present context. What is material is that the expression 'other income' was used in the context of mandate of Section 40(a)(i) and not in the context of treaty classification of income. Learned Departmental Representative has clearly missed out this vital fact. Let us now tum to the provisions of Article 23 of the applicable tax treaty. As we have noted earlier, this treaty provision provides that "items of income which are not expressly mentioned in the foregoing Articles of this Agreement may be taxed in accordance with the taxation laws of the respective Contracting States". Learned Departmental Representative's argument is that "consultancy charges, brokerage, commission, and incomes of like nature which are payments which are covered by the expression "other sums" as stated in Section 40(a)(i) and chargeable to tax in India as per the Income Tax Act, and also liable to tax as per taxation laws of Singapore" are squarely covered by Article 23 of the India Singapore tax treaty. This argument proceeds on the fallacious assumption that 'other sums' under section 40(a)(i) constitutes an income which is not chargeable under the specific provisions of different articles of India Singapore tax treaty, whereas not only this expression 'other income' is to be read in conjunction with the words immediately following the expression 'chargeable under the provisions of this (i.e. the Income Tax Act 1961) Act', it is important to bear in mind that this expression, i.e. 'other sums, also covers all types of incomes other than (a) interest, and (ii) royalties and fees for technical services. Even busine ss profits are covered by the expression 'other sums chargeable under the provisions of the Act' so far as the provisions of Section 40(a)(i) and Section 195 are concerned and, therefore, going by this logic, even a business income, when not taxable under article 7, can always be taxed under article 23. That is clearly an absurd result. A tax treaty assigns taxing rights of various types of income to the source state upon fulfilment of conditions laid down in respective clauses of the treaty. When these conditions are satisfied, the source state gets the right to tax the same, but when those conditions are not satisfied, the source state does not have the taxing right in respect of the said income. When a tax treaty does not assign taxability rights of a particular kind of income to the source state under the treaty provision dealing with that particular kind of income, such taxability cannot also be invoked under the residuary provisions of Article 23 either. The interpretation canvassed by the learned Departmental Representative, if accepted, will render allocation of taxing rights under a treaty redundant. In any case, to suggest that consultancy charges, brokerage and commission can be taxed under article 23, as has been suggested by the learned Departmental Representative, overlooks the fact

that these incomes can indeed be taxed under article 7, article 12 or article 14 when conditions laid down in the respective articles are satisfied.

9. It is also important to bear in mind the fact that article 23 begins with the words 'items of income not expressly covered' by provisions of Article 6-22. Therefore, it is not the fact of taxability under article 6-22 which leads to taxability under article 23, but the fact of income of that nature being covered by article 6-22 which can lead to taxability under article 23. 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 articles 6-22) etc. In our humble understanding, therefore, article 23 does not apply to items of income which can be classified under sections 6-22 whether or not taxable under these articles, and the income from consultancy charges on is covered by Article 7, Article 12 or Article 14 when conditions laid down therein are satisfied. Learned Departmental Representative's argument, emphatic and enthusiastic as it was, lacks legally sustainable merits and is contrary to the scheme of the tax treaty. While dealing with the scope of residuary article of income under the tax treaties, and in support of the above conclusions, we may also refer to certain observation, with which we are in most respectful agreement, made by the Hon'ble Justice P V Reddi, articulating the views of the Authority for Advance Ruling in the case of Gearbulk AG (318 ITR 66), and in his felicitous words as follows

……The question is whether the profits from the shipping operations in international traffic can be said to be "an item of income" "not dealt with" in the previous articles of DTAA ? We do not think so. Among the various items of income in the foregoing articles, business profits into which the shipping income falls has been dealt with under article 7. Profits from the international operation of ships are only a species of business profits just as the profits from international air transport. The latter is dealt with separately in article 8 for the reason that it does not fall in line with the scheme of taxation of business profits under article 7. Exclusive right is given to the State in which the enterprise resides. Permanent Establishment test is irrelevant under article 8. Hence, a separate article. As far as the profits from international operation of ships are concerned, it is an integral part of business profits; at the same time, they are excluded from the business profits - article for the obvious reason that it is not intended to be covered by the Treaty. That income has been left to the care of domestic law under which the burden of taxation on such income has been minimized (vide section 172 of Income-tax Act). We are of the considered view that a particular species of income which is specifically referred to in article 7 and deliberately left out of its genus, namely business profits, cannot be said to be an item of income not dealt with under article 7. The expression 'deal with' is a comprehensive expression having different shades of meaning. In the New Chambers Thesaurus, the meanings of'deal with' are given thus:

"1. deal with a situation, attend to, concern, see to, manage, handle, tackle, cope with, get to grips with, take care of, look after, sort out, process."

In Collins Cobuild English Language Dictionary, it is stated thus:

"If a book, speech, film etc. deals with a particular thing, it has that thing as its subject or is concerned with it."

In Shorter Oxford Dictionary (Thumb Index Edn.) one of the meanings given is:

"be concerned with (a thing) in any way; busy or occupied oneself with, esp. with a view to discuss or refutation."

The following meaning given in the New Oxford American Dictionary may also be noted :

"take measures concerning (someone or something) ……. take or have as a subject; discuss."

……...

9.1 The applicant's counsel submitted that an item of income can be said to have been dealt with in an article of the Treaty only if it defines its scope as well as allocates the right to tax such income between the two Contracting States. Mere exclusion of shipping business profits from article 7 does not amount to dealing with that item of income. We find it difficult to accept this contention. Allocation of taxing right to the source State can well be done by such a process of exclusion. There is no particular manner or methodology of achieving that result. The expression 'dealt with' does not necessarily mean that there should be a detailed or elaborate treatment of the subject

10. Clearly, therefore, the income from consultancy services, which cannot be taxed under article 7, 12 or 14 because conditions laid down therein are not satisfied, cannot be taxed under article 23 either. It is also only elementary that when recipient of an income does not have the primary tax liability in respect of an income, the payer cannot have vicarious tax withholding liability either. This position is independent of the payer having moved an application under section 195 or not, or on the payer or the payee having obtained an advance ruling in their favour or not. The law is now very well settled in this regard by Hon'ble Supreme Court's judgment in the case of GE India Technology Centre Pvt Ltd Vs CIT (supra) wherein Their Lordships have categorically held that, "where a person responsible for deduction is fairly certain, then he can make his own determination as to whether the tax was deductible at source and, if so, what should be the amount thereof". In view of these discussions, and bearing in mind entirety of the case, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

78. The approach so adopted by the coordinate bench has approval of the Hon'ble jurisdictional High Court in the case of Bangkok Glass Industry *(supra)* wherein Their Lordships declined to examine taxability of a receipt in the nature of fees for technical service, which failed the test of taxability under the respective treaty provision, under 'other income' clause of the treaty. This aspect of the matter and the impact of Hon'ble jurisdictional High Court's decision in the case of Bangkok Glass Industry *(supra)* has been discussed at length in dealing with ground of appeal no. 2 of the appeal by the Assessing Officer for the assessment year 2011-12. We rely upon the said analysis in this context as well. As the issue regarding approaching the residuary income clause, in a case in which the FTS tests fail, is covered by the decision of Hon'ble jurisdictional High Court, it is not even necessary to deal with how other Hon'ble High Courts have dealt with the issue. In view of Hon'ble jurisdictional High Court's aforesaid decision on the issue, and in the absence of any Hon'ble Supreme Court decision to the contrary, the view so take by the coordinate bench decision holds good in law. Respectfully following the view so taken by the coordinate bench, which is also in harmony with Hon'ble Delhi High Court in the case of Guy Carpenter *(supra),* Hon'ble Karnataka High Court in the case of De Beers India *(supra)* and Hon'ble jurisdictional High Court decision on this issue in the case of Bangkok Glass Industries *(supra),* we uphold the grievance of the assessee. This tax withholding demand must also, therefore, stand deleted. We order so.

79. Ground no. 4 is thus allowed.

80. In ground nos. 5, the assessee has raised the following grievances:

5. Remittances to non-residents towards software installation and annual license fees treated as fees for technical services and consequently held that such payments attract withholding tax liability.

5.1 The learned CIT(A) erred in holding that the following remittances towards software installation, configuration and annual license fees qualifies as Fees for Technical services under section 9(1)(vii) of the Act.

	Parties	***Country***	***Amount (INR)***
a)	***MDT Inc***	***USA***	***13,10,830***
b)	***Systran Software Inc***	***USA***	***2,08,558***

5.2 The learned CIT(A) has failed to recognize that the payment for offsite installation and onsite support was a part of the composite contract to purchase and configure the autosave software on account of which the

related payments would not qualify as Fees for included services under India-US DTAA.

5.3 Without prejudice to the above grounds, the learned CIT(A) failed to appreciate that the services had not been made available to the Appellant and consequently the amount paid would not qualify as fees for included eservices under India-US DTAA.

81. So far as this ground of appeal is concerned, during the course of proceedings before the Assessing Officer, the payment of Rs 13,10,830 was made to MDIT Inc for installation and extended support of change management software system, which was in the nature of off the shelf software. The payment of Rs 2,08,558 to Systems Software Inc. was in respect of annual licence fees for products in the nature of software. During the proceedings before the Assessing Officer, it was noted that the claim of the assessee is that these payments are neither in the nature of fees for technical services nor royalty, as defined under Article 12 of Indo US tax treaty, and, as such, the assessee did not have any tax withholding obligations. The Assessing Officer, however, rejected this plea and held as follows:

> The submissions of the company is carefully considered. However, the same is not acceptable. In respect of above payments, the same is made towards annual fees and towards software support services which is continuously provided to the company for utilizing technical knowledge by way of licence fees and the same is imparted to the company by technically qualified persons, the technical skill is provided to the company in installing software and for maintaining the same without break which falls under the category ñfees for technical servicesô as per section 9(1)(vii) of the Income Tax Act. Hence, it is held that the assessee should have deducted tax at source from the remittances made to the above parties at 10% of the amount paid.

82. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. In a brief order, the CIT(A) upheld the action of the Assessing Officer and declined to interfere in the matter. The assessee is not satisfied and is in further appeal before us.

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

84. We find that as far as software payments are concerned, as the law stands now in the light of Hon'ble jurisdictional High Court's judgment in the case of CIT Vs Vinzas Solutions India Pvt Ltd (TA No. 861 of 2016; judgment dated 4th January 2017), these payments are not taxable as royalty even under the provisions of the Income Tax Act. In any event, under the provisions of the Indo US tax treaty and as is held by a number of coordinate bench decisions, the use of copyrighted article cannot result in taxation of consideration for the same as royalty. As for the support services, this is not, and cannot be, anyone's case that these services resulted in any transfer of technology and thus satisfied the make available clause in FTS taxation provisions under the Indo US tax treaty. The authorities below have simply

proceeded to apply the domestic law, in respect of FTS, without any regard to the overriding treaty provisions. In view of these discussions, as also bearing in mind entirety of the case, we uphold the plea of the assessee and direct the Assessing Officer to delete the tax withholding demand in respect of these payments as well.

85. Ground no. 5 is also thus allowed.

86. In ground no. 6, the assessee has raised the following grievance:

> ***6. Others***
>
> ***6.1 The learned CIT(A) erred in law by failing to adjudicate on the taxability of the following remittances :***

	Parties	***Country***	***Amount (INR)***
a)	***Ford Motor Company of Australia Ltd***	***Australia***	***1,00,81,008***
b)	***Visteon Electronics Corporation***	***USA***	***302,400***

> ***Without prejudice to the above, the aforesaid payments were a part of the composite contract to purchase the imported machineries and the same does not qualify as Fees for technical services/Fees for included services under the respective articles of the Double Taxation Avoidance Agreement ('DTAA').***
>
> ***6.3 Without prejudice to the above, that aforesaid services have not made available any technical know-how or knowledge to the Appellant and consequently the charges paid would not qualify as Fees for technical services/Fees for included services under the respective articles of the DTAA.***
>
> ***6.4 The Appellant prays that directions be given to grant all such relief arising from the grounds of appeal mentioned supra as also all consequential relief thereto.***

87. Learned representative fairly agree that this issue has not been specifically adjudicated by the CIT(A) and there is no discussions by even the Assessing Officer on as to how these payments satisfy ómake availableô under the respective treaty provisions for taxability of fees for technical services. The assessee has nevertheless filed the detailed submissions in support of his stand, which, as noted above, none of the authorities below have dealt with at all.

88. In this view of the matter, in our considered view, the matter should be restored to the file of the Assessing Officer for adjudication *de novo* by way of a speaking order, in accordance with the law as explained earlier in this order, and after giving a fair and reasonable opportunity to the assessee. We order so. We also

make it clear that unless the Assessing Officer can make out a case as to how the services, in consideration of which the impugned payments are made, satisfy the requirements of ómake availableôclause in Indo US and Indo Australia tax treaties, there cannot be any occasion to hold the assessee responsible for non-deduction of tax source from these payments.

89. Ground no. 6 is also thus allowed, though for statistical purposes.

90. In the result, the appeal of the assessee for the assessment year 2012-13 is thus allowed.

91. To sum up, the appeals filed by the Assessing Officer are dismissed and the appeals filed by the assessee are allowed. Pronounced in the open court today on 31st day of January, 2017.

Sd/-	***Sd/-***
G Pavan Kumar	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Chennai, the 31st day of January, 2017.

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

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Chennai benches, Chennai