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Three Digests of 8000 Important Judgments on Domestic Tax (4400 cases), Transfer Pricing (3100), International Tax (500 cases)

(Pronounced in the period from July 2015 to December 2018)

**By Dr. Sunil Moti Lala, Advocate
(assisted by Team at SML Tax Chamber)**

ENCLOSED :

INTERNATIONAL TAX DIGEST (500 CASES)

PREFACE

We have prepared summaries of 8000 important judgments pronounced in the period July-2015 to December-2018. The same have been segregated into 3 Digests viz. :

- i) Domestic Tax Digest (4400 Cases)
- ii) Transfer Pricing Digest (3100 Cases)
- iii) International Tax Digest (500 Cases)

In each of the aforesaid Digests the judgments have been classified into various categories and sub-categories to enable ease of reference. Further, each Digest has been indexed separately along with hyperlinks which would enable the reader to straightaway go to the relevant category or sub-category of cases. Also, the case have been sequenced in the priority of Supreme Court, High Court and Tribunal. The High Court and Tribunal cases in each category / sub-category have been further arranged alphabetically i.e. e.g. all Allahabad High Court cases in each category/sub-category are placed together followed by say Bombay High Court decision if any and so on. Similarly, thereafter the Tribunal cases in each category/sub-category are also arranged alphabetically as indicated above. We have also given the date of pronouncement and the appeal numbers in most cases so as to enable the judgments to be retrieved from the website of the respective Court or Tribunal. Thus, with the hyperlinks and control "F" function the reader would be able to locate at one place all decisions rendered by a particular Court or Tribunal with respect to a particular category or sub-category of cases.

The International Tax Digest of 500 cases pronounced in the period **July-2015 to December-2018** is enclosed. We hope you will find the said Digest useful.

I must thank and acknowledge the painstaking efforts put in by all my team members at SML Tax Chamber in assisting me in preparing the aforesaid Digests. I would particularly like to thank Advocate/C.A's Bhavya Sundesha, Tushar Hathiramani, Shilpa Dinavahi, Sejal Mistry, Sahil Sheth for supporting me in this endeavour to serve the Tax Fraternity. Special thanks to Bhavya for making the sub-categories of cases (a very time-consuming exercise) which would be of immense use to the Reader.

If there are any suggestions the same are most welcome. You may write to ITAT online or inbox me directly at office@smltaxchamber.com.

HAPPY READING !! HAPPY RESEARCHING !!

August 2019
Mumbai

Dr. Sunil Moti Lala

INTERNATIONAL TAX DIGEST (500 CASES)
(Pronounced in the period July 2015 to December 2018)

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a. **Permanent Establishment**

Fixed PE

1. The assessee i.e. Formula One World Championship ('FOWC'), a company incorporated under the laws of the United Kingdom, had entered into an agreement with FIA and Formula One Asset Management Ltd ('FOAM') (i.e. an associate company of FOWC) by way of which it was licensed all the commercial rights in the Championships for a period of 100 years. For the purpose of conducting a racing event i.e. the Formula one grand prix in India, FOWC entered into a Race Promotion Contract with Jaypee Sports International Ltd ('Jaypee') granting it the right to host, stage and promote the Formula One event in Buddh International Circuit in India for a consideration of USD 40 million for a period of 5 years. Vide a separate agreement, Jaypee had to two associated companies of FOWC. The High Court had held that the consideration paid to FOWC was not royalty under Article 13 of the DTAA and that Buddh International Circuit constituted FOWC's fixed place PE India since FOWC and its employees had full access to the Buddh International Circuit and FOWC was granted access for a period of 6 weeks at a time during each season / each race and that the access was for a period of 5 years i.e. the duration of the Race Promotion Contract and Jaypee's capacity to act was extremely limited. Accordingly, it held that FOWC carried on business in India within the meaning of expression under Article 5(1) of the DTAA. Referring to the arrangement between the assessee and its affiliates on one hand and Jaypee Sports on the other hand, the Apex Court observed that the arrangement clearly demonstrated that the entire event was taken over and controlled by FOWC and its affiliates and accordingly, rejected the assessee's stand that since the duration of the event was only 3 days, there was limited access granted which was not sufficient to constitute the degree of permanence necessary to establish a fixed place PE since for the entire period of race, the control was with FOWC. Further, it held that mere construction of the track by Jaypee was of no consequence while determining whether FOWC had disposal over the track. Accordingly, it upheld the findings of the High Court and held that the tests laid down for constitution of a PE viz. stability, productivity and dependence were satisfied. It concluded that the Buddh International Circuit was the fixed place of business at the disposal of FOWC and that the taxable event i.e. earnings from the grand prix had taken place in India and therefore FOWC was liable to pay tax in India on such income earned by it. However, it clarified that TDS obligation of Jaypee u/s 195 on the payments made to FOWC was limited to the appropriate portion of income which is chargeable to tax in India and directed the AO to compute the same.

Formula One World Championship Ltd. [TS-161-SC-2017] [Civil Appeal No. 3849 OF 2017]

2. The Court set aside the Tribunal's order wherein the Tribunal had restored the issue of existence of PE to the file of the AO for fresh consideration without considering the fact that the CIT(A) had noted all the relevant facts and submissions and, thus, everything was on record. It held that the Tribunal had failed to act as a final fact finding authority since it should have summoned all records and thereafter arrived at a categorical finding whether it was the CIT(A) or the AO who had erred. The AO had brought to tax in India, the fees and guarantee commission received

by the assessee, a Netherland based company, from an Indian company (which was also a group company) considering the said Indian company as the assessee' PE. The CIT(A), however, had reversed the AO's order holding that that the assessee had no PE in India and thus the said receipt was not taxable in India. On further appeal by Revenue, the Tribunal restored the matter to the file of the AO to determine the issue afresh rejecting the assessee's contention that the CIT(A) had noted the facts and submissions and thus everything was on record. Accordingly, the Court restored the matter back to the Tribunal to consider afresh on merits.

Co-operative Centrale Reiffeisen Boerenleenbank B.A. vs Dy. DIT [2018] 97 taxmann.com 24 (Bombay) - ITA Nos.1198 of 2015 and 260 and 264 of 2016 (Bom) dated August 29, 2018

3. The Court held that where the assessee, a UAE based company availed marketing information services from a company in India, since the said company was not authorized to conclude contracts on behalf of the assessee, no dependent agent PE was constituted. Additionally, the Court held that where the assessee company, in order to carry out its contract with ONGC for the fabrication and installation of petroleum products, opened a project office in Mumbai, the said project office would not constitute a fixed place PE since it was merely acting as a communication channel and therefore fell within the exclusionary clause (e) of Article 5 viz. auxiliary activities. Further, it held that even if a fixed place of business falls squarely under Paragraph 1 of Article 5 and is specifically listed in Paragraph 2 (i.e. Project office), it would not constitute a PE if it fell under any exclusionary clause of Article 5(3) of the DTAA. (i.e. preparatory or auxiliary activity)

National Petroleum Construction Company v DIT - (2016) 66 taxmann.com 16 (Del) [India - UAE DTAA]

4. Where the assessee a UK based company granted to Jaypee Sports, the right to host and promote Formula F1 Race at motor racing circuit owned by Jaypee and the assessee had full access to circuit and it could dictate as to who was authorized to access circuit and organising any other event on circuit was not permitted, the Court held that the said circuit, constituted permanent establishment of assessee in India. Further, it held that the sum received by the assessee from Jaypee Sports on the transfer of the right to host and promote 'Formula F1 Race to Jaypee Sports, would not amount to royalty as the use of rights by Jaypee had been strictly confined and limited to the promotion of the event and for no other purpose.

Formula One World Championship Ltd. vs. Commissioner of Income-tax, International Taxation [2016] 76 taxmann.com 6 (Delhi)

5. The Court dismissed the appeal of the Revenue and held that merely keeping books of accounts, apportioning a portion of telephone expenses to the assessee's LO or having a common manager for its LO and Project Office (PO) was not sufficient to conclude that the assessee's LO was being used to carry on the business and therefore, held that the LO did not constitute a PE in India. It also noted that the RBI had accepted the functioning of the assessee's LO for over three decades and that the assessee was adhering to the conditions imposed by RBI, one of which was to not carry any business or trading activity in the LO.

Mitsui & Co. Ltd. TS-310-HC-2017(DEL) (ITA 13/2005 dated July 27, 2017)

6. The Court quashed the ruling of the AAR and held that the assessee's liaison office in India engaged in purchasing activity was not a permanent establishment under Article 5 of the India–USA DTAA as the liaison office was engaged in identifying component manufacturers, price negotiation, discussion of material to be used, quality control and testing of products and coordination with supplier and customer. It observed that where a non-resident purchases goods in India for the purpose of export, no income accrues or arises in India for such non-resident.

M/s Columbia Sportswear Company v DIT (IT) (WP No 39548/2012) – TS-600-HC-2015 (KAR)

7. The Court upheld the invocation of CIT's revisionary jurisdiction u/s. 263 in case of assessee (a Singaporean co. engaged in rendering offshore geophysical services) for taxing the revenue received by the assessee from an Indian co. for providing seismic vessel in connection with oil exploration. During assessment, the AO had accepted the assessee's claim that since the duration of its contract with Indian Co. was only for 102 days, its income was not taxable in India since there was no PE in India as per Article 5(5) of India-Singapore DTAA (which provides 183 days threshold). The Court however accepted CIT's view that the seismic vessel itself constituted fixed place PE under Article 5(1) of DTAA and AO was wrong in accepting assessee's resort to Article 5(5) and that no effort was made by AO to study relevant provision of DTAA. Hence, it held that the CIT had rightly concluded that the AO's order was both erroneous and prejudicial to the interest of Revenue. Accordingly, assessee's writ against the show cause notice issued u/s 263 was dismissed.

NORDIC MARITIME PTE LIMITED vs COMMISSIONER OF INCOME TAX [TS-740-HC-2018(UTT)] – Writ Petition (M/S) No. 3708 of 2018 dated 11.12.2018

8. The Applicant, a resident of Luxemburg, entered into a Centralized Services Agreement (CSA) with an Indian company owning a hotel, for providing certain Global Reservation Services (GRS) and other services. The Applicant filed an application before the AAR to ascertain as to whether the payment received by it from the Indian company under the aforesaid agreement was to be taxed as FTS or royalty u/s 9(1)(vi) / 9(1)(vii) r.w. Article 12 of India-Luxembourg DTAA. AAR noted that in addition to the CSA, the Applicant had also entered into other agreements with the Indian company to provide further services in relation to hotel management and held that as per the terms of all the agreements, it could be said that the Hotel was at complete disposal of the Applicant, right from the stage of its construction to all the important functions in relation to its operation and management. Thus, AAR held that the Indian hotel constituted fixed place PE of the Applicant with respect to various income sources. Therefore, the AAR held that payments received by the Applicant for provision of global reservation services would be chargeable to tax in India as business income u/s 9(1)(i) r.w. Articles 5 and 7 of the India-Luxembourg DTAA and such income was attributable to the Applicant's fixed place PE in India, i.e. the Indian hotel.

FRS Hotel Group (LUX) S.A.R.L. in Re – [2018] 102 CCH 0017 (AAR) – AAR No 1010 of 2010 dated May 24, 2018

9. The Applicant was providing 4C-3D seismic data acquisition and processing services to ONGC and other customers in India in relation to the exploration of oil and gas. The AAR, relying on

the decision of Oil & Natural Gas Corporation Ltd. vs CIT [2015] 376 ITR 306 (SC) held that the income received could not be taxed as Fees for technical services. Further, since ONGC did not use or obtain the right to use the vessels/equipment of the Applicant, it held that the income could not be taxed as Royalty either. However, relying on the decision of the Apex Court in Formula One World Championships Limited (2017) 80 taxman.com 347, it held that the vessels used by the Applicant constituted a Fixed Place PE under Article 5 of the India-UAE DTAA as it satisfied the conditions as laid down by the Apex Court i.e. i) permanence of duration to the extent that was required by the business, and not meaning forever ii) there was a fixed place which were the vessels in the High Seas in a definite and composite geographical area, and from which its business of survey in connection with exploration was carried out; and iii) this place was at the disposal of the Applicant. It rejected the contention of the Applicant that no PE would be constituted as it would be governed under Article 5(2)(i) which required a presence in India of more than 9 months whereas it was in India for only 113 days and held that the services envisaged under Article 5(2)(i) included services such as of supervision, managerial, consultancy, or general nature which were not the services being provided by the Applicant.

SEABIRD EXPLORATION FZ LLC IN RE - (2018) 101 CCH 0119 IAAR - A.A.R. No 1295 of 2012 dated Mar 28, 2018

10. The Tribunal allowed assessee's appeal and held that income earned by the assessee-company (non-resident incorporated in UK) from rendering telecommunication services to VSNL could not be taxed in India, in absence of a PE in India, rejecting Revenue's contention that the location of Space Segment Monitoring System (SSMS) equipment in India and the presence of the liaison office constituted a PE. With respect to SSMS equipment, it was noted that the same was not used for rendering services during the period under consideration. The Tribunal also rejected Revenue's contention liaison office constituted fixed place PE since final agreements were being entered into by the clients there, noting that RBI under FERA 1973 had granted permission to set-up a liaison office under which assessee was strictly prohibited from undertaking any other activity of trading, commercial or industrial nature. It also noted that till now there was no infringement nor any other adverse view taken by the RBI qua the activities which were being carried out by the liaison office in India. It relied on the decision in the case of Mitsui & Co. Ltd. [2017] 84 taxmann.com 3 (Del HC) wherein it was held that if assessee was found adhering to the conditions imposed by the RBI for running of a liaison office, the onus was on Revenue to prove that the liaison office construed PE in India and noted that there was not even an iota of evidence referred to by the AO in this regard for the current and past AYs. The Tribunal also rejected Revenue's contention that telecommunication services provided to VSNL should be taxed as Royalty under India-UK DTAA, following co-ordinate bench decision in assessee's own case for an earlier year wherein it was held that receipts for providing telecommunication services could not be treated as Royalty under India-UK DTAA.
Inmarsat Global Limited v ADIT & others [TS-736-ITAT-2018(Mum)] - ITA NO. 8544/MUM/2010, 7031/MUM/2011, 7538/MUM/2012, 2075/MUM/2014, 1674/MUM/2015 & 1105/MUM/2016 dated 12.12.2018
11. The assessee, a company incorporated in Japan, was engaged in business of chemicals, dyestuffs, plastics, electronic materials, cosmetics, etc. and had made sales to Indian customers directly as well as through independent agents appointed in India. It had also set-up a Liaison

Office (LO) in India after obtaining a specific approval of RBI, as per which the LO's activities were confined to liaison and representative activities and it was not permitted to carry out any business/commercial activities in India. The AO opined that activities of LO involved identifying, negotiating and concluding business contracts in India for and on behalf of its parent office and, therefore, LO was to be considered as the assessee's PE in India as per Article 5 of India-Japan DTAA and consequently estimated the profit at 10% of the total turnover from India by invoking Rule 10. CIT(A) upheld the AO's order. It was noted that the co-ordinate bench in assessee's own case relating to succeeding assessment year had held that there was no evidence that could lead to the conclusion that LO was executing agreements independently with customers. The co-ordinate bench had held that the LO was providing auxiliary or support services and proverbial mind and management was located in Japan and, accordingly, neither there was a business connection in India nor LO constituted assessee's PE in India. The Tribunal followed the co-ordinate bench decision, noting that there was no change in circumstances and allowed the assessee's appeal.

Nagase & Company Ltd. v DDIT(IT) - [2018] 96 taxmann.com 504 (Mumbai - Trib.) – ITA Nos. 134 & 412 of 2009 & Others dated April 27, 2018

12. The assessee, a Korean company, had received consideration under an agreement with an Indian company to supply power equipment from outside India and claimed that since it did not undertake any activity in India and, no part of sales consideration was taxable in India. The AO, however, held that the assessee company had a business connection as well as a PE in India under Article 5 of India-Korea DTAA in form of the liaison office and attributed 50% of the amount received to the assessee's PE in India. It was noted that for the preceding year, on the basis of order passed by the High Court, the AO had attributed 25% of the receipts to PE in India, whereas for the subsequent years he had attributed 15% of the receipts to PE in India. The Tribunal thus restored the issue to the file of the AO with a direction to pass a speaking order in the light of the decisions for preceding as well as subsequent years.

Hyung Corporation v ACIT - [2018] 94 taxmann.com 363 (Delhi - Trib.) - IT APPEAL NO. 6960 (DELHI) of 2014 dated April 24, 2018

13. The assessee, a Mauritian company, was acting as a sub-contractor with HHI and VMGL for certain specialized job on ONGC Mumbai Uran terminal water projects. It had rendered services under two sub-contracts with HHI and VMGL in connection with prospecting for/or extraction or production of mineral oil in India. The assessee claimed that period of contracts in India being less than threshold limit of 9 months prescribed in article 5(2)(i) to constitute PE, income from such activities was chargeable to tax only in Mauritius and not in India. The Assessing Officer held that the assessee had a 'vessel' at its disposal which constituted a fixed place of business in India in view of article 5 (1) through which business of the assessee was carried on, and accordingly, it constituted its permanent establishment in India. The Tribunal held that duration of both sub-contracts in India was 201 days and 212 days respectively and thus, less than threshold limit of 9 months. Therefore, the assessee did not have permanent establishment as per article 5(2)(i).

GIL Mauritius Holding Ltd. v. Dy. DIT [2018] 99 taxmann.com 21(Delhi-Trib) ITA No. 2354 (DELHI) of 2012-dated October 22, 2018

14. The assessee company, a tax resident of South Korea, was engaged in the business of heavy engineering. The assessee was awarded a project by the ONGC for the purpose of surveys, engineering, commissioning, etc. of entire facilities and as per the terms of the contract, the assessee had to perform certain activities within India and outside India. At the instance of ONGC, the assessee opened a project office in Mumbai which the AO treated as a fixed place PE and attributed an adhoc 25 percent of gross Revenues received by assessee under project to alleged PE. On appeal, the Tribunal held that since Revenue could not bring any evidence on record to show that the alleged PE of assessee had any role to play in respect of offshore supplies made, no income from such offshore supplies could be attributed to the alleged PE. Accordingly, the Tribunal deleted the addition.
Samsung Heavy Industries Co. Ltd. v. DCIT (International Taxation) – [2018] 93 taxmann.com 224 (Delhi – Trib.) – IT Appeal No. 872 (Delhi) of 2017 dated April 25, 2018
15. The assessee, a Spanish company engaged in providing services of consultancy in project, engineering and electrical contract and supplies, carried out its projects in India through its PE, a Project Office (PO). The AO disallowed the deduction claimed by the assessee's PE with respect to 'Exchange Fluctuation Loss' suffered on account of advance received from Head Office in foreign currency for carrying out projects in India on the alleged ground that the amount received by the PO was not a loan but a capital contribution. CIT(A) upheld the AO's order. The Tribunal allowed the assessee's claim, noting that the amount received by the PE was loan and not capital remittance. It held that since loan was utilized in day-to-day operations, for project execution and to obtain material as per terms of contract, said remittance did not bring any capital asset into existence and thus the foreign exchange fluctuation loss on account of differential value in INR was allowable as deduction u/s 37(1).
Cobra Instalaciones Y Servicios SA v DCIT - [2018] 96 taxmann.com 80 (Delhi - Trib.) – ITA No. 2391 (DELHI) of 2018 dated June 28, 2018
16. The Tribunal allowed assessee's appeal and rejected the AO's attribution of 50% profits made by Corning SAS in France (Head Office), from direct sales made in India, to its Indian Branch office (BO). It was noted that the BO was remunerated with 3% commission on direct sales made by it to customers in India and in all other AYs (preceding as well as succeeding), the AO had accepted 3% commission without attributing any additional profits to BO. Further, noting that no substantial functions were performed and no risks was undertaken or assets were employed by BO in India in relation to the direct sales made by Corning SAS France in India, the Tribunal held that no profit in addition to the 3% commission income earned could be attributed.
Corning SAS- India Branch Office v. DIT(IT) – [TS-286-ITAT-2018(DEL)] – ITA Nos. 4678 & 4795/Del/2010 dated May 30, 2018
17. Assessee, a foreign company having Liaison Office in India, was a wholly-owned subsidiary of one Company-Metro AG, Germany and was engaged in business of procuring various goods and materials from various countries including India and selling to its Distribution Companies who further sold goods to retail customers. A survey was carried out in the premises of assessee's LO and on the basis of documents seized, AO opined that assessee had business connection in India and therefore income arising through such connection (directly/indirectly)

was taxable in India. The assessee, on filing the appeal, contended that operations of assessee in India were confined to purchase of goods in India for the purpose of export and thus no income would arise in India as per Exp.1(b) to S.9(1)(i) (which provides the instances of having business connection in India). However, as the AO made addition to assessee's income without carrying out any factual analysis, the addition was set aside by the Tribunal and the matter was remanded back to decide whether or not the assessee would fall under Exp.1(b) to S.9(1)(i).

Parpool Ltd v Asst DCIT [2018] 94 taxmann.com 353 (Delhi – Trib.) – ITA NO 4911 OF 2010; 1472 & 1473 OF 2015 dated 31.05.2018

18. The Tribunal held that where the assessee, a Japanese company engaged in business of manufacturing consumer products, opened a liaison office in India, since power of attorney did not authorize employee of LO to do core business activity or to sign and execute contracts etc., on behalf of assessee, it could not be regarded as assessee's PE in India.

Kawasaki Heavy Industries Ltd. vs. ACIT - [2016] 67 taxmann.com 47 (Delhi-Trib)

Agency PE

19. The Tribunal held that in absence of finding that DAPE of the assessee had been paid a remuneration less than arm's length remuneration, no part of profit of DAPE could be assessed in hands of the assessee.

ABB Inc. Dy. DTT (International Taxation) [2015]59 taxmann.com 159/69 SOT 537(Bang.)

20. The assessee, a Japanese company, was engaged in development, manufacture, assembly and supply of air-conditioning and refrigeration equipments. It sold the equipments to its Indian Subsidiary (DAIPL) and further DAIPL sold to customers in India. In addition, assessee also claimed to have made direct sales to third parties in India. AO stated that DAIPL was simultaneously undertaking marketing activities for assessee. Also, the communication in form of email demonstrated that DAIPL negotiated and finalized deals with Indian customers and conveyed it to the assessee. Further, assessee failed to provide any evidence as to how customers in India were directly approaching assessee in Japan to discuss & finalize the prices and requirements and therefore AO held that DAIPL carried out marketing activities for the assessee and was a Dependent Agent Permanent Establishment of assessee in terms of paragraph 7(a) and 7(c) of Article 5 of DTAA between India and Japan (which provides for instances of deemed PE) The Tribunal upheld AO's order and further held that since DAIPL was a PE in India, 30% of the net profit relating to sales in India would be attributable to the marketing activities carried out in India by DAIPL.

Daikin Industries Ltd. vs ACIT [2018] 94 taxmann.com 299 (Delhi- Trib.) – ITA NO 1623 of 2015 dated 28.05.2018

21. The Revenue had brought to tax the income earned by the assessee, a Finland based company, from offshore supply of telecom equipment manufactured in Finland in pursuance of supply contract with Indian customers, by considering the Indian subsidiary of the assessee, which took marketing and installation activities with the assessee's customers on principal to principal basis, to be the assessee's PE in India. The Tribunal held that since there was no physical space made available which can be said to be at the disposal of the assessee for the assessee's

own business of supply and sale of equipments, the Indian subsidiary could not be considered to be the assessee's PE in India in view of Article 5 of the India-Finland DTAA. It was further held that the Indian subsidiary also did not provide any business connection to the assessee as required by the provisions of section 9(l)(i) since the title of the goods supplied by the assessee were transferred outside India and the payments were also received by the assessee outside India. It concluded thus that the said income could not be brought to tax in India.

Nokia Networks OY v JCIT - [2018] 94 taxmann.com 111 (Delhi - Trib.) (SB) - IT APPEAL NOS. 1963 & 1964 (DELHI) of 2001 dated June 5, 2018

22. Where the Indian company provided marketing and sales support services to assessee (Dutch Company) for the NetApp products, the Tribunal held that the Indian company did not constitute PE of assessee. It rejected the revenue's stand that the Indian company constituted assessee's fixed place PE in India on the ground that I Co. was carrying on its own business as commission agent of assessee and held that there needs to be a clear-cut distinction between the business of the assessee as well as the business carried on by the Indian company itself for its own purposes. It further rejected the revenue's stand that the Indian company's local 'sales outlets' constituted fixed place PE in India under the Article 5(2)(h) of DTAA and observed that offices were only providing marketing support function and were not making any sales. It also rejected the revenue's stand that Indian company constituted assessee's dependent agent PE as the Indian company had the authority to conclude contracts by virtue of common directors who are eligible to sign contracts on behalf of foreign company as well as Indian agent on the ground that common director does not amount to constitution of PE. It further held that Indian company was legally and economically independent and was compensated at arm's-length basis by the assessee in terms of the agreement entered into between them.

Net App BV [TS-40-ITAT-2017(DEL)] (ITA No. 4781/Del/2013)

23. Though the agent of the assessee provided similar services to principals other than the assessee and the income from assessee constituted only 7.87% of its total income, the AO held that the assessee had a DAPE (Dependent Agent Permanent Establishment) and accordingly taxed income of the assessee earned from transportation of containerised cargo in terms of Article 5 r.w. Article 7 of the India-Netherlands DTAA. Following the Tribunal's order for earlier year in the assessee's own case wherein it had held that the said agent was an independent agent, and hence, did not constitute assessee's DAPE, the Tribunal dismissed Revenue's appeal filed against the CIT(A)'s order deleting the addition made by the AO who had considered the assessee's agent to be DAPE.

DCIT v Hoyer Global Transport B.V. – ITA No. 1543 /Mum/ 2016 dated 24.01.2018

24. The assessee, a US based company, had entered into a Master Franchise Agreement (MFA) with a company in India which in turn had entered into a Sub-Franchise Agreement (SFA). It offered income from franchise fee and consultancy services provided to M/s J for store opening to tax at the rate of 10% being royalty as per India-USA DTAA. The AO held that M/s J constituted the assessee's dependent agency / Permanent Establishment in India as per Article 5 of India-USA DTAA and thus taxed the total income of the assessee as business income @ 40% (after allowing a deduction of 5% from total income). The DRP held that M/s J did not constitute a PE or DAPE or agency PE of the assessee. On perusal of the Master Franchise

Agreement (MFA) between the assessee and M/s J and Sub-Franchise Agreement (SFA) between M/s J and the sub-franchisees, the Tribunal observed that the profit/ loss from the business belonged to M/s J or sub-franchise and that the assessee was only entitled royalty and store opening fees. It further observed that M/s J did not carry on any activity on behalf of the assessee and the restrictions provided in MFA and SFA were only to safeguard the brand value and to ensure the correct receipt of royalty income. Thus, the Tribunal held that since the assessee did not have any physical control on business of franchise and sub-franchise and none of conditions prescribed under Article 5 of India-USA DTAA were attracted, the DRP's order was to be upheld. Accordingly, the Revenue's appeal was dismissed.

DCIT (IT) vs. DOMINOS PIZZA INTERNATIONAL FRANCHISING INC. (BOM TRIBUNAL) (ITA No. 1447/Mum/2016) dated May 18, 2018 (53 CCH 0054)

25. The Tribunal dismissed Revenue's appeal against the CIT(A)'s order holding that the assessee did not have PE in India and allowed the assessee's cross objection wherein the assessee had contended that even if it was held that it had a PE in India, since it had paid remuneration/ commission to its agents in India at ALP, no adjustment was to be made in the hands of the assessee. It noted that similar issue had been decided in favour of the assessee in earlier year by the Tribunal in the assessee's own case following the decision in the case of CIT v E-funds I.T. Solutions Inc [Civil Appeal No. 6082 of 2015 (SC)] wherein it was held that where transactions between the AEs were at ALP, no further profits could be attributed even if there existed a PE in India. It further noted that for the year under consideration also, the TPO had in the case of assessee's AE-agent, accepted that the transactions between the said AE-agent and the assessee were at ALP and, accordingly, made no adjustment.

ADIT (IT) v Zee TV USA Inc – ITA No. 5603/Mum./2008 & CO. No. 47/Mum/2010 dated 25.01.2018

26. The Tribunal allowed assessee's cross objection and dismissed Revenue's appeal against CIT(A)'s order wherein CIT(A) had held that the assessee did not have PE in India and accordingly its business activities were not taxable in India. In cross objection, assessee contended that that even if it was held that assessee had PE in India, its income was not taxable in India as it had paid arm's length remuneration/ commission to its agent (also its AE) in India which was taxed in India and, therefore, no further adjustment was to be made in hands of assessee. The Tribunal noted that in TP assessment of assessee's AE, the TPO had accepted the transaction between the assessee and its AE to be at arms' length and no adjustment was made. Further, it relied on CIT v. E-funds I.T. Solutions Inc. [2017] 399 ITR 34 (SC) wherein it was held that since the transactions between non-resident assessee and its Indian AE were at ALP, no further profits could be attributed even if there existed a PE in India.

ADIT(IT) v Zee TV USA Inc. - [2018] 96 taxmann.com 509 (Mumbai - Trib.) – ITA No. 5608 (MUM.) OF 2008 dated April 23, 2018

27. The Tribunal held that the assessee's Indian group entity viz., SIPL, engaged in procuring business from Indian advertisers for a commission of 15% of business receipts did not constitute a dependent agent PE under Article 5(6) of India-Netherlands DTAA as SIPL i) was acting in the ordinary course of business ii) undertook agency activities for other entities as well and iii) was not authorized to enter into any agreement with any client independently. It also observed

that as per CBDT Circular No. 742 the rate of commission of 15% payable to Indian agents was as per industry norms and at ALP and therefore, no further attribution of profits could have been made in the hands of the assessee.

International Global Networks BV TS-340-ITAT-2017(Mum) (ITA No. 5689 to 5695/Mum/2014 dated July 26, 2017)

28. The Tribunal held that the company engaged in manufacturing products developed by the assessee as well as marketing the products manufactured by the assessee, in which the assessee held 50 percent share capital, did not constitute a PE of the assessee under Article 5 of the India- USA DTAA, since (i) the said company did not have the right to conclude contracts on behalf of the assessee, (ii) the assessee did not have access to the premises of the said company and (iii) the final decision of pricing of the product along with the term / conditions therein were taken by the assessee.

DDIT (IT) v Lubrizol Corporation USA - (2016) 47 CCH 0435 (Mum - Trib) - ITA No.

1247/Mum/2014 [India - US DTAA]

29. The Tribunal held that distribution revenue accruing to the assessee, a Mauritian company, by virtue of an agreement with Taj India was not taxable in India, absent a PE in India. It noted that Taj India,

appointed as an exclusive distributor, was acting independently qua its distribution rights and that the agreement was ostensibly on principal to principal basis and therefore Taj India did not constitute a Dependent Agent PE under Article 5(4) of the India- Mauritius DTAA.

ADIT (IT) v Taj TV Ltd-TS-428-ITAT-2016 (Mum) - ITA No. : 4678/ Mum/2007, : 412/Mum/2008,

4176/Mum/2009 [India - Mauritius DTAA]

30. The Tribunal held that that revenue earned by assessee (an Israel company) from contract with HPCL (an Indian petroleum company) for implementing automated systems was taxable in India, since the assessee's project office ('PO') incorporated in India to oversee implementation of project constituted assessee's dependent agent PE in India. It rejected the assessee's stand that contract can be split into supply of equipment which took place outside India and installation of systems at HPCL sites which was sub- contracted to another Indian company since the assessee supplied equipment to subcontractor, which in turn installed the same at the HPCL petrol pumps and that the assessee received the entire contract revenues from HPCL and compensated sub-contractor for the works carried out by it. Therefore it held that the contract was composite. It also rejected the contentions of the assessee viz (i) that PO did not constitute assessee's PE in India as it was merely coordinating the activities carried by sub-contractor (ii) the subcontractor did not constitute PE as it was an agent of independent status.

Orpak Systems Ltd. vs. ADIT - TS-94-ITAT-2016 (Mum)

31. The Tribunal held that the Indian subsidiary ('RIPL') of the assessee did not constitute a dependent agent PE by virtue of entering into a distribution agreement as the assessee merely provided products / services to RIPL for further distribution and that RIPL had independent

contracts with Indian subscribers, did not maintain stock of the assessee and did not conclude contracts on behalf of the assessee.

It was held that Bureau Chief deputed to India, who only acted as a Chief Reporter in India in the field of collection and dissemination of news, did not constitute a service PE as the functions of the Chief did not perform any services leading to earning of distribution fees to the assessee.

Reuters Limited v DCIT (ITA No 7895 / Mum / 2011) – TS-511-ITAT-2015 (Mum)

32. The Tribunal held that the transfer of advertising airtime by the assessee to its agent in India was not a purchase / sale of goods as it could not be consumed by the buyer agent without the assistance from the assessee. Accordingly it held that the agent could not be considered as selling advertisement airtime independent of the assessee and therefore could not be considered as independent. Further, since the agent exercised the authority to conclude contracts on behalf of the assessee, the Tribunal held that it was a dependent agent of the assessee under the India –US DTAA and therefore profits attributable to the PE were taxable in India.

NGC Network Asia LLC v JDIT(IT) – [2015] 64 taxmann.com 289 (Mum – Trib)

Service PE

33. The assessee (Saudi Arabian Oil Co.), a largest crude oil exporter, established a subsidiary in India (Aramco India-separate legal entity established under Companies Act) to carry out Business/Marketing Support Activities. However, the Revenue contended that Aramco India was a PE of the assessee applicant who was liable to tax in India in respect of its business profits. The AAR decided in favour of the assessee and held that Aramco India could not be said to be a PE of the Applicant as Aramco was carrying its own business in India providing assistance to the applicant and was accordingly duly remunerated. Also, the functions carried out in the premises by Aramco India was not to do business for the Applicant and it merely provided support services to the Applicant.

Saudi Arabian Oil Company, In re vs. [2018] 94 taxmann.com 194 (AAR – NewDelhi) / [2018]405 ITR 83 (AAR – NewDelhi) / [2018] 303 CTR 225 (AAR – NewDelhi) – AAR NO. 25 OF 2016 dated 31.05.2018

34. The Tribunal held that to determine whether a Service PE existed in India, the solar days and not the man days were to be taken into consideration. Accordingly, it held the AO erred in considering 4 of the assessee's service engineers as a Service PE as they were present in India for a period of 90 days each (thereby amounting to 360 man days) without appreciating that their presence in solar days i.e. 90 days was less than the 182 days threshold laid down under Article 5(3)(b) of India-Saudi Arabia DTAA. Accordingly, it held that there was no Service PE in India. It further held that the co-ordinate bench ruling in the case of ABB FZ-LLC [TS-256-ITAT-2017(Bang)] (wherein in the context of an assessee rendering management services, the Tribunal held that physical presence in India was not relevant for the formation of a Service PE) would not apply to the assessee's case as the impugned services for consideration in the instant case were that of the service engineers which required physical presence in India.

Electrical material Center Co. Ltd. [TS-451-ITAT-2017(Bang)] - IT (TP) A No. 1104 (Bang)

2013 dated 28-09-2017

35. Where the assessee, a Denmark based company, gave its vessel under charter hire arrangement for ONGC's operation of exploration and exploitation of oil and natural gas, since the crew on board were not employees of assessee and did not work under direction and control of assessee and, moreover, since the management of assessee responsible for taking decisions relating to assessee's business were in Denmark, it could not be said to have a Service PE in India in terms of article 5(2)(a) of India - Denmark DTAA.

Maersk A/s v ACIT - [2017] 86 taxmann.com 77 (Delhi - Trib.) - IT APPEAL NOS. 3905 (DELHI) OF 2009 dated 08.06.2017

36. The assessee, a US based company, was engaged in business of supply, installation and commissioning, of software which were used in connection with prospecting for production, exploration and extraction of minerals oils, which it supplied to various Indian companies. The assessee had also rendered services relating to installation and commissioning of software. The AO opined that title of goods (being software) was to pass outside India but owing to fact that installation and commissioning of software was required to be carried out in India, a part of income from sale of software was taxable in India. The Tribunal referring to the records of the case observed that the assessee had not participated in the installation activities for a period more than 10 to 15 days in India and therefore did not satisfy the criteria for constitution of service / installation PE. It further noted that the assessee did not have any office in India either and therefore did not have a fixed place of business in India. Accordingly, since the income derived by the assessee from sale of software was business income and the assessee did not have a PE in India, it held that the AO was not justified in taxing a part of the impugned income in India.

ACIT v Landmarks Graphics Corp - [2017] 87 taxmann.com 311 (Delhi - Trib.) - I.T. APPEAL NOS. 573, 2486 (DELHI) OF 2006 dated 12.07.2017

37. The Tribunal held that where all the conditions of Article 5(2)(k) of the DTAA were satisfied i.e. (i) there was furnishing of services including managerial services (ii) such services were other than those taxable under Article 13, (iii) such services were rendered out of India (iv) such services were rendered by 'other personnel' and (v) such activities continued for a period of more than 90 days within 12 months, the assessee was said to have a Service PE in India.

JC Bamford Investments Ltd v DCIT(IT) - (2016) 46 CCH 0435 (Del Trib) [India - US DTAA]

38. The assessee, a Singapore based company, rendered two type of services viz. rendering of management support services and technical services (in connection with setting up of internet data centres for BSNL) to its Indian subsidiary and received (i) Management Fee— for which it had deputed its employees in India for 2 days and (ii) Service Fee— for which it had deputed its employees for 171 days. The AO aggregated employees' stay on account of rendering of both the services and accordingly held service PE constitution since the cumulative period (i.e. 173 days) exceeded the threshold limit of 30 days as provide under Article 5(6) of the India-Singapore DTAA. Before Tribunal, the assessee offered to tax Service Fee as fee for technical services under section 9(1)(vii), taxable @ 10% under section 115A(1)(b). With respect to the Management Fee, the assessee offered to be governed by the DTAA provisions. Since the

employees of the assessee had visited India for a period of only 2 days for management support services, the threshold of 30 days was not satisfied and accordingly there was no Service PE in India and thus Management Fee was not taxable in India. The Tribunal held that in case of multiple sources of income, an assessee is entitled to adopt the provisions of the Act for one source while applying the beneficial DTAA provisions for the other, relying on Bangalore ITAT ruling in IBM world Trade Corporation. Thus, it accepted the assessee's aforesaid claim of non-taxability with respect to Management Fee for AY 2012-13 in absence of Service PE. However, for AY 2013-14, since the period of employees' stay exceeded 30 days for management support services also, the Tribunal upheld Service PE and remanded the matter to AO to verify the assessee's profit attribution to the PE in India. However, it noted that the Fees received by the assessee would be taxable under the Act as FTS (fees for technical services) under section 9(1)(vii) r.w.s. 115A(1)(b) @ 10% and not as business income and thus held that the maximum possible taxability in the hands of the assessee could not exceed 10%.

Dimension Data Asia Pacific Pte. Ltd. v. DCIT [2018] 99 taxmann.com 270 (Mumbai - Trib.) - ITA Nos. 1635 and 1636 (MUM.) of 2017 dated OCTOBER 12, 2018

39. The Tribunal held that in order to determine as to whether assessee, a German company, rendering services in field of exploration, mining and extraction to Indian companies, had PE in India, it was continuous period of stay of its employees in India which had to be taken into consideration and not entire contract period.

Rheinbraun Engineering Und Wasser GmbH v DDIT - (2016) 68 taxmann.com 34 (Mumbai- Trib.) [India - Germany DTAA]

Construction / Installation PE

40. The Apex Court dismissed Revenue's SLP filed against the High Court's order wherein it was held that since the period of supervision under contract between the assessee, a Japanese company, and Indian company did not exceed 180 days, it did not constitute a supervisory PE in terms of article 5(4) of India-Japan DTAA and, thus, the fees received for providing supervisory services was liable to be taxed as FTS at 20 per cent under article 12(2) of the said DTAA.

CIT v Sumitomo Corporation [2018] 96 taxmann.com 612 (SC) - SLP (C) APPEAL NO. 18509 of 2016 dated August 6, 2018

41. The Tribunal allowed the assessee's appeal against the AO's order (passed pursuant to DRP directions) and held that the amount received by the assessee, a Saudi company, from grouting activities in India were not taxable in India, in absence of a PE in India. The assessee, engaged in providing 'grouting and precast' solutions for subsea off-shore construction industry, contended that grouting activity was carried out in India for different unrelated third parties and grouting activity, being a construction activity, was not carried out in India for more than 9 months so as to constitute PE in India as per Article 5(2)(h) of India UAE-DTAA and thus, the business receipt from grouting activities were not chargeable to tax in India. The AO as well as DRP held that the assessee's equipment was in India for at least 264 days on which work for execution of construction was carried on and thus, it had equipment PE in India as per Article 5(1) of the said DTAA. The Tribunal held that since it is a settled legal principle that a general

provision would not be applicable when specific provision is there, specific Article 5(2)(h) was applicable. It further held that the observation by AO/DRP that 'grouting was not a simple masonry work and involved complex aspects' did not take grouting out of construction activities because there is no bifurcation of simple and complex masonry/construction work under Article 5(2)(h) and any further classification (as done by revenue) would amount to rewriting DTAA.

ULO Systems LLC v ADIT (2019) 101 taxmann.com 490 (Del Trib) – ITA No.5968 of 2010 (Del Trib) dated December 21, 2018

42. The Tribunal allowed assessee's appeal holding that the assessee-company (incorporated in Cyprus) did not constitute any 'installation PE' in India under clause 5(2)(g) of the India-Cyprus DTAA in connection with the award of contract by another foreign entity (AMC SA, being the main contractor) for placement of rock in seabed for laying of gas pipelines and other work in oil and gas field developed at East Coast of India. It rejected Revenue's contention that assessee's activity went beyond 12 months threshold period prescribed for installation PE under clause 5(2)(g) of the said DTAA, noting that the AO and DRP had wrongly concluded that assessee was involved in multifarious functions by considering the scope of work to be carried by AMC SA (pursuant to contract with Reliance & Niko Resources) as the scope of work for assessee. Further, it also rejected Revenue's contention that one of assessee's employee visited India prior to awarding of contract to assessee and that his period of stay should be considered for computing the aforesaid threshold period, holding that auxiliary and preparatory activity, purely for tendering purpose before entering of the contract and without carrying out any activity of economic substance qua the project could not be considered for determining threshold period. Thus, the Tribunal held that since the period for determination of PE which was to be reckoned from commencement date as per contract till competition date as per competition certificate was around 9 months and further, all the payments relating to contract were received before such completion date, in absence of anything on record to suggest that any activity post completion was carried out beyond the period of 12 months, the assessee-company did not constitute an 'Installation PE' in India under clause 5(2)(g) of the India-Cyprus DTAA.

Bellsea Ltd v ADIT [TS-426-ITAT-2018(DEL)] - ITA No. 5759/Del/2011 dated July 6, 2018

43. The Tribunal held that the contract revenue arising to the assessee, a US based company engaged in the manufacture and sale of equipment used in the seismic industry from offshore supplies pursuant to a contract entered into with ONGC was not taxable in India since the title in the goods passed offshore and therefore no part of the consideration could be attributed to supplies in India. It rejected the finding of the AO that the contract entered into by the assessee, which included supply of offshore supplies, equipment etc as well as installation and commissioning services, was a composite contract and held that the contract was divisible into different components, the consideration for which was separately contemplated. Further, since the Revenue failed to substantiate the presence of assessee's employees in India for more than 120 days (for providing training to ONGC), it held that the assessee did not have a installation PE in terms of Article 5(2)(j) / (k) of the India -US DTAA.

Ion Geophysical Corporation - TS-455-ITAT-2016 (Del) - ITA No.1607/Del/2015

44. The assessee was awarded contract by ONGC for supply, installation, testing and commissioning of Vessel and Air Traffic Management System (VATMS) along with provision of maintenance services. During AY 2012-13 & 2013-14, the assessee only provided Annual Maintenance Contract (AMC) services in relation to VATMS to ONGC. The AO brought to tax AMC fee received as business profits attributable to Installation PE in terms of Article 5(3) of India-Netherlands DTAA. The Tribunal reversed the AO's order, following co-ordinate bench decision in the assessee's own case for AY 2011-12 wherein it was held that since the VATMS equipment was already handed over to customer in year 2007 and no installation activity was carried out in India after that, it could not be held that the assessee had 'Installation PE' in India in the subject year. The co-ordinate bench had also held that the presence of Indian contractor to which assessee had sub-contracted whole AMC work on principal-to-principal basis, could not create any virtual presence of assessee in India, since the entire onshore maintenance contract was performed by the independent local contractor in India and the existence of PE needs to be determined based on the activities of the foreign enterprise. It thus held that the AMC fees received could not be brought to tax in India as business income in the absence of a PE. The Tribunal also rejected Revenue's contention to tax the AMC receipts as FTS holding that the AMC services did not make available any technical know how or knowledge to the personnel of the customer as per Article 12(5) of the India- Netherlands DTAA.

With respect to the assessee's two other projects in India, the Tribunal held that the assessee constituted Installation PE in India since the assessee could not provide details with regard to the number of days of stay in India for executing the installation work. However, it accepted assessee's alternative contention that only the onshore provision of services and onshore supply of equipments at 10% on gross basis should be considered as profits attributable to the Installation PE in India as against the AO's approach of taking the total receipts (i.e both offshore and onshore activities) since the PE could not have been involved in activities not carried in India.

***HITT HOLLAND INSTITUTE OF TRAFFIC TECHNOLOGY B.V. v DCIT (2018) 53 CCH 0371
KolTrib – ITA Nos. 290/Kol/2016 & 348/Kol/2017 dated July 20, 2018***

45. The assessee was awarded contract by ONGC for supply, installation, testing and commissioning of Vessel and Air Traffic Management System (VATMS) along with provision of maintenance services. During the year, the assessee only provided Annual Maintenance Contract (AMC) services in relation to VATMS to ONGC. The AO brought to tax AMC fee received as business profits attributable to Installation PE in terms of Article 5(3) of India-Netherlands DTAA. The Tribunal held that since the VATMS equipment was already handed over to customer in year 2007 and no installation activity was carried out in India during subject year i.e. AY 2011-12, it could not be held that the assessee had 'Installation PE' in India in subject year. It held that AMC services provided post completion of installation activities at site of customer, could not lead to carrying out installation activities for purpose of constitution of 'Installation PE' in India. The Tribunal also held that the presence of Indian contractor to which assessee had sub-contracted whole AMC work on principal-to-principal basis, could not create any virtual presence of assessee in India, since the entire onshore maintenance contract was performed by the independent local contractor in India and the existence of PE needs to be determined based on the activities of the foreign enterprise. It thus held that the AMC fees received could not be brought to tax in India as business income in the absence of a PE.

HITT HOLLAND INSITUTE OF TRAFFIC TECHNOLOGY B.V. vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) - (2018) 52 CCH 0280 KoITrib - ITA No. 390/Kol/2015 dated Apr 4, 2018

46. The Tribunal held that as activities relating to construction or installation are specifically covered under article 5(3), then one need not to go in for article 596) and, therefore, activity of the assessee which was purely installation services had to be scrutinized under article 5(3) only and not within article 5(6) and, accordingly, threshold limit of 183 days would be applicable. Since presence of the assessee in India for particular project was of less than 183 days, installation activity carried out by the assessee in terms of various contracts in India separately would not constitute PE in India under article 5(3) and, accordingly, revenue from the assessee's contract for installation activity in India was not taxable in India, either under article 7 of DTAA or under Act.

Kreuz Subsea Pte. Ltd. v. Dy.DTT (International Taxation)[2015] 58 taxmann.com 371/69 SOT 368/42 ITR(Trib.) 11/172 TTJ 291(Mum.)

47. The Tribunal held that though service of installation is covered by the FTS clause as well as Installation PE clause of the India China treaty and though the installation contract (including period of after sales service) exceeded 183 days, the income from installation activity was neither taxable as FTS nor as business income since the specific installation PE clause in India China Treaty would override General FTS clause and the aforesaid threshold limit of 183 days would have to be applied to the actual period of installation (which was less than 183 days) and not the contractual period.

Gujarat Pipavav Port Ltd v ITO - (2016) 67 taxmann.com 370 (Mumbai - Tribunal)

48. The Tribunal held that threshold time-limit of 183 days under article 5(3) would be calculated from date of actual activity for installation purpose and not from date of signing of contract. For computing threshold time-limit unconnected or independent projects cannot be taken together and should be considered on standalone basis, even though different contracts may have been entered into by same customer with contractor.

Kreuz Subsea Pte. Ltd. v. Dy.DTT (International Taxation)[2015] 58 taxmann.com 371/69 SOT 368/42 ITR(Trib.) 11/172 TTJ 291(Mum.)

Multiple PEs

49. The Apex Court dismissed Revenue's appeal and held that the Indian subsidiary of the US based assessee providing the assessee with support services which in turn permitted the assessee to render management and support services to its customers located outside India could not be considered as a) a fixed place PE of the assessee and no part of the main business of the assessee was carried on by the Indian subsidiary b) a Service PE as none of the assessee's end customers were located in India or received services in India c) a Agency PE as the Indian subsidiary did not have the authority to conclude contracts on behalf of the assessee. Further, without prejudice to the existence of PE, the Court held that since the

transactions between the assessee and the Indian subsidiary were held to be at ALP, no further profits could be attributed.

Assistant Director of Income-tax-1, New Delhi v. E-Funds IT Solution Inc. 86 taxmann.com 240 (SC)

50. The Court dismissed the appeal filed by the assessee, an US entity, against Tribunal's order holding that the liaison office of the assessee-group in India which carried out core marketing and sales activities and had prominent involvement in the contract finalization process, showed that the overseas entities of the group carried on business in India through such fixed place of business and thus had fixed place PE in India. It also noted that the India office was not only for data collection and information dissemination rather it discharged of vital responsibilities relating to finalization of commercial terms etc. The Court relied on the Apex Court decision in the case of Formula One World Championship v CIT (2017) 394 ITR 80 (SC) to hold that certain amount of space at the disposal of the enterprise which is used for business activities is sufficient to constitute a place of business and no formal legal right to use that place is required. Accordingly, it held that the assessee had fixed place PE in India located in the space which was taken on lease by another US based group entity for liaisoning work.

The Court also upheld the Tribunal's view that the expat employees working at such fixed place constituted Dependent Agent PE in India for all the overseas entities of the GE Group. It rejected assessee contention that the expatriates and employees of Indian subsidiary of the assessee-group only participated in the negotiation for conclusion of contracts but never had the authority to finalize any contract on their own volition, noting that the technical officials having varying degree of authority involved themselves - along with local managerial, in contract negotiation, often into core or "key" areas, clearly showed that the assessee carried out business through the PE in India.

Further, the Court approved the lower authorities' approach of calculating of total profit from the sales made by GE overseas entities in India at 10% of such sale. It also approved Tribunal's direction for considering 26% of total profit in India as attributable to the PE, noting that the extent of activities by the overseas group entities in making sales in India was roughly one fourth of the total marketing effort.

GE Energy Parts Inc. vs CIT (Intl Tax) [2019] 101 taxmann.com 142 (Del HC) – ITA No 621,627,628,629,671,674 & 675 of 2017 (Del HC) dated December 21, 2018

51. The Court held that where the subsidiary company of the assessee was compensated at ALP for international transactions with the assessee (its AE), assuming that the subsidiary company was the PE of the assessee, no further profits could be attributed to the assessee's operations in India. Without prejudice to the above, the Court held that the assessee's subsidiary in India did not constitute a fixed place PE since there was no evidence that the assessee had the right to use its premises or any fixed place at its disposal. The Court held that in the absence of any evidence that any of the assessee's employees provided services in India, there could be no Service PE and merely because the assessee had the right to audit the Indian subsidiary, it could not be concluded that the employees of the assessee provided services in India. Further, it held that there was no allegation that the Indian subsidiary was authorized to conclude contracts on behalf of the Petitioner and therefore could not be considered as a Dependent Agent PE.

Adobe Systems Incorporated v ADIT - (2016) 96 CCH 0012 (Del) [India - US DTAA]

52. The Court held that the assessee's liaison office and subsidiary company in India could not be considered as a Fixed Place PE since neither were their premises at the disposal of the assessee, nor did they act on behalf of the assessee in negotiating and concluding agreements. Further, the Court held that the Indian subsidiary company could not be treated as a Dependent Agent PE since it did not have the authority to conclude contracts on behalf of the assessee. Additionally, the Court held that the Indian subsidiary could not be considered as an Installation PE or a Service PE since the subsidiary carried out the tasks of installation and testing on its own accord and not on behalf of the assessee and that there was no material to hold that it performed services on behalf of the assessee. Therefore, the Court held that the supply of equipment to a third party overseas was not taxable in the hands of the assessee.

Nortel Networks India International Inc v DIT - (2016) 96 CCH 0001 - (Delhi) [India - US DTAA]

53. The Applicant, a Singapore based company and a leading global payment solution provider, used to charge banks [with whom it entered into Master License Agreements] processing fees relating to authorization, clearing and settlement of transactions. The Applicant provided the banks with a MasterCard Interface Processor (MIPs) that connected to the Mastercard Network and other processing centres. The MIPs were owned by the Indian subsidiary of the Applicant. The Applicant sought a ruling from AAR on the following issues i) Whether the digital equipment (MIP) created a PE (ii) Whether the MasterCard Network created a fixed place PE in India (iii) Whether agency relationship is created through Bank of India and its premises would constitute a fixed place PE (iv) Whether Applicant's subsidiary (MISPL) created a fixed place PE (v) Whether there was creation of a PE through the Applicant's visiting employees (vi) Whether there was a dependent agent PE created through MISPL

On the first issue, the AAR accepted Revenue's stand that even an automatic equipment can create a PE and did not have to be fixed to the ground to constitute a fixed place PE. It held that since significant functions were performed by MIPs in facilitating authorization process and the MIPs were at the disposal of the Applicant, the MIPs constituted PE on account of the test of disposal and permanence being satisfied.

In case of the second issue, it noted that apart from MIP, transmission towers, leased lines, fiber optic cable, nodes and internet (owned by third party service provider) and application software which constituted the Mastercard Network were located in India as well as outside India. It also noted that the task performed by the MasterCard Network were significant activities in the context of overall functions of transaction processing rendered to third party and not preparatory or auxiliary. Further, noting that the Applicant owned part of the Network, the AAR held that the Network also constituted PE.

With respect to issue (iii), noting that the settlement activities happened through Bank of India who carried out the functions under the instructions of the Applicant, it accepted revenue's contention that the Bank of India premises where settlement activities happened through employees created a fixed place PE.

The AAR noted that MCI (of which Applicant was a wholly owned indirect subsidiary) had a liaison office ('LO') in India and for which the Applicant had disclosed income from transaction processing service rendered in India at full 100% attribution of global net profit rate. The

Applicant had shut down LO and transferred the work and employees to MISPL. AAR held that once the Applicant in the case of LO had legally accepted a PE on account of 100% attribution of profit to India, now MISPL also created a PE of the Applicant.

The AAR, while examining whether the work carried out by the Applicant's employees visiting India was a part of transaction processing services, concluded that the work was an integral part of the Applicant's profession to provide new avenues of services to clients. Thus, it held that the employees visiting India were providing services to clients, and if they exceeded the threshold of 90 days in a year, a service PE could be created.

The AAR noted that the agreement concluded by the Applicant were routed through MISPL who brought the proposal though it was finalized by the Applicant. The above action of MISPL satisfied the requirement of securing order under Article 5(8) of DTAA and thus, MISPL constituted a dependent PE agent.

MasterCard Asia Pacific Pte. Ltd. In.re [TS-452-AAR-2018-TP] AAR No.1573 of 2014 dated 06.07.2018

54. Assessee, a company incorporated in USA, was part of GE Group had set up a Liaison Office (LO) in India with permission of RBI for undertaking purely liaison activities. However, pursuant to survey conducted at LO premises in India, it was observed that actual activities carried on from fixed place of LO did not remain confined only to those of a communication channel as the LO premises was constantly occupied/permanently used by expats who were working in India for GE overseas entities carrying out sales activities. Accordingly, the Tribunal upheld the order of the AO treating the LO as a fixed place PE of the assessee. Further, the Tribunal also noted that the GE group entities in India along with expatriates deputed by the assessee were undertaking marketing activities and sales functions of the entire GE group and that GE India along with the deputed employees had the authority to conclude contracts on behalf of the group. Accordingly, it Indian entities of the GE Group as well as the expatriates/employees of overseas GE entities constituted dependent agency PE.

For the purpose of attribution of income to the PEs, the Tribunal noted that AO carried the exercise of attribution in two parts, viz., calculation of total profit from the sales which was worked out at 10% applying Rule 10(iii) and second, attribution of such profit to marketing activities, which was taken at 35% of 10% relying on Delhi ITAT ruling in Rolls Royce. The Tribunal upheld the 10% total profit on sales arrived at by the AO but directed the AO to attribute only 26% towards marketing activities noting that the extent of activities of the overseas entity in making sales in India was roughly 1/4th of the total marketing effort.

GE Energy Parts Inc v ADIT - [2017] 78 taxmann.com 2 (Delhi - Trib.) - IT APPEAL NO. 671 (DELHI) of 2011 dated 27.01.2017

55. The assessee, engaged in supplying telecom equipment was a US based subsidiary company of Nortel Networks, Canada and had an indirect subsidiary company in India viz. Nortel Networks India. Nortel Networks, Canada also had a Liaison office in India. Since Reliance, India required an Indian company to bid for its contract of supply of optical hardware and provision of related installation and commissioning services, Nortel India entered into the said contract and assigned all its rights under the optical hardware contract to the assessee retaining the services contract. The AO / CIT(A) alleging that the entire contract was a whole and that the installation and negotiation was done by Nortel India, held Nortel India and the LO as a fixed

place of business, dependent agent PE, business connection, place of management, sale outlet, installation PE and Service PE under the India-US DTAA. The Tribunal relying on the order the Court in the assessee's own case held that mere existence of business connection without evidence of the attributable profits in India would not lead to taxability in the hands of the assessee and since the supply of equipment was done by the assessee outside India there was no income attributable on that account. Vis-à-vis the installation, commissioning and testing, the Tribunal held that the said services were provided by Nortel India on its own account and not on behalf of the assessee and therefore no installation or service PE existed. Further, it held that there was no evidence that the premises of LO or Nortel India were at the disposal of the assessee and therefore it could not constitute a fixed place PE as well. As regards dependent agent PE, it held that there was no evidence brought on record to prove that Nortel India habitually concluded contracts on behalf of the assessee and accordingly held that no dependent agency PE existed as well. Accordingly, it held that the assessee was not taxable in India.

Nortel Networks India International Inc v ADDIT – (2017) 51 CCH 0129 Del Trib – ITA No 3313 to 3315 / Del / 2012

56. The Assessee, a Korean company engaged in manufacturing and sales of various categories of televisions, home appliances, telecommunication terminals, semi-conductors as well as other state of art IT products for global markets, had a wholly owned subsidiary in India i.e. SIEL to whom it seconded its employees. The Tribunal observed that the expatriate employees were only discharging duties of subsidiary company towards holding company (and did not carry out any activities on behalf of its subsidiary) and whatever benefits that were derived by Indian subsidiary by such communication were offered to tax in India. Absent any provision for Service PE under the India-South Korea DTAA, the Tribunal held that the employees of the assessee did not constitute a fixed place PE in India as no business was carried on by the assessee through the expatriated employees nor did the assessee derive any income by them through activities of these employees. Accordingly, it held that no income was taxable in India.

Samsung Electronics Co. Ltd v DCIT - [2018] 92 taxmann.com 171 (Delhi - Trib.) - IT APPEAL NOS. 65 TO 70 (DELHI) OF 2013 dated MARCH 22, 2018

57. The AO had brought to tax in India the income earned by the assessee, a Singapore based company, from supply of hardware, by considering the Indian company forming part of the same group and the Indian liaison office of the group parent company (based in Canada) to be the assessee's PE in India as per Article 5 of the India-Singapore DTAA. The Indian company provided market support and licensing services to the assessee. However, the AO opined that the Indian company and the liaison office were actually involved in negotiation and conclusion of contracts on behalf of the assessee in India. Noting that there was no material on record which even remotely suggested that the liaison office had acted on behalf of the assessee or was negotiating and concluding agreements on its behalf, the Tribunal held that the liaison office could not be considered as a fixed place of business of assessee. With respect to the Indian company (being the subsidiary of the Canada based group parent company), it held that a subsidiary company was an independent tax entity and its income is chargeable to tax in the state where it is resident. The Tribunal thus held that since the Indian company performed the tasks contracted to it, on its own behalf, the income from such activities as well as any function

performed by the expatriate employees of group companies seconded to the Indian company would be subject to tax in hands of the Indian company and the same could not be considered as income of the assessee.

ADIT v Nortel Networks Singapore (P.) Ltd. - [2018] 93 taxmann.com 401 (Delhi - Trib.) - IT APPEAL NOS. 2757 AND 2760 (DELHI) of 2009 & 2172 TO 2176 (DELHI) of 2011 dated April 24, 2018

NORTEL NETWORKS SINGAPORE PTE. LTD. vs. DDIT (IT) (DELHI TRIBUNAL) (ITA Nos. 5482, 3240, 3241/Del/2012 & 553/Del/2015, 5505/Del/2012) dated May 28, 2018 (53 CCH 0083)

58. The Tribunal held that the assessee was not liable to pay in India for transferring money to India for its American clients even if it appointed agents in India to provide the services and set up a liaison office to interact with such agents as the agents / liaison office did not constitute a permanent establishment as per the India –US DTAA which was examined by the Tribunal:
Fixed Place PE: The assessee did not have a fixed place PE as it did not have its own outlet in India
Liaison Office as PE: The liaison office was engaged in activities which were preparatory or auxiliary in nature and therefore could not be considered as a PE in India.
Dependent Agent PE: The agents appointed were acting in the ordinary course of their business and their activities were not wholly or almost devoted to the assessee.
Software PE: The software belonged to the assessee and was merely used by the agents without parting of the copyright. Further, even if the software was to be considered as an installation, it would not be used for exploration or exploitation of natural resources and therefore could not be treated as a PE.

DDIT v Western Union Financial Services Inc – [2015] 64 taxmann.com 230 (Del Trib)

59. The Tribunal held that where assessee secured order on behalf of its Indian entity and outsourced work thereto, such entity constituted assessee's business connection in India. Also, where assessee received BPO services from its Indian entity, it did not constitute fixed place PE in India. Further, where Assessing Officer alleged that expatriate employees of assessee were providing services in India but could not render any evidence in this regard, it was held that there was no service PE in India.

DCIT v Vertex Customer Management Ltd - [2016] 67 taxmann.com 105 (Delhi-Tribunal) [India - UK DTAA]

60. The Tribunal held that the amount received by assessee (a Switzerland company) pursuant to NHPC project was taxable in India for AY 2008-09 as the assessee's Indian subsidiary ('CIWSPL') represented through its MD constituted its fixed place PE in India. It noted that CIWSPL's MD was the project coordinator and represented the non-resident assessee at site and signed all the documents on behalf of assessee and that the assessee's business was conducted from the address of the project coordinator and all correspondences relating to prospecting of client, participation in bids, correspondence with customers, signing of contract document, execution of the project and closure of the project etc. were initiated or routed through such address. Therefore, it rejected the assessee's stand that since the project duration was only of 40 days,

the assessee could not be said to have any PE in India in view of Article 5.2(j) of India-Swiss DTAA (which prescribes 182 days threshold for construction/installation/assembly PE). It observed that the “fixed place test” was positive for the assessee and it was not required to go for special inclusion for the purpose of determination of PE, more so since the contract was not related to a building site, construction, installation or assembly project and the work largely being in the nature of repair and supply of material.

Carpi Tech SA [TS-587-ITAT-2016(CHNY) – (India-Swiss DTAA)

61. The Tribunal held that project office(PO) in India of the assessee (Dutch company) did not constitute PE of assessee in India under Article 5 of India-Netherlands DTAA since the PO was for establishing Traffic Service system and no part of the contract execution was carried out through the PO in India and it was used only to collect money and pay certain expenses on behalf of the assessee. It further held that PO did not constitute installation PE in India since no installation activity were undertaken during the relevant AY and only maintenance services were undertaken (through a contractor in India). Consequently, the profits arising out of off-shore supply of equipments were also not taxable in India

HITT Holland Institute of Traffic Technology B.V [TS-48-ITAT-2017(Kol)] (IT APPEAL NO. 574 (KOL.) OF 2014)

62. The assessee was engaged by its customers for supervising detailed engineering, installation and commissioning activity undertaken independently by customers. The assessee had supervisory PE in India for rendering supervisory services on stand-alone basis. For purpose of computation of profit the assessee computed average profit margin earned by comparable Indian Companies at 17.93 per cent. The assessee, therefore, attributed profits to supervisory PE by applying a net profit rate of 17.93 per cent on gross revenue. The assessing Officer, however, disregarded such comparable companies and applied net profit percentage of 27.5 per cent as adjudication by Settlement Commission for Financial years 2007-08 and 2008-09. The Tribunal held that since the assessee did not maintain books of account in respect of its supervisory PE in India, there was clear violation of provisions of section 44AD. Therefore, impugned action of the Assessing Officer was rightly confirmed by DRP.

Outotec GmbH v. Dy. DIT(International Taxation)[2015] 58 taxmann.com 232/172 TTJ 337 (Kol.)

63. The Tribunal held that for the purpose of computing number of days stay for examining the threshold limit of 9 months under section 5(2)(i) of the India- Mauritius DTAA, each building site, construction, assembly project or supervisory activities was to be viewed independently on stand-alone basis and no aggregation was to be done. Accordingly, since the duration of the project did not exceed 9 months, the Tribunal held that there was no PE in India. Further, with regard to the assessee's Liaison office premises, it held that the office maintained by the assessee was in the form of an auxiliary unit to provide back up support and other auxiliary services for the purpose of maintaining coordination and aid to the functioning of the project and therefore did not constitute a PE as the activities were preparatory or auxiliary in nature.

J Ray Mc Dermott Eastern Hemisphere Ltd - TS-250-ITAT-2016 (Mum)

Attribution to PE

64. The AAR held that the entire contract revenue arising to the Applicant, a Singaporean company from L&T towards supply of goods and rendition of services was taxable in India as it was attributable to its PE in India and rejected the contention of the Applicant that the contract was bifurcated into two parts viz. (i) offshore supply of goods and (ii) provision of services since there was no division on the basis of supply and services and the payment was not separately linked with services and supply but was made on the basis of stages of completion of the contract irrespective of goods and materials brought in the premise and that the intention of the applicant was that the property in the goods will pass only when the installation and erection of entire works was completed.
MERO Asia Pacific Pte Ltd - TS-489-AAR-2016 - A.A.R. No 981 of 2010 [India - Singapore DTAA]
65. The Tribunal upheld CIT(A)'s order holding that as per Article 7(3) of the India-Mauritius Treaty all expenses incurred for purpose of business of PE are to be allowed and there cannot be any restriction on allowability of such expenses by subjecting the same to any limitation of taxation laws of contracting State (India), unlike the India-USA DTAA or India-UAE DTAA which specifically provide that deduction of expenses incurred for the purpose of business of the PE would be in accordance with provisions subject to the limitation of the taxation laws of that State. Accordingly, it held that deduction claimed for expenses incurred for the purpose of business of the PE of a Mauritian resident-entity was to be allowed, irrespective of the fact that TDS u/s 195 was not deducted, since the said claim could not be made subjected to provision of section 40(a)(i) or any other provision of Income-tax Act.
DDIT v Unocol Bharat Ltd [2018] 99 taxmann.com 158 (Delhi - Trib.) – ITA No. 1388 (DELHI) OF 2012 dated October 5, 2018
66. The Tribunal attributed 30% of profits to Indian branch of Singapore-based assessee in respect of direct sales in India by the head-office on the ground that the assessee had booked all expenses incurred on marketing activity for direct sale without receiving any corresponding income. It rejected the assessee's argument that AO had applied 'force of attraction rule' and held that where the Indian branch office renders some services in respect of the direct sales made by the head office, the determination of income for such services, cannot be brought within the ambit of force of attraction rule and that the AO had applied 'profit attribution' principle by confining income computation only to the extent of contribution of marketing services rendered by the Indian branch. Relying on the provisions of section 44BB and 44BBB, it directed computation of assessee's profit @ 10% of total sales in India and attributes 30% of such profits to Indian PE i.e. at 3% (30% of 10%) relying on various decisions.
Nipro Asia Pte Ltd. [TS-66-ITAT-2017(DEL)] (ITA No.4078/Del/2013)
67. The Tribunal applied the indirect method of attribution of profits as per Rule 10 of the Rules to attribute the profits of the assessee (a Chinese company) to its PE in India in respect of supply of telecom equipment and mobile handsets, since the assessee did not maintain any books of accounts relating to the PE in India. It held that for the purpose of attribution of profits to a PE, the most important aspect to be kept in mind is the level of the PE's participation in the economic

life of the source country and the nexus between the source country and the PE's activities. Referring to the activities performed by the Indian PE, the Tribunal held that the level of operations carried by the PE were considerable enough to conclude that almost the entire sales and after sales function were carried out by the PE in India and accordingly attributed 35 percent of the net global profits to the impugned PE. Further, it rejected the assessee's contention that no further attribution of profits could be made to the PE as the transactions were accepted to be at ALP by the TPO, since the post-sale activities carried out by the Indian entity surfaced only during survey carried out by the Department and were not subject matter of TP proceedings.

ZTE Corporation v ADIT - (2016) 70 taxmann.com 1 (Del - Trib) [India- China DTAA]

68. Where the assessee, a Singapore based company, had licensed its wholly owned subsidiary viz. ADSIL as its national marketing company in India (ADSIL marketed the assessee's Computerized Reservation System in India) and ADSIL was an agency PE of the assessee, the Tribunal relying on the decision of the co-ordinate bench (wherein the Tribunal relying on the decision of the Delhi High Court in Galileo International Inc and CBDT Circular No. 23, dated July 23, 1969) held that only 15 percent of the gross receipts of ADSIL was taxable and that the AO was unjustified in attributing the entire gross receipts as the income attributable to the PE. Noting that the assessee was paying a commission of 25 percent of gross receipts as commission to ADSIL, it held that after deduction of the said commission, there would be no income attributable to the PE and therefore observed that the assessee would not be liable to tax.

Further, refusing the assessee's request to furnish additional evidence with respect to reimbursement received, it dismissed the contention of the assessee that the CIT(A) had erred in treating the reimbursement received by it from ADSIL as business profits and held that the assessee was granted abundant opportunity to substantiate the nature of reimbursements before the AO which it failed to comply with. Accordingly, it held that the said reimbursements would be taxable as business income. However, it allowed the assessee to set off the commission payment to ADSIL against this income as well.

Sabre Asia Pacific Pte Ltd (Earlier Known as Abacus International Pte Ltd.) vs. DCIT - TS-112-ITAT-2018(Mum)-TP - I.T.A. No. 486/Mum/2016 dated 16.02.2018

69. The Tribunal upheld the order of the CIT(A) wherein the CIT(A) deleted disallowance u/s 40(a)(i) and held that TDS u/s. 195 was not applicable on payments made by assessee-company to a US based concern for provision of support services, rendered from outside India under a service agreement as the said services were not attributable to the US entity's PE in India (which was constituted vis-à-vis different set of services). It noted that the service agreement between the assessee and US co. envisaged providing of various services to assessee in the form of information support system, marketing and new business development, new product development, actuarial services, accounting support services, internal audit services, etc which were rendered in the US and relying on the decision of the Bombay High Court in WNS North America (ITA No. 1269 of 2013) held that activities carried on in the US could not be attributed to the US entity's PE in India. Accordingly, it dismissed Revenue's appeal.

DCIT vs Transamerica Direct Marketing Consultants Pvt. Ltd - TS-190-ITAT-2018(Mum) - ITA NO. 1978/MUM/2015 dated 19/03/2018

70. The Tribunal held that as interest payment by Permanent establishment (Branch office) to its head office (a foreign company) was a payment by a foreign company's Indian PE to foreign company itself; it could not give rise to any income, in hands of foreign company.
BNP Paribas SA v. ADIT - [2016] 69 taxmann.com 6 (Mumbai - Tribunal) [India - France DTAA]

General

71. The Apex court granted leave to the departments SLP against High Court's ruling that where assessee, a Mauritius based telecaster of TV channels, carried out entire activities from Mauritius, its affiliates/agents in India who were remunerated on arm's length basis for carrying out only routine functions in India, did not constitute assessee's PE in India.
DIT v. B4U International Holdings Ltd - (2016) 71 taxmann.com 182 (SC) - SPECIAL LEAVE TO APPEAL (C) NO. 10482 OF 2016
72. Where the transactions between the assessee and its Indian subsidiary were at ALP under TP proceedings, the Apex Court held that even if the subsidiary constituted a PE, no further profits could be attributed. Accordingly, it reversed the order of the High Court and held that the reassessment proceedings initiated by the AO was therefore invalid.
HONDA MOTOR CO.LTD, JAPAN vs. ASSTT. DIRECTOR OF INCOME-TAX, NOIDA & ORS. - (2018) 101 CCH 0169 ISCC - Special Leave to Appeal (C) No(s). 25363/2014 dated Mar 14, 2018
73. The AAR ruled that the non-compete fees received by the applicant foreign company from an Indian Company, as a part of consideration for transfer of shares held in another Indian Company was income from "Profits and gains of business or profession" u/s 28(va). However, it further ruled that in absence of any Permanent Establishment (PE) of the applicant-company in India, by virtue of Article 7 of India-UK DTAA, the said fees was not chargeable to tax in India.
HM Publishers Holdings Ltd., In re - [2018] 94 taxmann.com 193 (AAR - New Delhi) - A.A.R. NO. 1238 OF 2012 dated Jun 6, 2018
74. The Applicant was an International Association and did not have a motive to earn profits (as per Articles of Association). The AAR held that if the activities of the Liaison Office ('LO') proposed to be established in India are based on the principle of mutuality, then any incidental surplus arising to the LO should not be liable to tax in India under the provisions of the Income-tax Act, 1961 ('Act') or the India-Belgium DTAA. As regards the Revenues contention that, such LO constitutes a Permanent Establishment (PE) in India, AAR held that once the principles of mutuality are satisfied by an entity, it cannot be said that such an entity is carrying on any 'business' and where there is no 'business', a PE cannot be constituted.
International Zinc Association in Re – [2018] 102 CCH 0018 (Advance Rulings) – AAR No 1319 of 2012 dated May 24, 2018
75. The AAR, relying on Explanation 1 to section 9(1)(i) (which specifies that only that part of income which was due to operations in India would be deemed to accrue or arise in India) held that where the Applicant an Indian company entered into two agreements with a French

company ('MFPM') viz. (i) Umbrella Agreement for design, engineering, manufacturing and supply of machinery and equipment from outside India; and (ii) Services agreement, in relation to supervision of installation services rendered by different external suppliers and to coordinate the start-up and ramp-up services rendered by those suppliers, no income from off shore supply of equipment would be taxable in India as the transaction was completed outside India. However, it held that payments made for services of supervision rendered by MFPM to Applicant as per services agreement would be chargeable to tax in India as the activities of supervision took place in India.

Michelin Tamil Nadu Tyres (P.) Ltd., In re - [2018] 89 taxmann.com 217 (AAR - New Delhi) - A.A.R. NO 1218 OF 2011 – dated 19.12.2017

76. The Tribunal held that where the assessee received services from UK and UAE based entities in running a duty free retail outlet at international terminals under an Exclusive Procurement Agreement, it was not liable to deduct tax at source on payments made to such entities as alleged by the AO on the ground that the UK / UAE companies had a business connection in India, since the agreement did not envisage exercise of absolute control over the business of duty free shops by the UK / UAE entities and that they did not have the right to determine retail prices at the shops. The Tribunal also noted that the title and risk to the merchandise was transferred outside India and the fact that the commission paid was directly linked to sales was not a relevant factor.

Cochin International Airport Ltd v ITO - TS-73-ITAT-2016 (Cochin) [India - UK DTAA, India - UAE DTAA]

77. Where the assessee-company made payment of commission, legal and professional charges, outsourcing expenses to its AE, the Tribunal held that since the payments were not received by the AE in India and the AE did not have a business connection or PE in India, the assessee was not liable to deduct tax on the said payment and accordingly held that the AO was incorrect in disallowing the payments under Section 40(a)(i) of the Act.

IDS Infotech Ltd. v DCIT - [2017] 80 taxmann.com 88 (Chandigarh - Trib.) - IT APPEAL No. 130 (CHD.) of 2016 dated 09.03.2017

78. Where the assessee (PE of foreign bank) had paid interest on foreign currency loan availed from its UK HO, the Tribunal denied the deduction of interest paid on the ground that as per Article 7(5) r.w. Article 7(7) of India-UK DTAA, the interest deduction would be subject to domestic tax law and as per the Income-tax Act, interest paid by the branch to HO is not deductible, being payment made to self.

Standard Chartered Grindlays Pty Ltd. [TS-113-ITAT-2017(DEL)]

79. The Tribunal held that amount received by assessee, a Singaporean company engaged in business of making / accepting / executing and discounting of financial instruments, from its Indian associated enterprises by discounting their Promissory Notes was assessable as discounting charge and not as interest under section 2(28A) of the Act / Article 11 of India-Singapore DTAA. The same was business income of assessee which could not be taxed in India in absence of its PE in India. It further held that this was a case where assessee had

merely discounted the sale consideration receivable on sale of goods and not a case where any money had been borrowed or debt had been incurred.

Cargill financial Services Asia Pte. Ltd, In Liquidation v ADIT - [2016] 67 taxmann.com 266

(Delhi-Tribunal)

80. The Tribunal held that where UK-based non-resident company received non-compete fee, a business receipt, the same could not be taxed in India in the absence of a PE.

Trans Global PLC vs DIT (IT) - [2016] 68 taxmann.com 146. (Kolkata - Tribunal) [India - UK DTAA]

81. The Tribunal held that ownership of equipment was transferred outside India and majority of sale consideration was also received outside India in foreign currency. It was also noticed that in case acceptance tests were unsuccessful, the assessee was merely entitled to claim liquidated damages. It was also undisputed that as far as sale of equipment was concerned, no PE of the the assessee was constituted in India. In view of aforesaid, impugned addition made by authorities below was to be deleted.

Outotec GmbH v. Dy. DIT(International Taxation)[2015] 58 taxmann.com 232/172 TTJ 337 (Kol.)

82. The Tribunal held that Fees received by non-resident assessee for education consultancy services rendered by it was not taxable in India in absence of PE in India and the said services did not fall in category of Royalty or Fees for Included Services.

Partners Harvard Medical International Inc. v. Asstt. DIT (International Taxation) [2015] 60 taxmann.com 446/70 SOT 174/41 ITR (Trib.) 183 (Mum.)

83. Relying on the AAR ruling in the case of Cushman & Wakefield (S) Pte. Ltd., In re. (2008) 305 ITR 208 (AAR) and the decision in the case of CLSA Ltd. v. ITO(IT) (2013) 56 SOT 254 (Mum), the Tribunal held that the referral fee received by the Dubai branch of the assessee-swiss company from an Indian company for referring an Indian resident client was in nature of 'commission' to be taxed as 'business income' and not as 'fees for technical services'. In the above referred ruling, the AAR considered the provisions of the Act as well as the Indo-Singapore DTAA whereas in the above referred Tribunal decision, referral fees was held not to be in the nature of 'fees for technical services' within the meaning of section 9(1)(vii). The Tribunal, in the present case, further held since the assessee's branch did not have a PE in India and the assessee's PE in India had no role to play in the performance of the referral activity in question, the impugned fee could not be considered to be attributable to assessee's PE in India and, thus, the same would not be liable to tax in India as per article 7 of the Indo-Swiss DTAA.

DCIT v Credit Suisse AG – (2018) 90 taxmann.com 181 (Mum) – ITA Nos. 1247 (Mum) of 2016 and 7357 (Mum) of 2017 Cross objection no. 278 (Mum) of 2017 dated 09.02.2018

84. The Tribunal held that where assessee's branch office, which was considered as assessee's PE in India, was compensated at arm's length for performing services in respect of direct sales

made by assessee in India, no part of assessee's profit could be taxed in India as profit attributable to Indian PE.

St. Jude Medical Inc. v Dy. Dir of ITO (Int.Taxation) (2015) 64 taxmann.com 384 (Mum-Trib) - ITA Nos. 1978 to 1980 (Mum) of 2011 dated 31st July, 2015

b. Royalty

Software

85. The Court rejecting the Revenue's stand that software was a 'copyright' in terms of Explanation 2(v) to Sec 9(1)(vi) of the Act and also under Article 12(3) of India-China DTAA, held that the consideration received by assessee (a Chinese telecom company) for supply of software to Indian companies, could not be regarded as royalty since the supply of software was in the nature of sale of goods i.e transfer of copyrighted article and not transfer of copyright itself. The software was an integral part of the telecom equipment supplied by the assessee. Further, the supplies made (of the software) enabled the use of hardware sold, without the software the hardware was not possible.

ZTE Corporation [TS-33-HC-2017(Del)]

86. The Court held that consideration received by assessee on sale of pre packaged software was not royalty. It further held that there is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle the Court held that a non- exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of USA DTAA.

CIT & ANR vs. Halliburton Export Inc. & ANR - (2016) 96 CCH 0060 (Del HC) - ITA 363/2016, 365/2016 [India - US DTAA]

87. The Court held that software purchase payments by the assessee, in the capacity of a Value Added Reseller did not amount to royalty as payments made for purchase of a software as a product could not be considered to be for the use or the right to use the software. It held that it was necessary to make a distinction between cases where consideration as paid to acquire the right to use a patent or copyright and cases where payment was made to acquire patented or copyrighted products / material and where the payment was for copyrighted products / materials, the consideration was to be treated as a purchase of product. Accordingly, the disallowances made under section 40(a)(i) and 40(a)(ia) of the Act were deleted.

Pr CIT v M Tech India Pvt Ltd - (2016) 67 taxmann.com 245 (Del)

88. The AAR held that payments received by the applicant on sale of its e-learning software products to Skillsoft India for onward sale to final customers constituted Royalty under the Treaty as 'software' was included within the ambit of 'literary work' and the end-customers were

granted license to access software providing them the right to use the copyright embedded in the product notwithstanding its non-transferability.

SkillSoft Ireland Limited - (2015) 123 DTR (AAR) 17

89. Applicant, an Ireland based company was engaged in providing Skillsoft products, namely, course content and especially designed software to understand content. It appointed an Indian company as its reseller. As per agreement Indian company was buy products from applicant and licence it to Indian end users to access and use said products. Software contained simulation exercise for understanding content and it was not available in public domain. The AAR held that consideration paid by an Indian distributor to foreign company for use or right to use confident programme software (especially designed software) itself constitutes royalty in terms of DTAA between India and Ireland. It held that when a copyrighted article is permitted or licensed to be used for a fee, permission involves not only physical or electronic manifestation of a programme, but also use of or right to use copyright embedded therein and, thus it cannot be contended that payment received is only in respect of copyrighted article and no rights are granted to end users.

Authority for Advance Rulings - Skillsoft Ireland Ltd. [2015] 62 taxmann.com 304 (AAR – New Delhi) A.A.R. No.985 of 2010 dated July 20, 2015

90. The Applicant [a leading global payment solution provider] used to charge banks [with whom it entered into Master License Agreements] processing fees relating to authorization, clearing and settlement of transactions. The Applicant also received assessment fees for building and maintaining a processing network. Additionally, it received miscellaneous revenue for the provision of services which were ancillary to the transaction processing activities. The Applicant provided the banks with a MasterCard Interface Processor (MIPs) that connected to the Mastercard Network and other processing centres. The applicant sought a ruling on the issues (i) Whether transaction processing fee, assessment fees and transaction related miscellaneous fees amounted to royalty (ii) Whether use of MIP equipment amounted to royalty (iii) Whether the use of software amounted to royalty (iv) Whether the fees paid by the final consumer who was using the card amounted to FTS.

The AAR noted that bank issued their own card and used the logo owned by MasterCard. It examined the agreement between the Applicant and banks and concluded that the dominant purpose was to license the trademark/mark. It also observed that the Applicant made the payment of royalty to MCI US (who was the owner of the IPs) for further sublicensing the IPs. Thus, the AAR held that the payment received by the Applicant represented consideration for use of IPs in India, and hence to be classified as Royalty.

The AAR also held that MIPs are equipments whose use constituted royalty. Further, noting that the use of software inside MIP and cards in the application software were essential parts of the transaction without which transaction would not be completed, it held that the use of software was subject to royalty.

However, the AAR held that the relation between the final consumer and the Applicant was of use of a standard facility and hence transaction processing service rendered by the Applicant could not be taxed under the article of FTS in India-Singapore DTAA.

MasterCard Asia Pacific Pte. Ltd. In.re [TS-452-AAR-2018-TP] AAR No.1573 of 2014 dated 06.07.2018

91. The Tribunal held that consideration received by the assessee (a UAE based group company) from ABB Ltd. (assessee's Indian counterpart) pursuant to rendering technical services, constituted 'royalty' under Article 12 of India-UAE DTAA. It rejected assessee's argument that the amount was not taxable in India as neither did the DTAA have a specific FTS article nor was Article 22 ('other income') applicable as assessee did not have a PE in India. It observed that the service agreement gave opportunity to ABB Ltd of using the information pertaining to industrial/commercial / scientific experience belonging to the assessee which would fall within the ambit of 'royalty' definition under Article 12(3) of India-UAE DTAA. It further held that furnishing of consultancy services by the assessee through its employees would fall within the ambit of service PE under Article 5(2)(i) of India-UAE DTAA. It rejected assessee's stand that since the employees remained in India only for 25 days, service PE clause was not triggered and held that in the present age of technology where the services, information, consultancy, etc., could be provided with various virtual modes, services could be rendered even without the physical presence of employees of the assessee. It further held that for triggering PE, services or activities should have been rendered for more than 9 months and stay of the employees was not required for more than 9 months. It also rejected the assessee's reliance on co-ordinate bench ruling in assessee's own case for AY 2012-13 wherein it was held that FTS was not taxable in India in absence of assessee's PE in India since there was no examination by coordinate bench with regard to the nature of activities of assessee as to under which clause of DTAA such activities would fall.

ABB FZ-LLC [TS-256-ITAT-2017(Bang)]

92. The Tribunal held that the payment made by assessee to its parent in Italy towards software licenses purchased during AY 2009-10 to 2015-16 was not in the nature of royalty to attract deduction of tax u/s 195. It observed that even though the software license agreement permitted creation of unlimited software license copies, the same could be used by assessee only for internal business and assessee was not allowed to sub-license, assign or transfer such software and therefore the assessee was given only a right to use copyrighted software for limited term. Further, relying on the decision in the case of Dassault Systems Simulia Corporation, it held that though Finance Act 2012 widened the definition of Royalty w.e.f June 1976, there was no such amendment in the India-Italy DTAA as regards to definition of Royalty (article 13) and therefore the assessee was justified in harboring a view that payments made by it did not fall within the meaning of the term 'Royalty' as used in DTAA and thus assessee could not be saddled with a liability for failure to deduct tax source.

Saipem India Projctcs Pvt Ltd-TS-484-ITAT-2017(CHNY)- ITA No. 1862, 1863, 1868/mds/2017 dated oct 23, 2017

93. The Tribunal held that where the assessee obtained license only for the usage of software for a limited period and did not have right to change or modify software, payment made for obtaining license to use software could not be held to be royalty coming within ambit of DTAA or fees for technical services under section 9(1)(vii).

Nissan Motor India (P.) Ltd v DCIT - [2018] 92 taxmann.com 127 (Chennai - Trib.) - IT APPEAL NO. 1854 (CHNY) OF 2017 dated MARCH 21, 2018

94. The Assessee, engaged in business of development and distribution of software products in UK, sold software products in India, either through its distributors or directly to customers. The Tribunal held that receipts from offshore sale of software would not be taxable as business income under Article 7 of the tax treaty in absence of a PE in India. Further, the Tribunal held that such receipts could not be construed as royalty under Article 12 of the India-UK tax treaty as the Assessee was only selling copy righted article and there was no payment for use of copy right or acquiring the right to use the copy right. While doing so, the Tribunal relied on the judgement of the Delhi High Court in Infra Soft Pvt. Ltd (96 DTR 0113) and M Tech India P Ltd (132 DTR 0057). Relying on the ruling of Delhi High Court in New Skies Satellite (133 DTR 0185) Tribunal also noted that any amendment in the Act could not be read into the treaty.
DCIT (IT) & Ors. vs. Micro Focus Ltd. & Anr. – [2018] 53 CCH 0062 (Delhi ITAT) – ITAs No 3312, 3313, 2376 & 2377 of 2016 and 177 of 2017 dated May 17, 2018
95. The Tribunal held that consideration received by the assessee for providing access to internet and other networking facilities to an Indian entity was royalty under Article 12(3) of the India-US DTAA observing that such payment was for the use of embedded secrecy software enabling Indian customers to call residents of the USA and vice versa. Following the AAR Ruling in the case of ABC (238 ITR 296), it held that the transaction would be related to scientific work and would partake the character of intellectual property.
Cincom System Inc v DDIT (ITA No. 952/Del/2006) – TS-568-ITAT-2015 (Del)
96. The Tribunal allowed assessee's appeal against CIT(A)'s order wherein the CIT(A) had upheld the AO's order bringing to tax license fee received by the assessee, Canadian company, in terms of 'Membership and Technology Transfer Agreement' from Indian company for acquisition of certain specified licences relating to Reservoirs Synch Technology as royalty. It was noted that the payment for membership by the Indian company was purely for non-exclusive and non-transferable licence to use technology only for its own internal business purpose and there was neither sale of copyright nor licence was given for copyright in any kind of software or technology. The Tribunal accepted the assessee's submission that what was given under the agreement was right to use copyrighted article and not the copyright, relying on the decision in the case of DIT v. Infrasoftware Ltd. (2014) 20 Taxman 273 (Del HC) wherein it was held that payment made for use of copyrighted article cannot be considered as royalty under Article 12 of India-USA DTAA but as business income under Article 7. Accordingly, it held that the said payment could not be held to be reckoned as royalty under the India-Canada DTAA.
ONGC v DDIT [2019] 100 taxmann.com 265 (Del Trib) – ITA Nos. 3046 (DELHI) of 2010 & 3908 (DELHI) of 2011 & others dated November 19, 2018
97. The Tribunal allowed assessee's appeal filed against DRP's order confirming AO's action in taxing the revenue received by the assessee, a US company, on account of sale of off the shelf software as 'royalty' u/s 9(1)(vi) as well as under Article 12 of the India-US DTAA. It noted that on identical facts the Tribunal had decided in favour of the assessee in earlier years following the decision in the case of DIT v Infrasoftware Ltd (2014) 220 Taxman 273 (Del HC) wherein it was held that right to use a copyrighted article or product with the owner retaining his copyright was not the same thing as transferring or assigning rights in relation to the copyright and that the enjoyment of some or all the rights which the copyright owner had, was necessary to invoke the

royalty definition under Article 12 of the India-US DTAA. It also noted that the authorities below had not been able to establish that the sale of software was merely a right to use copyright article or product with the owner retaining its copyright and that the DRP had held that the assessee did not have a PE in India.

Landmark Graphics Corporation v ADIT – ITA No. 5285 /Del/ 2010 dated 18.01.2018

98. The Assessee, a Singapore based company, supplied software and hardware to a resident company and the hardware and software which were sold by the assessee were interdependent in the sense that the hardware was useless without this particular software and the software could not be used in any hardware other than the one for which it was permitted to be used. Following the decision in the case of the assessee's group company i.e., Nortel Networks India International Inc v. ADIT [ITA Nos. 3313 to 3315/Del/2012] decided in favour of assessee on identical issue, the Tribunal held that the embedded software was not royalty and the receipts on account of sale of embedded software could not be separately brought to tax. In the case of assessee's group company, the Court had relied on the decision in the case of CIT v ZTE Corpn. [2017] 392 ITR 80 (Del HC) wherein it was held that since the supply of software embedded in equipment enabled use of hardware sold, it resulted in a case of sale of copyrighted article and, thus, payment made towards supply of software was not taxable in India as royalty.

ADIT v Nortel Networks Singapore (P.) Ltd. - [2018] 93 taxmann.com 401 (Delhi - Trib.) - IT APPEAL NOS. 2757 AND 2760 (DELHI) OF 2009 & 2172 TO 2176 (DELHI) OF 2011 dated April 24, 2018

NORTEL NETWORKS SINGAPORE PTE. LTD. vs. DDIT (IT) (DELHI TRIBUNAL) (ITA Nos. 5482, 3240, 3241/Del/2012 & 553/Del/2015, 5505/Del/2012) dated May 28, 2018 (53 CCH 0083)

99. The Tribunal held that revenue earned from 'software sale' by assessee an India branch of a UK company to Indian customers was in nature of business receipts and not royalty as same was consideration for sale of a copyrighted product and not for use of any copyright. All Intellectual property rights to products remained with UK company and assessee could not use it or pass it over to anyone except by way of sale of software products Further, 'royalty' definition under India-UK DTAA did not include consideration for use of computer software. Furthermore, retrospective insertion of Explanation 4 to section 9(1)(vi) vide Finance Act, 2012 which included consideration for right to use a computer software within ambit of 'royalty' also could not be read into DTAA as a country which was party to a treaty could not unilaterally alter its provisions. Also the Tribunal further held that receipts from annual maintenance contract having same character as that of original software would be covered under business profits under article 7. Also, where training to employees of end users of software sold by assessee for which consideration had been received was ancillary and subsidiary to sale of software; it was to be treated as business receipts under article 7 of DTAA between India and UK.

Datamine International Ltd v ADIT - [2016] 68 taxmann.com 97 (Delhi-Tribunal)[India - UK DTAA]

100. Where the assessee entered into an agreement with ICC pursuant to which the assessee was granted 'promotional, advertising, marketing and other commercial rights' on a worldwide basis in connection with ICC events and was designated as the 'Official Partner of ICC' and also was

allowed to use ICC logo, marks etc., the Tribunal held that 'Right fees' paid by the assessee was exclusively for use of Marks of ICC for purposes of promotion and advertisement and not for manufacture and sale of licensed products and no part of 'Rights fee' was attributable to the use of marks for the manufacture and sale of licensed product (which was separately covered in the agreement). Accordingly, it held that the payment was not in the nature of royalty u/s 9(1)(vi) or FTS u/s 9(1)(vii) and consequently, TDS u/s 195 was not applicable.

Reebok India Company vs. DCIT [2017] 79 taxmann.com 271 (Delhi - Trib.)

101. The Tribunal held that payment by the assessee to various companies in USA, UK, Germany etc. for use of software licenses neither amounted to royalty, both under the Act and respective DTAA's, nor Fees for Technical Services ('FTS') as it could not be said that assessee was granted a right to utilize the copyright embedded in the software, but was only granted a right to use the software product. It further observed that assessee purchased end user software license packages which were used as tools in its software development activity, and held that it was a case of purchase of copyrighted article and not use of copyright itself.

Quaolcomm India Private Limited [TS-605-ITAT-2016(HYD)] (ITA Nos.1664 to 1667/Hyd/2011)

(India – USA, UK, Germany DTAA)

102. The assessee was appointed as a registered reseller of software products manufacture by Altiris, a Singaporean company. In terms of agreement, the assessee had to purchase software products from Altiris and sell those products to customers in India. In terms of agreement, role of the assessee was that of a trader and, there was no transfer of copyright or patent of software products by Altiris to the assessee. Moreover, the assessee was not even permitted to make copies or duplicate software.

The Tribunal held that on facts, payments made by the assessee to Altiris would not come within purview of royalty under section 9(1)(vi) and, thus there was no requirement to deduct tax at source while making said payments.

Asst. DIT v. Locuz Enterprise Solutions Ltd. [2015] 61 taxmann.com 47/154 ITD 808 (Hyd.)

103. The Tribunal held that software embedded in an equipment cannot be regarded as giving any independent right to use software and accordingly, consideration is paid for purchase for 'copyrighted article' which cannot be treated as royalty.

HITT Holland Institute of Traffic Technology B.V. v. DDIT [2017] 78 taxmann.com 101 (Kolkata - Trib.) (IT APPEAL NO. 574 (KOL.) OF 2014)

104. The Tribunal held that software payments by the assessee to a Singaporean company was not royalty as per Article 12(3) of India-Singapore DTAA since the software license agreement provided assessee the right to use the computer software and not right to use copyright in the computer software. It observed that Article 12(3) covers 'use of/right to use of any copyright of literary....' and not right to use software unlike Explanation 4 to section 9(1)(vi). As per section 90(2), the assessee could be governed by beneficial DTAA provisions and accordingly, the payment made did not fall under the definition of royalty as per Article 12(3). It further held that though computer software would be recognized as literary work as per Copyright Act but to

constitute royalty as per Article 12(3) of DTAA, the consideration should have been paid for the use or right to use copyright in the literary work and not the right to use the literary work itself.

I.T.C. Limited [TS-81-ITAT-2017(Kol)] (I.T.A No. 673/Kol/2013)

- 105.** The Tribunal held that where assessee had entered into agreement with US company for use of software owned by US company and said agreement specifically forbade assessee from decompiling, reverse engineering or disassembling software and it provided that assessee would use software only for internal business operation and would not sub-license or modify same, consideration payable by assessee was for use of copyrighted article and not for use of copyright and, hence, could not be considered as royalty within meaning of article 12(4) of India-US DTAA.

First Advantage (P) Ltd. [2017] 77 taxmann.com 195 (Mumbai Tri.)

- 106.** The Tribunal held that since as per agreement entered into between assessee and its US based AE, the assessee had only been granted a non-exclusive and non-transferable license to use copyrighted article, i.e., 'Blaze advisor' software of its AE for its internal business purposes and the AE had retained with itself copyrights of the same, the amount received by the AE from assessee did not give rise to any royalty income within meaning of Article 12(3) of India-US DTAA.

Reliance General Insurance Co. Ltd. v ITO(IT) [2018] 97 taxmann.com 350 (Mumbai - Trib.) – ITA No. 8184 (MUM.) OF 2011 dated August 23, 2018

- 107.** The assessee, UK based company, was in business of providing electronic deal matching system which provided requisite information and data for matching request for purchase and sale of foreign exchange, thus, enabling authorised dealers in foreign exchange such as banks and other financial institutions, etc. to effect deals in spot foreign exchange with other foreign exchange dealers. The main server of assessee was located in Geneva and access to the assessee's portal was given only by use of computer system and copyrighted software system provided by assessee under license. The AO held that the subscription charges received by assessee from customers in India was in nature of royalty. The Tribunal upheld the AO's order, following the coordinate bench in assessee's own case for earlier assessment years wherein, dealing with similar issue, it was held that assessee's activities would amount to imparting of information concerning technical, industrial, commercial or scientific equipment work and payment made in this respect constituted royalty.

DCIT v Reuters Transaction Services Ltd [2018] 96 taxmann.com 354 (Mumbai - Trib.) – ITA Nos. 1393 & 2219 (MUM.) OF 2016 dated August 3, 2018

- 108.** The assessee, a Belgian company engaged in business of production and sale of health and digital imaging solutions (MRI machines), earned receipts from sale of software licenses provided along with the equipment/ hardware sold in India to its India Group Company (AHIPL). The AO held that the consideration received from sale of software had to be treated as royalty as per sec 9(1)(vi) as well as under Article 12(3)(a) of the India-Belgium DTAA. The Tribunal followed the coordinate bench ruling in case of AHIPL wherein the Tribunal had quashed the order passed u/s 201 / 201(1A) holding that the payment made by AHIPL to the assessee-company was not in nature of royalty since the dominant character and essence of the

transaction was sale of machine by the assessee and the software, independently, had no value for the customer. In the case of AHIPL, the Tribunal had also relied on the coordinate bench ruling in HIIT Holland Institute of Traffic Technology BV vs DDIT wherein it was held that where software was embedded in equipment supplied for mere purpose of operating equipment, it was not a case of giving independent right to use software and hence the amount paid for supply of software was not taxable in India as royalty u/s 9(1)(vi). Accordingly, it allowed the assessee's appeal on this ground.

The Tribunal, however, remanded the issue of taxation of income earned from provision of information and communication service by treating it to be royalty for de-novo adjudication, noting that neither the AO nor the DRP had examined assessee's contention that the expanded definition of royalty after introduction of Explanation-4 to section 9(1)(vi) would not apply to assessee's case in absence of corresponding amendment in Article- 12(3)(a) of India Belgium DTAA

Agfa Healthcare N.V. vs Dy.CIT [2018] 97 taxmann.com 463 (Mumbai - Trib.)- ITA No.6740 of 2017 dated 31.08.2018

109. The Tribunal held that reimbursement of costs (without any mark-up), allocated to group entities on the basis of headcount which was paid to the Non-Resident Head Office ('HO') on account of usage of software purchased by the HO from various vendors was not chargeable to tax and did not attract provisions of section 195 of the Act.

Lionbridge Technologies Pvt Ltd v ITO(TDS) - (2015) 45 CCH 0006 Mum Trib

110. Where assessee, a non-resident company, supplied 'Off the shelf'/Shrink Wrapped' software to an Indian company for purpose of billing its customers, in view of fact that assessee exclusively owned all Intellectual Property Right (IPR) in software and it had merely granted a copyrighted article to Reliance (Indian customer) and not 'copyright' in article and that the software was a standard product already developed and made available to other customers, Tribunal held that the payment received by assessee was not liable to tax in India as royalty u/s 9(1)(vi) and article 12 of India-Ireland DTAA and since the assessee does not have PE in India, the said amounts are not liable to tax in India.

Intec Billing Ireland v ADIT (IT) – (2018) 90 taxmann.com 94 (Mum) – ITA No. 1535 (Mum) of 2014 dated 08.01.2018

111. Where assessee, engaged in business of providing telecommunication services, entered into various agreements with non-resident-vendors for supply of software and made payments for same, the Tribunal held that consideration paid by assessee to suppliers for acquiring copy of software was actually made for 'copyrighted article' and not for 'use of copyright or transfer of right to use of copyright and hence, payments made by assessee to vendors of software could not be taxed as royalty. In this regard, it noted that (i) the said agreements stipulated that assessee would be using software for 'operation of its wireless network only' and it was prevented from utilizing software for commercial use (ii) the copyrights in software was not transferred to customers, (iii) the access to 'source codes' in software was not granted to assessee and (iv) there was restriction on copying software.

DDIT v Reliance Communication Ltd – (2018) 90 taxmann.com 358 (Mum) – ITA Nos. 837 of 2007, 3431 to 3437 & 3440 to 3444 (Mum.) of 2008 & others dated 02.02.2018

112. The Assessee, a Netherland based company entered into service agreement (MSA) with WIPRO/IBM to provide IT services to various Shell Entities pursuant to which it provided restricted software/network access and related IT support services to WIPRO/IBM. The AO sought to tax the receipts as royalty as the amounts received for providing access to software. The Tribunal held that the access to software was not for use of any copyright and that the right to access/use of software was subject to various terms and conditions and was granted to WIPRO for very limited use in its own business and not otherwise. Further, it noted that the agreement restricted WIPRO from modifying the software and also provided that the software would be used only for providing services to Shell entities. Further, it observed that the software continued to be owned by the assessee and what WIPRO/IBM was getting is mere access to the software and the source code embedded in the software had not been imparted to them. Accordingly, it held that there was no use or right to use any process as held by the Assessing Officer and that the payments received by assessee could not be treated as 'royalty' under article

12(4) of India-Netherland DTAA.

DDIT (IT) v Shell Information Technology International BV - [2017] 80 taxmann.com 64 (Mumbai - Trib.) - IT APPEAL NOS. 5051 (MUM.) of 2009 dated 15.03.2017

113. The Tribunal held that consideration received by assessee for sale of software supplied as part of machine to end user was not royalty under article 12 of DTAA between India and Israel as there was no transfer of copyright or any rights therein nor was there any situation giving rise to any type of infringement of copyright by customers of assessee. It held that the amendment made in section 9(1)(vi) by way of insertion of an Explanation by Finance Act, 2012, for extending scope of term 'Royalty', could not be read into provisions of Article 12(3) of the Indo-Israel tax treaty as amendment made in provisions of Act cannot be automatically read into articles of treaty unless corresponding amendment is made in treaty as well.

Galatea Ltd v DCIT - [2016] 67 taxmann.com 190 (Mumbai-Trib) [India - Israel DTAA]

114. The Tribunal held that the definition of royalty under the DTAA and the Act was not paramateria since the Act defines royalty to include computer software which was not so in the relevant DTAA's. Further, it held that the difference between the term 'use of copyright in a software' and 'use of software' was to be appreciated and held that to constitute royalty under the DTAA the consideration paid should have been for the transfer of use of copyright in the work and not the use of the work itself. It held that the sale of a CD ROM / diskette containing software was not a license but was a sale of product which was a copyrighted product. Further, it relied on the decision of the Apex Court in the case of Sedco Forex International Drill INC. & Others v. Commissioner of Income Tax & another wherein it was held that if an explanation added to a provision changed the law, then it could not be presumed to be retrospective irrespective of the fact that the phrase used were 'it is declared' or 'for the removal of doubts', and held that payments made prior to Finance Act, 2012, to Hong-Kong entities for which there was no DTAA, would not be subject to deduction of tax, as Explanation 4 to Section 9(1)(vi) of the Act, though introduced as retrospective in nature with effect from 1.6.1976, had the effect of change in law and consequently was to be given prospective effect.

DDIT (IT) v Reliance Industries Ltd - (2016) 69 taxmann.com 311 (Mumbai - Trib) [DTAA

between India and Australia / Canada / Singapore / Netherlands / Germany / US / UK / UAE

115. The Tribunal held that the amount received by Baan Global BV, a Dutch company, for supply of 'off the shelf' software to its Indian distributor for onward supply to Indian customers was not taxable as royalty under the India- Netherlands DTAA since what was supplied was only copyrighted products and there was no transfer of right to use copyright in computer software since the agreement between the assessee and ultimate customers forbade customers from decompiling, modifying, reverse engineering or disassembling the software. It rejected the contention of the DRP that sharing of source code of software amounted to the use of 'process' and held that the customers were only permitted to use the source code for internal computing operations and was subject to riders and limitations. It also rejected the contention of the Revenue that the retrospective amendment to the Act was to be read into the DTAA and held that in the absence of a corresponding negotiation between the two sovereign nations to amend the specific provision of royalty in the DTAA, the amendment in the Act could not be read into the DTAA.

ADIT v Baan Global BV - TS-351-ITAT-2016 (Mum) - ITA No 7048/ Mum/2010 [India - Netherlands DTAA]

116. The Tribunal remanded the matter to AO for requisite verification in a case where assessee-company had made remittances to companies in USA/UK for purchase of software for resale without deducting TDS and as per AO the said payments were in nature of Royalty within meaning of section 9(1)(vi) but it was not clear whether the remittances were relatable to mere receiving software products from suppliers and passing it on to customers, or whether there was exploitation of software products obtained for commercial benefits of assessee.

India Soft Technologies (P.) Ltd v DDIT(IT) – (2018) 90 taxmann.com 188 (Pune) – ITA Nos. 1709 to 1712 (Pun.) of 2013 dated 24.01.2018

117. Noting that the Tribunal in assessee's own case relating to earlier assessment years held that the assessee was not liable to deduct tax at source while making payment for transfer of usage rights of software and availing other services such as maintenance of software training etc., the Tribunal deleted the disallowance made u/s 40(a)(i) in respect of overseas payment for purchase of software without deducting tax at source.

Capgemini Technology Services India Ltd. v DCIT – (2018) 90 taxmann.com 191 (Pune Trib) – ITA Nos. 216 and 360 (Pune) of 2015 dated 25.01.2018

Others

118. The Court dismissed Revenue's appeal against the Tribunal's order for AY 2007-08 wherein the Tribunal had held that reimbursement of lease line charges did not qualify as 'royalty' under Article 12(3)(b) of the India-UK DTAA and India-US DTAA and such amount received as reimbursement was not also not liable to be taxed as business profit under Article 7 r.w. Article 5 of the India-UK DTAA and India-US DTAA, noting that the issue stood concluded in favour of

the assessee in view of the Court's dismissal of revenue's appeal for AY 2004-05 on similar issue.

CIT (IT) v WNS Global Services (Uk) Ltd & ANR.– ITA No. 890 & 891 of 2015 (Bom) dated 07.02.2018

119. The assessee was engaged in the business of manufacture and sale of motorcycles using technology licensed by Honda Motor Co. Ltd., Japan ('HMCL') for which it had entered into a License and Technical Assistance Agreement ('LTAA') which prohibited the use of know-how for the purpose of exports. Subsequently, a separate Export Agreement ('EA') was also entered into whereby HMCL accorded consent to assessee to export specific models of two wheelers to certain countries on payment of export commission @ 5% of the FOB value of such exports. The AO recharacterized the export commission as royalty, considering the EA as an extension of the LTAA and disallowed the payment made under section 40(a)(i) since no tax had been deducted at source. The Court, observing that the EA and LTAA were two distinct agreements upheld the order of the Tribunal wherein it was held that the said payment could not be considered as royalty or FTS as HMCL had neither transferred or permitted the assessee to use any patent, invention, model, design or secret formula, nor had HMCL rendered any managerial, technical or consultancy services. The Court also observed that the attempt at re-characterizing the transaction as one involving payment of royalty overlooked the fact that the payment under the LTAA was treated by the assessee itself as royalty. Accordingly, it dismissed the appeal of the Revenue.

CIT vs. Hero Motocorp Limited - TS-180-HC-2017(DEL) - ITA 923/2015 dated 08.05.2017

120. The Court held that where the assessee had entered into a contract with IOCL for offshore construction work involving mobilization / demobilization and installation services, the Revenue was incorrect in separating the mobilization / demobilization services from the installation services since the payment made to the assessee was for the execution of a composite contract. It held that since the equipment used by the assessee while providing services to IOCL were in the exclusive control of the assessee and IOCL did not have any dominion or control over the same, the payment received by the assessee could not be taxed as equipment royalty under Article 12(3) of the India- Singapore DTAA. Further, it rejected the contention of the Revenue that the installation services were incidental to mobilization / demobilization services and therefore taxable under Article

12(4)(a) of the DTAA and held that since the demobilization / mobilization services were not taxable under Article 12(3), the installation services even if considered ancillary, would not be taxable. Further, it held that the said services were neither taxable under the DTAA since they didn't make available any technology nor under the Act since it fell under the exclusionary clause to Explanation

9(1)(vii).

Technip Singapore Pte Ltd v DIT - TS-301-HC-2016 (Del) [India - Singapore DTAA]

121. The Court held that unless the DTAA was amended jointly by both parties to incorporate income from data transmission services as partaking of nature of royalty, Finance Act, 2012 which inserted Explanations 4,5 and 6 to section 9(1)(vi) by itself would not affect meaning of term 'royalties' as mentioned in article 12 of India - Thailand DTAA.

DIT v New Skies Satellite BV - [2016] 68 taxmann.com 8 (Delhi) [India - Thailand DTAA]

122. The assessee-company entered into a technical assistance agreement with a non-resident company in Austria for design of a new 75CC, 3-valve cylinder head for moped application. The Assessing Officer treated payment to Austrian company as royalty. The Court held that since engine has already been developed by the assessee and scope of technical services agreement was only to design a new 3-valve cylinder head with a specified combustion system for considerable improvement of fuel efficiency, performance and meeting Indian emission standards and, moreover, all products, design of engines and vehicles were supplied by the assessee, payment did not constitute royalty.

Director of International Taxation v. TVS Motors Co. Ltd. [2018] 99 taxmann.com 40/259 Taxman 140 (Mad.)-T.C. (A.) No. 878 of 2008 dated October 24, 2018

123. The Applicant, a U.S. Entity, provided content delivery solutions through Akamai EdgePlatform to its customers through sophisticated technology which operated on an automatic and continuous basis. AAR held that since the solutions provided by the Applicant were neither specialized, nor exclusive to individual customer requirements, the payment received for such solutions should not fall within the scope of 'FTS' under Explanation 2 to Section 9(1)(vii) or Article 12 of the India-US tax treaty as it was a standard facility and did not make available any technological knowledge, skill, etc. to the customers.

In respect of sale of solutions to Akamai India and onward sale of the same to Indian customers, AAR held that the receipt of payment for such sale would not constitute 'royalty' under Explanation 2 to Section 9(1)(vii) or Article 12(3) of the India-US tax treaty as it did not involve right to use the Akamai EdgePlatform or transfer of any rights in relation to the same. Further, AAR held that the Applicant did not have a PE in India.

Akamai Technologies Inc. In Re – [2018] 102 CCH 0010 (AAR) – AAR No 1107 of 2011 dated May 21, 2018

124. The Tribunal held that payment towards IT support services by assessee (an Indian company) to its associated enterprise ('AE') in Canada would not be taxable as royalty under domestic law [u/s 9(1)(vi)] as also under Article 12(3) of the India-Canada DTAA, the payments were in the nature of reimbursements of expenses incurred by the payee on assessee's behalf without any income element embedded therein, also there were specific cost allocations which were borne by the assessee. Rejecting Revenue's contention that payment was taxable as royalties being consideration towards "use or right to use any industrial, commercial or scientific equipment" held that although service may involve use of equipment but that did not vest right in the assessee to use the equipment.

Bombardier Transportation India Pvt. Ltd. [TS-6-ITAT-2017(Ahd)]

125. The assessee credited the account of its Italian group company in its books of accounts in respect of royalty on technical know-how without deducting the tax u/s 195 since the actual payment of royalty was made in the subsequent year. The AO made a disallowance u/s 40(a)(i) due to non-deduction of TDS and held the assessee to be assessee in default u/s 201(1)/(1A). The Tribunal observed that as per Article 13 of India- Italy DTAA, taxability in the hands of the non-resident is triggered at the time of payment by the resident and accordingly, held that unless

the actual payment took place, the taxability under article 13 of Indo Italian DTAA did not arise. Relying on the decision of the Apex Court in the case of GE Information Technology [2010] 327 ITR 456 (SC), it held that the tax was not deductible u/s 195 since the royalty was not taxable at the time of credit as per the DTAA. With respect to the rate of tax, the Tribunal observed that Section 115A of the Act prescribed the tax-rate of 10% as against the tax-rate of 20% on royalties under Article 13(2) of DTAA and held that as per Sec. 90 of the Act, beneficial rate is to be applied i.e. 10% as per the Act, despite taxability being triggered as per the DTAA on the receipt basis.

Saira Asia Interiors Pvt. Ltd. [TS-134-ITAT-2017(Ahd)] [ITA No.673/Ahd/2014]

126. The Tribunal held that professional fees paid by the assessee-company to a US entity for rendering 'Strategic and Financial Counselling' services was not in the nature of royalty under Article 12(3) of India-US DTAA since the payment was made by the assessee towards rendition of (a) business promotion, (b) marketing, (c) publicity and (d) financial advisory services and not for the use of any information concerning industrial, commercial or scientific information in possession of the service provider. It clarified that the mere fact that the assessee had benefitted from rich experience of the service provider while availing of these services was wholly irrelevant. It further held that the payment did not constitute fees for included services under Article 12(4) of India-US DTAA as the 'make-available' test was not satisfied.

Marck Biosciences Ltd. [TS-128-ITAT-2017 (Ahd)] [ITA No. 203/Ahd/2014]

127. Where the assessee, engaged in the business of generation of power, entered into an agreement with a Norway based company for the purpose of carrying out research work related to extraction of electric energy from tidal waves but made payments to the said company for purchase of equipments and appliances and no research activity took place during the course of the transaction, the Tribunal held that the AO was unjustified in taxing the said payment as royalty by merely relying on the agreement. Accordingly, it held that the aforesaid transaction represented a sale of goods by the Norway company and held that since the Norway company did not have a PE in India, the payment made by the assessee was not liable to deduct tax at source on such payments. Accordingly, it held that the assessee could not be treated as an "assessee in default" under Section 201 of the Act.

Aatash Power (P.) Ltd v ITO - [2017] 78 taxmann.com 202 (Ahmedabad - Trib.) - IT APPEAL NO. 477 (AHD.) OF 2016 dated 30.01.2017

128. Where the assessee made payments to a German based company for sharing its standard operating procedures (SOPs) access to database, email server, hardware and software etc, the Tribunal held that since it was consideration for sharing of scientific, or for that purpose industrial and commercial experiences, same was taxable in India as royalty under article 13(3) of India-Germany DTAA. Accordingly, it upheld the AO's order issued under Section 201 of the Act.

Oncology Services India (P.) Ltd v ADIT - [2017] 82 taxmann.com 42 (Ahmedabad - Trib.) - IT APPEAL NO. 2990 (AHD.) OF 2013 dated 01.06.2017

129. The assessee made payment to GIL, a resident of Ireland, in respect of the purchase of advertisement space for resale to the advertisers in India under the AdWords program without withholding TDS as it was a mere non-exclusive distributor/ reseller of advertisement space to

the advertisers in India and such payment to GIL on distribution of ad space in India was not in relation to any 'transfer of any right' or 'right to use' any Intangible Property (IP). The AO held that such payment made by the assessee to GIL was royalty u/s 9(1)(vi) and since no taxes were withheld, the assessee was held to be assessee in default u/s 201(1). CIT(A) upheld the AO's order. The Tribunal observed that though ownership of these IPs were with GIL, the assessee was provided licence to use confidential information, technical know-how, trade mark, brand features, derivative works, etc. It held that the payment to GIL for use of IPs to provide better service was certainly in the nature of payment of royalty and was chargeable to tax u/s 9(1)(vi) and under Article 12 of the India-Ireland treaty. Thus, the Tribunal held that the assessee was rightly in default u/s 201(1).

However, the CIT(A) had held that since GIL was beneficial owner of the royalty receipts, the royalty would be taxed at 10% only as per India-Ireland DTAA., whereas in this regard, the AO had held that the royalty revenue collected was to be shared amongst various parent holdings of GIL and the assessee had not filed the relevant agreement between the different layers of holdings involved under the AdWord Program. Thus, was regard the rate of taxation, the Tribunal restored the matter to the file of the AO as it was not clear whether GIL had full control over receipt received under AdWord Program or GIL was merely acting as a conduit of its parent holdings.

Google India Private Limited & Ors. vs. JDIT (IT). – [2018] 53 CCH 0027 (Bangalore ITAT) – IT(TP)A No.374/Bang/2013, 881/Bang/2016, IT(IT)A No.2845/Bang/2017, 949/Bang/2017, 950/Bang/2017, 68/Bang/2015, 387/Bang/2017, 559/Bang/2016, 69/Bang/2014, 1295/Bang/2014, 466/Bang/2013, 191/Bang/2014, 205/Bang/2015, 1299/Bang/2015, 1190/Bang/2014 dated May 11, 2018

130. The Tribunal upheld the disallowance under Section 40(a)(i) of the Act and held that the payment made by the assessee to Google Ireland for granting distribution rights of 'Adwords programme' was taxable as royalty under Section 9 as well as under the provisions of the India-Ireland DTAA. It rejected assessee's stand that it was merely a reseller of advertisement space and no rights in the intellectual property of the Google were transferred to it and held that as per the distribution agreement the assessee had received technology enabling it to undertake focused target marketing and received access to various data with respect to the age, gender, region, language, taste habits, food habits, cloth preference, etc., which it used for selecting the advertisement campaign. It held that the intellectual property (IP) of Google vested in the search engine technology, associated software and other features, and hence use of these tools by the assessee for performing various activities, including accepting advertisements, providing before or after sale services and use of secret process, clearly fell within the ambit of 'royalty'. Further it dismissed assessee contention that initiation of TDS default proceedings beyond 4 years was bad in law and taking note of the amended law u/s. 201 (which requires initiation of proceedings within 6 years for the resident) held that the same treatment was to be afforded to non-residents as well in light of the non-discrimination clause contained in the DTAA.

Google India Private Ltd vs Addl CIT [TS-468-ITAT-2017(Bang)- IT(TP)A.1511 to 1518/Bang/2013 dated 23.10.2017

131. The Tribunal held that the amount received by a UK Resident company from its Indian affiliate under a Management and Administration Services agreement for services such as business

policy advice, market research, market analysis, evaluation of business opportunities etc constitutes royalty towards the supply of commercial information concerning commercial experience under the Act as well as the India-UK DTAA. It held that since some of the services under the said agreement were charged based on gross turnover, it indicated that the services were in relation to information, knowledge or expertise as well as experience already in existence and in possession of the assessee. In dealing with the contention of the assessee that the agreement was a composite agreement and some of the services were purely business / commercial practice, it held that since the assessee failed to provide a bifurcation of the same, then the other part of the services could also be given the tax treatment as given to one part of the services provided which constitutes the principle purpose of the contract.

TNT Express Worldwide UK Ltd v DDIT (IT)- TS-253-ITAT-2016 (Bang) [India - UK DTAA]

- 132.** The Tribunal rejecting the revenue's contention that charges paid by the assessee on account of the use and hire of a ship amounted to royalty within the meaning of section 9(1)(vi) and article 12 of the respective tax treaties since ship is an equipment, held that on perusal of time charter agreement, the captain/master of the vessel crew and other staff of the ship were controlled by the FSC and not the assessee, further, repairs, maintenance and insurance related expenses of the ship were borne by the Foreign Shipping Companies (FSC) . Therefore payment of hire charges by the assessee to foreign shipping companies (FSC) for transportation on time charter basis could not be regarded as royalty within the meaning of section 9(1)(vi).

Sical Logistics Ltd. [TS-701-ITAT-2016(CHNY)

- 133.** Where the assessee utilized data racks space (for storage of electronic data) owned and maintained by Cinenet USA, for which it paid storage charges to Cinenet who maintained the server outside India and the AO characterized such payments as royalty, the Tribunal remitted the matter to the file of the AO directing him to examine taxability under the India-USA DTAA and also to examine how the electronic data was transmitted to the server in the USA.

Ceequences Technologies (P.) Ltd v DCIT - [2018] 89 taxmann.com 178 (Chennai - Trib.) - IT APPEAL NO. 138 (MDS.) of 2017 dated 28.12.2017

- 134.** Where the assessee, a distributor, made payments for the cost of rights in the cinematographic films for exhibiting the same in India through various mediums, the Tribunal held that from a plain reading of clause (v) to Explanation 2 to section 9(1)(vi) it was clear that there was a specific exclusion for exhibition of cinematographic films from the purview of "royalty". Accordingly, noting that the law had expressly excluded consideration paid for exhibition of cinematographic films from the ambit of section 9(1)(vi), it held that the assessee could not be considered as an assessee in default under Section 201 of the Act for non-deduction of tax on such payments.

Indo Overseas Films v ITO - [2017] 81 taxmann.com 378 (Chennai - Trib.) - IT APPEAL NO. 2404 (MDS.) OF 2016 dated 16.02.2017

- 135.** The assessee, a Thailand based company, was engaged in business of providing digital broadcast services through its transponders (through satellite) to its customers both in India as well as non-residents. The AO held that the income received by assessee was chargeable to

tax in India as royalty u/s 9(1)(vi) as well as under article 12 of DTAA between India and Thailand. It was noted that the co-ordinate bench in assessee's own case in earlier assessment year had held that amendment made by Finance Act, 2012 [i.e. retrospective insertion of Explanation 5 & 6 under section 9(1)(vi) to bring within the purview of royalty income from data transmission services], would not affect Article 12 of DTAA and, therefore, income earned by assessee could not be held as 'royalty' chargeable to tax in India. The Tribunal followed the co-ordinate bench decision, noting that there was no change in circumstances, and allowed the assessee's appeal holding that income received by the assessee was not a royalty as per Article 12 of India-Thailand DTAA and therefore, the same was not chargeable to tax

Thaicom Public Co. Ltd. v DCIT(IT) - [2018] 96 taxmann.com 577 (Delhi - Trib.) - ITA Nos. 1062 AND 1063 (DELHI) OF 2015 dated April 26, 2018

136. The Tribunal dismissed the assessee's appeal and upheld the taxation of payment received for domain name registration as royalty as per section 9(1)(vi), following the Tribunal's order in the assessee's own case for the earlier year wherein it was held that rendering of services for domain registration was rendering of services in connection with use of intangible property which was similar to trademark and accordingly, charges received by assessee for services rendered in respect of domain name was royalty within meaning of section 9(1)(vi) r.w. clause (iii) of Explanation 2 to section 9(1). It was also noted that the assessee was not a tax resident of USA and hence it had not claimed the benefit of the India-USA DTAA.

GODADDY.COM LLC v DCIT(IT) (2018) 53 CCH 0386 DelTrib – ITA No. 7123/DEL/2017 dated July 24, 2018

137. The Tribunal held that the amount remitted by assessee, carrying on business of broadcasting of news channel, to a US company as per a contract with the US company, for using latter's satellite (transponder capacity) was not royalty and it was not taxable in India under provisions of article 12 of India-USA DTAA but the said amount would constitute business profits of the US company. It was noted that the activities and services were carried out through transponder located in space and these were not carried out or performed in Indian territories, and assessee was not having any control over transponders, it only had a right to use a certain capacity which was available within overall capacity of transponder. Further, since the US company didn't have a PE in India, the said sum was not chargeable to tax in India and consequently, not liable for TDS u/s 195.

Independent News Service (P.) Ltd. v ITO – (2018) 90 taxmann.com 163 (Del Trib) – ITA Nos. 1868, 1870 to 1882 of 2016 & ORS dated 25.01.2018

138. The Tribunal allowed the assessee's appeal against the CIT(A)'s order wherein the CIT(A) had confirmed the taxation of royalty income earned by the assessee, a US based company, by giving license to its key patents to non-resident original equipment manufacturers (OEMs), where the OEMs sold products to wireless carriers worldwide including India and the Indian carriers sold such products in India. The AO taxed said royalty income u/s 9(1)(vi)(c) and Article 12 of the India-USA DTAA on the ground that the OEMs carried on business in India and used assessee's patents for making or earning income from a source in India. Section 9(1)(vi)(c) provides that royalty paid by a non-resident (OEMs, in the present case) to another non-resident (the assessee) will be taxable, if the same is paid in respect of any right, property or information

used or services utilized for earning any income from any source in India. The Tribunal held that since the agreement with OEM was for use of 'intellectual property' for purpose of manufacture of equipments outside India, which were not India specific, it could not be said that OEMs used the assessee's patent for carrying on business in India. Further, it held that the sale of handsets to Indian carriers, without any operations being carried out in India, would amount to business with India and not "business in India". Accordingly, it held that the said royalty income could not be brought to tax u/s 9(1)(vi)(c) and as the income was not chargeable to tax in India as per the Act, there was no need to consider the provision of Article 12(7) of India-USA DTAA.

The AO had also taxed the amount received by the assessee on account of certain license to an Indian company to use copyrighted software for licensee's own business (including permission to make one copy for backup purposes) as royalty u/s 9(1)(vi)(c). Noting that there was no transfer of any right in respect of copyright by the assessee and it was a case of mere transfer of a copyrighted article, the Tribunal held that the said payment was for copyrighted article and represented purchase price of an article and could not be considered as royalty either under the Act or under the DTAA.

Qualcomm Incorporated v DDIT - [2018] 93 taxmann.com 80 (Delhi - Trib.) - IT APPEAL NOS. 5353 (DELHI) OF 2012, 1241 & 7064 (DELHI) OF 2014 6132 (DELHI) OF 2015 & 189 (DELHI) OF 2016 dated April 16, 2018

139. The assessee company was engaged as accredited domain name registrar. The assessee's income was mainly from the domain registration fees which was claimed to be not taxable in India. However, the AO assessed the same as royalty u/s 9(1)(vi) which was confirmed by the DRP. On further appeal, the Tribunal held that the rendering of services for domain registration is rendering of services in connection with the use of an intangible property which is similar to trademark and, therefore, charges received by the assessee for said services is royalty within the meaning of section 9(1)(vi).

Godaddy.com LLC v. ACIT – [2018] 92 taxmann.com 241 (Delhi – Trib.) – IT Appeal No. 1878 (Delhi) of 2017 dated April 3, 2018

140. The Tribunal held that the payment made by the assessee to the non-resident company (in Singapore) to access a publicly available database could not be taxed as royalty as neither did the assessee receive any knowledge as to how the databases were maintained nor did it receive any license for commercial exploitation of the copyright with regard to the database maintained by the payee. It held that the assessee had merely got a limited right to use the information solely belonging to the payee which amounted to use of 'copyrighted information' which could not be taxed as royalty under Article 12 of India-Singapore DTAA since there was no transfer of all or any rights in respect of copyright of literary work.

Kinsey Knowledge Centre India Pvt. Ltd. [TS-288-ITAT-2017(DEL)]

141. The Tribunal held that payment by the assessee (an Indian outbound call centre) to US Entities towards International Private Leased Circuit (IPLC) and connectivity charges for use of dedicated private bandwidth in underwater sea cable was neither royalty nor FTS under the Act as well as India-USA DTAA and accordingly no TDS u/s 195 was deductible. It held that since there was no human intervention involved and the "make available test" was not satisfied under

DTAA, it was not in the nature of FTS. It further held that since, the payment made to US entities was for transmission of call data and did not involve use or right to use any industrial commercial or scientific equipment and since, the control of equipment was also with the non-resident parties and not leased to the assessee, the non-resident parties did not provide use of any 'process' to the assessee, which were of patentable nature having exclusive ownership rights. Consequently, the payments did not amount to royalty under Act as well as the DTAA.

Geo Connect Ltd. [TS-39-ITAT-2017(DEL)]

142. The Tribunal held that payment of Inter-connect Usage Charges ('IUC') by Bharti Airtel ('assessee') to Foreign Telecom Operators ('FTO') in connection with its International Long Distance ('ILD') telecom service business was neither FTS nor royalty (including process royalty) u/s 9(1)(vi)/(vii) of the Act and therefore Section 195 of the Act was not applicable on the ground that for it to constitute technical services there should be an involvement/ presence of human element. It also observed that the 'inter connection facility' was a standard facility. Further, it rejected the Revenue's alternate stand that payment was in the nature of 'royalty' as it was made for 'use of process' since the assessee merely delivered the call that originates on its network to one of the inter connection locations of the FTO and FTO carries and terminates the call on its network and the assessee was nowhere concerned with the route, equipment, process or network elements used by the FTO. It clarified that the term "process" used under Explanation 2 to Sec 9(1)(vi) in the definition of 'royalty' does not imply any 'process' which is publicly available and not exclusively owned by grantor and that it implied an item of intellectual property and that the word "process" must also refer to a specie of intellectual property applying the rule of ejusdem generis or noscitur a sociis, the expression 'similar property' used at the end of the list further fortifies the stand that the terms 'patent, invention, model, design, secret formula or process or trade mark' are to be understood as belonging to the same class of properties viz. "intellectual property. It also clarified that the retrospective insertion of Explanations 5 & 6 to Sec 9(1)(vi) did not alter this position and moreover retrospective amendment in domestic legislation cannot affect royalty definition under DTAA which is very 'restrictive'.

Bharti Airtel Limited v ITO - (2016) 46 CCH 0304 (Del Trib) [India - UK DTAA]

143. The Tribunal held that where assessee received reimbursement from its India entity for use of equipments situated outside India and it could not be established that same was on cost to cost basis, it was taxable in India as royalty.

DCIT v Vertex Customer Management Ltd - [2016] 67 taxmann.com 105 (Delhi-Tribunal) [India - UK DTAA]

144. The Tribunal held that royalty income earned by the assessee, an Italian company under technical collaboration and license agreement with an Indian company was taxable on gross basis @ 20 percent under Article 13 of the India-Italy DTAA and not as business income @ 41.82 percent by treating its Indian branch as its PE. It dismissed the contention of the Revenue that since the employees of the assessee's Indian branch were technically qualified, they assisted the assessee in providing such services and held that the Revenue did not show any material evidencing that services were provided by employees of the Indian branch. Further, it

held that to connect royalty with a PE one has to evaluate the asset test which failed in the instant case.

Iveco Spa v ADIT - TS-450-ITAT-2016 (Del) - ITA No. 5447/Del/2010, ITA No. 5696/Del/2012 [India - Italy DTAA]

145. The Tribunal held that where assessee was granted license by two foreign companies (licensors) based out of US and UK and licensors provided data relating to geophysical and geological information and they were not responsible for accuracy or usefulness of such data, since licensors had only made available data acquired by them but did not make available any technology available for use of such data by assessee, payments made by assessee to said licensors was not in nature of 'Royalty' as per respective DTAA.

GVK Oil & Gas Ltd v ADIT - [2016] 68 taxmann.com 134 (Hyderabad- Tribunal) [India - US DTAA, India - UK DTAA]

146. The Tribunal held that payments made by assessee (an Indian company engaged in software development) to Verizon USA for providing internet and bandwidth services and for providing equipment ('CPE') which was to be installed at the customers' premises for accessing network connection, did not amount to royalty. It rejected the Revenue's stand that payment was for use of scientific or commercial equipment within the meaning of 'royalty' under the Act and held that the CPE was not a personalized/sophisticated modified equipment for specific and exclusive use of the assessee and therefore the payment could not be said to be for use of equipment.

Quaolcomm India Private Limited [TS-605-ITAT-2016(HYD)] (ITA Nos.1664 to 1667/Hyd/2011) (India-USA DTAA)

147. The Tribunal held that since transaction was primarily in nature of purchase and sale of telecast rights which did not involve any payment of royalty under section 194J, penalty could not be levied under section 271C.

ITO v. Aishwarya Art Creations (P.) Ltd. [2015] 61 taxmann.com 278/70 SOT 644/41 ITR (Trib.) 4 (Hyd.)

148. The Tribunal held that it was noticed that designs and drawings sold by the assessee were used by Indian customers for internal purpose of setting up plants and not for commercial exploitation. In view of aforesaid, designs and drawings sold by the assessee amounted to use of copyrighted article rather than use of a copyright and was, therefore, in nature of business income. Since entire work relating to design and drawings was done outside India and sale was taking place outside India, business income in question was not taxable in India.

Outotec GmbH v. Dy. DIT [2015] 58 TAXMANN.COM 232 / 172 TTJ 337 (Kol.)

149. The assessee, a Netherlands based company, (KPNEV) was engaged in business of lightning, consumer electronics, etc. It had entered into research and development agreement with its subsidiary Indian company (PEIL) to provide research and development services which included results of test inspections and investigation of products and their constituent parts and it provided guidance for manufacturing process, working method and rendering of packing, handling, shipping services, etc. PEIL agreed to pay the assessee a remuneration to reimburse cost of research and development. The Tribunal held that since the assessee did not transfer

right to use and by way of research and development, PEIL was entitled to enjoy only certain services such as product developments, maintenance of product quality, uniforms handling, packing, storage and marketing methods and, there was no transfer of copyright, there cannot be any occasion to hold amount received from PEIL as royalty. Further, transaction between assessee and PEIL was simply in nature of reimbursement of expenses incurred by the assessee, on behalf of PEIL and it was not an income for the assessee.

Koninklijke Philips Electronic N.V. V Dy. CIT [2018] 99 taxmann.com 23(Kol.-Trib.)- ITA Nos. 1889 (KOL.) of 2012 & 565 (KOL.) of 2014 & 381 (KOL) of 2015 October 25, 2018

150. The Tribunal held that the Service Tax and Research and Development Cess which was collected, paid and borne by the Indian Service recipients with respect to royalty income received by the non-resident assessee could not be added to the said royalty income which was offered to tax by the assessee. It was noted that though the assessee had shown gross amount of royalty income (including the tax and cess), the tax and cess amount were subsequently reduced from the income. Further, the Tribunal noted that (i) the liability for payment of said tax & cess was that of the Service Recipients (India entities) under reverse charge mechanism as per section 66A of the Finance Act, 1994 and section 3(2) of the Research and Development Cess Act, 1986 (which provide that in case of rendering of services by non-resident service providers, it is the service receiver which is made liable to pay the Service Tax / R&D cess on the consideration payable to the non-resident) (ii) the agreement between the assessee and the Indian entity also stated that the said tax / cess were to be borne by the Indian entities. Accordingly, the assessee's appeal was allowed.

The Proctor and Gamble Co. USA v DCIT (IT) [TS-759-ITAT-2018 (Mum)] – ITAT No. 6972 & 6973/MUM/2017 dated 28.11.2018

151. The Tribunal held that payment made by the assessee to a US company for transponder charges and linking up charges could not be treated as consideration for use or right to use any copyright or the other various terms used in Article 12(3) of the India-US DTAA and was therefore not taxable as royalty. Further, as regards the contention of the revenue, that the amended definition of royalty under the Act was to be read into the DTAA, the Tribunal, relying on the decision of the Court in New Skies Satellite, held that the definition of royalty under domestic law would not have any impact on the DTAA.

ADIT (IT) v Taj TV Ltd - TS-428-ITAT-2016 (Mum) - ITA No. : 4678/ Mum/2007, : 412/Mum/2008, 4176/Mum/2009 [India - US DTAA]

152. Where the assessee, a US based company, entered into an agreement with another US company in terms of which it acquired patent and technical information which was used by the Indian holding company for the purpose of manufacture of two products, the Tribunal held that in view of fact that assessee company got said products manufactured from its holding company in India which were subsequently sold in USA, it was a case where there was clear business connection with India and, thus, royalty paid by assessee to said US based company was taxable in India under section 9(1)(vi).

Dorf Ketal Chemicals LLC v DCIT - [2018] 92 taxmann.com 222 (Mumbai - Trib.) - IT APPEAL NO. 4819 (MUM.) OF 2013 dated MARCH 22, 2018

153. The Tribunal held that the payment made by the assessee to a UK based non-resident on account of transponder charges would not fall in nature of 'royalty' under the India-UK DTAA as the payment was made only for use of facility and it was not an equipment and did not amount to use of any copyright effecting work, secret formula, process etc or any other term described. It held that the payment of transponder charges could not be treated as a consideration for 'use' or 'right to use' any copyright of various terms used in in the DTAA viz. like 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 or in any manner related to any patent or trademark, design, secret formula or process. It was also not use or right to use any industrial, commercial, or scientific equipment and therefore held that the assessee was not liable to deduct tax under Section 195 of the Act.

UNITED HOME ENTERTAINMENT PRIVATE LIMITED & ANR. vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) & ANR. - (2018) 52 CCH 0098 MumTrib - ITA No. 1289/MUM/2016 dated Feb 9, 2018

154. The Tribunal held that payments received from an Indian bank for data processing support services provided by the assessee through a network of computer systems in Hong Kong was not taxable as royalty under section 9(1)(vi) since the infrastructure facilities provided by the assessee (in the form of data centre, storage facility, etc. for payer's banking operations) were merely to ensure quality, standard and safeguards, adopted in the course of data processing and there was no transfer or application of technology to the payer. It further observed that there was no use or income from leasing of equipment as provided in Explanation 2(iva) to section 9(1)(vi). It also held that payments received by the assessee would not qualify as fees for technical services as the assessee had provided only standard facility for data processing without any human intervention.

Atos Information Technology HK Ltd. [TS-54-ITAT-2017(Mum)] (ITA NO. 237,238,239 & 240/MUM/2016)

155. The Tribunal held that payments made by assessee to non-residents for downloading of photographs for exclusive one time use for publication in assessee's magazine in India did not amount to Royalty under article 12 of DTAA between India and was not liable for tax deduction at source since admittedly a) photographs had been given to assessee for limited purpose of its one time use in magazine b) assessee could neither edit photograph nor could it make copies of photograph to be sold further or to be used elsewhere c) assessee was not permitted to make resale of these photographs to any other person for any other use.

DCIT v VJM Media (P.) Ltd - [2016] 68 taxmann.com 305 (Mumbai- Trib.) [India - UK DTAA]

156. The Tribunal dismissed Revenue's appeal against DRP's order holding that fees received by the assessee, a Swedish company, from its Indian group company for system development and software maintenance services was not taxable in India since it neither fell within the definition of royalty nor Fees for technical services (FTS) under the India-Sweden DTAA r.w.India-portugal DTAA. The DRP rejected Revenue's contention that the said fees were taxable as royalty, noting that the assessee had not received any payment for granting license to use any software application to the Indian company. With respect to FTS, it relied on the co-ordinate bench

decision in the assessee's own case for an earlier year wherein it was held that since the fees received from IT support services rendered by the assessee to the Indian company, being in nature of system development services and maintenance of internally developed applications, did not make available technical knowledge, experience, skill, know how or processes it did not fall within the ambit of 'FTS' under the India-Sweden DTAA r.w. India-Portugal DTAA.

DDIT(IT) v Sandvik System Development AB - TS-618-ITAT-2018(PUN) - ITA No.497/PUN/2016 dated 12.10.2018

157. The Tribunal held that the payment of lease line charges made by the assessee to its US parent was not royalty under the India-USA DTAA and accordingly deleted Section 40(a)(i) disallowance for non-deduction of TDS u/s. 195 on the said payment. The US parent had entered into an agreement with third party service provider for providing of bandwidth services, and the parent company in turn, provided bandwidth services to its subsidiaries against reimbursement of lease line charges. Considering the extensive evidence filed by assessee which substantiated the privity of contract was between third party service provider and US parent, who in turn had received bandwidth and passed on the services to various entities of group on cost to cost basis, the Tribunal dismissed Revenue's contention that the assessee routed payments to third party service provider through its AE to avoid TDS obligations. Moreover, it held that the 'royalty' definition under the DTAA did not cover any such services, and relying on the decision of the Delhi High Court in *New Skies Satellite BV & Ors* it held that the amended royalty definition under the Act could not be extended to DTAA. Furthermore, it noted that the TPO had accepted assessee's international transaction of reimbursement of lease line expenses to be at arm's length and did not propose any adjustment and therefore held that once the nature of expenses had been so accepted by the TPO, the Assessing Officer could not sit in judgment of the TPO order since under the provisions of the Act, the order passed by the TPO is binding upon the AO.

T-3 Energy Services - TS-97-ITAT-2018(PUN)-TP - ITA No.826/PUN/2015 dated 02.02.2018

c. Fees for technical services

Make available

158. The Apex Court dismissed the assessee's SLP against the judgement of the Calcutta High Court wherein it was held that payment of consultancy fees paid to Singaporean company for forex derivative transaction services was taxable as 'Fees for technical services' ('FTS') for AY 2008-09 considering the fact that the Singaporean company provided expert guidance and consultancy services.

CIT vs. Andaman Sea Food (P) Ltd - [TS-30-SC-2016] [India - Singapore DTAA]

159. Assessee, a joint venture between Marks and Spencer and Reliance retail, entered into an agreement with M&S whereby the assessee was provided personnel to carry out the functions in the area of management, setting up of business, property selection and retail operation, product and merchandise selection and setting up merchandise team, for which it reimbursed the salary expenditure of 4 employees deputed to it. AO held that the sum was chargeable to tax as fees for technical services and therefore passed an order u/s 201 by treating the

assessee as 'assessee in default'. The Court upheld the order of the Tribunal wherein the Tribunal held that i) the impugned payment was not FTS since the technology was not 'made available' by payee to the assessee, that ii) the payment was a reimbursement of expenses and therefore in the absence of profit element in the said payment no tax was to be deducted and that iii) that TDS u/s 195 was not applicable on reimbursement as it was actually a payment made to the employees deputed in India under seconded agreement but routed through M&S. It also upheld the finding of the Tribunal that since the said payments were already subject to tax in India in the hands of the employees as it was a clear case of deputation of officials / employees, there was no question of treating the assessee in default for non-deduction of tax.

DIT (International Taxation) vs. Marks & Spencer Reliance India Pvt. Ltd - TS-178-HC-2017(BOM) - INCOME TAX APPEAL NO. 893 OF 2014 dated 03.05.2017

160. The Court held that the income of the assessee from rendering ISO certification and audit services was not taxable as fees for technical services under the Act or under the India-Germany DTAA as there was no transfer of technology and that the assessee was not involved in management of clients business. It held that though there were some instances of advice given it could not be termed as a pure consultancy service.

DIT v TUV Bayren (ITA No 1304 of 2013) – TS-586-HC-2015 (BOM)

161. The Court reversed the decision of the AAR and held that the Most Favoured Nation clause contained in Article 7 of the Protocol between India and France was applicable to Fees for technical services under the India-France DTAA and therefore where the Protocol provided that where any convention / agreement / protocol was signed between India and a OECD member state which limits India's taxation at source on FTS to a lower rate or on the basis of a restricted meaning the benefit under the Protocol could not be denied. Accordingly, it held that the definition appearing in the India- UK DTAA was to be read as forming part of the India-France DTAA as well and therefore since the management fee paid by the assessee to a French company was not covered under the FTS clause of the India-UK DTAA, the same would not be taxable under the India-France DTAA.

Steria India Ltd - TS-416-HC-2016 (Del) - W.P.(C) 4793/2014 & CM APPL. 9551/2014 [India - France DTAA]

162. The AAR held that administrative support services provided by a third party service provider to the Applicant in connection with the Applicant's contract with Indian Oil Corporation were not taxable as fees for technical services since it was in the nature of managerial services which did not make available any technical skill information or knowledge to the Applicant.

Foster Wheeler GB Ltd - TS-491-AAR-2016 - A.A.R. No 1003 of 2010 [India - UK DTAA]

163. The Authority for Advanced Rulings ('AAR') held that business guidance and procurement services provided by a company situated in the UK to an Indian company could not be classified as technical or consultancy services and moreover it did not 'make available' any technical knowledge and therefore could not be classified as FTS.

Measurement Technology Limited – (2015) 123 DTR (AAR) 34

164. The AAR held that fees received by the UK based applicant on account of supply management services such as ensuring market competitive pricing from suppliers, maintaining contract supply agreement with suppliers after identifying products availability, competitive pricing, provided to its Indian Group company could not be treated as fees for included services as the same did not impart any technical knowledge and expertise to its Indian Group company such that the Indian company could make use of it in the future, failing the condition of making available the technology as contained in Article 13 of the India UK DTAA. Further since managerial services were excluded from the ambit of Fees for technical services, the payment was not subject to tax.

Cummins Ltd In re - [2016] 65 taxmann.com 247 (AAR - New Delhi) [India - UK DTAA]

165. The AAR held that services generally related to human resource matters, cost control, fund management, quality and design reviews, etc., are routine managerial activities and cannot be classified as technical or consultancy services. By providing such services, it cannot be said that foreign company is making available any technical knowledge of enduring benefit which would enable Indian company to apply them on their won in future. Further after amendment effective from 11.02.1994 to DTAA between India and UK, managerial services are not covered in definition of FTS

Authority for Advance Rulings- Measurement Technology Ltd. United Kingdom,- (2015) 60 taxmann.com 1- A.A.R. No.966 of 2010 dated July 29, 2015

166. The Tribunal held that payments made by the assessee for 3D Seismic Data Interpretation services were not FTS under Article 13 of India- UK DTAA as services did not "make available" technical expertise, skill or knowledge and hence not liable for withholding tax under section 195 of the Act. It observed that the assessee had provided the initial data and the non-resident was only required to provide the interpretation report of such data and therefore held that the AO erred in treating maps/designs given by the non-resident to the assessee as technical plan or design since the said maps/designs were nothing but a way to interpret the data and could not be equated to development and transfer of technical maps and designs as contemplated by the AO. Further, it held that the payment was made for providing analysis of data and the conclusion provided by the non- resident did not enable the assessee to apply such knowledge or undertake survey independently without any assistance.

Adani Welspun Exploration Ltd v ITO - TS-249-ITAT-2016 (Ahd) [India - UK DTAA]

167. The Tribunal held that technical/consultancy service payments made by the assessee to a Switzerland based company, constituted fees for technical services under India-Swiss DTAA and it rejected the assessee's contention that by virtue of Protocol to the India-Swiss DTAA, the restrictive FTS provision in a subsequent DTAA between India and other OECD country should be read into the Indo-Swiss treaty and therefore the make available clause, though not present in Swiss treaty, but contained in India-Portuguese DTAA could be invoked as no technical knowhow was made available. It clarified that the Protocol only provided for re-negotiation of the clauses in India- Switzerland Treaty in case of more liberal subsequent agreements with other OECD countries, and thus, until it was actually re- negotiated and approved, the 'make available' limitation in India- Portugal DTAA treaty could not apply to Swiss remittances.

Torrent Pharmaceuticals Ltd. [TS-609-ITAT-2016(Ahd)] (ITA No.451/Ahd/2012) (India – Swiss DTAA)

168. The Tribunal held that consideration received by the assessee for providing deliverables in the form of best practice manuals, guidelines, newsletters developed by the assessee did not constitute fees for technical services absent the 'make available of technology'. It held that the fact that deliverables were interlinked with certain technical services did not alter their basic character. Further it noted that the India-Netherlands Treaty had the Most Favoured Nation clause, which provides for the extension of like benefits provided to other OECD countries and therefore considering the presence of the 'make available' clause in the India-USA treaty held that it was to be applied to the India- Netherlands treaty as well.

Shell Global Solutions International BV v ITO (I.T.A. No.: 1283/Ahd/2010) – TS-678-ITAT-2015 (Ahd)

169. The Tribunal, following the decision of the Court in Centrica India Offshore Pvt Ltd [TS-237_HC-2014 (Del)], held that payment made by the assessee to a Hong Kong based company for secondment of employees was taxable as FTS as the employees were rendering managerial and highly expert services to the assessee for and on behalf of the Hong Kong company. Further it held that TDS was deductible on the gross amount paid irrespective of the profit element of the payment and accordingly held the assessee to be an assessee in default under section 201 of the Act.

Food World Supermarkets Ltd v DDIT (ITA Nos.1356 & 1357/Bang/2013) – TS-629-ITAT-2015 (Bang)

170. The Tribunal held that payment made by assessee to its Malaysian subsidiary for carrying out clinical trial and R&D pursuant to Product Development agreement with Cipla constituted fees for technical service under Article 13 of India-Malaysia DTAA and TDS was required to be deducted under section 195 since the services provided by the Malaysian subsidiary were of technical nature and the DTAA between India and Malaysia did not contain the make available clause.

Stempeutics Research Pvt. Ltd. [TS-560-ITAT-2016(Bang)] (I.T.(I.T) A. No.1450/Bang/2013 & 1196/Bang/2014) [India - Malaysia DTAA]

171. The Tribunal held that since services provided by the assessee did not involve enabling recipient of services to utilize knowledge or know how on his own in future without aid of services provider, 'make available' clause was not satisfied and, accordingly, consideration for such services could not be taxed under article 12(4)(b) of India US tax Treaty.

ABB Inc. v. Dy. DTT (International Taxation) [2015] 59 taxmann.com 159/69 SOT 537 (Bang.)

172. The assessee, a Japanese company, had deputed some of its employees to its Indian subsidiary and the salary of such employees were reimbursed by the Indian subsidiary. The

assessee claimed that since it was only a case of reimbursement of expenses, amount was not taxable in India. The AO however held the same to be taxable in the hands of the assessee as FTS. The DRP relied on the decision of *Centrica India Offshore (P.) Ltd. v. CIT* [2014] 364 ITR 336 (Del HC) and held that the receipt was to be considered as FTS irrespective of the fact whether it was received with mark up or cost to cost basis. The Tribunal upheld the DRP's order noting that (i) the assessee could not file reconciliation with regard to receipt and the actual payment to the employees (ii) the employees deputed by assessee were high level technical executives and they were rendering highly technical services to Indian subsidiary and (iii) the seconded employees had to work as per the direction, control and supervision of the assessee. Further, it held that the AO had rightly observed that the technology was made available to the Indian subsidiary, therefore, there was no need for the employees of the assessee to come again. Accordingly, it held that the receipts fell within the ambit of FTS as defined in Explanation 2 to section 9(1)(vii).

Panasonic Corporation v DCIT [2018] 99 taxmann.com 183 (Chennai - Trib.) – ITA No. 1483 (CHNY) OF 2017 dated August 2, 2018

173. The Tribunal held that testing fees paid by assessee (an Indian company) to Netherlands company was not taxable as FTS under India-Netherlands DTAA since the knowledge of testing was not made available to the assessee and therefore held that the assessee was not required to deduct TDS u/s. 195. Accordingly, it deleted the disallowance made by the AO under Section 40(a)(i) of the Act.

Areva T & D India Limited (Now Alstom India T & D India Ltd) [TS-149-ITAT-2018(CHNY)] - /ITA No.2079/Chny/2014 dated 23.03.2018

174. The Tribunal held that where the assessee, engaged in engineering and construction works, availed services of review and tracking of execution plans of the assessee and also obtained procedures from a foreign company which also undertook project budget and client satisfaction, the foreign company had made available its technical knowledge, expertise and know-how in execution of the contract with the assessee in India and hence the assessee was liable to deduct tax under section 195 of the Act on the said payment.

Forster Wheeler France SA v DDIT (IT) - (2016) 67 taxmann.com 120 (Chennai- Trib)

175. Following the ruling of the co-ordinate bench in the assessee's own case for other years (i.e. AY 2007-08 in ITA No 222/Coch/2013 and AY 2008-09 to AY 2013-14 in ITA No 99-104 of 2017), the Tribunal held that payment made by the Assessee for management service in AY 2011-12 and AY 2012-13 could be considered as FTS as per Article 12(4)(b) of the India-US tax treaty as in addition to providing the input, service and advice, the US company also provided training to the employees of the Assessee, thereby making available expertise and technical knowledge.

US Technology Resources Private Limited vs. DCIT – [2018] 53 CCH 0071 (Coch ITAT) – IT(TP) Appeal No. 475/Coch/2016, 134/Coch/2016 (SA No. 08/Coch/2018) dated May 23, 2018

176. The assessee-company, engaged in business of manufacturing of master batches and engineering plastic compounds, had made payment to an individual, being a German resident, for production process training and technical research agreement for development and production of new products and for supervision of erection and commissioning of certain machine. The AO brought to tax the said amount as FTS u/s section 9(1)(vii) as well as Article 12 of India-Germany DTAA. The Tribunal rejected the assessee's claim that the payment could not be considered as FTS under Article 12 since the German individual had not 'made available', noting that Article 12 of India-Germany DTAA does not have 'make Available' clause for FTS and further the said DTAA r.w. the Protocol also did not contain the 'Most Favoured Nation' clause, as claimed by the assessee. However, it held that the said payment was not covered by Article 12 but Article 14 which is more specific as it applies specifically to 'professional services' provided by the 'Individual resident'. Further, noting that the German individual neither had any fixed base in India nor had stayed for 120 days or more in India, the Tribunal held that the said income was chargeable to tax only in Germany by virtue of article 14 of India-Germany DTAA, though the same was chargeable to tax as FTS u/s 9(1)(vii). Similarly, with respect to payment made to an individual being a Swiss resident for services in the nature of 'Independent scientific services', it held that since the Swiss individual neither had any fixed base in India nor had stayed for 183 days or more in India, the said income was chargeable to tax only in Swiss Confederation by virtue of article 14 of India-Swiss DTAA

Poddar Pigments Ltd. v ACIT [2018] 97 taxmann.com 643 (Delhi - Trib.) – ITA Nos. 5383 TO 5386 (DELHI) OF 2014 dated August 23, 2018

177. The Tribunal remanded the issue of taxability of gross fees earned by the Indian branch of the assessee, Sweden company, from contracts awarded by the Indian telecom companies for installing GSM mobile telephone network back to the file of the AO, noting that the AO had decided the issue simply on the basis of an AAR ruling in assessee's case which was given based on the provisions of the India-Sweden DTAA and the said DTAA had been substituted by a new DTAA, which was not considered by the AO. Based on the said ruling, the AO had held the gross receipts to be taxable as FTS @ 20% u/s 115A without allowing any deduction in view of section 44D, as against the assessee's claim of considering the gross receipts to be business income and allowing deduction of expenses as per Article 7 of the India-Sweden DTAA. It was noted that though the definition of FTS was same in the old as well the new DTAA, the Protocol appended to the new DTAA had the Most Favoured Nation (MFN) clause as per which the 'make available' clause in the India-Finland DTAA was to be imported in the India-Sweden DTAA.

Ericsson Telephone Corporation India AB (India Branch) v Dy.DIT – ITA No. 893 (DELHI) OF 2006 dated July 4, 2018

178. The Tribunal held that the amount received by the assessee, Belgium company, from an Indian company for providing Information Technology Support Services was not chargeable to tax in India as FTS, in view of MFN clause in India-Belgium DTAA r.w. India-Portugal DTAA which provides for taxation of FTS only if make-available condition is satisfied. On perusal of the description and nature of the IT support services provided in the service agreement, the Tribunal noted that the assessee had rendered IT support services from outside India and no personnel of assessee visited India in connection with provision of such services. Further, it noted that the

AO/ DRP had not specified how the IT support services "make-available" knowledge, experience etc. to the recipient. Thus, the Tribunal held that these services were merely in nature of routine IT support services and availing such services in no manner had given any benefit to the Indian company with technical knowledge, skill or expertise to be able to apply it in future to perform functions independent of the assessee-company. Therefore, the amount received for IT support services was not in nature of FTS as it did not satisfy the 'make available' condition and accordingly the addition was deleted.

Soregam SA v DDIT [2019] 101 taxmann.com 94 (Delhi - Trib.) – ITA No. 123 (DELHI) OF 2015 dated November 30, 2018

179. Where assessee, a Singapore based company, claimed to have provided administrative support services to an Indian entity but the nature of services rendered was not clear from the documents and evidence submitted by it before the lower authorities, the Tribunal remanded the matter back to AO to decide whether the services involved in the agreement satisfied the 'make Available' criteria or not and, consequently whether the said services constitutes FTS under the India-Singapore DTAA.

CEVA Asia Pacific Holdings Company Pte Ltd. v DDIT – (2018) 89 taxmann.com 410 (Del Trib) – ITA No. 1503 (Delhi) of 2014 dated 08.01.2018

180. The assessee-company had paid sales commission to two non-residents agent for booking export order from foreign buyers and the process of procurement of order included display or demonstration of goods of assessee to foreign buyers who would place the order for purchase of those goods, and non-resident agents would forward those purchase orders to assessee. The Tribunal held that above process could not be termed as managerial service so as to qualify as 'fee for technical services' (FTS) as defined in Explanation 2 below section 9(1)(vii). However, with respect to assessee's contention that that no part of services was rendered in India and thus the said payment was not taxable in India, it held that in view of Explanation inserted below section 9(2) by Finance Act, 2010, even if services are rendered outside India, same may fall under FTS so as to be deemed to accrue or arise in India. The Tribunal also accepted assessee's contention that as per DTAA with the relevant countries (Canada & UK), which override the Act, the service provided by the non-resident agents did not fall within the term FTS as defined in the DTAAs since the AO had not been able to establish that the services of procuring orders had made available any technical knowledge, experience, skill know-how etc. to the assessee.

Further, it held that since the AO had neither established that the non-resident had business connection in India as per section 9(1)(i) nor that it had any PE in India in terms of DTAA with relevant countries, the income of the non-residents were not taxable as business income in India.

ACIT v Evergreen International Ltd. – (2018) 91 taxmann.com 111 (Del Trib) – ITA No. 177 (delhi) of 2015 dated 07.02.2018

181. The Tribunal held that the amount received by the assessee-company, a UK based company, for inspection and testing services rendered to Indian customers in respect of imported/exported cargo and certification in relation to quality and price could not be taxed in India in accordance with Article 13(4)(c) of the India-UK DTAA dealing with Fees for Technical Services (FTS) since

it was not making available any technical knowledge, experience, skill, know-how or processes to recipient of service. It was noted that there was no dispute between the parties that the sum so received was chargeable to tax according to the provisions of domestic tax laws. However, it was held that though all the services provided by the assessee were in the nature of technical analysis, unless the service recipient was able to perform those services independently without the help of the service provider, it could not be said that services had been made available by the service provider to the service recipient, as per article 13(4)(c) of the said DTAA. Accordingly, noting that the Revenue had not brought on any material to show that subsequently the recipient of those services had performed these services on their own without the help of the assessee or any other similar service provider, the said amount received by the assessee was not chargeable to tax in India.

Inspectorate International Ltd. v ACIT - [2018] 95 taxmann.com 229 (Delhi - Trib.) - IT APPEAL NOS. 4938 (DELHI) OF 2016 & 6365 (DELHI) OF 2017 dated June 18, 2018

- 182.** The Assessee had entered into a contract with a USA based non-resident company for carrying out certification work with respect to certain oil fields and the consideration received by the non-resident company was claimed to be not taxable in India in view of provisions of India-USA DTAA. The AO, however, brought the said consideration to tax as fees for technical services u/s 9(1)(vii) r.w.s 115A. the Tribunal allowed the assessee's appeal following the co-ordinate bench decision in assessee's own case wherein it was held that the said consideration could not be construed as fees for included services under India-USA DTAA as no technical knowledge, skill, know how etc. was made available to the assessee. Further, the co-ordinate bench had held that since the non-resident company did not have any PE in India the same could not be taxed as business profits in India as per Article 7 of the India-USA DTAA.

ONGC LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) - (2018) 53 CCH 0272 DelTrib - ITA No. 1330/DEL/2016 & 1332/DEL/2016 dated June 29, 2018

- 183.** The Tribunal held that payment made to UK parent for provision of management services in relation to advise and guidance on key management decisions to explore the possibilities of acquisition of businesses was not taxable as fees for technical service under Article 13 of India-UK DTAA as the make available test contained in the DTAA was not satisfied.

Xansa India Ltd. [TS-597-ITAT-2016(DEL)] (India-UK DTAA)

- 184.** The assessee's group company (Granite USA) had seconded employees to assessee in India who were rendering services in the nature of erection, installation, commissioning, warranty administration, operation maintenance, inspection, renovation and modernization of power plant. The salaries and other allowances were paid overseas by the group company Granite USA for sake of administrative convenience which were reimbursed by the assessee. The assessee had deducted tax at source u/s.192. The assessee had also reimbursed travel and conveyance expenses to its group company and its various branch office. The AO was of the view that services rendered by the seconded employees satisfied the make available clause as provided under the DTAA between India and USA and held that it was in the nature of "FTS" and disallowed the amount under the provisions of s 40(a)(i) on account of non-deduction of TDS u/s.195. The AO also disallowed the travel and conveyance expenses under the provisions

of s 40(a)(i) on account of non-deduction of TDS u/s.195. The DRP concurred with the view of the AO. It was assessee's contention that the salaries were being reimbursed on cost to cost basis and further, the services were provided by seconded employees on regular basis and there was no imparting of technical knowledge hence it did not fall within the purview of fees for technical services under the DTAA. The assessee also contended vis-a-vis travel and conveyance expenses that payments were in nature of reimbursement on cost to cost basis and the amounts were not chargeable to tax in India and hence did not warrant disallowance u/s.195. The Tribunal remanded the issue following the coordinate bench decision of the assessee for its earlier year wherein the AO was directed to verify the factuals after affording the assessee an opportunity to furnish requisite details that would have a bearing on disallowance u/s.40(a)(i) of the Act.

Granite Services International India Private Limited vs DCIT [TS-628-ITAT-2018(DEL)-TP] ITA No.740/Del/2014 dated 19.06.2018

185. The Tribunal held that payment made by ONGC (as representative assessee) to a Canadian university ('Non-resident' or 'NR') for collaborative research, participation, training and maintenance services of air injection equipment (used for increasing the recovery of oil) constituted FTS under Article 12 of India-Canada DTAA for AYs 2010-11 and 2011-12. It rejected the NR's stand that know-how/technology was not made available to ONGC and observed that the service agreement not only contemplated participation but also provided for training and collaborative research between the personnel of NR and ONGC, pursuant to which know-how was shared with ONGC personnel; Further, it rejected NR's alternate stand that even if the receipts were taxable, the same were to be taxed under section 44BB (special provision for oil exploration companies) since the services were directly associated with extraction and production of mineral oil by holding that Section 44BB was applicable only in cases where consideration was received for services relating to exploration activity which were not in the nature of technical services. Also, it accepted Revenue's plea that since the NR itself was not involved in extraction or production of mineral oil, Section 44BB was not applicable.

ONGC as representative assessee for M/s University of Calgary, Alberta, Canada [TS-175-ITAT-2017(DEL)] - ITA No.4877/Del/2013 and 1327/Del/2016 dated 28/04/2017

186. The Tribunal held that amount received by assessee of Rs. 23.77 cr (out of total receipts of Rs. 33 crore), a UK based event management company pursuant to contract with BCCI for providing assistance in organizing Indian Premier League (IPL) cricket tournament was taxable as fees for technical services under Article 13 of India-UK DTAA on the ground that assessee had made available the procedures, agreements for organizing IPL by virtue of which BCCI would be able to carry on the IPL events subsequently.

International Management Group (UK) Ltd. [TS-545-ITAT-2016 (Del)] (ITA No.1613/Del/2015) [India - UK DTAA]

187. Where the Indian company provided marketing and sales support services to assessee (Dutch Company) for the NetApp products, the Tribunal held that support services rendered by the assessee to customers in India did not amount to FTS as it failed the 'make-available' test under DTAA.

Net App BV [TS-40-ITAT-2017(DEL)] (ITA No. 4781/Del/2013)

- 188.** The Tribunal held that in terms of article 12 of DTAA between India and Finland, for services to qualify as technical services, service provider must itself develop technical plan or design and then transfer same to recipient of services. Where a foreign company (a Finnish Entity) merely provided services to assessee-Indian company to ensure that HV AC, Electrical and Fire Protection systems, to be installed, by contractor at assessee's factory, were of suitable design and quality, such services did not 'make available' any technical knowledge, skill or experience to assessee nor was it consisted of development and transfer of a technical plan or technical design to assessee; and thus payments made to said company did not constitute FTS. The services were performed by Finnish enterprise primarily from outside India and its employees made intermittent visits to India only for purpose of attending meetings with assessee. Thus, it could not be said that Finnish enterprise had a PE in India, consequently payments received by Finnish enterprise from assessee for providing services were not liable to taxation in India.
ITO vs. Nokia India (P.) Ltd.- (2015) 59 taxmann.com 120(Delhi-Trib)-ITA No.1941(Delhi) of 2012 dated July, 8, 2015
- 189.** The Tribunal held that where by rendering supervisory services for erection and commissioning of plant of Indian entity in India, nothing had been 'made available' by Finland entity to Indian entity which could be used in future without involvement of such residents of Finland, such technical services did not fall within purview of definition of 'fees for technical services'.
Outotec India (P.) Ltd. v. Asstt. CIT[2015] 59 taxmann.com 108/69 SOT 618/41 ITR (Trib.) 449/172 TTJ 186 (Delhi)
- 190.** The Tribunal held that where in course of business carried on by assessee-company as a stock broker, foreign subsidiaries rendered services which were in nature of simple marketing services of introducing foreign institutional investors to invest in capital markets in India, but no technical service was being made available, payments made to subsidiaries would not fall within definition of 'fees for technical services' taxable in India.
Batlivala & Karani Securities (India) (P) Ltd v. DCIT - (2016) 71 taxmann.com 142 (Kolkata - Trib) - IT APPEAL NOS. 1234 AND 1235 (KOL.) OF 2013 [India - UK DTAA]
- 191.** The Tribunal held that revenue earned by assessee, a resident of Finland from management support and other services rendered to its Indian group concern were not taxable as fees for technical services under the provisions of Article 13 of India-Finland DTAA on the ground that such services did not make available technology or technical knowhow to the recipient to function on its own without the dependence of the assessee.
Outotec Oyj [TS-569-ITAT-2016 (Kol)] (I.T.A Nos. 558/Kol/2014 & I.T.A Nos. 462/Kol/2015) [India - Finland DTAA]
- 192.** The assessee, a wholly owned Indian subsidiary of Chinese holding company, entered into an agreement with Hunan, a Chinese company, to train Chinese engineers in English language for setting up of steel plant in India for which its holding company made payment on behalf of assessee for and the assessee subsequently repaid said payment to holding company without deducting tax at source. The AO held that the aforesaid services obtained by the assessee were technical services and therefore held that the payment made being fees for technical

services ought to have been made after deduction of tax at source. Accordingly, the AO disallowed the expenses under Section 40(a)(i) of the Act. The Tribunal rejected the assessee's contention that the said payments were in the nature of mere reimbursements to its holding company and therefore not liable to TDS. However, it relied on the decision of the co-ordinate bench in *Lloyds Register Industrial Services (India) (P.) Ltd. v. Asstt. CIT* [2010] 36 SOT 293 wherein it is held that as per common sense training expenses could not be called as "fee for technical services" and that even highly qualified personnel might require training to carry out the job for which they are recruited and the person imparting training could not be said to be rendering technical, managerial or consultancy service. It held that training was a continuous process because technology was changing very fast and therefore, expenses incurred towards training cannot be termed as "fee for technical services." Accordingly, it deleted the disallowance made under Section 40(a)(i) of the Act.

Ershisanye Construction Group India (P.) Ltd. v DCIT - [2017] 84 taxmann.com 108 (Kolkata - Trib.) - IT APPEAL NO. 756 (KOL.) OF 2015 dated 12.04.2017

193. The assessee, an LLP incorporated in UK, provided legal advisory services to its clients worldwide, including India and in its return of income, offered certain amount to tax as income attributable to work performed in India by its PE in India which was created on account of its personnel (employees and other executives) staying in India for more than 90 days. The AO, however, opined that entire receipts were in nature of FTS within meaning of Explanation 2 to section 9(1)(vii) as services were utilized in India and that the same was FTS as per Article 13(4) of the India-UK DTAA also. The Tribunal held that since the services rendered were purely of legal advisory nature, it could not be concluded that by way of rendition of those services, assessee 'made available' to its clients technical knowledge, skill experience, know-how or process, etc. Therefore, it held that the said income was not FTS as per Article 13 and, accordingly, it could not be brought to tax as FTS as per provisions of section 9 also in view of section 90(2).

Linklaters LLP v DCIT [2018] 97 taxmann.com 464 (Mumbai - Trib.) – ITA No. 1540 (MUM.) OF 2016 dated August 29, 2018

194. The Tribunal held that since the maintenance services of software and training services provided by the AE did not 'make available' any technology to assessee, the payment made for providing such services were not covered within meaning of 'fees of included services' as defined in India-US DTAA, but could be considered as business profits under Article 7 of the said DTAA. However, since the AE did not have PE in India, it held that the same could not be taxed in India as per Article 7 of the India-US DTAA also.

Reliance General Insurance Co. Ltd. v ITO(IT) [2018] 97 taxmann.com 350 (Mumbai - Trib.) – ITA No. 8184 (MUM.) OF 2011 dated August 23, 2018

195. The Tribunal held that the payment made by the assessee to foreign companies situated in Netherlands and Sri Lanka for audit, knowledge about tax law applicable (VAT Laws) in that country etc was not taxable as i) it could not be considered as royalty or FTS under the India-Netherlands DTAA as the non-resident entity merely provided the assessee with information and also had not made available technical knowledge/experience/skill etc. to the assessee ii) it was not taxable under Article 14 of the India-Sri Lanka DTAA (there being no FTS clause) since

the Article provided that the profits on account of professional services would only be taxable in the country of receipt.

ACIT v Deloitte Haskins & Sells - [2018] 92 taxmann.com 279 (Mumbai - Trib.) - IT APPEAL NOS. 4844, 5095 & 6786 (MUM.) 2011 dated MARCH 23, 2018

- 196.** The Tribunal held that the business development fees paid by assessee-company to its wholly owned subsidiary in Singapore for marketing, business development services and customer co-ordination support services was not taxable as FTS under the Act and India-Singapore DTAA. Referring to the agreement entered into by the assessee with its subsidiary, it observed that the services rendered did not follow a common set of methods but were rendered using various tactics and negotiation strategies which were personal in nature, did not involve any use of technical skills and also did not involve rendering advice and therefore it held that the services could not be categorized as 'managerial', 'technical' or 'consultancy' in nature. Further, it held that the services did not constitute FTS under the DTAA as the requirement of Article 12 of India-Singapore DTAA -i.e. making available of services in the nature of managerial, technical or consultancy was not satisfied. It held that for a service to be made available, the service recipient should be able to make use of the knowledge, by itself in its business for its benefit and without the recourse to the service provider in future, which was not so in the instant case.
Fractal Analytics Pvt.Ltd. v DCIT - TS-107-ITAT-2018(Mum) - ITA No. 3511/Mum/2015 dated 01.3.2018
- 197.** Where the assessee, Indian branch of a non-resident company, had made payment to its HO towards allocation of expenses incurred by HO and there was nothing on record to prove that HO had made available technical knowledge to the assessee by performing activities specifically for assessee, Tribunal held it was pure and simple allocation of expenses among various group entities and the said expenditure could not be treated as FTS as per article 13(4) of the India-France DTAA.
Credit Agricole Corporate & Investment Bank v DDIT – (2018) 168 ITD 553 (Mum) – ITA Nos. 6682 & 6706 of 2012 dated 05.01.2018
- 198.** The Tribunal deleted the disallowance made by the AO u/s 40(a)(i) on account of payment of global support service fees to a company in Singapore without deducting TDS thereon, where the AO opined that the said payment was in nature of FTS as defined in Explanation 2 to section 9(1)(vii), holding that the payment made by the assessee could not be considered as FTS as defined under article 12(4)(b) of the India-Singapore DTAA and for this reason there was no need to examine taxability of the same u/s 9(1)(vii). While holding that the said payment doesn't fall within the definition of FTS under the DTAA, the Tribunal noted that as per terms of agreement, the Singapore company had to provide management consulting, functional advice, administrative, technical, professional and other support services to assessee and there was nothing in agreement to conclude that in course of such provision of service, the said company had made available any technical knowledge, experience, skill, know-how, or process which enabled assessee to apply technology contained therein on its own.
ExxonMobil Company India (P.) Ltd. v ACIT – (2018) 92 taxmann.com 5 (Mum) – ITA No. 6708 (mum.) of 2011 dated 21.02.2018

199. The Tribunal held that income earned by Linklaters (UK based LLP engaged in providing legal/consultancy services) in respect of services rendered in India was neither FTS nor Independent Personal Service. It rejected the revenue's stand that the assessee had made available knowledge to its clients and that the entire receipts were FTS on the ground that mere rendition of services did not fall within the gamut of the expression 'make available' unless the recipient was in a position to deploy similar skills or technology or techniques in future without the aid or assistance of service provider and consequently, the legal advisory services provided by the assessee failed the make available test. It further held that Article 15 – Independent Personal Service applies only to individuals and not partnership firms. It observed that the assessee had service PE in India on account of its personnel staying in India for more than 90 days and remitted the matter back to AO for examination with respect to taxability as business income. Further, relying on co-ordinate bench ruling in the assessee's own case, it rejected stand of revenue that the assessee was not eligible for treaty benefit being a fiscally transparent entity.

Linklaters LLP [TS-36-ITAT-2017(Mum)] (I.T.A. No.1690/Mum/2015)

200. The Tribunal held that payment made to Singaporean entity for rendering post production services was not FTS under Article 12 of India-Singapore DTAA as no technology or skill was made available to the assessee. It further held that in absence of the work carried out through non-resident's PE in India, the payment could not be taxed as business profits under Article 7 of DTAA.

Red Chillies Entertainment Pvt Ltd [TS-86-ITAT-2017 (Mum)]

201. The Tribunal held that the assessee was not liable to deduct tax under section 195 of the Act on payments made towards security surveillance services paid to a non-resident since the payment was towards maintenance of common security platform applicable to all Group companies which did not make available any technical knowledge, experience, skill and therefore did not fall under the definition of fees for included services under the India -China DTAA.

DCIT v Dominion Diamond (India) Pvt Ltd - TS-42-ITAT-2016 (Mum) [India - China DTAA]

202. The Tribunal held that sum received by the assessee, a UK based Company, for allowing Indian telecom operators to use its Virtual Voice Network (VVN), i.e., a facility used to connect the call to the end operators could not be treated as royalty or FTS in terms of Article 13 of India-UK DTAA since the payment was made to the assessee for using its services and not for the use of any scientific equipment or technology. Also payment for service could not be brought to tax as 'FTS' under Article 13 of India-UK DTAA as no technology was made available to the service recipient, since it was not able to apply that technology without recourse to the service provider.

Interroute Communications Ltd v DDIT - [2016] 68 taxmann.com 160 (Mumbai -Tribunal) [India - UK DTAA]

203. The assessee, an Australian company, had entered into an agreement with ONGC for offshore supply of products/equipment, repair activities, equipment rentals and project management

services and claimed the revenue received on account of offshore supply and repair activities to be not taxable in India. As regards offshore supply of equipment, the Tribunal held that since property in goods were transferred by assessee to ONGC outside India and entire sale was executed outside India, revenue received by assessee therefrom could not be taxed in India. As regards repair work undertaken by assessee at its overseas workstations located outside India, it held that since it was in connection with supply of plant and machinery on hire (revenue from which was offered to tax u/s 44BB) to be used for extraction or production of mineral oils, the same would clearly fall within sweep of exclusion contemplated in Explanation 2 to section 9(1)(vii) and thus could not be taxed as FTS in India. The Tribunal held that even otherwise, since rendering of repair work by assessee outside India would not enable ONGC personnel to make use of any technical knowledge, experience etc. in future, amount received by assessee could not be brought to tax as 'royalty' or FTS under Article 13 of India-Australia DTAA. The Tribunal also rejected the AO's contention that the aggregate revenue of assessee from ONGC was taxable on net income basis u/s 44DA as royalty / FTS, holding that various activities undertaken by assessee under contract with ONGC were separate, divisible and independent of each other and thus taxability of revenue from such activities was required to be undertaken separately.

DCIT v Cameron Australasia Pty. Ltd [2018] 96 taxmann.com 331 (Mumbai - Trib.) – ITA No. 3711 (MUM.) OF 2016; C.O. NO. 315 (MUM.) OF 2017 dated July 13, 2018

- 204.** The Assessee-company, a tax resident of Netherland, was engaged in conducting training programs and providing access to various computer systems, viz. Centralized Reservation System ('CRS'), Property Management Systems and Other Systems to Marriott chain of hotels over the world. AO observed that assessee was in receipt of consideration for services rendered to their Hotels in India (Indian Hotels) as per Training and Computer Systems Agreements for conducting training programs of their employees and also other services. AO characterized aforesaid receipts as royalty and FTS, brought same to tax in hands of assessee. CIT(A) concluded that the consideration received by assessee were taxable as FTS. Assessee contended that consideration received for services rendered by it to Indian Hotels were in nature of reimbursement of expenses incurred by it and as there was no mark up or profit made by rendering the said services, there was no income liable to taxed in India. The Tribunal rejected assessee's claim since the assessee had failed to substantiate the same on the basis of any clinching evidence. It held that neither the training services rendered by the assessee to the Indian Hotels could be held to be technical services, nor the same could have been characterised as "ancillary and subsidiary" services as per Article 12(5)(a) and, hence, the consideration received by the assessee for rendering the training services could not be held as FTS. It further held that the access to CRS, Property Management System and Other Systems provided to Indian Hotels were common facilities and were not tailor made services to suit the specific requirements, hence, could not be construed as technical services to be taxed as FTS.
- RENAISSANCE SERVICES BV vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) - (2018) 53 CCH 0149 (Mum Trib) - ITA No. 7159/Mum/2012 dated Jun 8, 2018***

- 205.** The Tribunal held that the consultancy fees received by the assessee (a Netherlands based entity) from ZPMC (a Chinese entity) pursuant to the supply of cranes to assessee's Indian

group entity under the terms of Main Purchase Agreement ('MPA') @ USD 15,000 / 50,000 per crane supplied would not be taxable in India. Noting that the services were rendered by assessee outside India i.e China to a non-resident i.e. ZMPC and the same were utilized in manufacturing the cranes outside India i.e. in China, it held that the amount would not be deemed to accrue or arise in India as per section 5 read with section 9 and hence would not be taxable in India. Further, it held that Article 12 of DTAA between India and Netherlands would be applicable only if the services rendered were in the nature of information concerning technical/industrial/commercial knowledge or experience or skill. Accordingly, it concluded that, consultancy fees received by the assessee from ZPMC were not FTS and therefore not chargeable in India. Further, it held that since the actual receipt of fees was in the subsequent AY, it could not be taxed in the impugned year.

APM Terminal Management B.V vs DCIT-TS-386-ITAT-2017(Mum)-ITA No. 3621/mum/2015 dated 06.09.2017

- 206.** The Tribunal held that the payment of professional fees made by the assessee to non-residents in the UK, USA, France and China did not constitute fees for technical services since it did not make available to the assessee, any technology by virtue of which it would be able to apply such technology without recourse to the service provider. Further, in dealing with the alternate contention of the assessee that the payments, being made to individuals, would be governed by Article 15 viz. Independent Personal Services and not FTS, the Tribunal agreed with the same and held that since none of the individuals were present in India for a period of 90 days or more the same would not be taxable under Article 15 of the respective DTAA's. Further, it held that the retrospective amendment to Section 9(1)(vii) inserted vide Finance Act, 2010, doing away with the requirement of services being rendered in India, would not be applicable to the assessee, since at the time of deduction of tax, the same was not applicable and therefore it deleted the disallowance made under section 40(a)(i) of the Act.

KPMG v ACIT - (2016) 46 CCH 0339 (Mumbai - Trib) [DTAA between India and US / UK / France /China]

- 207.** The assessee, an Indian company, entered into an agreement with Appledore, a U.K. based company, to undertake evaluation of business opportunities to carry out projects in India. Appledore had carried out global market survey to determine demand for repairs, conversions, new builds and to determine short/medium/long term business prospects in India. The Tribunal held that since these services were neither geared to nor did they 'make available' any technical knowledge, skill or experience to the assessee or consisted of development and transfer of a technical design to the assessee, payments made by the assessee for these services were not taxable as per Article. 13.

ITO v. Skill Infrastructure Ltd. [2015] 62 taxmann.com 33/70 SOT 186 (Mum)

- 208.** The Tribunal held that when expenses are in the nature of reimbursements, they are not liable to tax. Further it was held that where the assessee merely rendered services without imparting any knowledge or skills, the said service could not be considered as fees for technical services under the India-Israel Double Tax Avoidance Agreement.

ADIT v TTI Team Telecom International Ltd – (2015) 45 CCH 0042 Mum Trib

209. The Tribunal held that since there was no transfer of any technology, technical know-how or technical designs by consultants of Singapore which the assessee could utilize subsequently in other projects, payment for same was not taxable as the FTS. Moreover, having regard to definition of the PE provided in article 5(2)(j) of the Indo-Thailand DTAA, since recipient concerns did not have any PE in India, the impugned income could not be taxed as business profits in India.

Bramhacorp Hotels & Resorts Ltd. v. Dy DIT[2015]61 taxmann.com 186/70 SOT 25 (Pune)

Ancillary and subsidiary to royalty payment

210. The Tribunal held that payment received by the assessee (US software company) for rendering implementation, consultancy and maintenance services in connection with 'customized' software licensed to Indian customers, amounted to Fees for Includes Services ('FIS') under Article 12(4) (a) of India-US DTAA (which provides that FIS includes payments for the rendering of any technical or consultancy services if such services are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 (i.e. 'royalties') is received). It rejected the assessee's stand that since no knowledge was made available to the Indian customers, the amount could not have been taxed as FIS u/s 12(4)(b) and held that for article 12(4) the fee for included services may fall in clause (a) or clause (b) and compliance of both clauses wasn't necessary. Further, relying on the Karnataka High Court ruling in the case of Samsung Electronics Ltd, it held that payment from software supply amounted to royalty. On going through the technical services contract it noted that the services provided by the assessee were for the effective use of the customized software licensed to Indian customers. Accordingly, it held that the contract was for rendering services complimentary and supplementary to the licence which would be taxable as per Article 12(4)(a).
- i2 Technologies US Inc. [TS-263-ITAT-2017(Bangalore)]***

211. The Tribunal held that the amount received by the assessee, UK company, from its Indian subsidiary for providing SAP/CAD software related support was to be taxed as FTS as per Article 13(4)(a), since the same was ancillary and subsidiary to the enjoyment of the right / property for which royalty was received by assessee and hence 'make available' clause under Article 13(4)(c) was not applicable. It noted that in earlier years, assessee had entered into bilateral agreement under which it used to receive royalty from the Indian subsidiary for licensing the technology with an exclusive right to manufacture and market, however, during relevant AY, assessee entered into a Tripartite Agreement whereby the technology was sub-licensed by assessee to another group company, and the royalty paid by the Indian subsidiary was routed through the said group company. Accordingly, noting that the entire royalty amount was passed on to assessee through the other group company (after reducing 0.5%), the Tribunal held that the amount received for software related support was ancillary and subsidiary to the enjoyment of the right / property for which the said royalty was received by the assessee and thus was to be taxed as FTS as per Article 13(4)(a).

J.C. Bamford Excavators Ltd v DDIT [TS-389-ITAT-2018(DEL)] – ITA No. 1540/DEL/2014 dated July 18, 2018

212. The assessee, a Netherland based company, engaged in business of executive search service as well as providing technology, software and related support services to its group companies, had entered into a Licence agreement (LA) with its Indian subsidiary whereby it granted license to the Indian subsidiary to use trade-name, trademark, and rights to use software owned by it against license fee which was offered to tax as royalty. It had also entered into a service agreement (SA) whereby, both the Indian subsidiary and the assessee had agreed to provide, on a principal-to-principal basis, support and services to each other in relation to executive search assignments against executive search service fee (ESF). The AO held that terms and conditions in SA were part and parcel of LA and that same were ancillary and subsidiary to application or enjoyment of right/property/information for which royalty was received by the assessee and thus, ESF was taxable as FTS under Article 12 of the India-Netherland DTAA. Noting that the license fees and search fees were governed by separate and distinct agreements entered into by the assessee and the Indian subsidiary, the Tribunal held that they would constitute different sources of the assessee's income and thus the ESF were independent services, not provided for purpose of enjoyment/application of right, property, etc. It, thus, held that ESF was not taxable as FTS under Article 12(5)(a) of the India-Netherland DTAA. Further, in relation to SA, the assessee had also received payments from the Indian subsidiary towards reimbursement of expenses towards travel and stay, video conferencing charges, insurance, and other miscellaneous expenses, which was also taxes as FTS by the AO. Noting that the reimbursement of expenses were supported by third-party invoices and services provided by assessee were purely passed on as reimbursement of actual cost without any markup, the Tribunal held that the reimbursement of expenses did not constitute FTS as per Article 12 of the said DTAA.

Spencer Stuart International BV v ACIT - [2018] 94 taxmann.com 380 (Mumbai - Trib.) - IT APPEAL NO. 1696 (MUM.) OF 2015 dated June 1, 2018

Absence / presence of specific Article / provision for FTS in DTAA

213. The Tribunal rejecting Revenue's contention that commission payments constitute 'fees for technical service' (FTS) held that commission paid to non-resident export commission agents by assessee (an Indian company engaged in manufacturing steel pipes) was not taxable in India for AY 2010-11 & Section 195 TDS was not applicable. To analyze TDS applicability, the tribunal listed down three categories based on agent's tax residency jurisdictions:-

- (a) Jurisdictions with which India has tax treaties but DTAA does not have specific FTS article (i.e. Thailand, UAE)
- (b) Jurisdictions with which India has tax treaty and such DTAA's further have a specific FTS clause [on lines similar to domestic FTS provision u/s 9(1)(vii)] and
- (c) Jurisdictions with which India does not have any tax treaty.

With respect to the first category the court held that payment was not taxable in India since there was no specific FTS article in respective DTAA's and further the NRs do not have PE in India. Rejecting the Revenue's contention receipt could be taxed under other income article of the treaty held that 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. With

respect to category (b) and (c) held that taxability in these cases had to be decided on the basis of the provisions of domestic law. Rejecting Revenue's reliance on AAR ruling in SKF Boilers & Driers Pvt. Ltd. wherein commission paid to non-residents was held as taxable u/s 9(1)(i) read with Sec 5(2)(b) on the grounds that the right to receive the commission arose in India, the court opined that when no operations of commission agent's business were carried on in India, Explanation 1 to Sec 9(1)(i) takes the entire commission income outside the ambit of deeming fiction u/s 9(1)(i) r.w. 5(2)(b). Analyzing the scope of scope of managerial, consultancy and technical services to lead to taxability as FTS u/s 9(1)(vii), and held that unless there was a specific and identifiable consideration for the rendition of technical services, taxability u/s 9(1)(vii) would not get triggered.

Welspun Corporation Limited [TS-7-ITAT-2017(Ahd)]

- 214.** The Tribunal held that absent a specific Article taxing fees for technical services under the India-Saudi Arabia DTAA, income of the assessee in the nature of fees for technical services would be taxed as per the Article on 'Other Income'. It held that since the assessee was a resident of Saudi Arabia and the DTAA provided that other income would only be taxable in the state of residence, it held that fees for technical services received by the assessee would not be subject to tax in India.

Electrical material Center Co. Ltd. [TS-451-ITAT-2017(Bang)] - IT (TP) A No. 1104 (Bang) 2013 dated 28-09-2017

- 215.** The Tribunal reversed the order of the DRP and held that the fees for technical services ('FTS') received by assessee (company incorporated in UAE) from its Indian counterpart was not chargeable to tax in India absent FTS article in India – UAE DTAA. It held that since the income derived by the assessee from providing services was its regular business activity, it could only be taxed as business income under Article 7 of the DTAA and in the absence of PE in India, the assessee was not chargeable to tax in India. It rejected the Revenue's plea that FTS income was taxable u/s 9(1)(vii) and held that once the income chargeable to tax as per the DTAA was categorized by excluding the Fees for Technical Services then the scope of taxing the said income cannot be expanded by importing the said provision from the Income Tax Act when it is excluded under the DTAA.

ABB FZ LLC [TS-589-ITAT-2016(Bang)] (I.T.(I.T) A. No.188/Bang/2016) (India-UAE DTAA)

- 216.** The Tribunal held that since there was no specific taxability provision under the India-Thailand tax treaty with respect to taxability of fees for technical services, the amount earned by non-resident companies as fee for technical services were only species of business profits and since payee companies did not have PEs in India, amount in question was not liable to tax in India. It dismissed the contention of the AO that since there was no Article on Fees for technical service under the DTAA, the taxability of the said payments would be governed under the Act. It held that the DTAA is an alternate tax regime and therefore where a payment / receipt was not subject to tax under the DTAA it could not be taxed under the Act. Accordingly, it held that the assessee was not liable to deduct tax at source on such payments.

DCIT v Ford India Ltd - [2017] 78 taxmann.com 5 (Chennai - Trib.) - IT APPEAL NOS.673 TO 840 (CHENNAI) OF 2015 dated 31.01.2017

217. The Tribunal held the FTS received by assessee, a UAE based company, from its Indian AE for providing management and technical consultancy services were in nature of business receipts but not taxable in the present cases as (i) assessee had submitted that the India-UAE DTAA does not have any specific clause on taxability of fees for technical services and, hence, the said receipt was business income; (ii) the employees of assessee had worked for less than 9 months, the assessee had no PE in India and consequently the said business income was not taxable in India.

Booz & Company (ME) FZ-LLC v DDIT – (2018] 90 taxmann.com 49 (Mum) – ITA No. 4063 (Mum.) of 2015 dated 19.01.2018

Service not rendered in India

218. The assessee made payment for server maintenance charges and testing and development charges to its parent company in Italy on which no tax was deducted at source. The AO made addition under section 40(a)(i) treating the said payments as FTS. Vis-à-vis server maintenance charges, the Tribunal held that since they were paid for usage of intranet, internet, mail data backup, etc., located at Germany and assessee was merely using technology provided by parent company and no managerial, consultancy and technical services were provided by parent company, the payment made was not FTS.

Vis-à-vis the testing charges, it observed that the assessee-company manufactured parts according to drawing and specifications and designs of parent company and, subsequently, sent to Italy for testing on their efficiency and strength, activity of testing, operating of machine and noting of actual reading and determining whether it would suit to design specifications or not. It held that though these activities were specialized activities which only a technical person can do and amounted to technical services, since the services were rendered outside India it was not taxable. Accordingly, it held that no disallowance under section 40(a)(i) was called for.

Cooper Standard Automotive India (P.) Ltd. v ACIT - [2017] 84 taxmann.com 200 (Chennai - Trib.) - I.T. APPEAL NO. 785 (MDS.) OF 2014 dated 12.04.2017

219. The Tribunal deleted the disallowance made by the AO u/s 40(a)(i) for AY 2003-04 for delay in depositing TDS u/s. 195 on payment made by the assessee (an Indian company) to German and UK entities for professional and corporate maintenance charges applying relief under non-discrimination article under respective DTAAs, since similar payments to residents did not attract the disallowance in the event of non-deduction of TDS prior to amendment made by FA 2004. With respect to server maintenance charges paid for accessing server belonging to German parent and usage of intranet, internet, mail data back-up etc., the Tribunal relying on Bharti Cellular [TS-6095-HC-2008(DELHI)-O] held that TDS u/s. 195 was not applicable as the payment did not amount to FTS in absence of human involvement and was in the nature of reimbursement of expenses. With respect to payment of testing and development charges paid to entity in Italy for the services rendered in Italy, the Tribunal held that payment constituted FTS having regard to 'human intervention since the activity of testing, operating of the machine was a specialized activity which only a technical person could do. However, since the services were rendered outside India and utilized in India, it held that explanation to section 9(2) was introduced by Finance Act 2007 w.e.f.1976 and as on the date of assessment there was no provision to tax the FTS rendered outside India and therefore, no tax was deductible u/s 195.

Cooper Standard Automotive India Pvt. Ltd TS-311-ITAT-2017(CHNY] (ITA No.785/Mds/2014 dated April 12, 2017)

220. The assessee made payments to a Singapore based company viz. RAP for services such as advice and guidelines in security practices, operations management on IT infrastructure, compliance to corporate policies on usage of IT services etc. It contended that since no income had accrued or arisen in India to RAP income was not liable to tax in India and therefore did not deduct tax on such payments. The AO contended that payment in question being in nature of technical fees paid to non-resident, income deemed to accrue or arise in India under section 9(1)(vii). The Tribunal, noting that the AO had not thoroughly examined nature of services rendered by RAP and whether or not they were rendered outside India or rendered in India, set aside the order of the AO and remanded the matter for fresh adjudication.

Rhodia Specialty Chemicals India Ltd. v Add CIT - [2017] 81 taxmann.com 423 (Mumbai - Trib.) - IT APPEAL NOS. 622 & 830 (MUM.) OF 2014 dated 24.04.2017

Reimbursements

221. The Apex Court held that sum received by the Assessee by way of reimbursement of cost of the global telecommunication facility provided to its agents cannot be treated as FTS. Further, relying on decision of Kotak Securities Ltd. (2016) 383 ITR 1 (SC), it held that this was a common facility provided by assessee to its agents to enable them to discharge their role more effectively, which was an integral part of shipping business and accordingly, it could not be treated as fees for technical services. It further observed that since there was no profit element embedded in the payments which was accepted by the TPO to be in the nature of reimbursements and at arm's length, it could not be income chargeable to tax.

A.P. Moller Maersk A/S [TS-70-SC-2017] (Civil Appeal No.8040/2015)

222. The Tribunal held that the payment received by the assessee (Swiss company engaged in providing operations and management services to airports) from Bangalore International Airport Authority Ltd. ('BIAL') for secondment of skilled personnel constituted FTS under the Act as well as under India-Swiss DTAA as all the secondees had expertise in the field of management and were holding very high managerial position. It observed that secondees were under the employment of the assessee and not with BIAL and accordingly, it rejected assessee's contention that payments were salary reimbursements as the seconded personnel worked under the direct control and supervision of BIAL, satisfying the employer-employee test.

Flughafen Zurich AG [TS-96-ITAT-2017(Bang)] (I.T.(I.T) A. No.1525/Bang/ 2010)

223. The assessee, a manufacturer of motor cars in India exported the motor cars to other countries through its sister concerns who acted as the dealer of the assessee-company. It also provided warranty to the end customers who purchased the car. The assessee's sister companies maintained the cars sold by the assessee according to the terms of the warranty promised by the assessee-company, towards which it incurred expenditure. As per the contractual obligation, the assessee company reimbursed such expenses to its dealer - sister companies. The Tribunal observed that the reimbursements received by the sister concerns from the assessee were for the purpose of earning income from source outside India (export sales) and therefore held that

by virtue of section 9(1)(vii)(b), the reimbursement payment by the assessee company to its sister concerns was to be excluded from the deeming provision of section 9(1) viz. income accruing or arising in India. Hence, it held that the assessee company would not be liable to deduct tax under section.195.

Nissan Motor India (P.) Ltd v DCIT - [2018] 92 taxmann.com 127 (Chennai - Trib.) - IT APPEAL NO. 1854 (CHNY) of 2017 dated MARCH 21, 2018

224. The assessee, a foreign company incorporated in USA and also tax resident of USA, received corporate IT charges under the agreement entered into with Indian group entity CPIL for providing IT related services. It claimed that such charges were mere reimbursement of cost, thus, not taxable either under domestic law or under DTAA. The AO held the said charges received to be income in nature of Royalty / Fee for Included Services under relevant articles of India-USA DTAA. Noting that the CIT(A) in the subsequent AYs i.e. AY 2009-10 to AY 2014-15 had decided the identical issue in favour of assessee and the revenue's had not filed an appeal against the said decision of CIT(A), the Tribunal rejected the revenue's appeal against the DRP's direction accepting the assessee's contention, relying on the Apex Court decision in the case of Radhasoami Satsang v CIT (1992) 193 ITR 321 (SC) wherein it was held that once the parties have allowed the position to sustain by not challenging the order, it was not appropriate to allow the position to be changed in subsequent years.

CARGILL INCORPORATED v ADD.CIT (IT) – (2018) 52 CCH 49 (Del Trib) – ITA Nos. 491/Del/2012, 492/Del/2012, 5647/Del/2011, 446/Del/2012, 447/Del/2012, 5503/Del/2010, 5648/Del/2011 dated 19.01.2018

225. The Tribunal held that service tax did not have any element of income i.e. it was not in the nature of fee for technical services and therefore did not partake the character of income hence was not includible in the gross receipts offered for taxation.

DDIT v Egis Bceom Intl SA - (2016) 46 CCH 0098 (Del Trib) [India - France DTAA]

226. The assessee, a non-resident company incorporated in USA was engaged in grading and certification of diamonds. It entered into a training and technical service agreement with GIA India for training the employees of GIA India and providing technical services for the implementation of grading policies, procedures and processes for which it raised separate debit notes for 'fee for training and technical services' (FTS) rendered by it to GIA India (on which tax had been paid) and also on account of reimbursement of travel expenses, group health insurance and other minor incidental expenses incurred by it pertaining to the same. The AO held the impugned sum as part of FTS and made an addition of the same, which was upheld by the CIT(A). The Tribunal referred to the agreement entered into between the parties and observed that assessee was entitled to receive only amount incurred by way of "cost to employ" the individuals with a markup of 6.5% and held that expression cost to 'employ' individuals is different from the expression cost incurred to 'depute' a person. It held that cost of employment would clearly mean and include only internal costs that were incurred by assessee to employ an individual and that any costs incurred over and above that to depute an individual for a particular assignment which was not assessee's internal assignment would be an external cost borne or paid by it on behalf of GIA India and could not be treated as a service. Further, noting

that there was no profit element in the reimbursement made, it held that the payment could not be chargeable to tax in India.

Gemological Institute International Inc vs. DCIT - TS-189-ITAT-2017(Mum) - ITA No.4659/Mum/2014 & ITA No.385/Mum/2016 dated 09 .05.2017

227. The Tribunal held that the payment made by the assessee to its overseas group company as reimbursement of expenses incurred by them for recruitment of employees on behalf of the assessee did not come within the purview of Article 12(4) of the India-USA DTAA as the payments were pure and simple reimbursement of recruitment expenses. Accordingly, the Tribunal deleted the disallowance made under section 40(a)(i) of the Act.

ACIT v Lehman Brothers & Advisors Pvt Ltd - (2016) 67 taxmann.com 225 (Mum- Trib) [India - US DTAA]

Technical service as per section 9(1)(vii)

228. The Court held that where an arranger of bank engaged in mobilizing deposits in India for Deposits Scheme, appointed non-resident sub-arrangers for mobilizing fund outside India, services rendered by non-resident sub-arrangers would not fall within category of managerial, technical or consultancy services; and therefore payments made by the assessee to such non-residents would not be liable to TDS and accordingly, the disallowance under section 40(a)(i) of the Act was deleted.

DIT (IT) vs. Credit Lyonnais - [2016] 67 taxmann.com 199(Bombay)

229. The Court held that agency commission paid by the assessee to non-resident agents for procuring orders for the assessee outside India, would not be taxable as fees for technical services under section 9(1)(vii) of the Act and therefore section 195 of the Act would not be applicable, since obligation to deduct tax at source under section 195 only arises if the payment is chargeable to tax in the hands of the non-resident recipient.

CIT v Farida Leather Company - (2016) 66 taxmann.com 321 (Mad)

230. Where assessee had purchased certain plant and machinery from a foreign company located in Saudi Arabia and had entered into a contract with another foreign company in UAE for installation and commissioning of said machinery outside India, the Tribunal held that it could not be construed to be a technical service within meaning of section 9(1)(vii) and, thus, payment made in respect of same was not liable to tax in India. Consequently, it did not require any deduction of tax u/s 195.

Shivsu Canadian Clear Waters Ltd. v DCIT – (2018) 90 taxmann.com 352 (Chen Trib) - ITA No. 2347 (Mds.) of 2017 dated 25.01.2018

231. Where assessee engaged in trading in jewellery, precious and semi-precious stones, made payments to various foreign parties for rendering services such as online advertisement, webpage security certifications, maintenance of database of customers, etc, the Tribunal held that since said the services did not fall within meaning of 'technical services' under section 9(1)(vi), assessee was not required to deduct tax at source while making payments in respect of

services in question. Accordingly, it deleted the disallowance made under Section 40(a)(i) of the Act.

ACIT v Carat Lane Trading (P.) Ltd - [2018] 89 taxmann.com 434 (Chennai - Trib.) - IT APPEAL NO. 213 (MDS.) OF 2017 dated 28.12.2017

232. Where the assessee company was developing and exporting gas circuit breaker and vacuum circuit breaker for which design tests were conducted as per IEC Standards, and the assessee company had paid testing charges without TDS to foreign companies, the Tribunal held that the said payment was FTS liable for TDS and that though the products were sent out of India, source of income was created once export orders were concluded in India. It further held that in order to fall within second exception provided in section 9(1)(vii)(b), source of income, and not receipt should be situated outside India.

DCI - Large Taxpayer Unit v Alstom T & D India Ltd - [2016] 68 taxmann.com 336 (Chennai-Tribunal.)

233. The Tribunal held that the payment made by the assessee to a Korean non-resident company for testing and certification services was taxable as fees for technical services and therefore liable to withholding tax, by relying on the decision of the Court in the case of M/s Havells (India) Ltd wherein it was held that fees for testing and certification services was taxable in the hands of the non-resident company since the assessee (making the payment) in that case could not prove that the testing services availed were utilized in a business outside India as a result of which the source was to be considered to be in India.

Megawin Switchgear Pvt Ltd v ACIT - (2016) 47 CCH 0039 (Chen Trib)

234. The Tribunal held that where the assessee-company made payment to U.K based company for rendering designing services, the said payment was nothing but FTS as defined in article 13 of DTAA and accordingly upheld the 40(a)(i) disallowance made by the AO.

Vis-à-vis payment made by the assessee to a German company for marketing services (i.e. Services for arranging business meetings with importers outside India), the Tribunal held that the said services could not be treated as be FTS either under the Act or under the DTAA because no managerial or technical consultancy services were provided by the foreign payee.

DCIT v Mira Exim Ltd - [2017] 81 taxmann.com 303 (Delhi - Trib.) - IT APPEAL NO. 125 (DELHI) OF 2014 dated 24.04.2017

235. The Tribunal held that where the assessee, a foreign company provided consultancy services for highway projects in India, it would not amount to technical service as it was related to construction activity, which was specifically excluded from the scope of fees for technical services under the Act and thus it would not be subjected to presumptive taxation under section 44D of the Act but would be taxed as regular business profit.

DDIT v MSV International Inc - [2016] 67 taxmann.com 156 (Delhi- Trib).

236. The Tribunal held that payment made by the assessee to an Israel based company under an annual maintenance contract was not taxable in India and accordingly there was no liability to deduct tax under section 195 of the Act since the payment towards AMC was in the nature of routine repairs and maintenance and not in the nature of fees for technical services absent

managerial, technical or consultancy services provided to the assessee. Further, it rejected the contention of the Revenue that the services were rendered in India since as per the warranty agreement the equipment was sent outside India for repairs and re-imported in India and therefore it was incorrect to conclude that the entire services were rendered in India.

ACIT v HCL Comnet Ltd - TS-456-ITAT-2016 (Del) - ITA No 321/ Del/2012, 5651/Del/2012, 6142/Del/2012 [India - Israel DTAA]

237. The Tribunal upheld the CIT(A)'s order holding that the professional fees received by the assessee, an NRI residing in UK, from Indian companies was taxable as FTS under Explanation 2 to section 9(1)(vii), noting that though the assessee had offered to tax the said income on net basis (i.e. after reducing expenses) in his return of income, the recitals in the TDS certificate had categorized the receipts as fee for professional and technical services and the assessee had not brought any evidence to prove the nature of services or actual rendering of services. It also rejected the assessee's claim that he had mistakenly offered the receipts to tax and that these were commercial receipts for services rendered outside India, not taxable in India absent PE, noting that amounts were credited to assessee's NRO savings account in India.

Shri Sanjiv Ghai v Dy.DIT - [TS-338-ITAT-2018(DEL)] - I.T.A. Nos.5681 to 5686 & 5864 to 5868/Del/2014 dated 27.06.2018

238. The Tribunal held that where assessee engaged in business of export of special pipes, made payments to foreign party towards supervision of installation of pipes and fittings, since same was in respect of assembly of project, said payments would squarely fall within sweep of exceptions carved out in Explanation 2 to section 9(1)(vii) and thus could not be taxed as FTS.

Chemical Process Piping (P.) Ltd.v R.M. Madhavi - [2018] 94 taxmann.com 116 (Mumbai - Trib.) - IT APPEAL NOS. 1036 & 1037 (MUM.) of 2016dated 02.05.2018

239. The Tribunal held that export commission payments to foreign brokers for rendering services abroad was not a sum chargeable to tax in hands of foreign brokers as contemplated under section 195 and was not a fee for technical / managerial service as defined in Explanation 2 to section 9(1) (vii) to bring it to tax under fiction created by deeming provisions of section 9.

ACIT v Pahilarai Jaikishin - [2016] 66 taxmann.com 30 (Mumbai-Trib)

240. The Tribunal held that standby charge was a fixed annual charge, which was payable not for providing or rendering services albeit for facility or infrastructure maintained for ready to use for rendering technical services or for repairing services, if required and, therefore, receipt on account of standby maintenance charges was not chargeable as 'fees for technical services' within scope of section 9(1)(vii).

Flag Telecom Group Ltd. v. Dy. DIT (International Taxation) [2015] 59 taxmann.com 411/69 SOT 679/174 TTJ 92 (Mum.)

Others

241. The AAR held that program fees received by the Applicant, Regents of the University of California from its Indian counterpart for holding management programs for training senior executives was not taxable under the India-US DTAA since the applicant's activity was in the

nature of educational activities and could not come within the ambit of fees for includes services or royalty under Article 12(5) of the India-US DTAA which excludes amount paid for teaching in or by educational institutions.

The Regents of University of California - TS- 490-AAR-2016 - A.A.R. No 1656 of 2014 [India - US DTAA]

242. The AAR held that the service fee payable by the Applicant to its Russian subsidiary for providing product promotion services was not FTS under the Act or under Article 12 of the India-Russia DTAA since the services rendered could not be considered as consultancy services as they merely entailed preparation of reports by the Russian subsidiary which were statistical in nature. Further, it dismissed the alternate contention of the Revenue that the same could be taxed as managerial services since the job of the medical representatives of the Russian subsidiary was to merely meet doctors and pharmacies which could not said to be managing the affairs of the Applicant.

Dr Reddy's Laboratories Ltd - TS-487-AAR-2016 - A.A.R. No 1572 of 2014 [India - Russia DTAA]

243. Services provided by Chinese subsidiary of Indian holding company in connection with procurement of goods by Indian company from Chinese vendors involving specialized services of market research, information on new developments was taxable as fees for technical services on the gross amount @ 10 percent.

Guangzhou Usha International Ltd In re – (2015) 62 taxmann.com 96 (AAR – New Delhi)

244. The Tribunal had allowed the assessee's claim for Nil withholding/ non-taxability in respect of payment made by it to a German company for services rendered by the personnel of the German company solely relying on an AAR ruling in the case of *Tekniskil (Sendirian) Berhad v. CIT [(1996) 222 ITR 551 (AAR)]* wherein it was held that the FTS arising out of supply of skilled labour were not liable to tax in India in terms of Article 7 as 'business profits' on the ground that the assessee did not have a Permanent Establishment (PE) in India in terms of Article 5 of the India-Malaysia DTAA. However, noting that the relevant India-Malaysia DTAA as applicable for the aforesaid ruling did not have the FTS clause, the Court remanded the matter back to the Tribunal to examine whether the aforesaid payments amounted to FTS under Article VIIIA of India-Germany DTAA.

DIT (IT) v Modiluft Ltd – (2018) 93 taxmann.com 180 (Del) – ITA Nos. 772 of 2004 & 15 of 2005 and others dated May 8, 2018

245. The Tribunal allowed the assessee's appeal against the AO's order wherein the AO had held the amount received by the assessee from Airport Authority of India (AAI) towards installation, commissioning and testing charges was towards training and taxable as FTS as per Article 12(5) of the India - Netherlands DTAA. It was noted that the said amount was received by the assessee in furtherance of the contract entered with the AAI earlier for supply of equipments (as additional resources for urgent requirement) and the main contract value received from such contract was examined in past and accepted to be towards installation. It was also noted that the assessee had entered into a separate contract for training service in past and the bifurcation of consideration received towards installation and training was accepted by the Revenue. The

Tribunal thus held that it would be inappropriate to question the contract in this year after the completion of the contract, especially in view of the fact that the AO had not adduced any reasoning to construe the said receipt as attributed towards training. It thus held that the additional amount received from AAI towards installation, commissioning and testing charges was not taxable as FTS within the meaning of Article 12(5) of the India - Netherlands DTAA as the same was not received towards training as assumed by the AO. Further, the Tribunal held that income in respect of such services could not be taxed even as business income, in the absence of a Permanent Establishment (PE) of the assessee in India as per Article 7 of the India-Netherlands DTAA.

HITT HOLLAND INSITUTE OF TRAFFIC TECHNOLOGY B.V. vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONA TAXATION) - (2018) 52 CCH 0280 KoITrib - ITA No. 390/Kol/2015 dated Apr 4, 2018

246. Where, as per MAP settlement arrived at for earlier years, the income derived from borrowed service charges was held not to be taxable as Fees for technical services / royalty, the Tribunal held that the AO erred in taxing the same as FTS for the year under review. Further, considering that the assessee did not have a PE in India, it held that the said income would not be taxable in India.

MCKINSEY & COMPANY INC. & ORS. vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONL TAXATION) & ORS - (2018) 52 CCH 0182 MumTrib - ITA Nos. 1748/Mum/2016 dated Mar 14, 2018

247. The Tribunal held that in view of MAP proceedings settled between the Government of India and the Government of U.S.A., it was to be held that such borrowed services provided by the assessee could not be held to be part of the FTS/FIS and hence not taxable in India under article 12. Further in view of fact that the assessee did not have any PE in India, services rendered were not taxable under the Treaty.

McKinsey & Company INC Italy v. Asstt. DIT (IT) [2015] 60 taxmann.com 466/70 SOT 276/43 ITR (Trib.) 45 (Mum)

248. The Tribunal allowed the assessee's appeal and held that the amount received by assessee, a Singapore based entity, for rendering legal services in India was not 'fee for technical services' as per the India-Singapore DTAA and accordingly not chargeable to tax in India. It followed the co-ordiante bench decision for earlier year in assessee's own case wherein it was held that fees so received by assessee was not in nature of 'fees for technical services' under article 12 of India-Singapore DTAA. In the earlier year, the Tribunal had held that the said receipt would be chareable to tax in India as business receipt if a PE could be constituted based the period of stay of the assessee's personnel exceeding the threshold limit of 90 days in the relevant previous year.

Linklaters Singapore (Pte) Ltd v DCIT [2019] 101 taxmann.com 486 (Mum Trib.) – ITA No. 854 (MUM.) of 2017 dated December 26, 2018

249. Where the assessee made a payment for acquisition of Designs and Drawings for purpose of completing operating and maintaining the plant imported from the non-resident, the Tribunal held that the said payment could not be considered as FTS as the payments were not merely

inextricably linked with the plant but without such payments the plant would not have been installed and commissioned. It held that the payments towards Designs and Drawings would in fact constitute part of the cost of acquisition of the plant.

TATA STEEL LIMITED vs. INCOME TAX OFFICER (INTERNATIONAL TAXATION) - (2018) 52 CCH 0174 MumTrib - ITA No. 1086/Mum/2017 dated Mar 1, 2018

250. The Tribunal held that fee for included services (FIS) would not include amounts which are inextricably and essentially linked to start up services and sale of property.

Raytheon Ebasco Overseas Ltd v DCIT - [2016] 68 taxmann.com 133 (Mumbai-Tribunal) [India - US DTAA]

251. The Tribunal held that review of design does not amount to transfer of design and hence fees for the same cannot be taxed as FTS / FIS under the India US treaty. It also held that where the service of installation was inextricably connected to sale of goods, the same could not be treated as FIS or FTS.

Gujarat Pipavav Port Ltd v ITO - (2016) 67 taxmann.com 370 (Mumbai - Tribunal) [India - US DTAA, India - China DTAA]

252. The Tribunal held that where assessee rendered composite service of managerial and technical nature to its Indian subsidiary and the CIT (A) taxed half of receipts therefrom without analyzing bills to segregate them, action of CIT(A) was not justified and restored the matter to the file of CIT (A).

ADIT v Lloyds Register UK - [2016] 68 taxmann.com 309 (Mumbai- Tribunal) [India - UK DTAA]

253. The Tribunal held that when amount received by assessee was not in nature of "Fee for technical services" as per definition of Article 13(4)(c) of the India-UK DTAA, there was no necessity to examine its taxability u/s 9(1)(vii).

IMG Media Ltd v DDIT - (2015) 44 CCH 0553 Mum Trib

d. Capital Gains

254. The assessee (Dutch company) sold its shares in an Indian company (engaged in the business of developing, maintaining and operating an industrial park) to a Singapore company. The assessee contended that Article 13(5) of India-Netherlands DTAA provides that the gains on alienation of any property not referred under any other clause would be taxable in Netherlands and therefore gains on sale of shares of Indian company were not taxable in India. Accordingly, it claimed refund of taxes deducted by the seller. The AO contended that the value of the shares was derived from the immovable properties in India and held that Article 13(1) which provides that gains on alienation of immovable property may be taxable in India would apply. It rejected the assessee's contention that Article 13(5) would apply since that was the residuary clause. Accordingly, it rejected the assessee's claim of refund of taxes deducted. The CIT(A) upheld the order of the AO. The Tribunal held that a share in a company could not be considered to be

immovable property and accordingly, Article 13(1) would not apply. It accepted the assessee's contention that capital gains were not taxable in India as per Article 13(5). The Court approved the Tribunal's findings that alienation of shares by assessee did not fall under Article 13(1) of the DTAA and by virtue of residuary clause in Article 13(5), gains would be exempt from taxation in India.

Vanenburg Facilities BV [TS-246-HC-2017(AP)] I.T.T.A. NOS.55 AND 71 OF 2014 dated 16.06.2017

255. Rejecting the allegation of the Revenue that the assessee (a Mauritius company) was a mere shell company having no business/commercial substance and not eligible to the benefits of Article 13 of the India-Mauritius DTAA, the Court observed that it was holding a Category 1 Global Business License issued by Financial Services Authority of Mauritius, valid TRC and held shares of TIL for 13 years which proved that the assessee was not a shell company. Accordingly, it held that the assessee was eligible to treaty benefits and therefore the capital gains arising to it in respect of transfer of shares of Tata Industries Limited ('TIL') to Tata Sons Limited ('TSL') was not taxable in India in view of Article 13 of India-Mauritius DTAA.

JSH (Mauritius) Ltd. TS-308-HC-2017(BOM) (W.P. No. 3070 of 2016 dated July 28, 2017)

256. The Court held that the situs of an intangible asset was the situs of the owner of such asset and that an intangible asset does not have any physical form at any particular location and therefore could not be presumed to be situated in India when its owner was outside India. It held that the legislature could have, through a deeming fiction, provided for the location of an intangible capital asset but it had not done so insofar as India is concerned. Citing the deeming fiction introduced for the situs of shares in an indirect transfer, it held that since there was no like provision for intangible assets, the well accepted principle of 'mobilia sequuntur personam', which provides that the situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset, was to be followed. Accordingly, since the assessee / owner of the intangible asset was not in India at the time of transfer of intellectual property rights to another company viz. SAB Miller, no income accrued to the Petitioner in India.

CUB Pty Ltd v UOI - TS-401-HC-2016 (Del) - WP(C) 6902/2008

257. AAR ruled that the benefit of proviso to section 112 (1) of taxation at lower rate of 10% cannot be denied to foreign companies with respect to long-term capital gains arising on sale of listed equity shares of an Indian company following the decision in the case of Cairn UK Holdings Ltd. v. DIT (2014) 220 Taxman 230 (Del HC)

Finnish Fund for Industrial Cooperation Ltd., In re vs. – (2018) 91 taxmann.com 133 (AAR) – AAR no. 1375 of 2012 dated 28.02.2018

258. AAR ruled that the benefit of proviso to section 112 (1) of taxation at lower rate of 10% could not be denied to foreign companies with respect to long-term capital gains arising on sale of listed equity shares of an Indian company following the decision in the case of Cairn UK Holdings Ltd. v. DIT (2014) 220 Taxman 230 (Del HC) and several other AAR rulings. Further, it allowed assessee's claim for deduction of expenses incurred towards fees for computerization of share certificates in order to transfer them to escrow account considering them to be incurred in connection with transfer of shares as per provisions of section 48.

Honda Motor Co. Ltd., In Re – (2018) 253 Taxman 402 (AAR) – A.A.R. No 1200 of 2011 dated 07.02.2018

259. The AAR held that settlement amount received for surrender of right to sue was not taxable since it was a capital receipt and could not be charged to capital gains as its cost of acquisition was not determinable. Further, the AAR held that the settlement amount was received as a result of surrender of claim against another company and its auditors and not in substitution of any business income and therefore the said amount could not be taxable in accordance with the principle of surrogatum, since it did not replace any business income.

Aberdeen Claims Administration Inc - (2016) 65 taxmann.com 246 (AAR- Del)

Lead Counsel of Qualified Settlement Fund - (2016) 65 taxmann.com 197 (AAR- Del)

260. The AAR held that where a Mauritius based company proposed to transfer shares held by it in an Indian company in favour of a company proposed to be incorporated in Singapore pursuant to a group reorganization initiated 20 years back, it could not be said to be a tax avoidance scheme merely because treaty benefits were available. It further observed that the Mauritius company had been operating for a period of 10 years and therefore could not be considered as a shell company. It held that the applicant was not liable to capital gains tax as per Article 13 of the DTAA, since Article

13(1) and 13(3) were not applicable and in the absence of a permanent establishment Article 13(2)

of the DTAA was also not applicable.

In the absence of a PE in India, the MAT provisions did not apply to the applicant and neither did the transfer Pricing provisions apply as there was no income arising out of the said international transaction.

Dow Agro Sciences Agricultural Products Ltd In re - [2015] 65 taxmann.com 245 (AAR-New

Delhi) [India -Mauritius DTAA]

261. The AAR held that the capital gains arising to the Applicant, a Mauritian company and wholly owned subsidiary of a Japanese Bank, on transfer of shares of an Indian asset management and trustee companies was not taxable under Article 13 of the India-Mauritius DTAA. It noted that the Applicant held more than 75 percent of the paid up capital of the asset management and trustee companies and held a valid TRC and therefore the Revenue were incorrect in contending that the Applicant was merely a 'permitted transferee' just to claim the benefit of the India-Mauritius DTAA and that the Japanese parent company was in effective control of the transaction. Noting that the Applicant had a valid TRC, the AAR held that the beneficial provisions of the DTAA could not be denied to the Applicant.

Shinsei Investment Ltd - TS-473-AAR-2016 - A.A.R. No 1017 of 2010 [India - Mauritius DTAA]

262. The AAR, invoking the non-discrimination clause under Article 25(1) of the India-Italy DTAA, held that capital gains arising on amalgamation of a non- resident company having an Indian branch with its group company(an Italian based bank) was not taxable in light of the exemption provided in Section 47(vi) which is otherwise available only to Indian companies. It dismissed

the contention of the Revenue that the applicants case fell under the exception carved out under Article 25(3) and clarified that the said exception only applied to personal allowances etc and would be in context of individuals and not companies. It further held that even if the amalgamation was considered as a transfer, since the shareholders of the applicant and not the applicant received consideration by virtue of shares of the amalgamated company, there would be no capital gains tax in the hands of the applicant since it did not receive any consideration. Further, the AAR also held that that the consideration received by the shareholders of the applicant was not chargeable to tax as capital gains in view of Article 14(5) of the India-Italy DTAA which provided that capital gains shall be taxable only in Italy.

Banca Sella SPA - TS-468-AAR-2016 - AAR No 1130 of 2011 [India - Italy DTAA]

263. The AAR held that as per Article 13(4) of the India-Mauritius DTAA, the assessee, Mahindra-BT, Mauritius, was not liable to tax in India in respect of the transfer of shares in Tech Mahindra Ltd ('TML') to AT&T International USA ('AT&T'). It rejected the Revenue's contention that the applicant was incorporated without any economic substance and that its sole purpose was to hold shares to facilitate a tax neutral share transfer noting that there was a commercial option agreement between TML and AT&T, whereby AT&T was to be offered an opportunity to hold shares in TML only once AT&T had provided TNML was a certain level of business and that there was nothing wrong if the Applicant held the shares in TML and transferred them to AT&T subsequent to the fulfillment of conditions prescribed in the Options Agreement. It further rejected the stand of the Revenue that the control and management of the Applicant was situated in India under section 6(3) of the Act since the condition of control and management being wholly situated in India was not satisfied as various important decisions on financial matters were taken by the Applicant's Board of Directors in Mauritius.

Mahindra-BT Investment - TS-479-AAR-2016 - A.A.R. No 991of2010 [India -Mauritius DTAA]

264. The Court held that the AAR was incorrect in rejecting the application based on the fact that it was a prima facie case of tax avoidance as there was not a single finding of fact to prove so. The Court stated that the TRCs issued by the Mauritius authorities were sufficient evidence for accepting the status of residence and beneficial ownership. Further it interpreted the words "liable to taxation" to mean that the Government is entitled to tax the person whether or not he actually pays the tax and accordingly held that the DTAA would be applicable and no tax was deductible on capital gains arising from sale of shares from the Mauritius entity to the Indian assessee company.

Serco BPO Private Limited v AAR - (2015) 60 taxmann.com 433 (Punjab & Haryana)

265. The Tribunal held that gains from alienation of shares of capital stock of the company the property of which consists directly or indirectly principally of immovable property situated in a contracting state may be taxed in that State and therefore, the assessee a resident of India, transferring shares of a Sri-Lankan company would be taxable in Sri Lanka itself. It held that the contention of the CIT in invoking 263 of the Act on the basis that the AO failed to examine the issue adequately and that the AO failed to compute long term capital gains and short term capital gains separately, was not consequential since the capital gains would be taxable only in Sri Lanka in any case.

Jay Agriculture & Horticulture Pvt Ltd v Pr CIT - (2016) 46 CCH 0118 (Ahd Trib) [India - Sri Lanka DTAA]

266. Where during A.Y. 2011-12, the assessee bought back its shares from its 99% holding company in Mauritius and claimed exemption for the capital gains under Article 13(4) of India-Mauritius DTAA and the AO treating the buy-back as colourable device to transfer the accumulated profits, treated the same as dividend u/s 2(22)(d) liable to DDT u/s 115-O, the Tribunal held that buy-back payment to the extent of fair market price (FMP) would not be treated as colourable device and accordingly, capital gains benefit under Article 13(4) of India-Mauritius DTAA would be available. Further, relying on CBDT circular 3/2016, it held that buy-back of shares pre-2013 would be taxable as capital gains as per the provisions of sec 46A of the Act and could not be recharacterized as dividend. However, it held that in case the buy back price was not based on the real valuation and was artificially inflated by the parties then it was certainly a device for transfer of the reserves and surplus to the holding company by avoiding the payment of tax and it would be treated as colourable device and accordingly, the payment over and above FMP would fall within the ambit of section 2(22)(d) subject to DDT. Accordingly, it remitted the matter to the AO to determine the FMP of the shares as on the date of buy back.

Fidelity Business Services India Pvt. Ltd. [TS-110-ITAT-2017(Bang)]

267. The Tribunal confirmed capital gains tax on Cairn UK Holdings over sale of its shareholding in Cairn India Holdings Ltd. (resident of USA) to Cairn India Ltd as shares of Cairn India Holdings Ltd. derived their value solely from the assets located in India as per Section 9(1)(i) of the Act. It observed that the assessee by virtue of being holding company of Cairn India Holdings Ltd. had held rights in control and management of shares of nine Indian subsidiary companies of Cairn India Holdings Ltd. which controlled Oil & Gas sector in India and accordingly, it categorized these rights as 'property' as defined under Explanation to section 2(14) of the Act. Accordingly, it rejected assessee's arguments that the transaction was genuine group restructuring as a result of which management and control remained in the same hands and accordingly, conditions stipulated in the definition of the term 'property' were not satisfied. It further rejected assessee's contention that no real income had accrued to the assessee on the ground that the financial statements of the assessee reflected that the assessee had earned substantial gain on sale of shares and on account of taxes not paid by it due to exemption claimed on capital gains. It also rejected assessee's contention that this was transfer by way of exchange and not sale and accordingly, FMV of the asset received in consideration for the assets transferred should be taken as full value of consideration and cost of acquisition should be stepped up to the fair value of the shares of Cairn India Holding Ltd. on the date of acquisition and upheld AO's computation of capital gain by deducting from full value of consideration, the actual cost of acquisition incurred by the assessee for acquisition of the property i.e. original cost of shares.

Cairn UK Holdings Limited [TS-89-ITAT-2017 (Del)] [ITA No. 1669 /Del/2016]

268. The Tribunal rejected the assessee's contention that since Indo-UK DTAA notified in the year 1994 provided for taxation of capital gains tax as per domestic tax laws of the contracting state, the domestic law prevailing in 1994 should be applied and held that provision in the DTAA

cannot make the domestic law static and such article in DTAA also cannot limit the boundaries of domestic tax laws.

Cairn UK Holdings Limited [TS-89-ITAT-2017 (Del)] [ITA No. 1669 /Del/2016]

- 269.** The assessee-individual had purchased a residential flat from two non-residents (vendors) under a sale deed which had been executed in favour of the assessee by the GPA holder of the vendors (who was an Indian resident) and since, the assessee had made the payment of sales consideration to the said GPA holder, he had not deducted TDS u/s 195 on such payment. The AO treated the assessee as “assessee in default” u/s 201(1) and levied interest u/s 201(1A) on the TDS amount determined by considering provisions of section 50C while computing LTCG. The Tribunal held that at best, the GPA holder could be considered as only a conduit between the assessee and the owners of the property and therefore, in the true sense, the assessee had made the payment to the non-residents only. However, in the present case, since the assessee had subsequently paid tax u/s 195 on LTCG arising in the hands of the vendors on transfer of the said flat, it was held that the assessee could not be treated as an “assessee in default” u/s 201(1), but was only liable for interest u/s 201(1A) till the date of payment of taxes by him. Further, the Tribunal rejected AO’s action in invoking provision of section 50C to compute the LTCG, holding that it was not dealing with the liability of the vendors to pay the taxes, but with the liability of the assessee to deduct taxes at sources and as far as the liability of the assessee was concerned, TDS would only be on the actual consideration credited or paid by the assessee, whichever is earlier.

BHAGWANDAS NAGLA v ITO(IT) – (2018) 52 CCH 61 (Hyd Trib) – ITA No. 143/Hyd/2017 dated 25.01.2018

- 270.** Where the assessee, a Spanish company, had invested in some Indian companies which were in business of developing properties in India, the Tribunal held that the AO was unjustified in invoking the provisions of Article 14(5) of DTAA between India and Spain (governing taxability on account of transfer of immovable property) to tax the income arising from the sale of shares of the Indian companies as the assessee was holding shares in an Indian company and not holding any immovable property in India. Accordingly, it held that the taxability of sale proceeds would be governed by Article 14(6) of the DTAA, as per which the gains would be taxable only in Spain and therefore concluded that capital gains derived by the Spanish assessee from sale of shares of the Indian companies could not be taxed in India.

ADIT v Merrill Lynch Capital Market Espana S.A.S.V - [2017] 86 taxmann.com 161 (Mumbai - Trib.) - IT APPEAL NOS. 2824, 4987 (MUM.) OF 2012 & 4578 (MUM.) OF 2014 dated 11.09.2017

- 271.** The assessee, a tax resident of Singapore registered as Foreign Institutional Investor (FII) in debt segment, claimed capital gain on sale of debt instruments as exempt under Article 13(4) of India-Singapore DTAA which was disallowed by the AO by applying Article 24 of DTAA (which provides for restriction of claim of exemption of income to the extent of repatriation of such income to other country (Singapore)). The Tribunal noted that assessee was taxable in Singapore on its worldwide income (which was also supported by a letter provided by the Singapore Revenue authorities) and held that Article 24 of the DTAA would only apply where income paid from sources in one Contracting state (India) which was exempt from tax or enjoy

tax at a reduced rate, was taxable on remittance basis in the other state in which the recipient was resident (Singapore). Accordingly, it held that Article 24 of the DTAA would not be applicable in the case of the assessee as its worldwide income was taxable in Singapore and therefore the issue of remittance of the said income was not relevant. Further, it also held that Article 24 would only apply to the income which is either 'exempt' from tax in India or 'tax at a reduced' rate in India whereas in the case of the assessee the capital gains were not taxable in India and was only taxable in Singapore. Therefore, for both the reasons mentioned above, it held that Article 24 was wrongly invoked by the AO.

Citicorp Investment Bank (Singapore) Ltd. v DCIT - [2017] 81 taxmann.com 368 (Mumbai - Trib.) - IT APPEAL NO. 793 (MUM.) OF 2015 dated 24.03.2017

- 272.** The Tribunal held that where the assessee transferred shares under a scheme of arrangement approved by the High Court, the scheme would not fall under the category of re-organization under Article 13(5) of the India - Netherlands DTAA, since the object of the scheme was not financial re- structuring but to enable the assessee to transfer its shareholding and pursuant to the scheme there was only a reduction in the share capital but the security holders continued to enjoy the same rights and interests, thereby not satisfying the definition of reorganization. Accordingly, it held that the gain received by the assessee was taxable in India.

Accordis Beheer BV v DIT - TS-10-ITAT-2016 (Mum) [India - Netherlands DTAA]

- 273.** The Tribunal held that advance given by assessee, a non-resident company, to its wholly owned subsidiary is a property in the sense that it is an interest which a person can hold and enjoy, and since it is a property and is not covered by exclusion clauses set out in section 2(14), it is required to be treated as a 'capital asset' and if any loss arises on sale of the said asset, it would be treated as short term capital loss in the facts of the given case.

Siemens Nixdorf Informationssysteme GmbH v DDIT - [2016] 68 taxmann.com 113 (Mumbai - Tribunal)

- 274.** The Tribunal held that where the assessee was resident of both India and Sri Lanka, as per Article

13 of the India-Sri Lanka DTAA, capital gains arising from the transfer of immovable property situated in Sri Lanka would be taxable only in Sri Lanka. However, it held that the same was also income chargeable to tax in India under the provisions of the Act and therefore to avoid double taxation relief i.e. credit for tax paid in Sri Lanka would be granted to the assessee in accordance with Notification No 91 of 2008 read with the DTAA.

Shalini Seekond v ITO - (2016) 47 CCH 0398 (Mum - Trib)- I.T.A. No. 3877/Mum/2012 [India - Sri Lanka DTAA]

- 275.** The Assessee, a tax resident of Singapore, claimed that the short-term capital gain derived by it from Indian securities was as not taxable in India under Article 13(4) of the India-Singapore DTAA. The AO, however, rejected such claim referring to Article 24 of the said DTAA which provides that the exemption available under the said DTAA with respect to income from any

source in a Contracting State (India) will be limited only to the extent such income is repatriated to the Other Contracting State (Singapore), if such income is taxable in the Other Contracting State (Singapore) by reference to the amount which is remitted to or received in that Other Contracting State (Singapore) and not the full amount. The DRP held that the entire income received by the assessee from all sources was taxable in Singapore irrespective of the fact whether it was received in Singapore or not and allowed the assessee's claim. The Tribunal held that Article 13(4) is not an exemption provision but it speaks of taxability of particular income in a particular State by virtue of residence of assessee and provisions of Article 24 (which is applicable to exempt income) does not have much relevance insofar as it relates to applicability of article 13(4) to income derived from capital gain. Thus, it dismissed the Revenue's appeal.

DCIT v D. B. International (Asia) Ltd - [2018] 96 taxmann.com 75 (Mumbai - Trib.) – ITA No. 992 (MUM.) OF 2015 dated June 20, 2018

e. Dividend Income

276. Where as per Article XI of DTAA entered into between India and Malaysia as prevalent during AY 1992-03, tax on dividends was liable to be levied in the country where the income had accrued, the Apex Court following its decision in the case of CIT v. Torquise Investment & Finance Ltd. [2008] 300 ITR 1/168 Taxman 107 (SC), held that dividend income received by the assessee from a foreign country was exempt from taxation.

DCIT v Tripti Trading & Investment Ltd - [2017] 80 taxmann.com 287 (SC) CIVIL APPEAL NO. 1521 of 2007 dated 09.03.2017

277. The Tribunal held that where the assessee society received dividend income from an Omani company, which was offered to tax in India, it would be liable to credit of tax paid under the India - Oman DTAA, in spite of the fact that the Omani tax laws exempts tax on such income, as the term 'tax payable' in Article 25(4) of the DTAA includes tax which would have been payable but not paid due to certain tax incentives under laws of the contracting State.

Krishak Bharati Cooperative Ltd v ACIT - (2016) 67 taxmann.com 138 (Del - Trib) [India - Oman DTAA]

278. The Tribunal held that for AY 2004-05, dividend received by the assessee from a Malaysian Bank would be governed by the old DTAA between India and Malaysia and therefore would not be liable to tax in India. Post AY 2004-05, the dividend income would be taxable in both states and subject to tax credit under section 91 of the Act.

DCIT v UCO Bank - (2016) 46 CCH 0313 (Kol Trib) [India – Malaysia DTAA]

279. The Tribunal held that where the assessee, a resident of India, received dividend from a company incorporated in Brazil, then as per Article 10 read as well as Article 23 of the India-Brazil DTAA, the dividend could have been taxed at a rate not exceeding 15 percent in Brazil

as per the DTAA. However, since the Brazilian law declared the dividend income to be exempt from income-tax, as the assessee was a resident of India within the meaning of paragraph 3 of Article 23 of the DTAA (which provides that where a company which is a resident of a Contracting state derives dividends which, in accordance with the provisions of paragraph 2 of Article 10 may be taxed in the other Contracting state, the first mentioned State shall exempt such dividends from tax), such dividends were exempt from tax in India.

ITO v Besco Engineering & Services Pvt Ltd - (2016) 47 CCH 0028 (Kol) [India - Brazil DTAA]

f. Independent Personal Services

280. The Tribunal held that the amount received by the assessee, a US individual, for rendering software development services to an Indian entity was not taxable in view of Article 15 of India-US DTAA and rejected the AO's contention that the impugned services not being covered under Article 15 were taxable under Article 12 of the DTAA. It held that once a receipt was of a nature covered under Article 15, it would stand excluded from Article 12 by applying sub-clause 5 of Article 12. It further observed that software development services essentially required intellectual skill and was dependent on individual characteristics as a result of which it fell within the ambit of 'professional services under Article 15(2) and also noted that while dealing with the scope of services covered under Article 15, there could be overlapping effect of the scope of services covered under other Articles but as long as the services were rendered by an individual or a group of individuals, the rendition of services was covered by Article 15.

ITO v SusantoPurnamo - TS-438-ITAT-2016 (Ahd) - I.T.A. No. 254/ Ahd/2015 [India - US DTAA]

281. The assessee rendered supervisory services to an Indian entity 'Sterlite' in connection with erection and commissioning of plant in India by outsourcing such services from Finnish entity IPS for which certain payment was made to IPS. According to the assessee, such payment was not taxable in hands of IPS in terms of article 13. On enquiry, it was found that IPS was found that IPS was nowhere involved in providing supervisory services to Sterlite and services were rendered by five engineers from Finland. The Tribunal held that amount paid by the assessee to Finnish engineers was covered only under article 15 and not article 13. Since said five engineers were not representing IPS, for purpose of article 15, amount payable to each of such five persons should satisfy duration test of 90 days on individual basis and if this conditions was found wanting qua some individuals, then amount payable to such individual residents of Finland, would cease to be chargeable to tax in terms of article 15 notwithstanding its taxability under section 9(1)(vii), read with section 5.

Outotec India (P.) Ltd. v. Asstt. CIT [2015] 59 taxmann.com 108/69 SOT 618/41 ITR (Trib.) 449/172 TTJ 186(Delhi)

282. The Tribunal held that the AO was incorrect in treating the assessee as an "assessee in default" under section 201 by considering the payment made by it to Precision Energy Associates LLC represented by its proprietor Joe Mitchell, a professional consultant. It held that the provisions of the India- US DTAA would override the provisions of the Act and therefore taxability of the

services would have been governed either by Article 15 viz. independent personal services or Article 16 viz. dependent personal services. It noted that if the services provided by Joe Mitchell were considered as dependent personal services, the same would not be taxable under Article 16 since the period of stay of Joe Mitchell in India did not exceed 183 days. Alternatively, it held that if the services were to be treated as independent personal services, for the purpose of determining the number of days stay in India, either the date of arrival or the day of departure was to be excluded and since Joe Mitchell had made seven visits to India, a period of 7 days was to be excluded. Accordingly, the number of days stay in India of Mr Mitchell would amount to 86 days as opposed to the 93 days erroneously computed by the CIT(A) and therefore the payment to Joe Mitchell would not be taxable under the India-US DTAA.

Spectrum Power Generation Ltd v ACIT – (2016) 48 CCH 0261 (Hyd – Trib) (ITA No 1101 / Hyd / 2016) (India-US DTAA)

283. The Tribunal deleted addition under section 40(a)(i) for TDS default on payments made by assessee company to NR individuals for providing engineering services on the ground that services provided by both the individuals fell under the ambit of independent personal services (IPS) and their stay in India was less than 183 days. The Tribunal further observed that even when payments within the purview of IPS were treated as FTS, such payments would be taxed under the article governing IPS and not FTS under the relevant clauses of DTAA.

ABC Bearing Ltd [TS-23-ITAT-2017(Mum)]

284. Where the assessee paid professional fees to its independent director and did not deduct tax since the director had not stayed in India for more than 90 days in view of Article 15 of India-UK DTAA, however, the AO treated the amount as taxable in India as per Article 17 of India-UK DTAA (Director Fees) and disallowed the fees paid as tax was not deducted, the Tribunal held that Article 17 was not applicable since the payment to the director was on account of professional services rendered by him and not in the capacity as a member of Board of Director of company and accordingly, held that the payment was not liable to be taxed in India in view of Article 15 of India-UK DTAA.

Nagpur Power & Industries Ltd. vs. DCIT (2017) 49 CCH 0113 Mum Trib (ITA No. 5808/Mum/2013 & 6468/Mum/2014)

285. The Tribunal held that payment of legal fees by the assessee to UK firm for educating its officials regarding various legal/regulatory requirements for setting up of a bank branch outside India falls within the exceptions under section 9(1)(vi)/(vii) as the payment was made to carry on business outside India and create a new source of income outside India and hence, not taxable as royalty/fees for technical service under the Act. It further held that under India-UK DTAA, as per Article 15(Independent Professional Services) being more specific than Article 13 (Royalty/ Fees for Technical Service) the fees were not taxable, since no employee of the UK firm was present in India for more than 90 days.

Kotak Mahindra Bank Limited - TS-528-ITAT-2016 (Mumbai Trib)- ITA No. 3901/Mum/2013 [India - UK DTAA]

g. Salary

- 286.** The Court held that, salary of a non-resident seafarer for services rendered outside India on-board foreign ships accrues outside India and is not assessable in India even if received by the seafarer into the NRE bank account maintained in India by the seafarer
Sumana Bandyopadhyay vs DDIT- ITA No. 374 of 2016, [2017] 88 taxmann.com 847 (Calcutta)/[2017] 396 ITR 406 (Calcutta), dated 13.07.2017
- 287.** Where the applicant-employer, engaged in business of software development and IT Enabled Services, had sent two of its employees-assignees on deputation to US and Germany and the applicant had filed the application with AAR seeking ruling on issue of taxability in India of salary of its employees sent abroad for rendering services to foreign company and the applicant-employer's liability to deduct TDS on thereon, the AAR ruled that the income earned by assignees/employees from services rendered in USA / Germany respectively would be chargeable to tax in USA / Germany only and not in India for period of their deputation and since there was no obligation on employee to pay tax on income from salaries, there would not be any liability to deduct tax u/s 192 by applicant- employer. Further, with respect to the applicant-employer's query as to whether the applicant could give the said employees credit of taxes paid in US/ Germany on their return to India, it was ruled that the employees were covered by provisions contained in Articles 25 of India-USA DTAA and Article 23 of India-Germany DTAA and, thus, were entitled to credit for foreign taxes deducted. Accordingly, while deducting TDS u/s 192, the employer could give credit for taxes deducted during their deputation outside India in view of provisions of section 192(2).
HEWLETT PACKARD INDIA SOFTWARE OPERAN PRIVATE LIMITED IN RE – (2018) 401 ITR 0339 (AAR) – A.A.R. No 1217 of 2011 dated 29.01.2018
- 288.** The Tribunal allowed the assessee's appeal against the CIT(A)'s order and directed to delete the addition made by taxing the salary income received by the assessee with respect to his employment in Korea, noting that the assessee had stayed outside India for more than 182 days and thus had become a non-resident. It held that when a citizen of India leaves India for employment abroad and stayed outside India for 182 days or more, then he becomes a non-resident and the income received from services rendered outside India could not accrue or arise or deemed to accrue or arise in India and could not be taxed in India notwithstanding the fact that the same is credited in the bank in India or TDS had been deducted on such income by the foreign employer.
AVDESH KUMAR vs. DCIT (2018) 172 ITD 0073 (Delhi-Trib) - ITA No. 747/Del/2018 dated July 30, 2018
- 289.** The Tribunal held that since the assessee, an employee of a US based company, was a non-resident providing services in the US and subject to tax in the USA he was exempt from tax in India as per Article 16 of the India-USA DTAA and merely because he was paid salary by the US company's Indian counterpart, which was later reimbursed by the US company, tax could not be levied on him in India.
Neeraj Badaya v ADIT(IT) - (2016) 46 CCH 0541 (Jaipur)

290. The assessee, a non-resident individual, was a Marine Engineer, employed as a master on a foreign bound ship with M/s. Wallem Ship Management Ltd. for which he received remuneration outside India in foreign currency. The remuneration was directly credited by the foreign company in his NRE bank account in India. The assessee claimed that the remuneration received was not taxable in India as the point of payment of the remuneration was outside India and that the mere transfer of the payments by the foreign company in his NRE account in India would not render the receipt to be "income received in India" as per section 5(2)(a). The AO contended that as per section 5(2)(a), irrespective of the residential status and whether or not the income was received in foreign currency or Indian currency, income received/deemed to be received in India was taxable in India. Accordingly, he taxed the income on the ground that the said income was received in India as per section 5(2)(a). The CIT(A) upheld the order of AO. The assessee contended before the Tribunal that as per CBDT Circular No. 3/2017 [which states that the salary accrued/accruing to a non-resident seafarer for services rendered outside India on a foreign going ship (with Indian flag or foreign flag) would not be included in the total income merely because the said salary was credited in the NRE account maintained with an Indian bank by the seafarer], the remuneration received would not be taxable u/s 5(2)(a). The Tribunal observed that the salary credited to NRE A/c could be of two types, 1) Salary directly credited by employer to NRE A/c of seafarer maintained with an Indian Bank 2) Salary credited to the seafarer A/c maintained outside India and later on transferred to the NRE A/c in India. It further observed that the second situation was clearly outside the purview of provisions of section 5(2)(a), as it was a mere transfer of assessee's fund from one bank account to another which would not give rise to "Income". However, the Circular was unclear whether both or only the second type of situation was covered by it. Accordingly, it gave benefit of doubt to the assessee and held that the circular covered both type of situations. It relied on the Apex Court decision in the case of Commissioner of Customs vs Indian Oil Corporation Ltd 267 ITR 272 (SC) wherein it was held that the Revenue was bound by the CBDT circulars even though the circular was contrary to statute. Accordingly, it held that the remuneration received by the assessee would not be taxable in India.

Shyamak Gopal Chattopadhyay [TS-219-ITAT-2017(Kol)] I.T.A. No.67/Kol/2016 dated 02.06.2017

291. The Tribunal held that the salary received by the assessee, a non-resident individual, working as a marine engineer in foreign waters, was taxable in India since it was received in the assessee's NRE account in India. It rejected the contention of the assessee that the income was not taxable in India since it was received in foreign currency and held that Section 5(2)(a) provides for taxability of any income received or deemed to be received in India irrespective of the residential status of the recipient.

Tapas Kr Bandopadhyay - TS-310-ITAT-2016(Kol)

h. Interest Income

292. The assessee (Dutch company) sold shares of an Indian company to the Singapore company. It received interest from the Singapore company for delay in payment of consideration. The assessee claimed that receipt of interest was in Netherlands and therefore it did not accrue or

arise through or from any property in India or from any asset or source of income in India or through transfer of a capital asset situated in India and accordingly was not taxable in India. Accordingly, it claimed refund of taxes deducted by the Singapore company. The AO contended that the interest arose through a transaction involving sale of a capital asset situated in India and would therefore be deemed to have accrued or arisen in India under Section 9(1)(v) of the Act. Accordingly, it rejected the assessee's TDS refund claim. The CIT(A) upheld the order of the AO. The Tribunal observed that section 9(1)(v) of the Act had no applicability and therefore, the interest could not be said to accrue or arise or to have deemed to accrue or arise in India. It rejected the AO's contention that the interest was paid on account of a transaction involving the sale of a capital asset in India since the interest was paid to compensate for the delay in remitting the sale consideration. Accordingly, it held that the same was not taxable in India. The Court upheld the Tribunal's order and held that such interest was not taxable u/s. 9(1)(v) of the Act as there was no debt incurred or monies borrowed for any business purposes. Accordingly, it held that the same was not taxable in India as per Article 11(1) of India-Netherlands DTAA which provides that it would be taxable in Netherlands.

Vanenburg Facilities BV [TS-246-HC-2017(AP)] I.T.T.A. NOS.55 AND 71 OF 2014 dated 16.06.2017

293. The Court held that interest received by Indian branch of foreign bank from head office would not be taxable in India.

DIT(IT) v. Oman International Bank S.A.O.G. [2017] 80 taxmann.com 139 (Bombay) ITA Nos. 1775 & 1789 of 2013 dated July 1, 2015

294. The Applicant, a French limited liability company, would be earning front-end fee, commitment fee, cancellation fee, amendment fee and monitoring fee from Indian customers under a financing arrangement. As regards the 'front-end fee' payable for appraisal of loan, AAR held that since the debt claim would not be in existence when such fees are payable, it cannot be construed as interest under Article 12 or FTS under Article 13 of the India-France tax treaty. AAR also held that 'front-end fee' other than appraisal fee was taxable as interest under Article 12 as it was in relation to a debt claim. Further, AAR held that commitment fee, cancellation fee, amendment fee and monitoring fee are directly related to a debt claim as they were charged after disbursement of loan and hence were chargeable as interest under Article 12 of the India-France tax treaty.

Societe De Promotion Et De Participation Pour La Cooperation Economique In Re – [2018] 102 CCH 0011 (AAR) – AAR No 1105 of 2011 dated May 21, 2018

295. The Tribunal held that interest paid by the assessee company to non-resident investors on FCCBs is specifically excluded from the deeming provision as per section 9(1)(v)(b) of the Act, as per which interest payable in respect of any debt incurred outside India and used for the purpose of business or profession carried on by such person outside India or for the purpose of making any investment outside India, could not be covered in the definition of income deemed to accrue or arise in India. It further held that the place of actual lending was important to determine the place where the interest income can be said to have accrued or arisen. Accordingly, the assessee was not an assessee in default within the meaning of section 201(1) of the Act.

ADIT (IT) v Adani Enterprise – (2015) 45 CCH 0029 Ahd Trib

296. The Tribunal allowed the assessee's appeal and held the monthly assured return received by assessee-individual, UK resident, from builder in lieu of advance paid towards purchase consideration of commercial space in a proposed complex to be 'interest income' chargeable to tax at concessional rate of 15% as per Article 12 of India-UK DTAA, rejecting Revenue's stand that the same should be treated as return from investment and assessed as 'income from other sources' (not being interest income under Article 12). It noted that the property was not in existence at the time of making payment and therefore was not capable of yielding rent, lease money or capable of being commercially exploited and further, the terms of allotment letter evidenced that until the Conveyance deed was executed and registered, the builder would have full authority over the proposed unit and 95% advance by assessee would merely be a token payment with no lien or interest in the said unit.

The Tribunal, however, rejected the assessee's alternative that the assured return was only in the nature of capital receipt not liable for taxation, noting that even after payment of 95% of the price, the assessee did not get right or lien in the property and thus held that the aforesaid transaction was a financial transaction between the assessee and the builder.

Mohinder Singh Sanghera & Other v ADIT [TS-540-ITAT-2018(CHANDI)] - ITA No. 369 to 371 & 372 to 374/Chd/2016 dated September 17, 2018

297. The Tribunal held that since definition of interest as mentioned under article 12(4) of India-Italy DTAA did not cover interest on refund of tax, plea raised by the assessee was to be rejected. Consequently, impugned order passed by the Assessing Officer required no interference.

Ansaldo Energia SPA v. Dy.DIT (International Taxation) [2015] 63 taxmann.com 280/155 ITD(Chennai)

298. The Tribunal allowed the assessee's appeal and held that tax residency certificate issued by the Mauritian authority was sufficient evidence to hold the assessee-bank to be 'beneficial owner' of the interest income received from investment in debt securities and consequently, in view of provisions of Article 11(3)(c) of the India-Mauritius DTAA, the said income was not taxable in India. Article 11(3)(c) provides that interest income arising in a contracting state shall be exempt from tax in that state provided it is derived and beneficially owned by any bank carrying on a bona fide banking business which is resident of the other contracting state. The Tribunal relied on the CBDT Circular No. 789, dated 13-4-2000 which provides that wherever a Certificate of Residency is issued by the Mauritian authority, such Certificate will constitute sufficient evidence for accepting the status of residence as well as the beneficial ownership for applying the provisions of the India-Mauritius Tax Treaty. It also clarified that though the said Circular was specifically in the context of incomes by way of dividend and capital gain on sale of shares, it would be equally applicable in the present case.

HSBC Bank (Mauritius) Ltd. v DCIT [2018] 96 taxmann.com 544 (Mumbai - Trib.) - ITA No. 1708 (MUM.) OF 2016 dated July 2, 2018

299. The Tribunal held that where assessee, a non-resident, earned interest income on FCCBs issued by an Indian company abroad, in view of fact that entire proceeds of FCCBs had been

utilised by Indian company in said country for repayment of an acquisition facility, interest income in question was not liable to tax in India as per exception carved out in section 9(1)(v)(b). The Tribunal held that where assessee, a non-resident, received interest on fully convertible debentures issued by an Indian company, said interest income would be liable to tax at rate of 10 per cent in terms of Article 11 of India-Cyprus DTAA.

The Tribunal held that where assessee, a non-resident, received consultancy fee from an Indian company, same was liable to be taxed at rate of 10 per cent in terms of article 12 of India-Cyprus DTAA as against 42.23% as per the provisions of the act.

Clearwater Capital Partners (Cyprus) Ltd. v DCIT (Internation Taxation) [2018] 94 taxmann.com 118 (Mumbai – Trib.) – ITA NOS. 843 AND 1025 OF 2016 dated 02.05.2018

- 300.** The Tribunal held that element of relationship between borrower and lender is a key factor to bring payment within ambit of definition of interest under section 2(28A); and since an arranger is only a intermediary/third party, any fee paid as arranger fee cannot be termed as 'interest' under both limbs of definition given in section 2(28A). Since HSBC-Hongkong, as an arranger, was not involved in providing control, guidance or administration of credit facility nor it was involved in day-to-day functioning of assessee in overseeing utilisation or administration of credit facility and, further, it was not in charge of entire or part of transaction of arranging services, it could not accordingly, termed as managerial or consultancy services within the meaning of section 9(1)(vii). Thus arranger fee could not be held to be taxable under section 9(1)(vii) and, the assessee was not liable to deduct TDS under section 195 on payment of arranger fee to HSBC-Hongkong.

Idea Cellular Ltd. v. Asstt. DIT(IT) [2015]58 taxmann.com 101/69 SOT 526/41 ITR(Trib.) 338/172 TTJ 540(Mum.)

i. Foreign Tax Credit

- 301.** The Apex Court granted SLP against the decision of Delhi High Court wherein it was held that where assessee-society received dividend income from an Omani company on which it was not liable to pay any tax in Oman by virtue of exemption granted as per Omani tax laws, purpose of exemption being to promote economic development, assessee-society was entitled for getting credit for deemed dividend tax payable in Oman by virtue of provisions of DTAA read with section 90 together with clarifications issued by Sultanate of Oman.

Pr.CIT v Krishak Bharti Cooperative Ltd.-10 – (2018) 253 Taxman 242 (SC) – SLP (Civil) Diary No. 41708 of 2017 dated 19.01.2018

- 302.** Where the assessee, who executed projects in Saudi Arabia, income on which tax was levied in Saudi Arabia claimed benefit under section 91 of the Act including on the sums which were allowed as deduction under 80HHB and 35B, the Court upheld the decision of the Tribunal and held that since amounts claimed as deduction under section 80HHB and section 35B admittedly did not bear any tax in India, no relief could be granted under section 91 as there was no double taxation on such amounts.

Reliance Infrastructure Ltd. v. CIT, Mumbai [2016] 76 taxmann.com 257 (Bombay)

303. The assessee had received dividend from its JV company in Oman which was exempt by virtue of Article 8(bis) of Omani Tax Laws and it claimed tax credit in India as per Article 25(4) of India- Oman DTAA (which provides that credit would be granted for the tax which would have been payable in Oman but is not paid due to tax incentives granted in Oman to promote economic development). The same was allowed by the AO. However, CIT during the revisionary proceedings u/s 263 observed that the FTC would be allowed only if the tax was paid in Oman or where the tax was not payable due to the tax incentives granted in Oman to promote economic development and since under the Omani Tax Laws dividend was absolutely exempt, no tax was paid and it could not have been said that any specific exemption was granted for the purpose of tax incentives for economic development under Article 8(bis.) as the dividend was exempt across the board with no exception . The Tribunal allowed the FTC claim of the assessee which was upheld by the Court by relying on the letter of Oman Ministry of Finance wherein it was clarified that Article 8(bis.) was inserted to promote economic development by attracting investments. Accordingly, it rejected the Revenue's contention that Article 8(bis) exemption could not be construed as an incentive granted under Oman's tax laws so as to qualify for the benefit under Article 25(4).

KRISHAK BHARATI COOPERATIVE LTD. [TS-160-HC-2017(DEL)] [ITA 578, 579/2016]

304. The Court rejected the argument of the Revenue that only if the income is chargeable to tax in India could the assessee claim benefit of foreign tax credit (under the India-Canada DTAA). It held that income under section 10A of the Act was chargeable to tax under section 4 and 5 of the Act but no tax is charged because of the exemption given under section 10A only for a period of 10 years and therefore merely because the exemption was granted, it could not be postulated that the assessee was not liable to tax. It further held that the benefit of foreign tax credit has been extended and hence payment of tax in both jurisdictions was not sine qua non for granting relief.

Wipro Limited v DCIT – TS-565-HC-2015(KAR)

305. The Tribunal, relying on its order in the assessee's own case for the prior year held that foreign tax credit ('FTC') claimed by assessee (an Indian company engaged in software development) in respect of taxes withheld in Singapore and Indonesia on receipt from software license sale and annual maintenance contract (AMC) was to be granted to the extent of corresponding 'income' that had suffered tax in India and not by taking into consideration gross receipts. The Tribunal, noting the language in the DTAA's and the UN and OECD Conventions, held that the expression used in the FTC Articles was 'income', which essentially implied 'income' embedded in the gross receipt, and not the 'gross receipt' itself. It held that, in principle the assessee's argument that 'gross receipts' were to be considered for computing FTC could not be accepted. However, since the facts of the case of the assessee were unique i.e. vis-à-vis software license sale / income (i.e.its main business was carried on in India and only some isolated transactions leading to the impugned income had taken place in Singapore and Indonesia which did not require any activity on the part of the assessee and therefore had no associated costs i.e. in the nature of passive earnings) it held that no part of the costs incurred in India was to be allocated to earnings from Singapore and Indonesia. Further, as regards the income from AMC, the Tribunal held that the assessee had allocated the costs corresponding to this income on a proportionate basis and since no defects were pointed out by the Revenue it rejected the AO's

approach of allocating costs in proportion of turnover. It also held that the actual tax attributable to such income was to be determined by apportioning the actual tax paid under MAT provisions in the same ratio that the doubly taxed profit bore to the overall profits. Accordingly, the appeal of the assessee was partly allowed.

ELITECORE TECHNOLOGIES PRIVATE LIMITED vs. DEPUTY COMMISSIONER OF INCOME TAX - (2018) 52 CCH 0275 AhdTrib - ITA No. 3546/Ahd/2015 dated Mar 20, 2018

- 306.** The Tribunal set aside CIT(A)'s order disallowing foreign tax credit (FTC) claimed by the resident assessee (an individual) with respect to taxes withheld on dividend income earned in US. It directed the AO to compute the admissible tax credit after examining i) the residential status of the assessee under treaty (since for claiming treaty benefits, the assessee needs to be resident under the Act as well as under Article 4 of India-US DTAA), ii) whether amounts shown as dividends were actually in the nature of dividends, iii) whether tax deducted in US was in accordance with the provisions of Article 10 of the India-US DTAA and iv) whether the FTC claimed by the assessee was lower of tax withholding rates in US or Indian tax on such income (which was to be restricted to the rate specified under Article 10 of DTAA).

Bhavin A.Shah [TS-130-ITAT-2017(Ahd)] [ITA No.933/Ahd/2013]

- 307.** The assessee had rendered certain technical services to its Chinese subsidiary, on which taxes were withheld in China as per Article 12 of India-China DTAA. However, since the assessee had failed to claim the foreign tax credit (FTC) in its return of income, it claimed the same before the AO. The AO relying on the Apex Court's decision in case of Goetze India [TS-21-SC-2006-O] rejected the claim of the FTC made by the assessee. The CIT(A) without examining the claim of FTC, rejected the AO's contention and directed the AO to grant FTC to the assessee. Relying on the jurisdictional High Court rulings in the case of UTI Bank Limited [ITA No. 382 to 384 of 2016] and Mitesh Impex [TS-5339-HC-2014(GUJARAT)-O], the Tribunal held that it would be permissible to raise the claim for the first time before the appellate authority or the Tribunal when facts necessary to examine such claim are already on record and accordingly, powers of the appellate authorities were not fettered by the Apex Court's decision in Goetze India. However, since the CIT(A) had not examined the claim of FTC, it remitted the matter back to CIT(A) to decide it afresh.

Suzlon Energy Limited [TS-159-ITAT-2017(Ahd)] [ITA No.1369/Ahd/2013]

- 308.** The assessee had earned foreign incomes on which taxes were withheld in respective source countries (Rs. 55.61 lakhs) and it had claimed foreign tax credit (FTC) in India for the same. The AO had allowed FTC upto Rs. 3.10 lakhs and CIT(A) had confirmed the same but he allowed expense deduction u/s 37(1) for the balance amount not allowed as credit. The Tribunal reversed the CIT(A)'s order and denied the deduction u/s 37(1) of the Act for that portion of foreign taxes paid for which credit was not available u/s Sec. 90/91. The Revenue contended that tax expense cannot be allowed as deduction u/s 37(1) since the same would be hit by the bar u/s 40(a)(ii), however, the assessee contended that provisions of Section 40(a)(ii) applied only for tax as defined u/s 2(43) (i.e. Indian income-tax) and that it would not extend to the taxes paid abroad. The Tribunal observed that as per the explanation to Sec. 40(a) (ii), tax would also include any sum which is eligible for credit of tax u/s 90 / 90A/ 91 and accordingly, rejecting the assessee's contention, held that the same was covered by the scope of Sec 40(a) (ii). Relying

on the Apex Court decision in the case of Smimthkline & French India Ltd it disallowed the deduction of foreign tax as an expense u/s 40(a)(ii).

Elitecore Technologies Private Limited [TS-129-ITAT-2017(Ahd)] [ITA No.508/Ahd/2016]

- 309.** The Tribunal allowed foreign tax credit ('FTC') claimed by assessee (an Indian company engaged in software development) in respect of taxes withheld in Singapore and Indonesia on receipt from software license sale and annual maintenance contract (AMC). It noted that the assessee claimed FTC by taking into consideration gross receipts & adjusted the same against its MAT liability and that the Revenue restricted FTC claim only to the extent of corresponding 'income' that had suffered tax in India. It computed the said tax as the actual MAT liability divided in the same ratio as the corresponding foreign receipts bore to the overall turnover of the assessee. The Tribunal, noting the language in the DTAA's and the UN and OECD Conventions, held that the expression used in the FTC Articles was 'income', which essentially implied 'income' embedded in the gross receipt, and not the 'gross receipt' itself, held that, in principle the assessee's argument that 'gross receipts' were to be considered for computing FTC could not be accepted. However, since the facts of the case of the assessee were unique i.e. vis-à-vis software license sale / income (i.e.its main business was carried on in India and only some isolated transactions leading to the impugned income had taken place in Singapore and Indonesia which did not require any activity on the part of the assessee and therefore had no associated costs i.e. in the nature of passive earnings) it held that no part of the costs incurred in India was to be allocated to earnings from Singapore and Indonesia. Further, as regards the income from AMC, the Tribunal held that the assessee had allocated the costs corresponding to this income on a proportionate basis and since no defects were pointed out by the Revenue it rejected the AO's approach of allocating costs in proportion of turnover. It also held that the actual tax attributable to such income was to be determined by apportioning the actual tax paid under MAT provisions in the same ratio that the doubly taxed profit bore to the overall profits. Accordingly, the appeal of the assessee was partly allowed.

Elitecore Technologies Private Limited [TS-4-ITAT-2017 (Ahd)]

- 310.** The Tribunal held that the assessee was entitled to tax credits in respect of State income taxes paid abroad as section 91 does not differentiate between State and Federal taxes and provides for both types of Income taxes to be taken into account for purpose of tax credits against Indian Income Tax liability. However, it held that credit for all taxes paid abroad in any case cannot exceed Indian income tax liability in respect of same income.

Dr. Rajiv I. Modi v DCIT - [2017] 86 taxmann.com 253 (Ahmedabad - Trib.) - IT APPEAL NO.

1285 (AHD.) OF 2014 dated 21.09.2017

- 311.** The Tribunal held that taxes withheld in USA (i.e Federal and State tax) in the case of the assessee individual would not be added back while computing income taxable in India. It rejected the Revenue's contention that since the assessee was ordinarily resident in India, by virtue of section 5(1)(c), the federal taxes and state income taxes withheld in the USA, was part of assessee's taxable salary income in India and held that for clause (c) of section 5(1), grossing up of income is not required and only net income after TDS is to be taxed in India. Noting that since the AO had determined the amount of credit of tax paid in USA after including the US tax

amount as an income taxable in India, it aside the determination of tax credit under Article 25 to the file of AO for fresh decision with the direction that the tax withheld in US should not be added back to quantify the income taxable in India.

Sunil Shinde vs. ACIT [TS-377- ITAT 2149] dated 31.08.2017 (Bangalore)

312. The Tribunal granted the assessee relief under section 90 of the Act for taxes paid in a foreign country while computing the tax liability as per MAT provision under section 115JB of the Act. It held that once taxable income was determined under normal provisions of the Act or as per Section 115JB of the Act, subsequent set off / rebate is governed by the normal provisions of the Act. It also held that there was no provision of the Act debarring granting of credit for tax paid abroad in case income is computed under section 115JB of the Act.

DCIT v Subex Technology Ltd (ITA No 913(B) / 2013) – TS-644-ITAT-2015 (Bangalore)

313. The Tribunal allowed the assessee's appeal against the CIT(A)'s and the AO's denial to grant credit of tax withheld by the US company on payment of interest to the assessee-Indian company, noting that as per Article 25 of the India-US DTAA, if resident of India derives income which may be taxed in US, then India had to allow deduction from tax on income of resident an amount equal to tax paid in US and as per Article 11 of the said DTAA, interest can also be taxed in source State in which it arises according to laws of source State. However, the matter was remanded for the limited purpose for production of TDS certificate or other similar document by the assessee-company.

Uniparts India Ltd. v CIT [2018] 96 taxmann.com 397 (Delhi - Trib.) - ITA Nos. 201 TO 205 (DELHI) of 2015 dated July 2, 2018

314. Pursuant to search and seizure operation u/s 132, the AO made addition on account of undisclosed deposit u/s 153A based on the assessee's HSBC Swiss bank statement received through information under DTAA through Foreign Tax & Tax Research (FT & TR) division. The Tribunal noted that the bank statement obtained by the AOs did not have any signature of a bank official, name of the bank or place where the branch of the bank was situated and that the AO had not mentioned the same in his assessment order and instead had asked the assessee to furnish the bank statements of impugned account, the existence of which was denied by the assessee. It also noted that nothing was brought on the record to substantiate that the documents were obtained by the AO under any DTAA. Accordingly, it deleted the addition made denying the authenticity of the documents and accordingly, set aside the assessment order u/s 153A.

Shyam Sunder Jindal [TS-143-ITAT-2017(Del)] [ITA No. 5448/Del/2016]

315. The Tribunal relying on the Co-ordinate Bench ruling in the case of Essar Oil Ltd [TS-6680-ITAT-2013(MUMBAI)-O] and considering the term 'may be taxed in that other state' in Article 6(1) of India-UAE DTAA, held that income from Dubai Villa of the assessee was liable to be tax in India to the extent includible in the return of income and the credit of the taxes paid would be allowed in the other contracting state.

Shah Rukh Khan [TS-109-ITAT-2017(Mum)] [ITA No.623 & 4763/Mum/2013]

j. Withholding tax

Royalty

316. The Tribunal dismissed the assessee's appeal filed against CIT(A)'s order confirming AO's action in treating the assessee to be "assessee in default" u/s 201(1) on account of non-deduction of TDS u/s 195 while making payment to non-resident for purchase of shrink wrap cassettes/CDs. It followed the Tribunal's order in assessee's own case for earlier years on identical facts wherein the Tribunal had, in turn, followed the High Court's order (subject to the outcome of the SLP pending before the Apex Court) in assessee's own case holding that the said payment made were in nature of royalty.

IBM India Private Limited v DCIT – ITA Nos. 47 & 48/Bang/ 2017 dated 19.01.2018

317. The Tribunal dismissed assessee's appeal against CIT(A)'s order holding assessee to be assessee-in-default u/s 201(1) for non-deduction of TDS u/s 195 while making payment to US company for purchase of license to use its copyrighted software by treating the said payment to be royalty as per section 9(1)(vi) and Article 12 of India-USA DTAA. It relied Jurisdictional HC ruling in Samsung Electronics [203 Taxman 477 (Kar HC)] which was squarely against the assessee. Infact, in that case, it was purchase of readymade off the shelf computer programme whereas in the present case, there was no purchase and only annual license was taken for use of software. The Tribunal rejected the assessee's contention for bonafide belief which was based on certain favourable Tribunal rulings, holding that where the assessee feels that whole or part of the sum to be paid by the him to a non-resident is not chargeable to tax in India in the hands of the recipient, the assessee should make application u/s 195(2) instead of deciding that no TDS is to be deducted.

Avesthagen Ltd v ITO [TS-486-ITAT-2018(Bang)] - ITA No.173/Bang/2016 dated 03.08.2018

318. The Tribunal deleted the disallowance made u/s 40(a)(i) for non-deduction of TDS u/s 195 while making payment to a Philippines based company for rendering game moderation services in respect of a game development by the assessee, holding that the said payment was not in nature of royalty as per Article 13 of India-Philippines DTAA but was in nature of FTS and since there was no Article in the said DTAA dealing with FTS, the said receipt could be brought to tax in India only as business income under Article 7 of the DTAA, if the Philippines based company had a PE in India. Accordingly, noting that the said company did not have any PE in India, it held that the payment in nature of FTS was not chargeable to tax in India. The Tribunal had held that the said payment could not be considered as 'royalty' since the lower authorities had already accepted it to be FTS and further the since assessee had not made the said payment for use of or right to use information concerning industrial, commercial or scientific expertise, as required under Article 13 of the DTAA.

Zynga Game Networks India (P.) Ltd. v ACIT [2018] 97 taxmann.com 44 (Bangalore - Trib.) – ITA No. 2139 (BANG.) OF 2017 dated August 3, 2018

319. The Tribunal held that where assessee made royalty payments to non-residents, since benefit of DTAA was available to said recipients, their TDS liability could not be more than rate prescribed under DTAA or Act whichever was lower.

Dy.CIT, (Intl. Taxation) Circle-1(1) Bangalore v. Infosys BPO Ltd., [2015] 60 taxmann.com 465(Bangalore), IT (IT) A Nos. 1143(Bang) of 2013, 8 & 9(Bang) of 2014, CO Nos.83 & 84(Bang.) of 2014 dated June 29, 2015

320. The Tribunal allowed the assessee's appeal against the CIT(A)'s order wherein the CIT(A) had upheld the order passed u/s 201(1)/ 201(1A) to hold assessee to be assessee-in-default for non-deduction of TDS u/s 195 on payment made to a Netherland based company for acquisition of computer hardware, software and related support services for installation and maintenance. It noted that software had been sold to the assessee as shrink-wrapped software, which was commercially off the shelf software sold in retail. It thus held that in view of the binding precedent of the Jurisdictional High Court in the case of DIT v. Infrasoftware Ltd. [2014] 220 Taxman 273 (Del), the sale of the hardware along with the software embedded therein was not taxable in the hands of the non-resident recipient in absence of any Permanent Establishment of the said non-resident in India. With respect to the services of installation and other support services, the Tribunal accepted assessee's contention that since the said services had not made available any technology or know-how to the assessee, the payment made for such services did not qualify for FTS under the relevant DTAA.

Ciena India (P.) Ltd. v ITO - [2018] 96 taxmann.com 17 (Delhi - Trib.) - IT APPEAL NOS. 959 & 984 (DELHI) OF 2011 dated June 29, 2018

321. The Tribunal deleted the disallowance made u/s 40(a)(i) on account of payment made to a US company, without deducting TDS, as per an agreement entered into with the US company for the purpose of assessee's consultancy business, noting that the assessee had paid only an Affiliation fee which was a one-time payment not involving any transfer of technical knowledge or use of technical knowledge and thus could not be considered as 'royalty' either under the Act as well as under the India-US DTAA. It was noted that as per the agreement two types of payment were to be made viz. 'affiliation fee' and "Fees on consulting and reports" and, unlike the latter fee, affiliation fee was not the fee on consulting and reports. Further, since the US company did not have any PE in India, the Tribunal held that the payment did not attract any TDS provisions.

Customer Lab Solutions (P.) Ltd. v ITO [2018] 95 taxmann.com 280 (Hyderabad - Trib.) – ITA No. 438 (HYD.) OF 2017 dated July 4, 2018

322. The Tribunal allowed assessee's appeal against CIT(A)'s order where the CIT(A) had held that assessee to be assessee-in-default u/s 201(1)/ (1A) for non-deduction of TDS u/s 195 while making payment of user charges to Intelsat Corporation, USA for the transponder facility to enable transmission of uplinked programs to be seen over the footprint of the satellite (mainly India) by treating them to be in the nature of royalty. The Tribunal relied on the decision in the case of Viacom 18 Media Pvt. Ltd vs ADIT (ITA No.s 599 to 614/Mum/2016) as well as DIT(IT) vs. Intelsat Corporation [ITA No.530 & 545/2012 (Del HC)] wherein it was held that similar payment made to Intelsat were not chargeable to tax in its hand in India.

ZEE ENTERTAINMENT ENTERPRISES LTD v INCOME TAX OFFICER [TS-674-ITAT-2018(MUM) - ITA Nos 4652/MUM/2016 dated 06.11.2018

323. The Tribunal held that in the assessee's own case, in earlier year, the Tribunal had held that impugned expenditure fell under the Explanation 4 to section 9(1)(vi) and since section 40(a)(i) refers to only the Explanation to section 9(1)(vi), impugned expenditure could not be disallowed under section 40(a)(i). Following said decision, the assessee's claim towards expenditure was to be allowed.

SAB Miller India Ltd. v. Addl. CIT[2015] 63 taxmann.com 341/41 ITR (Trib.) 167(Mum)

324. The Tribunal allowed the assessee's appeal and deleted the disallowance made u/s 40(a)(i) on account of non-deduction of TDS u/s 195 while making payment to a USA based company towards web hosting charges in order to carry on its activity of distributorship of recharge pens of various DTH providers via online network. The AO had held that the web hosting charges paid for use of servers were for use of commercial equipments within meaning of section 9(1)(vi), read with Explanation 2 and Explanation 5 of the said clause, thereby, assuming character of royalty taxable in India. The Tribunal held that since assessee did not possess and did not have any control over server or server space being deployed by the USA company, while providing e-services as per agreement, there was no scope to construe that e-service / web-hosting charges paid to the said company could be described as royalty. Further, it rejected Revenue's contention that the said payment was royalty in view of Explanation 5 (stating that the fact whether possession or control was with the service recipient or not is not relevant for deciding if the consideration paid for service is royalty) which was inserted vide the Finance Act, 2012 retrospectively w.e.f. 01/04/1976, noting that the years under appeal were AY 2010-11 & AY 2011-12 and hence, the payment were made before such retrospective amendment was made. The Tribunal held that the law does not compel a person to do something which he cannot possibly perform and accordingly, the amendment with retrospective effect could not fasten the assessee with liability to withhold tax for the years which had already been closed prior to insertion of amendment. It also held that, in any case, the amendment in the Act could not be brought into the DTAA and as per India-USA DTAA, in view of the fact that the possession and control of the server/ server space was not with the assessee, the said charges were not in nature of royalty.

EPRSS Prepaid Recharge Services India (P.) Ltd. v ITO [2018] 100 taxmann.com 52 (Pune Trib) – ITA Nos. 828, 1204 (Pun) of 2016 dated October 24, 2018

325. The Tribunal cancelled the order passed by the AO u/s 201(1)/ 201(1A) wherein the AO had treated the assessee to be in default for non-deduction of TDS on payment of license fees for use of computer software in view of the insertion of Explanation 4 to section 9(1)(vi) vide the Finance Act, 2012 with retrospective effect from 01.06.1976 (which clarifies that right to use of computer software including license is 'royalty'). The Tribunal held that since the assessee had not explained the terms of agreement with different entities from whom the software was purchased, it could not be found that whether the same was for the right to use of copyrighted article or the right to use copyright. However, it held that liability could not be fastened on the assessee to deduct tax at source on the basis of subsequent amendments made in the Act in relation to payments made to Non-resident, on a date prior to the date of amendment, though retrospectively applied. The Tribunal further held that in any case the assessee could not be held liable for deduction of tax in view of the definition of 'royalty' under the DTAA with the

respective countries, since the same was not amended and the DTAA provisions being beneficial would override the Act.

TATA TECHNOLOGIES LIMITED vs. DEPUTY DIRECTOR OF INCOME TAX (INTERNATIONAL TAXATION) - (2018) 193 TTJ 0833 (Pune) - ITA NO. 1433/PUN/2014 dated Apr 5, 2018

Fees for Technical Services

326. The Court dismissed Revenue's appeal against Tribunal's order upholding CIT(A)'s order deleting the disallowance made u/s 40(a)(i) relating to payment to a Phillipines based company for providing technical service without deduction of TDS u/s 195. It was noted that the Tribunal as well as CIT(A) had given a concurrent finding that though the services were in nature of technical services but were covered by clause 9(1)(vii)(b) which states that FTS is not taxable in case where the services are utilized outside India in a business or profession carried outside India, or for purpose of earning any income outside India. It was noted that technical services provided by a non-resident were utilized for serving assessee's foreign clients i.e. source of income namely assessee's customers were foreign based companies. Accordingly, the Court held that the assessee was not required to deduct TDS on the said payments.

PR.CIT v MOTIF INDIA INFOTECH (P) LTD (2018) 409 ITR 0178 (Guj HC) – TAX APPEAL No. 1177 of 2018 dated October 16, 2018

327. The assessee, an Indian company, made payments to a US company for rendering management, financial, legal, public relations, treasury and risk management services which involved giving advices for making correct decision. Noting that the said payment was made without deducting TDS u/s 195, the AO made disallowance u/s 40(a)(i) opining that the same was in nature of FTS as per section 5(2) r.w.s 9(1)(vii). The Court held that the consideration paid to the USA Company did not fall under the purview of FTS as per Article 12 of the India-US DTAA since the US company only assisted the assessee in taking correct decisions by offering advise on factual basis (with respect to the problems arising at various points of time band) and there was no transfer of technical or other know-how to the assessee. Accordingly, it directed the AO to consider the claim of expenditure afresh without looking at the application of section 195(1).

US Technology Resources (Pvt) Ltd v CIT [2018] 97 taxmann.com 642 (Kerala) - ITA No.38 of 2014 & 19, 26 TO 30 of 2018 (Mad) dated August 9, 2018

328. The Court deleted the disallowance made u/s 40(a)(i) for non-deduction of TDS u/s 195 on payment made to a non-resident agent under Agency Agreement for services rendered by him as the broker of the assessee, an Indian company, wherein such services also included procuring orders upon market survey with regard to demand for the products of the assessee in the foreign country. The AO had held the said payment to be in nature of Fees for Technical Services (FTS) as per section 9(1)(vii) attracting TDS provisions u/s 195. The Court held that the service of market survey only to ascertain demand for product in market was incidental to function of commission agent of procuring orders and was, in any case, not managerial, technical or consultancy service so as to be charged to tax in India as FTS. Further, there was

no finding that the agent had any place of business in India. It thus held that since TDS was not required to be deducted u/s 195, there could not be any disallowance u/s 40(a)(i).

Evolv Clothing Co. (P.) Ltd. v ACIT - [2018] 94 taxmann.com 449 (Madras) - TAX CASE (APPEAL) NO. 572 of 2013 dated June 14, 2018

- 329.** The Tribunal dismissed Revenue's appeal against the CIT(A)'s order allowing the assessee's appeal filed u/s 248 seeking declaration that no tax was deductible u/s 195 in respect of payment made by the assessee-company to AACL (an Israel company) for managerial services, as the said services did not make available technical knowledge, experience, skill, know-how or processes and in terms of Most Favoured Nation clause contained in DTAA between India-Israel, the language of DTAA between India-Portugal would apply, which mandates the 'make available' condition. It held that the thrust of arrangement was essentially for supervisory and consultancy services, which inherently could not be said to be covered by 'make available clause' in tax treaties for simple reason that while these services, may require technical inputs, mere rendition of these services does not, by itself, result in transfer of technical knowledge, skills or experience.

DCIT v Sun Pharmaceutical Laboratories Ltd [2018] 96 taxmann.com 105 (Ahmedabad - Trib.) – ITA Nos. 1345 TO 1347 (AHD.) of 2016 dated July 11, 2018

- 330.** The Tribunal allowed assessee's appeal and deleted the disallowance made u/s 40(a)(i) with respect to various payments made by the assessee to its US AE on account of MIS Services, Cost Allocation, Corporate Allocation Charges and Legal Expenses, without deducting TDS u/s 195. It held that as per India-US DTAA, unless technical services, payment for which is sought to be taxed as fees for technical services, make available technical skill, knowledge and know-how, the same cannot be brought to tax and the fact that the services are customized and made to order is wholly irrelevant to determine whether make available clause is satisfied. Thus, it held that said payment was not taxable in India in view of the India-US DTAA and accordingly, there was no liability to deduct TDS.

Seal For Life India (P.) Ltd. v DCIT [2018] 96 taxmann.com 645 (Ahmedabad - Trib.) – ITA No 1236 (AHD.) OF 2017 dated August 2, 2018

- 331.** The Tribunal allowed assessee's appeal and deleted the disallowance made u/s 40(a)(i) for non-deduction of TDS u/s 195 on payment made to a Swiss entity for testing services, holding that the said payment did not amount to fees for technical services as per the India-Swiss DTAA. It noted that as per protocol to the India-Swiss DTAA, beneficial provisions for taxation of fees for technical services in the DTAA's between India and other OECD member countries such as Canada could be imported into the India-Swiss DTAA. As per India-Canada DTAA, the said payment could be taxed as FTS only if it make available technical knowledge, skill, know-how, etc. Accordingly, noting that the said services were simply testing services which did not involve any transfer of technology, the Tribunal held that the payment for such services was not chargeable to tax in India and thus the assessee did not have any withholding tax liability.

Anjani Synthetics Ltd v DCIT [2019] 101 taxmann.com 136 (Ahd - Trib.) – ITA No. 3594 (Ahd.) of 2015 dated December 5, 2018

332. The Tribunal upheld the CIT(A)'s order deleting the disallowance made u/s 40(a)(i) for non-deduction of TDS u/s 195 on payment made to a UK based foreign company for consultancy services rendered by the said company, rejecting the AO's contention that the said payment was taxable as FTS under article 13 of the Indo UK DTAA. It noted that the services were simply in nature of consultancy services which did not make available any technical, skill or know how and from perusal of the consultancy agreement also no provision for transfer of technology could be found. The Tribunal thus held that unless there is a transfer of technology in sense that recipient of service is enabled to provide same service on his own, without recourse to original service provider, 'make available' clause was not satisfied and, accordingly, the consideration for such services could not be taxed under Article 13 (4) of Indo UK DTAA. Further, with respect to payments made to two persons in Egypt and Philippines which were on account of salaries, it was held that since, in terms of the provisions of the respective tax treaty, these payments did not have any tax liability in India, there was no question of any tax withholdings.

DCIT v Bio Tech Vision Care (P.) Ltd. - [2018] 93 taxmann.com 20 (Ahmedabad - Trib.) - IT APPEAL NOS. 1388, 2766 & 3154 (AHD.) OF 2014 dated April 18, 2018

333. The Tribunal held that where the assessee made payments in consideration for services rendered by non-residents, in view of the fact that no finding had been brought on record by the Revenue that non-residents had business connection in India, it could be concluded that no services were rendered by non-residents in India. Further, since no finding was made vis-à-vis the nature of the payments and no evidence was brought on record to show that the payments were in the nature of fees for technical services, the provisions of section 40(a)(i) of the Act would not be applicable since the receipts were not in the nature of income deemed to accrue or arise in India in the hands of the non-residents.

IDS Infotech Ltd v DCIT - (2016) 69 taxmann.com 393 (Chandigarh)

334. The assessee was engaged in the business of providing audio, video and web conferencing services to various customers across the globe. During relevant year, assessee paid certain amount to foreign service providers towards international toll free services. The assessee claimed that it was not a case of payment for technical services and, therefore, tax was not required to be withheld on those payments. The revenue authorities took a view that payments were made by assessee to international toll free service providers to enable its clients outside India to access its services. It would squarely fall under the ambit of section 195 and therefore, payments made without deducting tax and remitting the same would not qualify as expenditure under section 40(a)(i). The Tribunal held that the said payments being in nature of fees for technical services, the assessee was liable to deduct tax at source while making same.

Conference Call Services India (P.) Ltd. v. Asstt. CIT [2015] 60 taxmann.com 423/69 SOT 749 (Chennai)

335. The Tribunal dismissed Revenue's appeal and upheld the CIT(A)'s order holding that assessee was not liable to deduct TDS u/s 195 on payment of survey fees by the assessee-insurance company to non-resident surveyors for assessing loss / damage in transit of goods to foreign country. It noted that the surveyors had assessed damage of goods outside country that they had assessed damages as per their experience and knowledge but said knowledge was not made known to assessee and what was reported to assessee was only extent of damage so as

to enable assessee to compensate loss to customers. Accordingly, the Tribunal held the said payments were not liable to tax in India and there was no requirement to deduct TDS thereon.

Royal Sundaram Alliance Insurance Co. Ltd. v DCIT [2018] 97 taxmann.com 644 (Chennai - Trib.) ITA Nos 1622 to 1630 (CHNY) OF 2011 & OTHERS dated August 6, 2018

- 336.** The Tribunal remanded the issue of non-deduction of TDS u/s 195 on payment made to various non-resident companies for Annual Maintenance Charges (AMC) back to the AO, noting that (i) while opining that the said payments were in nature of fee for technical services taxable in India, the revenue authorities did not go into question whether non-resident companies made available any technical knowledge to assessee through AMC and (ii) moreover, authorities below did not even test transactions with relevant articles in respective DTAA's, with regard to definition of 'fees for included services'. Similarly, it also remanded the issue of non-deduction of TDS u/s 195 on payment to a Singapore based company for acquiring licence for software, noting that while determining whether the said payment was in nature of royalty u/s 9(1)(vi) and under article 12(3) of India-Singapore DTAA, the AO had not examined the real nature of software, i.e. whether it was firmware or embedded software or standalone software, which was essential to determine its taxability.

Cognizant Technology Solutions India (P.) Ltd. v ITO [2018] 100 taxmann.com 464 (Chen Trib) – ITA No. 689 (CHNY.) OF 2015 dated November 20, 2018

- 337.** The assessee filed its return and declared total income at nil and book profit of Rs. 2,94,58,68,507/- for taxability u/s 115JB of the Act. During scrutiny assessment, the AO noted that the assessee had made payments to Flour Transworld Services Inc. and Furgo Survey Ltd. and treated the said payments as fee for technical services (FTS) and disallowed the deduction u/s 40(a)(i). The CIT (A) deleted the disallowance in respect of payment made to Flour Transworld Services Inc. but upheld the disallowance in respect of Furgo Survey Ltd. The Department appealed before the Tribunal and challenged the deletion by the CIT (A) in respect of Flour Transworld Services Inc. The Tribunal laid down that the India-US treaty provided for a restrictive meaning of FTS in as much as only those technical services which were ancillary to the application of right or which 'make available' technical knowledge or skill were taxable. The Tribunal further noted that the assessee had made payments to the company for rendering services in connection with review of alternative vaporization process for LNG terminal and to recommend a suitable process to assessee and subsequently held that the services involved deployment of personnel having requisite experience and skill to perform the services and it would not be possible that the assessee would carry out such services in future on its own without the resources of the service provider. Accordingly, the Tribunal dismissed the appeal of the Department on the ground that the nature of services rendered did not indicate making available of technical knowledge or skill and the payment made did not qualify for FTS as per the provisions of India-US DTAA.

ACIT v. Petronet LNG Ltd. - [2018] 92 taxmann.com 407 (Delhi - Trib.) - IT APPEAL NO. 865 (DELHI) of 2011 dated APRIL 6, 2018

- 338.** The assessee was providing annual maintenance in respect of equipments manufactured and supplied by US AE and in case of critical/emergency of issues of customers, on-call advisory services were obtained remotely from US AE through call centres. The assessee paid to its AE

for such technical on-call assistance support received. The AO disallowed the said payment u/s 40(a)(i) for non-deduction of TDS u/s 195 opining the said payment to be in nature of FTS. The Tribunal noted that the services provided by US AE to assessee were in nature of assistance in trouble-shooting, isolating problem and diagnosing related trouble and repair services and the same were provided to the assessee's customers remotely and there was no provision of on-site support services. It held that as per the description of services rendered, the amount paid qualified as FTS as defined under Explanation 2 to section 9(i)(vii). However, it did not satisfy the 'make available' clause as per article 12(4) of India-US DTAA and, thus, provisions of section 195 were not applicable. Accordingly, it deleted the disallowance.

Ciena Communications India (P.) Ltd. v ACIT [2018] 98 taxmann.com 458 (Delhi - Trib.) – ITA Nos. 3561 TO 3563 (DELHI) of 2018 dated September 27, 2018

- 339.** The Tribunal dismissed Revenue's appeal against the CIT(A)'s order deleting the disallowance made by the AO u/s 40(a)(i) on payment made to a Swedish entity without deducting tax at source, holding that though the said payment was in nature of fees for technical services, in view of the Most Favoured Nation (MFN) clause in the India-Sweden DTAA, the said payment was taxable in India only if it fell within the narrower definition of fees for technical / included services provided in the India-Portugal DTAA. CIT(A) had held that the impugned payment did not fall within the definition of fees for included services as per the India-Portugal DTAA and further the same could not be taxed as business income also in absence of PE in India. The Revenue contended that the benefit of India-Portugal DTAA could not be extended to the assessee in absence of any separate notification issued by Government of India. The Tribunal held that the protocol to the India-Sweden DTAA makes it clear that the MFN clause "shall apply" in India-Sweden DTAA and the issuance of a notification has nowhere been stipulated as a condition precedent therein. Further, it held that section 90(1) is very clear that only a DTAA would be notified and not the application of such a 'MFN' clause.

INCOME TAX OFFICER vs. M.S.K. TRAVESL & TOURS LTD. - (2018) 53 CCH 0214 KolTrib - ITA No. 284/Kol//2015 dated June 22, 2018

- 340.** The Tribunal deleted the disallowance made by the AO u/s 40(a)(ia) on account of non-deduction of TDS u/s 195 while making payment to a Singapore based company for purchase of drawings for a project being undertaken by the assessee (engaged in development of residential housing project), rejecting the Revenue's contention that the said payment qualified as "fees for technical services" as defined under Article 12 of India-Singapore DTAA. It noted that as per the agreement entered into with the Singapore company, it appeared to be a case of outright purchase of drawings and designs by the assessee and that no facts were brought on record by the Revenue to show that as a consequence of supply of project specific designs, there was transfer of any technology so as to qualify as "fees for technical services" under the said Article. With respect to another payment for purchase of drawing from an individual who was a UAE resident, the Tribunal held that as per Article 14 of India-UAE DTAA, right to tax the income from professional activities by the resident of Dubai (UAE) vested only with UAE and not India and thus, there was no occasion to deduct TDS u/s 195 on such payment.

ITO v Bengal NRI Complex Ltd – ITA No. 1290 & 1088/Kol/ 2014 dated 16.03.2018

341. The wholly owned US subsidiary of Indian Assessee and other companies incorporated in USA provided marketing and sales support services to the Indian Assessee, Tribunal held that payments made for such services would not fall under the ambit of FTS under Article 12 of the India-US tax treaty and hence the same would not be taxable in India as the services were rendered outside India. Thus, the Tribunal held that the Assessee was not liable to deduct TDS u/s. 195 on payment of fees for such services to US entities (including Assessee's wholly owned US subsidiary) for securing orders and soliciting business from foreign customers. Rejecting Revenue's contention that the US entities could not claim treaty benefits as the assessee had not proved that conditions prescribed in Article 24(1) were satisfied, Tribunal noted that 70% of the payment was made to Assessee's wholly owned US subsidiary, wherein Assessee (Indian tax resident) itself directly owned 100% of its issued equity capital, the conditions prescribed in Article 24(1) were duly fulfilled [Article 24(1) provides that in order to avail the benefit of tax treaty, more than 50% of the number of shares of a company (US entities, in the present case) should be owned directly or indirectly by one or more individuals who are resident either in India or USA.]

Onprocess Technology India Pvt. Ltd. & Anr. vs. DCIT – [2018] 53 CCH 0074 (Kolkata ITAT) – ITA No. 1047/Kol/2016, 1241/Kol/2016 dated May 24, 2018

342. The Tribunal dismissed Revenue's appeal and upheld CIT(A)'s order holding that the assessee-company to be not an assessee-in-default since the search fees paid by the assessee-company to SSIBV, Netherland based entity, as per service agreement was not taxable in tax as Fees for technical services and thus not liable for deduction of tax at source. The AO noted that the assessee had also paid licensee fee to SSIBV under the licensee agreement and held that the service agreement flows out of the licensee agreement itself. He thus held that the search fees paid were ancillary and subsidiary to enjoyment of right, property under the licence agreements and was taxable as fees for technical services as per Article 12(5)(a) of the India-Netherland DTAA. The Tribunal followed the decision given by the co-ordinate Tribunal bench in the case of SSIBV wherein it was held that the search fee could not be treated to be ancillary and subsidiary to licensee agreement and the service agreement was independent of the license agreement and thus service fee was not taxable as FTS. The co-ordinate bench had inter alia noted that since the search fees was to be determined on the basis of relative contribution of each party (i.e. assessee and SSIBV), in a given situation, SSIBV (assessee) could also receive search fees from the SSIBV, but the same was not true for licence fee as SSIBV was not supposed to pay anything to SSIBV (assessee) as license fee.

ITO(IT) v SPENCER STUART (INDIA) PVT. LTD. (2018) 53 CCH 0390 MumTrib - ITA No. 217/Mum/2017, 220/Mum/2017, 221/Mum/2017 dated July 23, 2018

343. The Tribunal allowed the assessee's appeal and deleted the disallowance made u/s 40(a)(i) on account of non-deduction of TDS u/s 195 while making payment to a French professional for providing advisory services by way of review strategies and M & A options. It rejected AO's contention that the amount paid was taxable in India as fee for technical services, holding that since professional services rendered did not 'make available' to assessee any technical experience, skill, know-how etc., the said amount was not taxable in India, considering the beneficial provisions of India-France DTAA read with India-UK DTAA (on account of most favoured nation clause forming part of Protocol to India-France DTAA).

Entertainment Network (India) Ltd. v JCIT [2019] 102 taxmann.com 49 (Mum Trib.) – ITA No. 643 (MUM.) of 2017 dated December 21, 2018

344. Where assessee made payments to non-residents for technical services after deducting tax @ 20%, whereas AO contended that TDS should be deducted @25% u/s 115A; observing that the non-resident did not have PAN and the rate provided under India-France DTAA for FTS was lower than rates provided u/s 115A, Tribunal held that TDS was to be deducted at a lower rate as provided under DTAA and not as provided u/s 115A and it remanded the matter to AO to verify whether the non-residents were entitled for benefits under DTAA.

ITO v Atos Worldwide India (P.) Ltd. – (2018) 90 taxmann.com 306 (Mum) – ITA No. 6424 (mum.) of 2016 dated 29.01.2018

345. Following the ruling of the co-ordinate bench in the assessee's own case for earlier year (i.e. AY 2007-08 in ITA No 6708/Mum/2011), Tribunal held that payment of global support service fees made by the Assessee in AY 2008-09 could not be considered as Fees for Technical Services ('FTS') as per Article 12(4)(b) of the India- Singapore tax treaty as the twin test of rendering services and making technical knowledge available at the same time was not satisfied. Accordingly, Tribunal held that disallowance under section 40(a)(i) could not be made in the hands of the assessee while making such payment.

Exxon Mobil Company India Pvt. Ltd. vs. ACIT – [2018] 53 CCH 0072 (Mum ITAT) – ITA No 3601/Mum/2014 dated May 23, 2018

346. The AO made disallowance u/s 40(a)(i) for the assessee's failure to deduct tax at source while making payment of FTS to a foreign company. The assessee relied on the CBDT Circular No. 3/2015, dated 12.02.2015 which provides that in cases where TDS is not deducted u/s 195, the AO shall determine the appropriate portion of the sum chargeable to tax, as mentioned in section 195(1), in order to ascertain the tax liability on which the deductor shall be deemed to be an assessee in default u/s 201, to contend that for the purpose of section 40(a)(i) also, only appropriate portion of such sum which is chargeable to tax under the Act shall be disallowed. The Tribunal, however, did not accept assessee's said contention holding that since disallowance u/s 40(a)(i) in case of the assessee was in context of amount paid by it towards FTS and not towards 'other sum' chargeable under Act, the said CBDT circular was not of any assistance to it.

Chemical Process Piping (P.) Ltd.vR.M. Madhavi - [2018] 94 taxmann.com 116 (Mumbai - Trib.) - IT APPEAL NOS. 1036 & 1037 (MUM.) of 2016dated 02.05.2018

Commission / Marketing

347. The Assessee-company made payments to non-resident agents for carrying out exports out of India. The non-resident agents did not have permanent establishment in India and their activities as commission agents were being carried out outside India. The Court held that, on facts, there was no liability on the assessee to deduct tax at source in respect of payment made to said non-resident agents merely because a portion of sale to overseas purchasers took place in India.

Principal CIT v. Ferromatic Milacron India (P.) Ltd. [2018] 99 taxmann.com 154 (Guj.)- R/Tax Appeal No. 1233 of 2018 dated October 9, 2018

348. The Tribunal had deleted the disallowance made u/s 40(a)(i) for non-deduction of TDS u/s 195 on payment made by the assessee to its foreign agents for rendering sales and marketing services abroad. It noted that since the foreign agents had rendered their services abroad and they did not have a fixed base in India, the said payment was not taxable in India and thus, there was no requirement to deduct TDS u/s 195. The Revenue filed appeal against the Tribunal's order placing reliance on Explanation 2 to section 195(1) which provides that obligation to comply with section 195(1) would extend to any person, irrespective of the fact if the non-resident person has a residence or place of business or business connection in India or any other presence in any manner whatsoever in India. The Court held that once the conclusion is arrived that such payment did not entail tax liability of the payee under the Act, as held by the Supreme Court in the case of GE India Technology Centre (P.) Ltd. v. CIT [2010] 327 ITR 456 (SC), section 195(1) would not apply. Thus, noting that the Revenue did not seriously contend that the said payment was taxable in India, it dismissed the Revenue's appeal.

Pr.CIT v Nova Technocast (P.) Ltd - [2018] 94 taxmann.com 322 (Gujarat) - R/TAX APPEAL NO. 290 of 2018 dated April 9, 2018

349. The Court confirmed the Tribunal's order and held that commission paid by assessee (engaged in garments exports) to an Indian agent on behalf of the foreign entity was taxable in India and accordingly disallowed it under section 40(a)(i) as requisite withholding tax had not been deducted. Noting that concurrent orders of the lower authorities confirmed the position that commission had actually been received in India, the Court held that Circular No. 786 of 2000 (wherein it was clarified that commission remitted directly to foreign agent abroad was not taxable in India) was not applicable.

Smt. Fathima Harris vs. ITO-TS-390- HC-2017(MAD)- -T.C. (Appeal) no 121 of 2009- dated 27.04.2017

350. The Tribunal upheld the CIT(A)'s order deleting disallowance made by the AO u/s 40(a)(i) on account of payment of commission to non-resident / foreign commission agent for rendering service outside India without deducting TDS u/s 195, holding that in absence of PE or business connection in India, the said payment could not be deemed to accrue or arise in India.

ASSISTANT COMMISSIONER OF INCOME TAX vs. MANUFAX INDIA S.B. - (2018) 52 CCH 0348 AgraTrib - ITA Nos. 434 & 446/Agra/2015 dated Apr 11, 2018

351. The assessee paid commission to a non-resident for procuring export sale order without deducting tax at source u/s 195 and thus, the AO disallowed the expenditure u/s 40(a)(i) holding that the commission payable was deemed to accrue or arise in India and accordingly taxable u/s 5(2)(b) r.w.s 9(1)(i) [being income accruing or arising through business connection in India]. The CIT(A) upheld AO's order. The Tribunal held that deeming fiction u/s 9(1)(i) could not be invoked in the present case since no part of the operations of the recipient's business, as commission agent, was carried out in India and thus the said commission was not taxable under the Act. Hence, following the Apex Court ruling in the case of GE India Technology Centre Pvt Ltd Vs CIT wherein it was held that payer was bound to withhold tax from the foreign remittance

only if the sum paid was assessable to tax in India, it held that the assessee was not required to deduct TDS from the aforesaid payment towards commission, since the same was not taxable under the Act as well as the relevant tax treaty.

Ferromatic Milacron India Pvt. Ltd. v DCIT (2018) 52 CCH 0553 AhdTrib - ITA Nos. 2451 & 2616/Ahd/2015 dated 19.04.2018

- 352.** The Tribunal held that the remittance of sales commission to non-resident agents was not taxable in India absent operations carried out in India and therefore it deleted the disallowance made under section 40(a)(i) of the Act. It held that even though Section 9(1)(i) of the Act was triggered in the instant case, it had no impact on the taxability in the hands of the commission agent because admittedly no business operations were carried out in India and by virtue of Explanation 1 to Section 9(1)(i) of the Act, the entire commission income was outside the ambit of income deemed to accrue or arise in India.

ITO v Excel Chemicals India Ltd - TS-417-ITAT-2016 (Ahd) - I.T.A. No.5/Ahd/16

- 353.** The Tribunal dismissed Revenue's appeal against the CIT(A)'s order deleting the disallowance made u/s 40(a)(i) on account of non-deduction of TDS u/s 195 while making payment of commission to non-resident foreign agents who were carrying out activities outside India, noting that the non-resident agents did not have any PE in India and accordingly, no part of commission income of those agents could be said to have been accrued or arisen in India. It also held that the commission payments could not be regarded as fees for technical services as defined in Explanation 2 of section 9(1)(vii) as commission payment was not for rendering any managerial, technical or consultancy services.

DCIT v Mc Fills Enterprise (P.) Ltd [2019] 101 taxmann.com 212 (Ahd - Trib.) – ITA No. 3469 (Ahd.) of 2015 dated December 17, 2018

- 354.** Assessee company engaged non-resident agents to procure export orders in various countries. In lieu, assessee paid commission to its agents. Assessing Officer disallowed it on account of non-deduction of TDS under section 195. The Tribunal held that Foreign concern was acting as selling agent for assessee and no services were rendered by it within the taxable territory. Assessee was not liable to deduct tax at source when non-resident agent provided services outside India. There was also no finding by the Assessing Officer that the non-resident agents have a permanent establishment in India or have any business connection in India, by virtue of which the payment of commission would have accrued or arose in India.

Dy.CIT, Madurai v TVS Srichakra Ltd. [2015] 64 taxmann.com 18(Chennai), ITA No.501(MDS) OF 2015 dated July 31, 2015

- 355.** The Tribunal upheld CIT(A)'s order deleting disallowance made by the AO under section 40(a)(ia) of the Act on account of non-deduction of tax on selling expenses paid to non-residents since the payments made to the said non-resident parties were for the purpose of marketing and consultancy services rendered outside India and the said payments were not exigible to tax deduction at source u/s 195 of the Act as there was no income accruing or arising in India in the hands of the said non-resident parties in view of Section 9(1)(vii) of the Act read with Section 90(2) and the treaty provisions as per the India-USA DTAA.

ITO vs. Annik Technology Systems P. Ltd. (2016) 48 CCH 0132 (Delhi Trib.) (ITA No. 4763/DEL/2012) [India - US DTAA]

356. The assessee paid Foreign commission (to Agents rendering services outside India for promotion of sales) and did not deduct tax at source u/s 195 as no part of income arose in India. The AO disallowed the commission paid u/s 40(a)(i) holding that the TDS was supposed to be deducted u/s 195. The CIT(A) deleted the disallowance made by the AO. The Tribunal followed (1) GE India Technology Centre (P) Ltd vs. CIT wherein it was held that TDS was to be deducted only if income was chargeable to tax in India in the hands of non-resident recipient, (2) CIT vs. R.D. Aggarwal & Co. & Anr. wherein it was held that where assessee's non-resident Agent did not have PE in India, the Commission to agents could not arise in India and (3) CIT v. Toshoku Ltd wherein it was held that commission earned by non-residents for services rendered outside India could not be deemed to be income, which had accrued or arisen in India in terms of section 9(1)(i). It thus held that the Commission Agent had no 'business connection' in India and upheld the CIT(A)'s order of deleting the disallowance.

Punjab Stainless Steel Industries & Anr v ACIT & Anr (2018) 52 CCH 0296 DelTrib - ITA No. 6043/Del/2014, 5997/Del/2014 dated 09.04.2018

357. The Tribunal held that non-resident commission agents based outside India rendering services of procuring orders cannot be said to have a business connection in India and therefore commission payments to them cannot be said to have been either accrued or arisen in India. It dismissed the contention of the Revenue that the right to receive the commission arises in India when the order gets executed by the assessee and held that the assessee was not liable to deduction under section 195 of the I.T. Act on account of foreign agency commission paid outside India for promotion of export sales outside India. Accordingly, it deleted the disallowance made by the AO under Section 40(a)(i) of the Act.

Divya Creation v ACIT – [2017] 86 taxmann.com 276 (Delhi - Trib.)/[2017] 189 TTJ 466 (Delhi - Trib.)

ITA No.5603/Del/2014 dated 14.09.2017

358. The assessee had made payments for marketing activities carried out in Bangladesh to a non-resident without deducting tax at source. The AO disallowed the amount under provisions of s 40(a)(i) on the ground that payments made to non-resident who have their business in India for rendering management, consulting and technical services is taxable in India as per sec 5(2) r.w.s 9(1)(vii) (c) of the Act. The AO also noted that a copy of the agreement between the assessee and the non-resident was not furnished by the assessee. It was the assessee's contention that such disallowance could not sustain in view of the services being rendered in Bangladesh and in absence of business connection of payee in India, no income accrued or arose in India. Noting that the assessee had furnished a copy of the agreement with the non-resident to the DRP as additional evidence, the Tribunal restored the issue of disallowance u/s.40(a)(i) following the coordinate bench decision of the assessee for its earlier year wherein the issue was restored on account of no supportings before the AO (whether services were rendered in Bangladesh and not in India) and it was observed that a disallowance could not be

made on mere presumption that payments made were in nature of Royalty/FTS and accordingly, claim had to be verified by the AO.

Philip Morris Services India S.A v DDIT [TS-488-ITAT-2018(DEL)-TP] ITA No.827/Del/2014 dated 21.06.2018

- 359.** The Tribunal dismissed Revenue's appeal filed against the CIT(A)'s order deleting the disallowance made u/s 40(a)(i) by the AO on account of export commission and other related charges paid to non-resident/ foreign agents, relying on various judicial precedents wherein it has been held that commission payment made to non-resident agent for services rendered by them outside India are not chargeable to tax in India and thus not liable to TDS u/s 195.
DEPUTY COMMISSIONER OF INCOME TAX vs. STERLING ORNAMENT (P) LTD. - (2018) 53 CCH 0252 (Del Trib) - I.T.A. No. 4395/DEL/2014 dated June 27, 2018
- 360.** The assessee was engaged in the business of trading fabrics and manufacturing and trading ready made garments and had paid commission on export sales to its two agents appointed in UAE during the relevant year. The AO rejecting the assessee's explanation that the provisions of section 195 were not applicable in the instant case. On appeal, it was noted by the Tribunal that all the activities of the agents were performed overseas and in addition to that the Revenue had failed to establish that the foreign agents had any office or any business operation in India. In view of these facts, the appeal of the Revenue was dismissed and it was held that the commission income could not be said to accrue or arise in India in terms of Section 9(1)(i).
ACIT v. Vipin Kumar Gupta – [2018] 93 taxmann.com 399 (Delhi- Trib.) – IT Appeal No. 4923 (DELHI) of 2014 dated April 25, 2018
- 361.** The assessee-company, engaged in business of manufacturing, trading and marketing of footwear, paid commission to non-resident agents for procuring orders from parties situated outside India, without deducting TDS. The AO was of the opinion that the amount paid as commission was actually in the nature of fees for consultancy services and, therefore, in view of section 9(1)(vii)(c), the income of the agents accrued in India. He thus invoked section 40(a)(i) and disallowed the said amount. The CIT(A) deleted the disallowance holding that services rendered by the agents were not in nature of consultancy services. The Tribunal upheld the CIT(A)'s order noting that there was no document on record to effect that non-resident rendered any technical, consultancy or management services and thus held that TDS was not required to be deducted from said payment.
DCIT v Taj International (P.) Ltd [2018] 96 taxmann.com 222 (Delhi - Trib.) - IT APPEAL NO. 6140 (DELHI) OF 2014 dated July 20, 2018
- 362.** The Tribunal set aside the CIT(A)'s order confirming the disallowance made u/s 40(a)(ia) on account of non-deduction of TDS on commission payments made to foreign agents in Hong Kong (with which India doesn't have a DTAA) with respect to export made to parties referred by them, noting that the payment was not received by the foreign agents in India and services rendered by them in their respective countries and thus, the income could not be said to have accrued or arisen in India as per section 5(2). Further, it held that neither the income could be deemed to have accrued or arisen in India in view of provision of section 9(1)(i) nor it is not the

case of revenue that payment was made by assessee on account of technical services rendered by the foreign agents and, thus, assessee was not liable to deduct TDS u/s 195.

Bengal Tea & Fabrics Ltd. v DCIT – (2018) 91 taxmann.com 38 (Kol Trib) – ITA No. 1667 (kol.) of 2016 dated 28.02.2018

- 363.** Where the the AO had made disallowance u/s 40(a)(ia) on account of non-deduction of TDS u/s 195 while making payment for commission to non-resident receipts in four countries and the CIT(A) had deleted the said disallowance holding that the it was not necessary to deduct TDS since the said receipt were exempt in the hands of the recipients, noting that neither the AO nor the CIT(A) had examined the nature of services against which the commission had been paid and the assessee was not able to explain the nature of services before the Tribunal, the Tribunal remanded the matter to the file of AO to examine the nature of services rendered by the overseas parties and the relevant provisions of DTAA with respective countries.

ITO v Shamrock Pharmachemi Pvt. Ltd - ITA No. 2279/Mum/2016 dated 16.03.2018

- 364.** The Tribunal deleted the disallowed made u/s 40(a)(i) with respect to commission paid to non-residents for services of mobilizing deposits, etc. without deducting TDS u/s 195, holding that commission earned by the non-residents for rendering services abroad could not be construed as income accrued or arisen in India since they non-residents did not have any business operations in India

State Bank Of India v ACIT – (2018) 91 taxmann.com 312 (Mum) – ITA Nos. 4598 and 4736 (Mum.) of 2010 dated 31.01.2018

- 365.** The assessee company, engaged in exporting cotton yarn, paid commission to foreign agents for booking the export orders abroad without deducting TDS u/s 195. On claiming deduction on the said payment, the AO disallowed the same u/s 40(a)(i) by stating that the commission fell within the purview of S.9(1)(i) and S.9(1)(vii) r w S.195. The CIT(A) deleted the disallowance after taking note of the fact that the Tribunal in the assessee's own case for earlier assessment year had deleted similar disallowance made by the AO under section 40(a)(i). On appeal by Revenue, the Tribunal upheld the CIT(A)'s order noting that neither the foreign agent had business connection in India and nor the brokerage/commission paid by assessee could be treated as fees for technical services.

ITO v Indo Industries Ltd. [2018] 94 taxmann.com 180 (Mumbai - Trib.) ITA NO 4642 OF 2016 dated 11.05.2018

Interest

- 366.** The Tribunal held that interest on tax refund was not covered under the definition of interest under Article 12(4) of the India-Italy DTAA and therefore the lower authorities were justified in imposing TDS under section 195 of the Act on the said interest.

Ansaldo Energia SPA v DDIT (ITA Nos. 1496 to 1498/Mds/2014) – TS-686-ITAT-2015 (Chny)

- 367.** The assessee had borrowed monies from Standard Chartered, Mauritius and HSBC, Mauritius and had paid interest on the same without deducting TDS u/s 195. The AO held that the tax was

deductible at source since related agreements were signed in India, hence the income had accrued in India and thereby disallowed the interest expense u/s 40(a)(i). The Tribunal allowed the assessee's claim granting the treaty protection under Article 11 (relating to interest) which provides for taxability in Mauritius and not in India. It rejected the Revenue's contention that since the related agreements were signed in India and the Indian affiliates had stood as guarantors to the borrowings by the assessee, the interest income had accrued and was taxable in India. It observed that none of the 3 tests laid down in Article 5(1) of India-Mauritius DTAA for constitution of fixed place PE were satisfied in present case, viz 1) physical criterion 2) subjective criterion and 3) functionality criterion and as Articles 5 and Article 7 (relating to PE and its attribution) were not applicable, Article 11 would apply. It further clarified that mere presence of affiliates of Standard Chartered Mauritius and HSBC Mauritius in India and the occasional use of the office of Indian affiliate did not lead to a conclusion that Standard Chartered Mauritius and HSBC Mauritius had PE in India. Accordingly, it deleted the disallowance of interest expense u/s 40(a)(i) and held that interest was not subject to TDS u/s 195.

Hyundai Motor India Limited [TS-166-ITAT-2017(CHNY)] [I.T.A. No. 853/Chny/2014 and 563/Chny/2015]

- 368.** The Tribunal upheld held the AO's disallowance u/s 40(a)(i) for non-deduction of TDS while making payment of usance interest (on delayed payment for imports) by the assessee-company to its Singaporean Holding Co., relying on the High Court decision in the case of CIT v Vijay Ship Breaking Corporation [261 ITR 113 (Guj)] wherein it was held that usance interest was covered under the definition of interest u/s 2(28A) and thus liable for TDS u/s 195. It rejected assessee's contention that the said High Court order had merged with the order of the Supreme Court wherein the High Court's order had been reversed, noting that the Supreme Court had given relief on a different reasoning (dealing with applicability of legislative amendment) and the Supreme Court had categorically stated that the issue raised by the appellant was not adjudicated. The Tribunal held that the doctrine of merger does not have universal application and it depends upon the nature of jurisdiction exercised by the superior forum and thus, in present case, the doctrine of merger was not applicable. Accordingly, it held that the aforesaid High Court decision decided against the assessee still hold the water.

ACIT v Overseas Trading and Shipping Co. Pvt. Ltd. [TS-596-ITAT-2018(Rjt)] – ITA No. 211/Rjt/2007 dated September 28, 2018

Reimbursement

- 369.** The Apex Court dismissed the SLP filed by Revenue against the High Court's order wherein the High Court had upheld Tribunal's order holding that payments made by assessee-organisation to Federation of International Hockey for arranging for provisional services connected with event of Hockey World Cup (such as travel, hospitality and provision of food etc.), merely represented reimbursement of expenses not chargeable to tax in India and thus not liable for TDS u/s 195.
- Pr. CIT v Organizing Committee Hero Honda FIH World CUP [2019] 100 taxmann.com 441 (SC) – SLP (Civil) Diary No. 37870 of 2018 dated November 12, 2018***

370. The assessee entered into a contractual relationship with the Federation of International Hockey ('FIH') for organising the Men's Hockey World Cup as per which FIH was to act as the facilitator. The assessee made a reimbursement to FIH on account of pay-outs made by FIH on the assessee's behalf on which no TDS was deducted. The AO was of the opinion that the reimbursements included commission paid by the assessee and therefore the assessee ought to have deducted TDS and accordingly disallowed the payments invoking Section 40(a)(ia) of the Act. The Court upheld the findings of the Tribunal and CIT(A) that the payments were mere reimbursements having no income element and accordingly no tax was to be deducted and further noting that the lower authorities had observed that the assessee had no privity of contract with the service provider, dismissed the Revenue's appeal observing that no substantial question of law arose therefrom.

PR CIT v Organizing Committee Hero Honda FIH World Cup – TS-165-HC-2018 (Del) - ITA No 353 / 2018

371. The assessee entered into a secondment agreement with its holding company whereby certain employees were placed by the holding company at the disposal and control of the assessee and the assessee had made remittances to its holding company in respect of reimbursement of payroll costs without deducting any tax at source as the payments were simple reimbursements without involving any profit element taxable in the hands of holding company and that the tax was duly deducted on the salaries paid to the employees. However, the AO contended that since the employees were of holding company, the payment was for services rendered by these employees and also work done by the employees had resulted in creation of a service PE and that the entire amount paid to the holding company was attributable to PE, taxable on gross basis @ 40% in absence of details of expenditure and accordingly, raised demand u/s 201 r.w.s. 195. The Tribunal held that payment made to holding company consisted of income chargeable to tax under the head 'income from salaries' and accordingly, there were no withholding tax obligations u/s 195 and that the assessee had already discharged the TDS obligations on salary payments and accordingly, withholding tax demand u/s 201 r.w.s 195 was not sustainable. It further held that the payments undisputedly were in the nature of the reimbursements, and, the income embedded in these payments had already been brought to tax in India in the hands of ultimate beneficiaries- i.e. the seconded employees, and accordingly, there could not have been any tax withholding obligations under section 195. As regards, AO's contention of existence of service PE, it held that whatever had been paid to the holding company was, in turn, paid by it to its employees seconded to the assessee and accordingly, there could not have been any profits in the hands of the service PE, and what was taxable in the hands of the PE under article 7(1) of India-USA DTAA was not the gross receipt but the profits attributable to the PE.

Burt Hill Design (P.) Ltd. v. DDIT [2017] 79 taxmann.com 459 (Ahmedabad -- Trib)

372. The Tribunal deleted the disallowance made by the AO u/s 40(a)(i) on account of payment of professional charges and towards reimbursement of administrative charges and reimbursement of insurance and foreign travel expenses to a person who was responsible for procurement, chemical development and technological upgradation etc. With respect to professional charges, the Tribunal held that the same was not taxable since the non-resident payee did not have any PE or any business connection in India and the revenue had failed to bring any evidence to prove it was not so. With respect to the reimbursements, it held that these were simply

reimbursement of administrative expenses incurred by the concerned person outside India and did not involve any element of income and thus TDS was not required to be deducted.

DISHMAN PHARMACEUTICALS & CHEMICALS LTD. & ORS. v DCIT(OSD) & ORS. - (2018) 53 CCH 0065 AhdTrib - ITA No. 692/Ahd/2011, 2447/Ahd/2011, 2957/Ahd/2013, 3086/Ahd/2013, 817/Ahd/2011, 773/Ahd/2011 (CO No.89/Ahd/2011) dated May 23, 2018

- 373.** The Tribunal dismissed Revenue's appeal against the CIT(A)'s order holding that the assessee could not be considered to be assessee-in-default for non-deduction of TDS u/s 195 on reimbursements made to its Phillipines based group company for salary cost of the expatriate employees deputed to India since the said reimbursement / payment made was not chargeable to tax in India as per the India- Phillipines DTAA. It rejected AO's contention that the said payment was taxable in India as fees for technical as per the provisions of section 9(1)(vii) as well as the DTAA, noting that the India-Phillipines DTAA does not have any provision for taxation of fees for technical services. Accordingly, the Tribunal held that the said payment was business income of the Phillipines based group company as per Article 7 of the said DTAA and the same was not chargeable to tax in absence of PE in India.

DCIT v IBM India (P.) Ltd [2018] 100 taxmann.com 230 (Bangalore - Trib.) – ITA Nos. 1288, 1291, 1294, 1297, 1300, 1303 & 1306 (BANG.) OF 2017 dated November 16, 2018

- 374.** The Tribunal held that the payment made on account of webhosting charges and marketing expenses by the assessee for services rendered outside India was in the nature of reimbursement of expenses and was not subject to withholding since the services were rendered outside India and since there was no PE in India the same were not taxable. Further the said payments were not in the nature of royalty or fees for technical services.

DCIT v Matrimony Com Pvt Ltd – (2015) 45 CCH 0227 Chen Trib

- 375.** Where the assessee had made payments on account of reimbursement of expenses as well as fees for technical services to non-residents and did not deduct tax on the reimbursements (while it deducted tax on the FTS paid), the Tribunal noting that the assessee had produced supporting back to back evidence to substantiate that the payments were pure reimbursements, held that no tax was to be deducted at source as there was no income element in the said payment. Accordingly, it held that the assessee could not be classified as an assessee in default under Section 201 of the Act.

Hospira Healthcare India P Ltd v DCIT – (2018) 92 taxmann.com 225 (Chennai – Trib) – ITA NO 1916 / Chny / 2017 dated March 15, 2018

- 376.** The Tribunal held that the reimbursement of expenses for intranet and SAP charges made by the assessee to its German holding company constituted royalty under the Act as well as DTAA and therefore the assessee ought to have deducted tax on the same. It held that the SAP software was customized and the payment was made for the use of licensed software and therefore the payment made by the assessee constituted payment for use of scientific equipment under the Act as well as DTAA. It rejected the contention of the assessee that since the payment was only a reimbursement of expenses, no tax was to be deducted, noting that the assessee failed to produce any agreements, contracts or working to substantiate its claim. It held that if the contention of the assessee was to be accepted then all payments to a third party

routed through a holding company would be considered as reimbursement of expenses, rendering the provisions of the Act and DTAA redundant.

SMS Iron Technology Pvt Ltd – TS-555-ITAT-2017 (Del) ITA No. 4480 to 4486 /Del / 2014 dated 25.10.2017

- 377.** The Tribunal allowed assessee's appeal and deleted the disallowance made u/s 40(a)(i) for non-deduction of TDS u/s 195 on reimbursement made to a US based company, engaged in provision of manpower recruitment services, for salary and other cost paid to expatriates employees outside India for and on behalf of assessee. The AO opined that said amount constituted fees for included services (FIS)/fee for technical services in terms of India-US DTAA as well as u/s 9(1)(vii) and accordingly liable for TDS u/s 195. It was noted that the expatriate employees employees having different work profiles and job responsibilities were seconded by the US company to assessee in India, pursuant to secondment agreement, for facilitating assessee's business operations. The Tribunal held that so long as a payment to non-resident entity is in nature of payment consisting of income chargeable under head 'Salaries', assessee does not have any tax withholding applications u/s 195. Accordingly, after perusing the secondment agreement and Form 16, it concluded that the employees seconded to assessee-company were working as employees of assessee-company, their salary was subject to TDS u/s 192 and, therefore, provisions of section 195 were not applicable. It rejected the reliance placed by Revenue on the Jurisdictional High Court decision in the case of Centrica India Offshore (P.) Ltd. v. CIT [2014] 224 Taxman 122 (Del HC) by holding that in case of Centrica (supra), the secondment was established only to provide services to the overseas entity to ensure that the services to be rendered to the overseas entities by the Indian vendor were properly coordinated.

AT & T Communication Services (India) (P.) Ltd. v DCIT [2019] 101 taxmann.com 105 (Del - Trib.) – ITA No. 1653 (DELHI) OF 2016 & 354 (DELHI) OF 2017 dated October 31, 2018

- 378.** The Tribunal remanded the issue of deduction of TDS u/s 195 while paying payment of certain sum by the assessee, Indian company, to foreign group company towards reimbursement of common cost allocated to assessee as per cost sharing agreement, noting that the AO had not stated on what basis he considered the nature of payment to be made as fees for technical services. Before the Tribunal, the assessee had furnished a number of documentary evidences, to demonstrate that payment made to the foreign group company was actually relating to services rendered by different pool members on cost-to-cost basis without any markup. Accordingly, it directed Revenue to examine all necessary and relevant documents including cost sharing agreement, auditor's report as well as other additional evidences filed by assessee before deciding the nature of the payment.

BASF India Ltd. v DCIT [2019] 102 taxmann.com 133 (Mumbai - Trib.) – ITA Nos. 4754 & 4755 (MUM.) of 2015 dated December 14, 2018

- 379.** Where the assessee made payments on account 'staff cost', 'travelling', 'advertising & promotional expenses' and 'other miscellaneous expenses' to its overseas entities and the same were in the nature of mere reimbursement of costs without any mark-up, the Tribunal, following the decision of the Court in IT v. Siemens Aktiengesellschaft, [2009] 310 ITR 320/177 Taxman 81 (Bom.) held that the assessee was not liable to deduct any tax on the impugned payments

as they were mere reimbursements and did not have any income element. Accordingly, it upheld the CIT(A)'s deletion of the disallowance under Section 40(a)(i) of the Act.

Pfizer Products India (P.) Ltd v ACIT - [2017] 87 taxmann.com 243 (Mumbai - Trib.) - I.T. APPEAL NOS. 1457 & 1535 (MUM.) OF 2015 dated 01.09.2017

- 380.** Where the assessee made payment of software maintenance charges, data communication charges etc to its AE, the Tribunal noting that the payment was in nature of reimbursement of expenses without any mark up held that the same was not liable to tax in India and deleted the addition made by the AO under Section 40(a)(i) who contended that the said payments were royalty on which the assessee ought to have deducted tax at source @ 10 percent as per per the

India-France DTAA.

Societe Generale v DCIT - [2017] 81 taxmann.com 244 (Mumbai - Trib.) - IT APPEAL NO. 1854 (MUM.) OF 2015 dated 19.04.2017

Section 206AA

- 381.** The Court partly allowed assessee's (a non-resident company) writ challenging constitutional validity of Sec. 206AA (as it existed prior to the amendment in 2016 and which prescribed higher withholding rate of 20% if payee failed to furnish PAN). The assessee challenged applicability of higher TDS rate of 20% u/s 206AA in respect of payments in the nature of 'fees for technical services' which attracted lower TDS rate of 10% under the India-Singapore treaty. The Court acknowledged that the law before 2016 amendment, went beyond the provisions of DTAA which in most cases mandated a 10% cap on the rate of tax applicable to the state parties but held that the issue urged was largely academic on account of corrective amendment made by the Parliament. However, it held that Section 206AA (as it existed) was to be read down to mean that where the deductee i.e. the overseas resident business concern conducts its operation from a territory, whose Government has entered into a DTAA with India, the rate of taxation would be as dictated by the provisions of the treaty.

Danisco India Pvt Ltd [TS-63-HC-2018(DEL)] - W.P.(C) 5908/2015 dated 05.02.2018

- 382.** The assessee, a foreign company, received payment towards management services and IT support services rendered to Indian company. The Indian entity, i.e., Calderys had withheld taxes at the rate of 20 per cent from the payment made to the assessee since the assessee-company did not have any PAN at the time of receipt of said payments. However, in the return of income, the assessee claimed that the same was taxable at the rate of 10 per cent being royalty/FTS, as per article 13 of DTAA between Indian and France and accordingly claimed refund in its return of income. The AO denied refund and was of the view that Indian entity had to withhold taxes on such payments as per provisions of section 206AA since the assessee did not have a PAN. The Tribunal, referring to Section 90(2) of the Act (which states that DTAA's would override domestic law, in cases where the provisions of DTAA's are more beneficial to the assessee) and held that the provisions of section 206AA could not override the provisions of the DTAA. Accordingly, it upheld the order of the CIT(A) allowing the assessee its refund claim.

DCIT v Calderys France - [2017] 84 taxmann.com 301 (Pune - Trib.) - IT APPEAL NO. 1265 (PUN.) of 2015 dated 14.07.2017

Uniphos Environtronic (P.) Ltd v DCIT - [2017] 79 taxmann.com 75 (Ahmedabad - Trib.) - IT APPEAL NO. 947 (AHD.) OF 2016 dated 06.02.2017

383. The assessee company had made payment for consultancy services to a non-resident company (Chinese) and deducted TDS @10% as per the India-China DTAA. However, the CPC-TDS computed TDS @ 20% as per S.206AA (applicable in a case when PAN is not furnished by the deductee) and raised a tax demand on the assessee alongwith interest on account of TDS deducted short by 10%, while passing order u/s 201(1). The CIT(A) deleted the said tax demand and interest thereon. The Tribunal upheld the CIT(A)'s order and followed GE India Technology Centre Pvt. Ltd. vs. CIT wherein it was held that section 90(2) provides that DTAA shall override domestic law in cases where the provisions of DTAA are more beneficial to the assessee. Thus, the Tribunal held that the demand raised by the AO on the differential tax rate was to be deleted on the ground that since the assessee had taken benefit of DTAA, the provision of domestic law (S.206AA in the instant case) could not be invoked by the AO and accordingly dismissed the Revenue's appeal.

ITO v Sichuan Fortune Projects Management Ltd. (2018) 52 CCH 0289 AhdTrib - ITA Nos. 3554, 3555 & 3556/Ahd/2016 dated 09.04.2018

384. The Tribunal held that the question of applying a rate of 20 percent and making consequent adjustment on payments made by the assessee to a non- resident, ignoring the provisions of the DTAA was a legal question which was beyond the scope of intimation under section 200A of the Act which provided for adjustments on account of arithmetical errors and therefore, the said intimation and adjustment was not justified.

Wipro Ltd v ITO - (2016) 46 CCH 0187 (Bang - Trib)

385. The Tribunal held that Section 206AA does not override the provisions of section 90(2) and in cases of payments made to non-residents, the assessee had correctly applied the rate of tax prescribed under DTAA and not as per section 206AA because provisions of DTAA were more beneficial.

Emmsons International Ltd. v. DCIT – [2018] 93 taxmann.com 487 (Delhi – Trib.) – IT Appeal Nos. 5124 to 5127 (DELHI) of 2015 dated April 2, 2018

386. The Tribunal held that the treaty provisions by virtue of section 90(2) which override the charging provision of domestic law would also override the provision of section 206AA irrespective of non-obstante clause contained therein and that accordingly, section 206AA cannot override the beneficial DTAA rates. Drawing analogy from Karnataka HC ruling in case of Kaushallaya Bai & others (W.P. NOS. 12780 - 12782 OF 2010, it held that section 206AA would not apply to non-residents who were not required to obtain PAN. It further observed that unlike GAAR provisions which override treaties, there was no such provision to give overriding effect to the provisions of section 206AA over tax treaties.

Nagarjuna Fertilizers [TS-67-ITAT-2017(HYD)]

387. Where the assessee had not deducted TDS u/s 195 @ 20% in view of provisions of section 206AA on amount remitted to non-residents not having PAN and it claimed before the Tribunal that it deducted TDA @ 10% in accordance with the respective DTAA provision, the Tribunal

followed the decision in the case of Nagarjuna Fertilisers & Chemicals Ltd. v ITO (2001) 119 Taxman 37 (Hyd Trib) wherein it was held that the treaty provisions which are beneficial to the non-residents would prevail over the provisions of section 206AA. However, since the AO had not examined the nature of payments as to whether they were covered by the respective DTAA provisions or not, it remanded the matter to the AO for verifying the same and further directed the AO to not treat the assessee as an “assessee in default” u/s 201(1) and not to charge interest u/s 201(1A) if the payments are covered by the DTAA provisions.

Dr. Reddy's Laboratories Ltd. v ADIT – ITA No. 827 & 828/ Hyd/ 2015 dated 28.02.2018

Grossing up

388. Where the assessee had entered into an agreement with UK based university for providing certain technical services for which it had agreed to bear Indian taxes, the Court held that the assessee was required to gross-up amount of FTS paid to university as per section 195A, for purpose of deducting TDS. It held that even if the assessee opts to be governed by the provisions of the India-UK DTAA, in absence of tax computation mechanism in the said DTAA, income is to be computed as per the provisions of the Act considering the grossing up provision of section 195A and then the rate of tax as per the Act or the DTAA, whichever is more beneficial, would be applicable

TVS Motor Company Ltd. v ITO [2018] 96 taxmann.com 567 (Madras) – [T.C. (Appeal). Nos.1509 to 1513 of 2007 (Mad)] dated August 24, 2018

389. The Court dismissed assessee's appeal and held that the assessee was required to gross-up the amount of fees for technical services paid to UK based university as per section 195A, for the purpose of deducting TDS at the rate mentioned in India-UK DTAA noting that the assessee had entered into agreement with University of Warwick,UK for providing certain technical services, taxes on which were borne by the assessee and the assessee had deducted TDS at 15% as per India-UK DTAA on actual payment made to the said university. Accordingly, it held that since the tax which had been borne by the assessee, being income of the University was covered by the words “gross amount”, as mentioned in the Treaty, the Revenue was justified in grossing up by applying Section 195A (which provides that where the tax chargeable on any income liable for TDS is to be borne by the payer, then for the purposes of TDS, such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force, be equal to the net amount payable). The Court held that the treaty does not provide mechanism for computation of income, but only provides rate at which such income is taxable, thus the computation of income is required to be made by applying provisions of the Income-tax Act, 1961.

SUNDARAM CLAYTON LIMITED vs INCOME TAX OFFICER (IT) [TS-686-HC-2018(MAD)] Tax Case Appeal Nos. 1200 & 1201 of 2008 dated 22.10.2018

390. The assessee made commission payment to various agents based in foreign countries on account of export made to parties referred by them, which were disallowed by the AO on the ground that no TDS was deducted u/s 195 on such payment. The Tribunal held that since the payment for commission was not received by foreign agents in India, the same was not taxable u/s 5(2)(a) and further since the same was on account of services rendered by them in their

respective countries, it did not accrue or arise in India. It observed that it was not the case of Revenue that payment was made by assessee on account of technical services rendered by the foreign agents. The Tribunal thus held that since none of the conditions mentioned in section 9, viz. business connection in India, property in India, asset or source in India or transfer of capital asset situated in India, were fulfilled in the present case, no income could be deemed to have accrued or arisen in India. Therefore, it held that since the income was not chargeable to tax in India, there could be no liability to deduct TDS u/s 195.

DCIT v Gujarat Microwax (P.) Ltd - [2018] 96 taxmann.com 644 (Ahmedabad - Trib.) – ITA No. 2503 (AHD.) of 2016 dated May 24, 2018

Others

391. The Court held that demurrage charges paid by an Indian company to a foreign shipping company without deducting tax at source do not attract disallowance under section 40(a)(i) of the Act as it was covered specifically by section 172 of the Act which is a code in itself. Due to the conflicting view expressed by the co-ordinate bench in DCIT v Orient (Goa) Pvt Ltd, the Court held that the issue was to be resolved by a larger bench and sought for the direction for constitution of a Larger Bench.

CIT v VS Dempo and Company Pvt Ltd (ITA No 989 and 991 of 2015) – TS-526-HC-2015 (BOM)

392. The assessee, engaged in development of international trade, procured raw materials and finished products from various Group entities on which no tax had been deducted. On appeal to the Court, there was a difference in opinion between the Hon'ble Judges – one Judge holding that Section 195 of the Act would be applicable on such payments irrespective of the whether the recipient had a PE in India as all of them evidently had business connections in India and that the deduction provisions would apply in the hands of the payer so long as the transactions are chargeable to tax and the other judge holding that since the recipients did not have a PE in India there was no requirement for deduction of tax in India. Accordingly, the matter was placed before the Hon'ble Chief Justice for appropriate orders.

CIT v Mitsubishi Corporation India P Ltd – (2017) 87 taxmann.com 217 (Del) – ITA No 180 of 2014

393. The Court held that for AY 2001-02, prior to the insertion of section 40(a)(ia) of the Act, disallowance of payments to non-residents on account of non-deduction of tax at source was discriminatory, since payments to residents were not subject to such disallowance arising out of non-deduction of tax at source and consequently assessee would be eligible to benefit of Article 26(3) of the India-US DTAA i.e. Non-discrimination, and therefore it held that the administrative fee paid by the assessee to its US based holding company was allowable in spite of non-deduction of tax at source.

CIT v Herbalife International India Pvt Ltd - (2016) 96 CCH 0007 (Del) [India - US DTAA]

394. The Court held that mere passing of book entries, which were reversed would not give rise to an obligation to deduct tax at source under section 195 of the Act as the assessee had neither

paid the royalty nor reflected the same as payable and therefore the assessee could not have been treated as an assessee in default under section 201 of the Act.

DIT v Ericsson Communications Ltd – (2015) 61 taxmann.com 117 (Delhi)

- 395.** Assessee-Hotel made payment for publicity purposes to a US company outside India without TDS deduction on basis of assessment of said US company, wherein said company was found liable to pay tax on such income, proceedings for non-deduction of tax at source were initiated against the assessee and assessee was held as an 'assessee-in-default'. The Tribunal held that the income earned by US company in India was not liable for deduction of TDS under section 195 read with section 197, in respect of payments made by the assessee as it did not have a permanent establishment in India as per section 9 read with its Explanation and, consequently, provisions of sections 201(1) and 201(1A) were not attracted. The Court held that though the Assessing Officer of US company at Delhi had held that such payments which were made by the assessee to Sheraton were liable to payment of tax on the basis of which proceedings were initiated against the assessee, the said order of the Assessing Officer was set aside by the Tribunal and affirmed by the Delhi High Court, meaning thereby that the said Sheraton was not liable for payment of tax. Further, it held that where recipient of income, a foreign company, is not chargeable to tax in India as it does not have PE in India, then question of deduction of tax at source by payer-assessee would not arise.

CIT, Bangalore v. ITC Hotels Ltd. [2015] 60 taxmann.com 346 (Kar HC) - IT Appeal Nos.477 & 478 of 2019, dated June 15, 2015

- 396.** The Court set aside the Tribunal's order wherein the Tribunal had held that order u/s 195(2) determining amount of TDS to be deducted by an assessee is not an appealable order before CIT (A) since the same does not fall in the category of appealable orders under section 246 & 246A. The Court held that the Tribunal's order suffered from infirmity and was per incuriam as the Tribunal did not consider the provisions of section 248 which allow a payer who denies his liability to deduct tax u/s 195 to file an appeal before the CIT(A). Thus, it remanded the matter back to the Tribunal for deciding the appeal afresh in accordance with law, considering the provisions of section 248.

Bangalore International Airport Ltd. v ITO (IT) - [2018] 96 taxmann.com 86 (Karnataka) – ITA No. 401 & 429-431 of 2016 dated June 21, 2018

- 397.** The assessee was engaged in the business of dredging and marine engineering services and had made payments to foreign companies without deducting tax. The DCIT contended that the assessee should have deducted tax @ 40% and held the assessee liable u/s 201(1). The assessee filed a writ petition before the High Court against the order of the DCIT. The Court directed the assessee to treat the order as show cause notice and submit the preliminary objections to the impugned order. The Court further laid down that the principles of Natural Justice was not followed by the Revenue and the assessee was to be given sufficient time to file their objections. Accordingly, the matter was remanded to the DCIT to pass fresh orders.

International Seaport Dredging (P.) Ltd. v. DCIT – [2018] 93 taxmann.com 488 (Madras) – W.P. Nos. 10319 & 10320 of 2018 dated April 25, 2018

398. The AAR held that unless payment made attracted tax under the Act, there would be no liability to deduct tax under section 195 of the Act. Penalty ordered by the US Court could never attract any tax under the provisions of the Act and therefore no tax was to be deducted on such payment.

Satyam Computer Services Ltd v In Re – (2015) 94 CCH 0118 IAAR

399. The assessee had made payment to a US entity for services rendered by the personnels of the US entity for installation and commissioning of certain equipment purchased by the assessee, without deducting TDS u/s 195 and claiming benefit of India-US tax treaty. Noting that the assessee had furnished only Form W9 (which is given under US Internal Revenue Code for providing the correct TIN to the person who is required to file an information return with the IRS) for establishing treaty entitlements, the Tribunal held that Form W9 was wholly irrelevant in respect of tax withholdings outside the United States and that the same was merely a declaration by the US based entity, and it could not be treated as a certification by any authority. However, noting that the assessee was not given sufficient time to furnish the relevant evidence for establishing the treaty entitlements of the US entity, the Tribunal remanded the matter to the file of the CIT(A) for fresh adjudication *inter alia* for giving the assessee a fresh opportunity of furnishing the said evidences not limited to, but including, the tax residency certificate.

Skaps Industries India (P.) Ltd. v ITO - [2018] 94 taxmann.com 448 (Ahmedabad - Trib.) - IT APPEAL NOS. 478 AND 479 (AHD.) of 2018 dated June 21, 2018

400. The Tribunal dismissed Revenue's appeal against CIT(A)'s order deleting disallowance made by the AO u/s 40(a)(i) on account of short deduction of TDS while making payment of royalty & brand usage fees payment to a Japanese company, noting that the assessee had deducted TDS @ 20% of the gross amount, whereas the AO opined that the TDS should have been deducted @22.66% after including the surcharge and education cess. Referring to Article 2 of the India-Japan DTAA which provides that tax includes surcharge, it held that there was no obligation upon the assessee to deduct the TDS on the payment made to the Japanese company after including the surcharge over and above the tax rate as specified under the provision of DTAA with Japan. Further, the Tribunal held that the education cess partakes the character of surcharge and thus there was no need to include education cess also while deducted TDS.

ACIT v Panasonic Energy India Co. Ltd [TS-721-ITAT-2018(Ahd)] - I.T.A. No. 2882/Ahd/2016 dated 03.12.2018

401. The Tribunal held that assessing Officer's order under section 195(2) determining the amount of TDS to be deducted from payment to non-resident is not an appealable order u/s 246 / 246A and CIT(Appeals) cannot entertain appeals against it and any order passed by CIT(A) by entertaining such appeal will be unsustainable for want of jurisdiction - Consequently, the Tribunal also cannot entertain any appeal against CIT(A)'s order on the matter.

Bangalore International Airport Ltd v ITO - [2016] 68 taxmann.com 228 (Bangalore - tribunal)

402. The Tribunal held that once the assessee has complied with the provisions of section 195 of the Act by obtaining the certificate under section 195(2) then no disallowance can be made in respect of the said amount paid to the non-resident by invoking section 40(a)(i) of the Act.
DCIT v Carl Zeiss India Pvt Ltd [IT(IT)A Nos 1258(B) / 2014 & IT(IT)A No 1251(B) / 2014] - TS-463-ITAT-2015(Bang)
403. The AO made a disallowance u/ 40(a)(i) with respect re-insurance premium paid by the assessee, an insurance company, to non-resident re-insurance company since the assessee failed to deduct TDS u/s 195 while making the said payment. The CIT(A) restricted the disallowance to 15% of amount paid without assigning any reason for the same. The assessee contended that since non-resident re-insurance company operated outside country, its income was not taxable in India, therefore, assessee was not liable to deduct TDS. The Tribunal rejected the assessee's above contention, noting that as section 2(9) of the Insurance Act, 1938, a foreign company engaged in re-insurance business was required to establish a branch in India, and unless a branch is established in India, the non-resident insurance company could not do any business in India. It thus held that the profit of non-resident re-insurance company was taxable in India and the assessee had to deduct tax at source. The Tribunal held that even otherwise, if assessee claimed that there was no person in India, and premium was paid directly to non-resident re-insurance company, then transaction of assessee was clearly in violation of provisions of section 2(9)(c) of Insurance Act, 1938, which would lead to disallowance of the entire amount paid in view of Explanation 1 to section 37(1). It thus allowed the revenue's appeal and held that the CIT(A) was not justified in restricting the disallowance to 15%.
DCIT v Cholamandalam MS General Insurance Co. Ltd. - [2018] 96 taxmann.com 625 (Chennai - Trib.) - ITA Nos. 1618 to 1621, 1674 to 1676 & 1759 of 2011 & Others dated July 31, 2018
404. The Tribunal held that revenue failed to prove that these expenses were liable to be taxed in India as income in hands of concerned payees. Further, services had been rendered by the assessee wholly outside India. Thus, no tax liability arose under section 195 and, thus, section 40(a)(i) was not attracted and disallowance made was to be deleted.
Asstt. CIT v. M.M. Forgings Ltd.[2015] 60 taxmann.com 403(Chennai – Trib.)
405. The Tribunal deleted the disallowance made by the AO u/s 40(a)(i) for non-deduction of TDS on (i) payment to a Dubai based company for carrying out some software related work in Dubai and (ii) payment to a Austria based company for on-shore work in Iran, noting that both the companies had rendered entire services outside India i.e. in Dubai & Iran and both the companies did not have any PE or business connection in India. It thus held that the said payments were not chargeable to tax in India and accordingly, were not liable for TDS u/s 195.
ASHOK LEYLAND LTD. vs. DCIT - (2018) 54 CCH 0147 ChenTrib – ITA No. 835, 836 & 837/Chny/2018 dated September 19, 2018
406. The AO treated the assessee as an assessee-in-default u/s 201(1) on account of non-deduction of TDS u/s 195 while making payment to (i) non-resident on account of marketing support charges (ii) to non-resident law firm towards legal charges for representing assessee-company in suit filed by another company and (iii) non-resident company based in USA which was

claimed by the assessee to be reimbursement of expenses being salary cost and overhead of employee seconded by the USA company to the assessee. With respect to payment of marketing support charges, the Tribunal accepted assessee's contention that the assessee could not be called upon to comply with provisions not in force at relevant time when payment was made [i.e. Expl to section 9(1)(vii) (on the basis of which it was held by the AO that the said payment was chargeable to tax in India and thus liable for TDS)] but introduced later by retrospective amendment. However, with respect to payment of marketing support charges and legal charges, the Tribunal noted that there was no finding in order of lower authorities as to whether the service was rendered in India or utilized in India and thus it restored the matter to file of AO to examine the same. With respect to the payment to USA company, the assessee claimed that that same did not include any element of profit so as to create a liability deduct TDS u/s 195 and the same was only a reimbursement. But since assessee had not substantiated the veracity of such claim by producing agreement entered into with the USA company, the Tribunal remitted this issue also to the file of AO for fresh consideration.

IBS Software Services Private Ltd. & Anr v DCIT (International Taxation) &Anr. (2018) 52 CCH 0317 CochinTrib - (2018) 52 CCH 0317 CochinTrib dated 12.04.2018

- 407.** The assessee-developer entered into a collaboration agreement with the 3 co-owners one of which was non-resident and paid earnest money of Rs.1 crore with signing of agreement. The Assessing Officer noticed that the assessee had made payments to power of attorney holder of the non-resident without deduction of tax thereon. Consequently, proceedings under section 201 were initiated against the assessee. The Commissioner (Appeals) upheld the contention of the assessee that in view of non-discrimination clause in article 26 of the DTAA between India and USA, the assessee was not obliged to deduct tax at source under section 195, as there is no provision in the Income-tax Act, requiring a resident to deduct tax at source from sale proceeds of land payable to any other resident. The Commissioner (Appeals) also observed that in any view of the matter, there was no loss to revenue because the non-resident had paid the due taxes. The Tribunal held that there is no provision in Act, requiring a resident to deduct tax at source from sale proceeds of land payable to any other resident; and in view of article 26 the assessee-developer could not be burdened with requirement of TDS in case of payment to three Indian parties including one non-resident for sale and purchase of property in India.

ITO v. Santur Developers (P.) Ltd. [2015]61 taxmann.com 304/70 SOT 475(Delhi)

- 408.** The Tribunal held that the assessee was not liable to deduct tax at source under section 195 of the Act on payment for land to a non-resident seller by invoking the non-discrimination clause under Article 26 of the India-US DTAA. It held that since there was no provision in the Act requiring a resident to deduct tax at source from sale proceeds of land payable to any other resident, the assessee could not be burdened with the requirement of TDS in case of payment to non-resident.

ITO v Santur Developers Pvt Ltd (ITA no. 1532/Del/2011) – TS-724-ITAT-2015 (Del)

- 409.** The Tribunal held that the assessee was not liable to withhold tax under section 195 of the Act on payment towards ground rent, advertisement and exhibition expenses to non-resident entities not having PE in India, since the payments were in the nature of business receipts which would be taxable only if the payee had a PE in India.

ITO v Brahmos Aerospace Pvt Ltd - TS-524-ITAT-2016 (Del) - ITA No. 966/Del/2015

410. The Tribunal deleted the disallowance made u/s 40(a)(i) with respect to payments made to foreign shipping / airline companies by the assessee-company, clearing and forwarding agent, noting that the non-resident companies had not rendered any services in India and did not have any PE in India. It thus held that the said payments made were not liable to tax in India under Act as well under relevant DTAA and accordingly, not liable for deduction of tax source.

KGL Network (P.) Ltd. v ACIT [2018] 97 taxmann.com 400 (Delhi - Trib.) – ITA No 301 (Delhi) OF 2018 dated July 2, 2018

411. The assessee-company was involved in development of infrastructure facilities for South Asian Federation Winter Games, 2009 (games) and entered into a consortium agreement with two foreign companies and one Indian company for rendering services with respect to construction of water storage and installation of ski lift and comprehensive maintenance for three years. The assessee made payment to foreign companies for supply of equipments. The AO held the assessee to be assessee-in-default u/s 201(1) for non-deduction of TDS u/s 195 on the said payment, considering the same to be taxable u/s 9(1)(vii) as fees for technical services. The CIT(A) held that the assessee had made payment for contract for work and since the payment was made to AOP (consortium), TDS was required to be deducted u/s 194C and not u/s 195. Revenue as well as assessee filed an appeal against the CIT(A)'s order. The Tribunal noted that consortium was formed with clear responsibilities been laid down for each party, wherein the foreign parties were only required to supply the equipments. It also noted that the payments had been made directly to those parties and naturally, each of them was individually charged to tax on their profits or losses. Further, noting that the title in goods had passed from foreign parties to assessee outside India at port of shipment, the Tribunal held that no income had accrued to those parties in India in terms of provisions of section 5 and section 9, and, consequently, provisions of section 195 as well as 194C did not apply to the said payments.

DCIT v Joint Secretary Organizing Committee for Winter Games, 2009 [2018] 100 taxmann.com 67 (Del Trib) – ITA Nos. 626 & 627, 798 & 798 & 799 (Delhi) of 2013 & 1576 (Delhi) of 2015 dated October 15, 2018

412. The Tribunal upheld the CIT(A)'s order deleting the disallowance made by the AO u/s 40(a)(i) on account of non-deduction of tax while making payment of consultancy and legal service charges to non-resident payee, noting that the assessee had not claimed deduction with respect to the said expenditure since the entire expenditure was capitalised as it pertained to power plants which were in pre-commencement stage. It relied on the decision in the case of Sonic Biochem Extractions P.Ltd. Vs. ITO [35 taxmann.com 463] wherein it was held that section 40(a) is applicable only if the assessee claims deduction of expenditure mentioned in the section.

DCIT & Anr. v ADANI POWER LTD. & ANR. - (2018) 53 CCH 0259 HydTrib - ITA No. 1663/Ahd/2014, 1686/Ahd/2014 With CO No.252/Ahd/2014 dated June 28, 2018

413. The Tribunal held that the second proviso to section 40(a)(ia) of the Act was retrospective in nature, being declaratory and curative in nature, seeking to eliminate unjust enrichment on part of the Government.

Dilip Kumar Roy v ITO - (2016) 68 taxmann.com 129 (Kolkata - Trib)

414. Tribunal remanded the matter back to AO where he had made a disallowance u/s 40(a)(i) for non-deduction of TDS u/s 195 on various payments made by assessee without appreciating in proper perspective various documents with detailed factual and legal submissions filed before AO along with supporting evidences including unit wise details of various expenditure incurred in foreign currency with detailed write up about each expenditure, submission with regard to non-applicability of TDS under domestic law as well as DTAA of respective countries for each of aforesaid expenditure, certificate of tax residency of parties to whom payments were made and declaration from them that no PE existed for them in India and copies of agreements entered into with those parties, copy of advertisements, copy of invoice, subscription renewal forms

DCIT v EIH Ltd. – (2018) 89 taxmann.com 417 (Kol) – ITA Nos. 110 and 153 (kol.) of 2016 dated 12.01.2018

415. The Tribunal deleted the disallowance made by the AO u/s 40(a)(i) on account of liasoning and other site charges paid to foreign service providers for rendering to the assessee-company at its project site in Saudi Arabia without deducting TDS u/s 195, noting that (i) the payments were made outside India for rendering services to the project located outside India i.e. no part of services was either rendered or received in India and (ii) the foreign service providers did not have any PE in India. It thus held that the said payment were not chargeable to tax in India and accordingly, were not liable for TDS u/s 195.

LIBRA TECHCON LTD. & ANR. V DCIT (2018) 195 TTJ 0105 (Mumbai) (URO) – ITA No. 2475/Mum/2013, 4480/Mum/2013 dated August 24, 2018

416. Assessee-company had paid interest on foreign currency loan called External Commercial Borrowings (ECB) lent by a group of financial institutions arranged by the arranger, i.e., ICICI Bank Ltd., offshore branch, Singapore (Singapore branch) without deducting TDS u/s 195. It contented that the said payment was covered by section 194A(3)(iii) of the Act since the payment was made to Singapore branch (being a resident) which is part of ICICI Bank to which Banking Regulation Act, 1949 applies. AO, however, considered the Singapore branch to be an arranger cum facility agent which arranged ECB and the group of financier based in Singapore or UK (i.e. non-residents) to be the main lenders. He accordingly, invoked section 195 of the Act and held assessee to be in default for short deduction of tax and interest u/s. 201(1)/201(1A). Noting that the agreement between the assessee and the bank stated that ICICI Bank Ltd was acting as an arranger cum facility agent and the Singapore branch was original lender whereas the letter written by the Singapore branch stated that the Singapore branch was an arranger and facility agent and the group of financial institutions assembled by the arranger was the lender of the loan, Tribunal held that the facts were contradictory to each other as per the assessee's own record. It, thus, remanded the matter to the file of AO for re-examination in light of the assessee's claim that the Singapore branch was the main lender.

BAJAJ ECO TEC PRODUCTS LIMITED vs. INCOME TAX OFFICER (INTERNATIONAL TAXATION) - (2018) 53 CCH 129 (MumTrib) - ITA Nos. 4609, 4610 & 4611/Mum/2016 dated Jun 8, 2018

417. The Tribunal dismissed Revenue's appeal against the CIT(A)'s order deleting the disallowance made u/s 40(a)(i) with respect to interest payment made by the assessee, branch of a foreign bank, to its Head Office in Singapore without deducting TDS u/s 195, following the assessee's own case in earlier year wherein relying on the decision in the case of Sumitomo Mitsui Banking Corporation v/s DCIT [(2012) 19 taxmann.com 364 (SB) (Mum.)] it was held that since under the domestic law the interest paid by the Indian branch to the head office was not allowable as deduction as this was payment to self, the same also could not be taxed in the hands of the bank in the domestic law and there were no express provisions in the relevant tax treaty which were contrary to the domestic law. Therefore, interest payment was not taxable in the hands of the bank and thus there was no question of deducting any tax at source.

ASSISTANT COMMISSIONER OF INCOME TAX & ORS. vs. DBS BANK LIMITED & ORS - (2018) 53 CCH 0167 (Mum Trib) - ITA No. 6865/Mum./2012, 6037/Mum./2014, 4949/Mum./2014, 6038/Mum./2014, 4948/Mum./2014 (C.O. no.8/Mum./2014) dated June 15, 2018

418. The assessee-company had a branch in UK and was doing business abroad under brand name of 'Cyber Jimmies' in UK. During relevant year, assessee paid advertisement expenditure to foreign magazines and publishing houses for advertisements of its brand and certain amount to foreign consultant for rendering services in UK in connection with registration of trade mark of 'Cyber Jimmies' in UK. Since assessee did not deduct tax at source while making said payments, AO disallowed same u/s 40(a)(i). The Tribunal noted that the recipients were foreign residents having no PE in India and services were also rendered by them outside India to the UK branch of the assessee, thus amount paid to them was not liable to tax in India. It held that there was no requirement of deducting tax at source from aforesaid payments and that impugned disallowance was to be deleted.

Cebon Apparel (P.) Ltd. v DCIT – [2018] 98 taxmann.com 253 (Mumbai - Trib.) – ITA No. 1651 (MUM.) of 2016 dated May 29, 2018

419. The Tribunal held that the payments made by the assessee to M/s EAT towards annual maintenance contracts would fall under the category of works contracts i.e business receipts in the hands of M/s EAT and therefore the same was not taxable in India since M/s EAT did not have a PE in India. Accordingly, it held that the assessee was not required to deduct tax at source u/s 195 of the Act and deleted the disallowance made under Section 40(a)(i) of the Act.

DHL Air Limited vs DCIT (International taxation) (2017) 51 CCH 152 Mum.Trib ITA No. 1438/mum/2017 dated 04.10.2017

420. The Tribunal held that the assessee, a branch of a foreign bank was not liable to deduct tax at source on payment of interest to its head office since the payment was made by the non-resident to himself and accordingly deleted the disallowance made under section 40(a)(i) of the Act.

DBS Bank Ltd v DDIT (IT) - (2016) 66 taxmann.com 173 (Mum)

421. The Tribunal held that the assessee, an independent insurance broker was not required to deduct tax at source on payments made to non-resident re-insurers since it was an independent broker and not an agent and did not carry out any activity on behalf of anyone in India and did not have the authority to conclude contracts in India. It observed that neither did the non-resident

reinsurers nor any independent insurance company have any control over the assessee and that section 9(1)(i) specifically excluded independent brokers from its ambit. Accordingly, it held that the assessee could not be treated as an assessee in default under section 201 / 201(1)(A) of the Act.

ADIT v AON Global Insurance Service Ltd - TS-756-ITAT-2015 (Mum)

422. The Tribunal deleted Sec 40(a)(i) disallowance for non-deduction of Sec 195 TDS on payment of technical know-how fees to AVL Austria, since under old DTAA provision of 1963 between India and Austria which existed till September, 2001, payment made by Indian entity to Austrian resident for rendering services in Austria was not taxable in India.

LML Ltd - TS 392 ITAT 2016 (MUM) ITA No. : 3668/Mum/2004 [India - Austria DTAA]

423. The Tribunal held that the amount remitted by the assessee to its 100 percent Mauritian holding company under a share buy-back scheme was not taxable in India during the relevant assessment year viz AY 2011-12 (prior to the insertion of section 115QA of the Act) since the shareholders were liable to capital gains tax under section 46A and there being no capital gains tax in Mauritius, no tax was payable. Accordingly it held that Section 195 was not applicable to the said transaction. It further dismissed the contention of the Revenue that the buyback scheme was a colourable device to avoid payment of DDT under section 115O and held that the buyback was legitimate and in accordance with section 77A of the Companies Act.

Korn Ferry International Pvt Ltd - TS-439-ITAT-2016 (Mum) I.T.A. No. 7367/Mum/2014, I.T.A. No. 7139/Mum/2014

424. The Tribunal deleted Sec 40(a)(i) disallowance and held that the assessee was not liable to deduct TDS u/s 195 on payments made to non- resident during AY 2010-11 for training conducted outside India and dismissed the contention of the Revenue that the assessee was liable to deduct TDS applying explanation to Sec 9(1) inserted retrospectively by Finance Act 2010 which provides that even where the non-resident has not rendered services in India, FTS shall be deemed to accrue

or arise in India. It held that an assessee who has to make the payment cannot visualize or apprehend that in future a retrospective amendment would be brought whereby it would require withholding of tax and that that law cannot compel a person to do something which is impossible to perform (i.e lex non cogit ad impossibilia).

Holcim Services South Asia Ltd v DCIT - TS-80-ITAT-2016(Mum)

425. Where the assessee had duly deducted tax at source during the relevant year on the payments for which disallowance under section 40(a)(i) was made on account of non-deduction of tax in the prior year, the Tribunal allowed assessee's claim of reversal of disallowance made in light of proviso to Section 40(a)(i) of the Act.

Star Limited [TS-773-ITAT-2016 (Mum)- TP]

426. The Tribunal held that appeal filed by the assessee- deductee against a 195(2) order passed upon application made by the payer / deductor was not maintainable since as per section 246A an order under section 195(2) was not appealable before the CIT(A). It further held that the only remedy against a section 195(2) order was appeal under section 248 which was required to be

filed by the deductor and not the deductee. It held that the order appealed against must be an order against an assessee determining its liability to be assessed under the Act and since, in the present case, the order under section 195(2) was against the deductor in whose case the assessment was concluded and not the assessee, the only course open to the assessee was to deny its liability to be assessed under the Act and claim a refund.

DCIT v Abu Dhabi Ship Building PJSC - TS-328-ITAT-2016 (Mum)

427. Relying on the case of the Court in Orient Goa Pvt Ltd [(2010) 325 ITR 554 (Bom)], the Tribunal held that failure to deduct tax under section 195 of the Act on payment of freight charges would attract disallowance under section 40(a)(i) of the Act unless the assessee had obtained certificate under section 195(2) of the Act and rejected the assessee's stand that 40(a)(i) disallowance was to be restricted only to amount remaining payable at the year end.

Elve Corporation v ACIT (I.T.A. Nos. 4108/Mum/2012 & 6279/Mum/2012) – TS-665-ITAT-2015 (Mum)

k. Shipping business

428. The Court held that section 44BBA could not be applied to bring to tax assessee's income on presumptive basis when assessee had incurred losses during the year. However, it held that the assessee had to produce books of accounts to substantiate that it had incurred losses or that its assessable income was less than its presumptive income.

DIT v Royal Jordanian Airlines (ITA 159/2002) – TS-709-HC-2015 (Del)

429. The Court held that the freight income earned by the assessee, a Singapore based company engaged in the shipping business, from the operation of ships was not taxable in India under Article 8 of the India- Singapore DTAA, despite the fact that the receipts were remitted to London and not Singapore, since the Inland Revenue Authority of Singapore issued a certificate stating that the entire freight income derived by the assessee would be assessable in Singapore on accrual basis without making any reference to the amount of income remitted or received in Singapore. The contention of the Revenue that the assessee was not entitled to the benefit of Article 8 by virtue of Article 24(1) (which provided that reliefs provided by the DTAA would only apply to income remitted to Singapore) was rejected by the Court on the ground that the said clause did not provide that Article 8 would not apply to every case of non-remittance and moreover the income in the instant case was taxable in Singapore on the basis of accrual.

M.T. Maersk Mikage [TS-474-HC-2016(GUJ)] SPECIAL CIVIL APPLICATION NO. 9150 of 2014 [India - Singapore DTAA]

430. The Court held that journey of a vessel between two ports is international traffic under Article 8 of the India – Singapore DTAA if the same was part of a larger journey between two foreign ports and that it was only when a ship or aircraft was operating solely between places in one contracting state that the transport was excluded from the scope of international traffic.

CIT v Taurus Shipping Services – [2015] 64 taxmann.com 64 (Guj)

431. The Tribunal allowed the assessee's (resident of Indonesia) appeal challenging assessment under section 172 of the Act (which deals taxation of non-resident shipping companies) and held that income earned from slot chartering in certain vessels sailing from Port of Mundra was not taxable in India as per Article 8 of India-Indonesia DTAA. It held that the Revenue was incorrect in denying exemption under Article 8 of India-Indonesia DTAA on the ground that vessels in which the containers were transported were not owned/ chartered by the assessee, since as per Article 8(1) source jurisdiction (India in this case) had no right to tax income from operations of ships in international traffic or even any activity directly connected with such operations, whether carried on by the assessee on his own/ in collaboration with others and that there was no reference to ownership and charter of vessels in Article 8 of the DTAA. It relied on Bombay HC ruling in Balaji Shipping UK Ltd wherein it was held that "slot hire facility is an integral part of the contract of carriage of goods by sea" and thus is eligible for treaty protection against source taxation of such income.

K Cargo Global Agencies v ITO - TS-235-ITAT-2016(Ahd) [India - Indonesia DTAA]

432. Where the assessee, a Singapore based company, engaged in the business of operation of ships in international waters, sought the benefit of Article 8 of India-Singapore DTAA (as per which its income would be solely taxable only in Singapore and not in India) for its gross freight earnings collected from India and the Revenue denied the treaty benefit in view of Article 24 (Limitation of Relief clause which states that the benefit claimed under the DTAA would be restricted to incomes that have been remitted to Singapore) as the assessee could not show that freight income was remitted to Singapore, the Tribunal observed as per Singaporean income-tax law, such income was regarded as Singapore sourced income and assessed to tax in Singapore on accrual basis and not on remittance basis and accordingly held that Article 24(1) would not be applicable and allowed the treaty benefit to the assessee.

Far Shipping (Singapore) Pte Ltd v ITO - [2017] 84 taxmann.com 297 (Hyderabad - Trib.) - IT. APPEAL NOS. 399 TO 436 (HYD.) OF 2017 dated 16.06.2017

433. The Tribunal upheld the CIT(A)'s order deleting the disallowance made by AO u/s 40(a)(ia) on account of payments made to foreign shipping lines without deduction of tax at source, in view of the provisions of section 172 applicable in case of Foreign Shipping Companies notwithstanding anything contained in other provisions and therefore, held that the provisions of section 194C and 195 relating to tax deduction at source were not applicable in such cases. It held that the issue was squarely covered by CBDT Circular No. 723 dated 19.09.1995 stating that where payments were made to shipping agents of non-resident shipping owners shipped at port in India, agents step into shoes of principal and accordingly provision of section 172 should apply and not provisions of Section 194 and 195.

DCIT v ASSOCIATED PIGMENTS LTD. - (2018) 52 CCH 4 (Kol Trib) - ITA No. 2042/Kol/2014 dated 03.01.2018

434. The AO taxed the amounts received by the assessee (a Danish company, resident of Denmark) on account of reimbursement of cost of IT system support services incurred by it for effective conduct of its day-to-day shipping operations business (and charged to the group entities / agents based on their usage) as fees for technical services under the India-Denmark DTAA and the receipts on account of inland haulage charges as profits of shipping business u/s 44B, rejecting the assessee's contention that both these receipts formed part of the shipping business

of the assessee which were not taxable in India in view of the provisions of Article 9 of the India-Denmark DTAA (which provides that profits derived from the operation of ships in international traffic shall be taxable only in the country in which the place of effective management of the entity is situated). The DRP directed the AO to accept assessee's above contentions, following the Tribunal's order in the assessee's own case for earlier year. The Tribunal also dismissed Revenue's appeal against the said directions of DRP, following the High Court as well as the Tribunal's order in the assessee's own case for earlier year wherein it was held that the said receipts were part of assessee's shipping business and could not be captured under any other provisions of the Act except under the DTAA and as per Article 9 of the India-Denmark DTAA, the said receipts were not taxable in India.

DCIT v A.P.Moller Maersk A/S – ITA No. 1743/Mum./2016 dated 23.01.2018

- 435.** The AO taxed the amounts received by the assessee-company, resident of France, on account of inland haulage charges and service tax on the same as profits of shipping business u/s 44B, rejecting the assessee's contention that both these receipts formed part of the shipping business of the assessee which were not taxable in India in view of the provisions of Article 9 of the India-France DTAA (which provides that profits derived from the operation of ships in international traffic shall be taxable only in the country in which the place of effective management of the entity is situated). Noting that on identical issue, the it had decided in favour of assessee in assessee's own case for earlier year, the Tribunal held that Inland Haulage charges and service tax thereon being part of the income derived from the operation of shipping in international traffic was exempt under Article 9 of the India-France DTAA and hence, not taxable in India. Accordingly, it allowed assessee's appeal and deleted the addition.

DELMAS S.A.S. vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) - (2018) 53 CCH 0142 MumTrib - ITA No. 2187/Pn./2017 dated Jun 13, 2018

- 436.** Assessee, a shipping company incorporated at Mauritius, had claimed its entire income not to be taxable in India in view of provisions of Article 8 of the India-Mauritius DTAA *inter alia* dealing with profits from the operation of ships in international traffic, supporting its claim by furnishing TRC issued by the Mauritian tax authorities. AO denied the said relief to the assessee holding that the effective management of the assessee was situated at a place which was other than India and Mauritius and further held that the assessee's income was chargeable to tax in India opining that the assessee had a PE in India in form of an exclusive agent (FCIPL). The Tribunal rejected the view taken by the AO noting that the activities of assessee's sole agent in India (FCIPL) were not devoted exclusively on behalf of assessee as it also did work on behalf of other principals and earned a substantial part of its income from them and, thus, held that FCIPL was not an exclusive agent of assessee so as to come under purview of definition of dependent agent as defined in Article 5(5) of India-Mauritius DTAA. Accordingly, it was held that the assessee did not have any PE in India and was not taxable as per article 7 of India-Mauritius DTAA. However, with respect to the assessee's contention with regards to effective place of management being in Mauritius, the Tribunal held that it was not necessary that effective management had to be only between two contracting states and, based on facts in the present case, the same was neither in Mauritius nor in India. Further, relying on the views of Klaus Vogel, it held that if the effective management of an enterprise was not in one of the contracting state, but was situated in the third state, the benefit of Article 8 of DTAA, could not be extended.

ADIT v Bay Lines (Mauritius) – (2018) 91 taxmann.com 110 (Mum) – ITA No. 1181 (Mum) of 2002 & others CO No. 32 (Mum) of 2010 & others dated 20.02.2018

437. Where the assessee, a Singapore based company, engaged in the business of operation of ships in international waters, sought the benefit of Article 8 of India-Singapore DTAA for its gross freight earnings collected from India and the Revenue denied the treaty benefit in view of Article 24 (Limitation of Relief) as the assessee could not show that freight income was remitted to Singapore, the Tribunal observed that the entire income was disclosed by the assessee in the return of income in Singapore, further, as per Singaporean income-tax law, such income was regarded as Singapore sourced income and assessed to tax in Singapore on accrual basis and not on remittance basis and accordingly held that Article 24(1) would not be applicable and allowed the treaty benefit to the assessee. It further held that it cannot be said that the shipping income earned from India is to be treated as exempt from tax or taxed at reduced rate, which is a condition precedent for applicability of Article 24 since India at the threshold does not have the jurisdiction to tax the shipping income of the non-resident entity.

APL Co. Pte Ltd. [TS-65-ITAT-2017(Mum)] (IT APPEAL NO. 4435 (MUM.) of 2013)

438. The assessee, a tax resident of Germany, was engaged in transportation of cargo to ports outside India and vice versa. It would transport cargo on vessels owned /chartered/pooled by it as well as on slot arrangement and in certain special circumstances such as where size of vessels was too large to enter Indian ports the assessee would transport cargo on feeder vessels from origin port to hub port and then cargo would be transported from hub port to destination port on vessels owned/chartered or pooled by assessee. The AO opined that assessee was not eligible for benefit of article 8 of DTAA in respect of freight earned by it from feeder vessels as they were neither owned, chartered or leased by assessee. The Tribunal noted that the co- ordinate bench in assessee's own case relating to earlier assessment year had followed order passed in case of DIT (International Taxation) v. Balaji Shipping U. K. Ltd. [2012] 211 Taxman 535/24 taxmann.com 229 (Bom.), and held that benefits of DTAA between India and Germany would be available to assessee in respect of revenue earned from feeder vessels obtained under slot hire arrangements. Accordingly, following the said decision it held that in the absence of any change in circumstances, benefit of article 8 of DTAA was to be granted to assessee in respect of revenue earned from feeder vessels in assessment year in question as well.

Hapag-Lloyd AG v DCIT - [2017] 87 taxmann.com 305 (Mumbai - Trib.) - I.T. APPEAL NO. 1441 (MUM.) OF 2017 dated 31.10.2017

439. The assessee, a Singapore based ship company engaged in the business of operation of ships in the international traffic claimed exemption under Article 8 of the India-Singapore DTAA but the AO denied the deduction on the ground that there was no evidence that the money had been actually remitted to Singapore and had suffered tax in Singapore. Accordingly, the AO denied treaty benefits under Article 24. The assessee during the Tribunal hearing filed a certification from the Singapore Authorities stating that the income had been brought to tax in Singapore. However, during the hearing, the Tribunal observed that as per the Singapore tax laws, the income of the assessee did not seem to be taxable in Singapore itself and therefore as per Article 24 if income has not suffered tax in Singapore, no benefit under the DTAA could

be granted. It held that there was a difference between 'subject to tax' and 'liable to tax'. In light of the new developments in the case, the Tribunal remitted the matter to the file of the CIT(A) for fresh adjudication.

BP Singapore Pte Ltd v ITO – ITA NO 409 / Rjt / 2016

440. The Tribunal held that the income of assessee (a UAE Co.) arising from operation of ships in India was not taxable as per Article 8 of India-UAE DTAA and held that the Revenue was incorrect in denying treaty benefits claiming that assessee could not be treated as a resident of UAE as its directors and shareholders were not UAE residents and its AGM was held outside UAE. It noted that the assessee was 'liable to tax' in UAE by the virtue of incorporation in UAE and hence it satisfied the 'residency condition', and rejected Revenue's invocation of tie breaker rule under Article 4(4) (which determines residence based on place of effective management - POEM) holding it would come into play when the assessee is resident of both the Contracting States but it was not the AO's case that assessee was a resident of India. Further, it upheld CIT(A)'s observation that since the Board meetings and important decisions were taken at Dubai and senior staff including MD were resident of Dubai, assessee's POEM was in UAE, and held that the place of holding of AGM and residential status of shareholders was not a relevant factor for determining residential status of the company. Further, it rejected Revenue's invocation of Limitation of Benefit ('LOB') clause under Article 29 of India-UAE treaty on the ground that entire share capital of the assessee was held by German entities and held that in order to invoke Article 29 what had to be established was whether or not the assessee company was not formed in the UAE. It further held that whether the company was to be formed in UAE or in Germany, would not have made any material difference as the Indo-German DTAA also granted similar treaty protection with regard to taxability of shipping profits.

ITO v Martrade Gulf Logistics FZCO -UAE - TS-575-ITAT-2017(Rjt) - ITA Nos. 7 to 9/Rjt/2011 dated 28.11.2017

441. The Tribunal held that the profits of the assessee from operation of ships was not taxable in India as per Article 8 of the India-UAE DTAA. It disagreed with the contention of the Revenue that since no taxes were actually paid in the UAE, the LOB clause was applicable and held that the requirement of actual liability had been done away with by the India-UAE protocol and thus the treaty benefits could not be denied. Further, it denied the Revenue's contention that the LoB clause was applicable as the vessel was owned by a non-treaty partner by observing that ownership of the vessel was not a condition precedent under Article 8.

ITO v MUR Shipping DMC Co (ITA No 405 / Rjt / 2013) – TS-603-ITAT-2015 (Rjt)

442. The Tribunal held that freight receipts of Singapore based shipping company was not taxable in India under Article 8 of the India-Singapore DTAA. IT held that the LOB clause was not triggered as the income was taxable on accrual basis and therefore the conditions stipulated in the LOB clause were not satisfied.

Alabra Shipping Pte Ltd v ITO (I.T.A. No.: 392/RJT/2014) – TS-588-ITAT-2015 (Rjt)

I. Section 44BB

- 443.** Where assessee, foreign company, had entered into contracts with (ONGC) for giving on hire their rigs for carrying out oil exploration activities in India, mobilisation fee received by assessee was to be included for computation of deemed profits and gains of business, chargeable to tax under section 44BB; Review petition against said decision was dismissed by the Apex Court.
Sedco Forex International INC v CIT [2018] 94 taxmann.com 119 (SC) – CIVIL APPEAL NO. 4906 OF 2010 dated 10.05.2018
- 444.** The Apex Court held that the mobilization fee received by the foreign assessee from ONGC for the transport of oil rigs to the drilling site was to be included in the amount subject to tax under Section 44BB of the Act. It held that on a joint reading of Sections 44BB, 5 and 9, the amount received by the assessee would be considered as income earned in India. Further it upheld the findings of the High Court and Tribunal and held that the mobilization fee was part of an indivisible contract and therefore the contention of the assessee that it was a mere reimbursement of expenses bearing no income element was invalid. It further held that as per Section 44BB of the Act whatever amount was paid to the assessee was to be treated as income of the assessee and therefore dismissed the assessee's appeal.
Sedco Forex International Inc. vs. Commissioner of Income-tax [2017] 87 taxmann.com 29 (SC) Civil Appeal No. 4906 of 2010 dated 30.10.2017
- 445.** The Court held that both section 44B and 172 of the Act open with a non-obstante clause and that section 44B provides for the computation and section 172 provides for the recovery and collection of taxes. The provisions of section 172 of the Act clearly provide the mechanism for levy, assessment and recovery and therefore there is no warrant in applying the provision of section 195 to the assessee and accordingly there is no obligation to deduct tax at source on the resident / Indian company making payments to non-resident covered under section 172 of the Act. Thus, no disallowance can be made under section 40(a)(i) of the Act in such a case.
CIT v VS Dempo & Co Pvt Ltd - (2016) 66 taxmann.com 93 (Bom)
- 446.** The Court held that consideration received by foreign company for services rendered to Indian entities for activity of 2D/3D seismic survey carried on in connection with exploration of oil could not be construed as "fees for technical services" in terms of Explanation 2 to section 9(1)(vii) and the same was liable to tax in India under section 44BB only if non-resident had a PE in India in relevant assessment year.
PGS Exploration (Norway)AS v ADIT - [2016] 68 taxmann.com 143 (Delhi)
- 447.** The AAR held that consideration received for on-board fabrication and installation of Floating Production Storage and Offloading facility under Change order was taxable in India under section 44BB of the Act despite working performed outside India as the change order was a mere extension of the Original Contract and therefore warranted similar tax treatment. Entire consideration received was taxable under section 44BB without splitting the same on the basis of travel of FPSO outside or in India as section 44BB did not provide for such splitting up.
Aker Contracting FP ASA - TS-773-AAR-2015

448. The AAR held that where the applicant provided coring service (which generally include the removal of sample formation material from a wellbore for further analysis of the said samples) sample analysis service to examine presence of petroleum in block for exploration, consideration received by applicant would be taxable under section 44BB and the provisions of sections 9(1) (vii), 44D and 44DA of the Act would not be applicable in view of the judgment of the Apex Court in Oil & Natural Gas Corpn. Ltd v CIT.

Corpro Systems Ltd., In re - [2016] 68 taxmann.com 330 (AAR-New DELHI).

449. Assessee, a non-resident company, was taxed u/s 44BB(1) @ 10% with respect to its revenue earned on account of charter hire of Deepwater Drilling Unit considering reimbursement receipts (on account of material recharge and fuel reimbursement as well as service tax reimbursement) as part of revenues taxable u/s 44BB. With respect to reimbursements other than service tax reimbursement, the Tribunal held that section 44BB refers to total payment to assessee or payable to assessee or deemed to be received by assessee and, thus, noting that it was not in dispute that amount was received by the assessee, it held that the AO was justified in including the said amount which was received while determining revenue under provisions of section 44BB. However, with respect to inclusion of receipts on account of reimbursements of service tax, the Tribunal held that the service tax was not an amount paid or payable, or received or deemed to be received by the assessee for services rendered by it and the assessee was only collecting service tax for passing it on to the Govt. Thus, it held that the service tax collected by the assessee does not have any element of income and therefore cannot form part of the gross receipts for the purposes of computing the 'presumptive income' of the assessee u/s 44BB.

TRANSOCEAN OFFSHORE DEEPWATER DRILLING INC. v ADD.CIT (IT) – (2018) 52 CCH 69 (Del Trib) – ITA No. 2072/DEL/2016 dated 30.01.2018

450. The Tribunal held that sections 44BB, 44DA and 115A rw Section 9(1)(vii) relating to royalty/FTS operate in different fields and accordingly held that where the assessee was imparting geophysical and geological services for prospecting for mineral oils, the same being services in relation to exploration of mineral oil then, the royalties/FTS would be taxable under section 44BB as section 44BB was a specific provision in relation to specific services and therefore would prevail over the other provisions dealing with royalties/FTS services. Accordingly, it held that the AO was not justified in taxing the receipts as a simple royalty or FTS under section 9(1)(vi)/(vii) read with section 115A.

DDIT v RPS Energy Pty Ltd.* - [2018] 92 taxmann.com 77 (Delhi - Trib.) - IT APPEAL NO. 45 (DELHI) OF 2015 dated MARCH 16, 2018

451. The Assessee had entered into a contract with a UAE based non-resident company for executing certain work in connection with oil fields located in Bay of Bengal and the consideration received under the said contract was not offered to tax since the entire work was executed outside India. The AO, however, brought the aforesaid receipts to tax in India u/s (9)(1)(i) holding the same to be income accruing or arising in India on the ground that the situs of the contract was in India. CIT(A) accepted the assessee's contention that the non-resident company did not carry out any business operation in India and did not have any PE in India as

per India-UAE DTAA, however, he brought to tax the impugned receipts u/s 44BB on the ground that the assessee itself (as an alternative plea) had opted to be governed by the said provision. The Tribunal held that merely because the assessee had taken an alternative plea without prejudice to the main contention, the same cannot be held against the assessee as there is no estoppel in law. It followed the decision of CIT v Enron Espat Services Inv. [327 ITR 626] wherein it was held that if the receipt by a non-resident was exempt from tax under the relevant DTAA, the said amount could not be brought to tax u/s 44BB and thus allowed the assessee's appeal.

ONGC LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) - (2018) 53 CCH 0272 DelTrib - ITA No. 1330/DEL/2016 & 1332/DEL/2016 dated June 29, 2018

- 452.** The Assessee-company, incorporated in France, was engaged in executing contracts with an Indian company for offshore drilling operations relating to mineral oil in India and computed its income as per the provision of section 44BB(1), thereby applying a deemed net profit rate of 10% of gross revenues. The assessee claimed that reimbursement of communication immersat charges and reimbursement of cost of equipment lost in oil wells as well as reimbursement of service tax should not be included in the gross receipts as they were in nature of reimbursement. The Tribunal dismissed assessee's appeal with regards to reimbursement of communication immersat charges and reimbursement of cost of equipment lost in oil wells, following the co-ordinate bench decision in the assessee's own case for an earlier year, wherein it was held that the said reimbursement receipts formed part of gross receipts for the purpose of section 44BB. However, it accepted the assessee's claim with respect to reimbursement of service tax, following Jurisdictional High Court decision of DIT v. Mitchell Drilling International (P.) Ltd. [2016] 380 ITR 130 (Del) and held that service tax being a statutory liability could not form part of the gross receipt for the purpose of deemed profit u/s 44BB. The Tribunal also dismissed assessee's claim that the interest received on income tax refund was covered by Article 12 of India-France DTAA which provides that interest will be taxable in resident State, following the High Court decision in the assessee's own case wherein it was held that since assessee had PE in India and was subjected to tax in India, the interest on refund of income tax was not covered by Article 12 of the said DTAA.

Pride Foramer SAS v JCIT - [2018] 97 taxmann.com 648 (Delhi - Trib.) - ITA No. 702 (DELHI) OF 2015 dated April 23, 2018

- 453.** The assessee company was engaged in providing services and facilities in connection with exploration and production of mineral oils and received revenue against work executed for different companies. The assessee offered to tax entire revenue u/s 44BB, thereby applying a deemed net profit rate of 10% of gross revenues. The AO however taxed the income received from Production Sharing Contract (PSC) partners engaged in oil exploration u/s 44BB but the receipts from the non-PSC partners (such receipt were on account of equipment rental) as FTS /royalty taxable @25% of the profit u/s 44DA. The Tribunal held that receipt from non-PSC partners was also taxable u/s 44BB in view of the Apex Court ruling in ONGC vs. CIT [376 ITR 306 (SC)] wherein it was held that where the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil and where the dominant purpose of each of such agreement is for prospecting,

extraction or production of mineral oils, though there may be certain ancillary works contemplated there under, the payments received under the said contracts would be more appropriately assessable under the provisions of section 44BB and not section 44D. Further, the Tribunal held that reimbursements received on account of service tax/ VAT were not to be included in gross receipt while computing tax payable u/s 44BB, relying on the decision of DIT v. Mitchell Drilling International (P.) Ltd. [2016] 380 ITR 130 (Del).

DEPUTY DIRECTOR OF INCOME TAX (INTERNATIONAL TAXATION) vs. B.J. SERVICES COMPANY MIDDLE EAST LTD. - (2018) 52 CCH 0371 DelTrib - ITA No. 6167/Del/2014 dated April 20, 2018

454. The Tribunal held that income received by a non-resident under a time charter agreement accrues and arises in India even when the vessel and crew are outside the territorial waters of India since the payments were intricately linked to the services/works rendered by the assessee and arose due to the execution of contract in India. Further, it held that if a non-resident is engaged in the business of providing services or facilities in connection with the prospecting for extraction or production of mineral oil, then 10% of the aggregate of the amounts received/accrued will be deemed to be the profits and gains of such business chargeable to tax in terms of provisions of section 44BB of the Act even if it was in the nature of Royalty / FTS since specific services were contemplated only under section 44BB of the Act and, therefore that being special provision, the same will prevail over all other provisions dealing with royalty/FTS.

Siem Offshore Crewing v ADIT - (2016) 46 CCH 0277 (Del Trib)

455. The Tribunal held that the service tax was to be excluded from the gross receipts for purpose of determining the income under section 44BB.

Sundowner Offshore International (Bermuda) Ltd. v Asstt. DIT (International Taxation) [2015] taxmann.com 170/70 SOT 656/41 ITR (Trib.) 71(Delhi)

456. The assessee, an Australian company, engaged in providing engineering and construction services to oil and gas companies received amounts for both work carried on in India as well as outside in India and only offered the income for work carried on in India as income relying on a statement prepared under software under the percentage completion method. The AO rejected the assessee's computation and held that both income for work carried on in and outside India were includible in the income which was taxable under Section 44BB of the Act which the assessee agreed to during the hearing before the Tribunal. The Tribunal in the interest of natural justice acceded to the assessee's requested to permit it to furnish the accounts to the satisfaction of the AO for the purpose of computation of income and directed it to furnish the financial statements and other documents as required under the law and held that after affording adequate opportunity of being heard to the assessee, the AO may decide the issues in accordance with the law.

DDIT v Clough Projects International Pty Ltd - (2017) 51 CCH 0163 MumTrib – ITA No. 2952/Mum/2010, 4930/Mum/2014, 4931/Mum/2014 (C.O. No. 09/Mum/2011, 61/Mum/2016, 62/Mum/2011 dated 06.10.2017

457. The Tribunal held that section 44BB does not envisage only direct use of plant and machinery in prospecting for or extraction or production of mineral oils and, therefore even amounts received by assessee from hiring of barge used for offshore accommodation of employees was to be taxed under section 44BB of the Act.

Valentine Maritime (Gulf) LLC v ADIT - [2017] 78 taxmann.com 109 (Mumbai - Trib.) - IT APPEAL Nos. 8694 AND 9239 (MUM.) of 2010 dated 18.01.2017

458. Where the assessee, a UK company had entered into a JV and was awarded a contract by RGPPL, an Indian company on Engineering Procurement and Construction basis and offered its income from engineering services and purchases within India for tax under section 44BBB but did not offer income arising out of procurement of offshore equipments for taxation, the Tribunal held that the AO erred in contending held that provisions of section 44BBB were applicable on the amount of offshore procurement as well, as it was part of same EPC contract. It observed that the contract entered into with RPPGL, in its consideration clause, had separately identified aggregate consideration payable in respect of different components of contract, namely, design and engineering services (onshore/offshore), import of equipment/material as well as equipment/material to be procured from within India and therefore held that the entire contractual revenue on account of offshore procurement could not be brought to tax under section 44BBB as consideration received by assessee for offshore supply of equipment was not chargeable to tax in India.

DCIT v Whessoe Oil & Gas Ltd - [2017] 87 taxmann.com 342 (Mumbai - Trib.) - IT APPEAL NO. 4673 (MUM.) OF 2015 dated 03.11.2017

459. The Tribunal held that where profits and gains of the business carried on by the assessee were to be computed at 10 percent of gross receipts as per section 44BB of the Act, deeming the gross receipts to be the income of the assessee, it could not claim a deduction of fuel cost incurred in respect of construction of offshore facilities, even though the same would be allowable under the normal provisions of the Act, since its taxability was governed by the provisions of Section 44BB which do not provide for deduction of expenses incurred.

Fugro Rovtech Ltd v ADIT(IT) - (2016) 66 taxmann.com 19 (Mum)

460. The Tribunal held that where the assessee and a Russian company entered into an agreement for the construction of Nuclear power plant in India, whereby the Russian company was to assist in setting up the Nuclear Power Station, the payment made to the Russian company was taxable under section 44BBB of the Act and not taxable as fees for technical services since the Russian company not only provided necessary assistance but also was actively involved in the process of setting up the Power Station by providing end to end services and deputing personnel for the purpose of carrying on construction.

DDIT(IT) v Nuclear Power Corporation of India Ltd - (2016) 46 CCH 0111 (Mum Trib)

461. The Tribunal held that the assessee, a Singapore Company and wholly owned subsidiary of an Indian company, engaged in the business of operating ships in international traffic across Asia and the Middle East could not be considered to have effective management and control in India merely because it had opened a bank account in India, having one of its directors in India or holding of only one meeting during the year in India. Also, it held that the location of the parent

company in India would not decide the residential status of the assessee. It dismissed the contention of the Revenue that the assessee was taxable under section 44B since the assessee did not own or charter or lease any vessel or ship for the year under consideration and therefore held that its income was to be taxed as business income and in the absence of PE in India no income was taxable in India.

Forbes Container Line Pte Ltd v ADIT - TS-126-ITAT-2016 (Mum)

m. Assessment / Appeals

462. The Apex Court dismissed Revenue's SLP against Delhi High Court judgment where the Court had quashed the AAR order rejecting assessee's application for advance ruling u/s 245R on the alleged ground that the questions for which reference was made, were part of the pending proceeding since notice was issued u/s 143(2) and further held that notice issued u/s 143(2) did not address itself to any specific question and that the issue of notice would be insufficient to attract automatic rejection of said application under proviso to section 245R(2). The High Court had directed AAR to process assessee's application and independently deal with it on merits in accordance with law.

Sage Publications Ltd. [TS-108-SC-2017] (SLP No. 3174/2017)

463. Where the reason recorded by the AO for issuing notice u/s 148 to the non-resident assessee proceeded on the assumption that assessee had business connection in India since large withdrawals were made from NRO bank account and return of income was not filed despite assessee having accrued interest income from NRO A/c, the Court held that the same could not form reasonable belief that income had escaped assessment and that the assessee was not required to file return as per section 115G. Accordingly, it quashed the notice issued u/s 148 as the same was without jurisdiction and bad in law.

Mr. Cyrus Kersi Vandrevala [TS-91-HC-2017(BOM)] (W.P. No. 2551 of 2016)

464. The Court held that when there was no failure on part of the assessee to disclose all material facts relating to income in question at the time of assessment and the AO concluded that the amount received by the assessee from its subsidiary under the software duplication and distribution license agreement was taxable as royalty, he could not subsequently initiate reassessment proceedings merely on the basis of change of opinion that the amount in question was to be taxed as business income.

Oracle Systems Corpn v DIT(IT) - (2016) 66 taxmann.com 286 (Del)

465. The Court held that where during the assessment under section 143(3) of the Act, receipts by the assessee was treated as royalty and taxed on gross basis at 15 percent, but the AO initiated reassessment proceedings contending that the said amount was to be taxed at 20 percent considering that the assessee had a PE in India and the royalty was attributable to the Indian PE, the reassessment proceedings were to be quashed as the AO had earlier examined the issue of royalty and its taxability in its entirety and all relevant facts were truly disclosed by the assessee.

Oracle Systems Corporation v ADIT – (2015) 62 taxmann.com 291 (Del)

466. The assessee had incurred the expenditure for the purchase of advertisement space from Google Ireland on which it did not deduct tax contending that the said amount was not chargeable to tax. However, the AO disallowed the same u/s 40(a)(i) on the ground that the assessee constituted dependent agent PE of Google Ireland and the payment made was in the nature of royalty and he also made an ALP adjustment in respect of the same. While pursuing the remedy before the DRP, the assessee made an application for stay of outstanding demand before the AO which was declined by him and consequently, relying on the CBDT Memorandum dated 29.12.2016 (which provides that in case demand is disputed by the assessee before CIT(A), then AO shall grant stay subject to payment of 15% of demand by assessee) filed the stay application before the Tribunal contending that the payment of demand be restricted to 15%. The Tribunal held that the assessee failed to establish the prima-facie case for demand non-recovery and that, the expenditure was rightly disallowed by the AO treating the assessee as dependent agent PE. It also noted that the assessee had sound financial position to pay the demand. It further rejected the assessee's contention that the addition on account of royalty u/s 40(a)(i) would lead to double additions as the addition was also made for the same transaction while computing the ALP u/s 92C and held that the disallowance u/s 40(a)(i) and the computation of income from international transaction regarding to ALP under Chapter X of the Income-tax Act operated in two different fields and had no co-relation with each other. It further held that the assessee would not suffer any irreparable loss / injury if the stay was not granted as it could get full refund with interest if assessee's appeal was allowed on merits. Further, relying on Karnataka High Court ruling in case of Flipkart India [TS-97-HC-2017(KAR)], it held that CBDT Instruction dated 29.02.2016 (providing guidelines for stay of demand at first appeal stage) would not be applicable to proceeding before the Tribunal and the same applied only to the proceedings pending before CIT(A). Accordingly, it directed the assessee to deposit 50% demand (20% within 7 days and balance in 6 monthly installment).

Google India Private Limited [TS-133-ITAT-2017(Bang)] [SP No. 45/Bang/2017]

467. The Tribunal held that where Commissioner passed a revisional order directing Assessing Officer to examine assessee's claim of tax credit under section 90 afresh in respect of foreign income, Assessing Officer could not redetermine assessee's residential status and change it from resident to non-resident.

C. Nedumudikilli v. Jt. CIT, Central Circle-IV (1), Chennai, [2015] 61 taxmann.com 79 (Chennai - Trib.), IT Appeal Nos. 2149 to 2152 (MDS.) of 2013 and 1472 to 1475 (MDS.) of 2014, dated June 25, 2015

468. The Tribunal, relying on decision in the case of ESPN Star Sports [TS-164-HC-2016(DEL)] and Honda Cars Ltd. [TS-5110-HC-2016(DELHI)-O], quashed draft as well as final assessment order passed by the AO as the assessee was not an 'eligible assessee' as defined u/s 144C(15) and since the assessee was an AOP between two Japanese companies it could not be treated as a foreign company. It further rejected Revenue's stand that since the project was erected in earlier years and the assessee's business was discontinued, set-off of losses u/s 72 should have been denied since the expenditure incurred by the assessee in preceding years was directly connected with earning of income received in current AY. Accordingly, the Tribunal allowed the carry forward of loss.

Mitsui Marubeni Corporation [TS-85-ITAT-2017(DEL)] (I.T.A. No. 5658/Del/2010)

469. The Tribunal quashed reassessment proceedings initiated by the Revenue seeking to tax technical and ground handling services rendered as fees for technical services under the Act as they were allegedly effectively connected with the assessee's PE in India, following the order of the Tribunal in the assessee's own case for previous assessment years wherein it was held that ground handling and technical services performed by the assessee should be considered as a part of operation of aircraft in international traffic under Article 8 of the India-Netherlands DTAA, and therefore could not be treated as fees for technical services under the Act.

DCIT v KLM Royal Dutch Airlines - TS-25-ITAT-2016 (Del) [India - Netherlands DTAA]

470. The assessee, a foreign company incorporated in Cyprus, was wound up on 24-5-2013, whereas assessment had been completed on 30-1-2017. The assessee claimed before the DRP for the first time that assessment was illegal and void since it was completed on a non-existent entity, the Tribunal held that as per section 176, in case of discontinuance of the business, the assessee was required to inform the AO and also in case of the liquidation, the liquidator of the company was required to give notice to the AO, informing him about such discontinuance/liquidation. It was noted that though the assessee had submitted that the AO was informed about the dissolution of the company but the assessee could establish that it had provided the information as per the requirements of the Act. The Tribunal, thus, set aside the assessment order passed and restored the matter to the file of the AO/ TPO to verify whether the assessee complied with various provisions of the Act relating to responsibility of company- in-liquidation or discontinuity of business.

Pesak Ventures Ltd. v DCIT(IT) - [2018] 95 taxmann.com 113 (Delhi - Trib.) - IT APPEAL NO. 1929 (DELHI) of 2017 dated June 19, 2018

n. Others

Interest under section 234B / 234C

471. Assessee, a non-resident, entered into a contract with Coal India Ltd. (CIL) in connection with development of a mine in India and it filed its ROI declaring procurement fees received from CIL as income from rendering technical services on which tax @ 30% u/s 115A was paid by CIL. However, the AO held that the procurement fees was in the nature of commission and not technical fees and held it to be taxable @ 65% and also held that the tax paid by CIL on behalf of the assessee was income in the hands of the assessee which had to be grossed up. Accordingly, he levied interest u/s 234B for the default in payment of advance tax. CIT(A) held that since the assessee was a non-resident, the payer (i.e. CIL) was responsible to deduct tax at source in terms of section 195 and the liability of the assessee to pay advance tax had to be computed after giving credit to the tax deductible (whether actually deducted or not) and accordingly, the assessee could not be called upon to pay interest under section 234B and therefore, deleted the interest under section 234B. The Tribunal upheld the order of the CIT(A) and held that if the payer failed to deduct tax, the Revenue could take action against the payer u/s 201(1), however, in such a case, the question of paying advance tax by the non-resident would not arise and accordingly, interest u/s 234B would be inapplicable.

ADIT v. White Industries Australia Ltd. [2017] 81 taxmann.com 33 (Kolkata - Trib.) (ITA Nos. 477, 478 & 507 (KOL) of 2010)

472. The Tribunal dismissed Revenue's appeal against the DRP's order directing the AO not to charge interest u/s 234B in the case of the assessee, a foreign company, since the income of a foreign enterprise is governed by the provisions of section 195 wherein any payment made to foreign enterprise would be subjected to full deduction of tax at source and thus consequently there is no liability on the foreign enterprise to pay advance tax.

HITT HOLLAND INSTITUTE OF TRAFFIC TECHNOLOGY B.V. v DCIT (2018) 53 CCH 0371 KoITrib – ITA Nos. 290/Kol/2016 & 348/Kol/2017 dated July 20, 2018

473. Relying on the decision in the case of DIT vs GE Packaged Power Inc. (2015) 56 taxmann.com 190 (Del HC) and CIT vs ZTE Corporation (2017) 392 ITR 80 (Del HC), the Tribunal held that interest u/s 234B could not be levied for non-payment of advance tax in the case of the assessee, a foreign company, since the income of foreign company was to be governed by provisions of section 195 wherein any payment made to foreign enterprise would be subjected to full deduction of tax at source. However, it upheld levy of interest u/s 234D holding that charging of interest u/s 234D was consequential in nature and remanded the matter to the file of the AO for verifying the actual refund figure granted to assessee earlier for computing the interest u/s 234D.

HITT HOLLAND INSTITUTE OF TRAFFIC TECHNOLOGY B.V. vs. DEPUTY COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION) - (2018) 52 CCH 0280 KoITrib - ITA No. 390/Kol/2015 dated Apr 4, 2018

474. The Tribunal held that provisions of section 195 of the Act do not apply to transaction between one non-resident to another non-resident. Further, it held that if the non-resident assessee is not liable to pay advance tax then there is no question to levy interest under sections 234B and 234C of the Act.

Star Limited [TS-773-ITAT-2016 (Mum) - TP]

475. The Tribunal deleted the interest levied u/s 234B & 234C in the case of non-resident assessee holding that if payer while making payments to non-resident has defaulted in deducting tax at source from such payments, the Revenue is not remedy-less and can take action against the payer u/s 201 and that the non-resident would not be liable to pay advance tax.

JAYANTHI BHARATH KUMAR v DCIT (2018) 53 CCH 0368 (VishakapatnamTrib) - ITA No. 272/Vizag/2017 dated July 13, 2018

Miscellaneous

476. The Apex Court held that the MAT Provisions were not applicable to foreign companies not (a) having a PE in India (b) required to seek registration under section 592 / 380 of the Companies Act as per Press Release dated September 24, 2015 and Instruction No 9 / 2015 dated September 2, 2015 issued by the Central Board of Direct Taxes

Castleton Investment Ltd v Director of Income tax (IT) – Civil Appeal No 4559 and 4560 of 2013

477. The Apex Court dismissed the Revenue's SLP filed against the decision of the Delhi High Court in the case of Hyosung Corporation wherein the Court had allowed the assessee's writ petition against the AAR ruling rejecting application on the ground that issues were pending adjudication before AO since section 143(2) notices were already issued. The High Court had accepted assessee's contention that mere issuance of notice u/s 143(2) would not make the question raised in the AAR application 'pending' before IT authorities. Accordingly, the Apex Court dismissed the SLP as it held that there was no legal and valid ground for interference with the order of the High Court.

CIT v Hyosung Corporation & ANR – TS-668-SC-2016

478. The Court held that expenses incurred on travelling of head office personnel of foreign bank who had travelled to various Indian branches were allowable under section 37(1), section 44C would not apply in such case.

DIT(IT) v. Oman International Bank S.A.O.G. [2017] 80 taxmann.com 139(Bombay) ITA Nos. 1775 & 1789 of 2013 dated July 1, 2015

479. The Court upheld the order of the Tribunal wherein it was held that forex gain arising to the assessee (Indian company) on receipt of royalty/interest income (which was exempt under India- Malaysia treaty) from Malaysian JV company was taxable in India notwithstanding the fact that the royalty/interest income was not taxable. It held that the gain on account of foreign exchange variation could not be attributable to royalty and interest earned in Malaysia, but was a benefit/income arising from subsequent transaction i.e. difference in exchange rate at the time of remittance of royalty/interest income from Malaysia.

Ballarpur Industries Ltd. TS-315-HC-2017(BOM) (ITA No. 11 of 2002 dated August 1, 2017)

480. The Court held that the Tribunal in the impugned order has recorded the fact that the respondent-assessee has admitted before it that to bring about parity, it is not claiming any deduction of interest paid by it to its head office while computing the taxable income, accordingly, in view of the above settled position that no person can make profit out of itself, the proposed question of law not being substantial, is not entertained.

Dir. of Income-tax (IT)I, Mumbai v. Credit Agricole Indosuez [2016] 69 taxmann.com 285 (Bombay), IT Appeal No. 1430 of 2013, dated June 17, 2015

481. The Court set aside Tribunal's order wherein the Tribunal had held that as per section 163, a representative assessee / agent is liable to tax in India on behalf of the non-resident assessee only with respect to its income which is 'deemed to have accrued in India' u/s 9 and not with respect to 'income accrued in India'. It held that section 160 makes it abundantly plain that a representative assessee would represent a non-resident assessee in respect of his income specified in section 9 and thus the representative assessee not only represents an income which has directly arisen or accrued in India but also that which has indirectly arisen or accrued in India, through a business connection. The Court held that only because of use of the short title to section 9, i.e. Income deemed to accrue or arise in India, does not absolve the representative assessee of the duty to account for any income which has directly arisen to the non-resident in India.

DIT(IT) v. Board of Control for Cricket in Sri Lanka - [2018] 97 taxmann.com 600 (Calcutta) - ITA Nos. 242 & 279 of 2008 dated September 25, 2018

482. The Court held that the words 'already pending' in section 245R(2) of the Act relates to the date of filing of application before the AAR and therefore notices issued under section 143(2) of the Act subsequent to filing the AAR application would not bar the AAR proceedings. It held that only if the question raised in the AAR application was already subject matter of proceedings before the income- tax authorities, could the AAR refuse to entertain the said application. Where the notice issued by the AO was in a standard format and not covering the specific issue which was subject matter of application before the AAR, there would be no bar on adjudicating such issues under section 245R of the Act.

LS Cable & System Ltd v CIT - (2016) 96 CCH 0011 (Del) Hyosung Corporation v AAR - TS- 274-HC-2016 (Del)

483. The Court allowed the Petitioner's writ and quashed the AAR order rejecting the Petitioner's application for advance ruling under Section 245R on the ground that since a notice under section 143(2) was issued in case of the Petitioner the matter was pending adjudication before AO thereby attracting bar on approaching the AAR, since the notice under section 143(2) was issued in general terms and it did not address itself to any specific question.

Sage Publications Ltd v DCIT - TS- 480-HC-2016 (Del) - W.P.(C) 5870/2016

484. The Court held that a notice issued under section 143(2) of the Act in a pre-printed format would not be a bar to the AAR application even if it was issued prior to the filing of the AAR application. Further, it held that the words 'already pending' in section 245R(2) of the Act covered situations wherein on the date of filing of the application before the AAR, the question raised therein was already subject matter of proceedings before the income tax authority and since the question before the AAR was not subject matter of the notice under section 143(2) of the Act, the AAR application could not be dismissed.

Hyosung Corporation v AAR - TS-77-HC-2016 (Del)

485. The Court restrained Vodafone Group Plc. UK (defendant) from initiating parallel arbitration proceedings under India-UK Bilateral Investment Promotion and Protection Agreement ('BIPA'), while the arbitration under India-Netherlands BIPA was pending. The Court observed that pursuant to retrospective amendments to Sec. 9 where the tax liability was imposed on Vodafone International Holdings B.V ('VIHBV') in respect of acquisition of stake in Hutchinson Essar Limited ('HEL') for its failure to deduct TDS on capital, VIHBV, the subsidiary of defendant group, had invoked the arbitration clause under the India-Netherlands BIPA. The Court held that the reliefs sought by the defendant under the India-UK BIPA and by its subsidiary i.e. VIHBV under the India-Netherlands BIPA were virtually identical and since the defendant as well as its subsidiary VIHBV were part of the same corporate group, they could not file two independent arbitral proceedings as that would amount to abuse of process of law.

Vodafone Group PLC United Kingdom TS-344-HC-2017(DEL) (I.A.9461/2017 in CS(OS) 383/2017 dated August 22, 2017)

486. Where the assessee had filed a revision petition u/s 264 seeking MFN clause benefit under the protocol to India Netherlands DTAA with respect to the payment of fees for technical services (FTS) to a Dutch party, which was rejected by the Commissioner holding that no notification was issued by CBDT making beneficial provisions under India Finland treaty applicable to India-Netherlands treaty, the Court held that protocol to the India-Netherlands DTAA itself provided for automatic application of subsequent treaty and therefore, no such separate notification was envisaged to be issued for enforcing such subsequent treaty with another OECD country. Accordingly, it set-aside the CIT's revisionary order u/s 264 and considering the fact that no detailed discussion on the factual aspect of the matter about payment of FTS was made, directed the CIT to decide the revision petition filed by the assessee u/s 264 de novo.
Apollo Tyres Ltd vs CIT-TS-585-HC-2017(KAR)-ITA No. W.P No. 31738 of 2016 dated 28.11.2017

487. The Court dismissed the petition filed by the petitioner challenging validity of section 94A(1) of the Act, (incorporating special measures in respect of transactions with persons located in notified jurisdictional areas) Notification No 86 and press release dated November 1, 2013. It held that Section 94A of the Act, empowering the Central Government to declare any country or territory outside India as a notified jurisdiction was constitutionally valid. It held that the Indian Constitution followed the dualistic doctrine with respect to international law and that international treaties do not automatically form part of the international law unless incorporated into the legal system by a legislation made by parliament. The Court held that the challenge to the constitutional validity of section 94A(1) of the Act was meritless and in dealing with the contention of the Petitioner that section 90(1)(c) of the Act could not be diluted by section 94A(1) of the Act, it held that in the case of lack of effective exchange of information, section 90(1)(c) of the Act gets diluted by the contracting parties and not by section 94A(1) of the Act. It observed that there was sufficient justification for the insertion of Section 94A of the Act which sought to take action against non-cooperative jurisdictions. With regards to the validity of Notification No 86, which declared Cyprus as a notified jurisdiction under section 94A of the Act, it held that the contention of the tax payer that countries with whom agreements were entered into under section 90(1) could not be considered as notified jurisdictional areas was incorrect as the language used in section 94A was 'any country or territory' and therefore the Central government could notify any country irrespective of the existence of a treaty with the said country. Further, the Court held that the impugned Press release, which speaks about the liability to withhold tax at 30 percent to payments made to non-residents in Cyprus using the words 'any sum', 'income' and 'amount', was not a legal document and therefore the language used therein could not be tested on the strength of law lexicons as they were meant for the benefit of the common man and therefore dismissed the contention of the petitioner pointing out the discrepancies in the terms used therein and those used in section 94A.
T Rajkumar v Union of India - (2016) 68 taxmann.com 182 (Mad)

488. The Court quashed the show cause notice issued u/s 163(1) proposing to treat the assessee, an Indian company, as agent of a foreign company (which was earlier a shareholder in the assessee-company) in respect of tax liability arising on account of capital gain earned on

transfer of shares of the assessee-company to another foreign company, in view of the fact that transfer took place outside India and the assessee had no role in such transfer.

WABCO India Ltd. Vs Dy.CIT (Int Taxation) Chennai [2018] 97 taxmann.com 620 (Madras) W.A. NO. 884 OF 2018 dated August 1, 2018

489. The Court, relying on the decision of the Apex Court in CIT v Toshoku Ltd (125 ITR 525), held that commission earned by a non-resident agent who carried on business of selling Indian goods outside India could not be said to be deemed income which had accrued or arisen in India.

CIT v Gujarat Reclaim & Rubber Products Ltd – (2015) 94 CCH 0148 Mum HC

490. Assessment order was passed under section 143(3) against which an appeal was filed before Commissioner (Appeals). While appeal was pending, assessment order was revised under section 263. The Tribunal quashed order under section 263 consequent to which order of Commissioner (Appeals) got revived. While giving effect to order of Commissioner (Appeals), Assessing Officer did not allow relief under section 90 for double taxation. The Tribunal held that Assessing Officer had not given any reasons for not allowing relief of double taxation under section 90 to assessee while giving effect to order of Commissioner (Appeals) and, therefore, impugned order passed by him was to be set aside.

Jt.CIT, LTU, Bangalore v. Canara Bank [2015] 64 taxmann.com 447 (Bangalore-Trib.), IT Appeal No.287(Bang) of 2014, dated July 24, 2015

491. The Tribunal deleted addition with respect to consultancy income received by assessee (RNOR) for services rendered outside India to a company (in Dubai in which assessee was a Director) and held that the income accrued to the assessee at a point of time (i.e. AY 2009-10) when he was a non-resident & since assessee already recognized the income at the point of accrual in an earlier year, it could not once again be considered as income at the point of receipt. Further it held that though assessee was paid by the company during the relevant AY i.e. after April 1, 2009 the confirmation from the company clearly indicated that services rendered were for the period November 2008 to March 2009 and accordingly held that as per Section 5(1) and 5(2) receipt in a later year, of an income which accrued or arose in an earlier year, would not render such amount taxable in the year of receipt.

Mr. J. Muthukumar [TS-93-ITAT-2018(CHNY)] - I.T.A.No.2203/CHNY/201 dated 13-02-2018

492. Where the assessee, a UK based company having its Branch Office in India, claimed deduction u/s 44C on a/c of "Head Office Expenditure" which the AO had disallowed as the same was not debited in the Profit and Loss A/c of the assessee, the Court allowed the said claim holding that it was irrelevant if the same was not debited in P&L A/C if the transaction was genuine, undisputed and not questioned.

Ernst & Young c ACIT [2018] 94 taxmann.com 227 (Delhi-Trib.) – ITA NOS. 6561-6562 OF 2016 dated 31.05.2018

493. The Tribunal allowed the USA based assessee-company's claim for interest u/s 244A on refund of TDS deducted by the Indian group company (also acting as representative assessee u/s 163) while making payment of royalty to the assessee-company. It rejected the reliance placed by the AO on CBDT Circular No.7/2007 dated 23.10.2007 stating that where refund of TDS is

claimed by the person making payment u/s 195, no interest/s 244A is admissible on such refund, holding that the said circular is applicable where the refund is claimed by the deductor and in the present case, the claim was made by the deductee. However, noting that the assessee had not claimed the TDS refund in the return filed but during assessment proceeding, the Tribunal held that interest will be allowed only from the date of passing assessment order and not from the period when TDS was deducted since the delay upto the date of passing assessment order was attributable to the assessee.

Whirlpool of India Ltd (as agent of Whirlpool Corporation (USA)) v DCI [TS-590-ITAT-2018(DEL)] -- ITA No.6530/Del/2015 dated 10.10.2018

494. The Tribunal held that the education cess is only a surcharge (as clarified by the Finance Act) and surcharge is only a tax [as clarified by the Hon'ble Apex Court in case of K. Srinivasan (1972) 83 ITR 346 (SC)] and therefore, education cess or any other surcharge should not be added separately to tax rate as per DTAA. The Apex Court in the aforesaid case held that term 'income-tax' as employed in section 2 of the Finance Act includes surcharge and additional surcharge whenever provided.

Soregam SA v DDIT [2019] 101 taxmann.com 94 (Delhi - Trib.) – ITA No. 123 (DELHI) OF 2015 dated November 30, 2018

495. The Tribunal held that guarantee fees received by non-resident assessee-company in respect of guarantees provided to support credit facilities availed by its subsidiaries in India was taxable as "other income" under Article 23 of India -UK DTAA (taxable at 40%) and not as 'interest' under Article 12 (subject to taxation at 15%). At the outset it rejected assessee's argument that such fees could not be taxed in India as they were received pursuant to the global corporate guarantee agreement with the banker outside India and held that it was not the entering of the global corporate agreement outside India that occasioned the assessee to charge the guarantee commission, but it was the act of the subsidiary in availing the loan that accrued the guarantee commission to the assessee". Referring to definition of term 'interest' u/s 2(28A) as well as Article 12(5) of the treaty, it held that the term 'interest' with its widest connotations, relates to payments made by the receiver of some amount, pursuant to a loan transaction and therefore could not include any payments made to stranger to the privity of loan transactions, though it was incidental to such loan. It therefore held that so long as the assessee was a stranger to the privity of contract of loan between the Indian entity and the banker, it could not categorize the corporate/bank guarantee recharge amount as interest for the purpose of taxation. It also rejected assessee's claim to treat guarantee fee/commission as 'business profits', noting that the assessee was in the business of manufacturing certain products and not providing corporate/bank guarantee.

Johnson Matthey Public Ltd. Company v DCIT - TS-578-ITAT-2017(DEL) - ITA No.-1143/Del/2016 dated 06.12.2017

496. The Tribunal allowed the assessee's appeal by allowing its claim of deduction in respect of profit shared with DRL, Switzerland ('DRL, SA') for AY 2009-10. Pursuant to tripartite 'out of court' settlement of patent infringement dispute with GlaxoSmithKline (GSK) regarding manufacturing of certain generic drug, assessee had entered into an agreement with DRL SA whereby DRL SA undertook liability insurance and Shelf Stock Adjustment ('SSA') risk and also agreed for

sharing assessee's R&D and legal costs for which the assessee agreed to share 50% of its profits arising from marketing the product in the US with DRL SA. The AO observed that the agreement between the assessee and the DRL SA was not reported properly in 3CEB report or in T.P. documentation to show that the same was within arms length range and therefore contended that the transaction between DRL, India and DRL, USA was an arrangement of profit shifting from India to Switzerland. Against this, DRP concluded that, 25% of the total profit paid to DRL Swiss, by DRL USA, was taxable profit in the hands of the assessee and was diverted to Switzerland. Noting the above agreement Tribunal rejected the Revenue's stand that the transaction between assessee and DRL SA was a colourable device to shift profit from India to Switzerland and held that if there was no such arrangement, the assessee would have borne the entire costs towards SSA which, in the instant case, was borne by DRL SA. It held that the the agreement between DRL India and DRL SA could not be doubted and further stated that the Revenue was not entitled to analyse the business decision taken by assessee for sharing profits.

Dr. Reddy's Laboratories Limited. vs. Add. CIT - TS-186-ITAT-2017(HYD) - ITA.No.294/Hyd/2014 dated 28.04.2017

497. Where pursuant to an agreement with Indian subsidiary, assessee-US company rendered various services to Indian subsidiary only in USA and no part of same was rendered in India and compensation payable by Indian subsidiary to assessee for services covered only cost actually incurred by assessee and no profit element or mark-up on cost was to be added to it, the Tribunal held that since expenses incurred out of India earlier paid by assessee were reimbursed in India by Indian subsidiary, the assessee being not recipient of sums in question and being only a conduit for payment by Indian subsidiary to third party service provider, said payment could not be charged to tax in hands of assessee.

ACIT vs Timken Company ITA No. 387 & 398 of 2010, [2017] 88 taxmann.com 21 (Kolkata - Trib.), dated 29.11.2017

498. The Tribunal held that only executive and general administration expenditure (viz., salary, rent, travelling expenses, tec.) incurred by the assessee outside India as enumerated in clause (iv) of Explanation to section 44C falls under purview of 'Head office expenses', 'license fee' payment for use of brand/trademark and other business intangibles, being in nature of intellectual property, fall outside ambit of section 44C. Further, services elaborated in management services agreement (viz. corporate communications, corporate finance, IT, HR etc.) also do not fall within ambit of section 44C. Since 'license fees' and 'management charges' does not fall in nature of Head office expenses under section 44C, disallowance made by the Assessing Officer and partly confirmed by Commissioner (Appeals) was to be deleted.

Lloyd's Register Asia (India Branch Office) v. Asstt. CIT [2015] 58 taxmann.com 58/69 SOT 441/ITR (Trib.) 186/174 TTJ 165 (Mum.)

499. The Tribunal held that the assessee, a partnership firm registered in the UK, was entitled to the benefits of India-UK Treaty even though it was not recognized as a taxable entity under the taxation laws of UK.

DDIT(IT) v Zee Telefilms Ltd – (2015) 45 CCH 0112 Mum Trib

500. Where the assessee, an Indian member of KPMG International (KPMGI), Switzerland, a mutual association, made payment towards reimbursement of cost to KPMGI, (as per the Membership Agreement) to enable it to discharge its function, the Tribunal held that the said payment was not taxable 1) on the grounds of 'mutuality' since, there was complete identity between the contributors and participators and further the actions of the participators and contributors were in furtherance of the mandate of the association and 2) in any case there was no profit element in the impugned transaction.

KPMG [TS-150-ITAT-2017(Mum)] [ITA No.2493/Mum/2012]

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