IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : "E" NEW DELHI

BEFORE SHRI I.C. SUDHIR, JUDICIAL MEMBER
AND SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

ITA No:1941/Del/2012
Asstt. Year : - 2006-07

Income Tax Officer, TDS Ward-2(1), International Taxation Drum Shaped, New Delhi. (PAN ALJPK6448A)	vs. Nokia India Pvt. Ltd. 5th Floor, Tower-A&B Cyber Green DLF City Gurgaon, Haryana.
(Appellant)	(Respondent)

Appellant by : Shri Salil Kapoor, Advocate,
Shri Vikas Jain, Advocate
Respondent by :Shri P. Dam Kanunjna Sr. DR

Date of Hearing :14.5.2015
Date of pronouncement : 8.7.2015

O R D E R

PER INTURI RAMA RAO, AM

This is an appeal filed by the revenue against the order of Commissioner of Income Tax (Appeals) XXIX New Delhi dated 28.2.2012 raising the following grounds of appeal :-

1. *"Whether on the facts and circumstances of the case, the CIT(A) has erred in holding that the consultancy fee paid to Ms Olaf Grandlund OY Finland, was not chargeable to tax in India and thus that there was no requirement to withhold*

tax on the impugned payments, even though these had been characterized as FTS taxable on source basis.

2. *Whether on the facts and circumstances of the case, the CIT(A) has erred in ignoring the decision of the Hon'ble Supreme Court in the case of 239 ITR 587 & 327 ITR 456 wherein it was held that it was incumbent upon the deductor to apply and seek a certificate for lower withholding tax order so as not to invite the provisions of section 40(a).*

3. *Whether on the facts and circumstances of the case the CIT(A) has erred in adjudicating that the services rendered by Ms Olaf Grandlund OY Finland, as per Para 5 of the ITO TDS's order were not squarely covered in the definition of FTS under Article 13(4)(c) of the India Finland DTAA and S 9(1)(vii), without any requirement for "make available" conditionality.*

4. *Whether on the facts and circumstances of the case the CIT(A) has erred in adjudicating that the services rendered by Ms Olaf Grandlund OY Finland, as per "scope of work" laid down in its agreement with assessee dated 01.02.2005, was not squarely covered in the definition of FTS under Article 13(4)(c) of the India Finland DTAA by relying upon the terms of an agreement entered into with Leighton Contractors (India) P Ltd which agreement does not find any mention in ITO TDS's order and thus constituted fresh evidence under Rule 46A.*

5. *Without prejudice to the foregoing ground, whether the CIT(A) has erred in accepting ration decidendi of case laws that applied the MOU accompanying the Indo-US DTAA to understand the terms of the Indo-Finland DTAA and "make available" especially since a treaty is unique for two nations that are a party to it having been negotiated and entered in to at a political level and has several considerations at their base.*

6. *Whether on the facts and circumstances of the case the order of the CIT(A) is perverse and liable to be quashed.*

7. *The appellant prays for leave to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal. "*

2. Briefly stated the facts of the case are as under :-

The respondent-assessee company i.e Nokia India Private Ltd. is a wholly owned subsidiary of Nokia Corporation. It is a company incorporated under the provisions of the Companies Act, 1956. During the year under consideration, it is in the process of setting up a manufacturing facility at Chennai. For this purpose, the contract for design, manufacturing and completion for the manufacturing facilities

was given to Leighton Contractors India Pvt. Ltd.. Olof Granlund Oy is a company incorporated in Finland and is engaged in the business of providing consulting services in relation to HVAC, electrical and fire protection systems and this company was engaged by the respondent-assessee company for the purpose of reviewing the design, construction plans prepared by the Leighton Contractors India Pvt. Ltd. This was to ensure that Nokia's global standards for the manufacturing facility are met. These services are rendered outside India only.

3. In consideration for the services rendered during the year under consideration the respondent-assessee company paid Euro 2,208421 (Rs. 11,869,359 approx) to Olof Granlund . Since the respondent assessee company took a view that the said payments are not liable to taxation in India under the provision of Double Taxation Avoidance Agreement entered between India and Finland. No taxes were withheld by the respondent- assessee company on said payments.

4. However, on the basis of information received from the authorised dealer, the Income Tax Officer TDS Ward-2, Intl. Taxation (hereinafter called TDS Officer) had called for the information and details and reasons for not deducting TDS on the said payments. After receipt of this information from the respondent-assessee company, a show cause

notice dated 28th September 2006 was issued to the respondent-assesee to explain as to why it should not be treated as an assessee in default under section 201 (1)and 1(A) of the Act for non deduction of tax u/s 195 of the Act in respect of the above payments made to the Olof Granlund Oy Finland. The respondent- assessee company responded to the show cause notice vide its letter dated 20th December, 2005 wherein the nature of services provided by M/s Olof to Nokia was brought to the notice of TDS Officer. The submissions made by the respondent- assessee company before the TDS Officer are as under :

> *"Olof Granlund Qy, company tax resident in Finland, is providing design control and quality control services in relation to HVAC, Electrical and Fire protection systems to be installed in Nokia India's manufacturing facility in Chennai. These services are being rendered by Olof Granlund Oy primarily from outside India and its employees are required to make intermittent visits to India only to attend meetings with Nokia India.*

Justification for Non withholding of taxes on payments made to Olof Granlund Qy

> *As per section 195 of the Act, taxes are required to be withheld on payments made to non-residents where such payments are chargeable to tax in India. Accordingly, in order to justify why no taxes have been withheld by Nokia India on payments made to Olof Granlund Qy for provision of design control and quality control services. It is pertinent to outline the technical position as regards taxability of Finnish enterprises in India.*
>
> *As per the provisions of section 90(2) of the Act, a foreign comp[nay has the option of being taxed in India under the provisions of the Act or the provisions of the Agreement for Avoidance of Double Taxation between India and the country of residence of such foreign company, whichever is more*

beneficial. Taxability of payments made to Olof Granlund Qy (being a tax resident of Finland) has therefore been determined under the beneficial provisions of the India-Finland tax treaty ('tax treaty').

Under the provisions of Article 13(4)(c) of the India-Finland tax treaty, the term ' fees for technical services' ('FTS') has been defined to include payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

The term 'make available' has not been defined under the India-Finland tax treaty. However, reliance can be placed on the 'Memorandum of Understanding concerning Fees for Included Services in Article 12' ('MOU') of the India-US tax treaty, which has clarified that :

> *"Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc.are made available to the person purchasing the service, within the meaning of paragraph 4 (b). Similarly, the use of a product, which embodies technology, shall not per se be considered to make the technology available."*

5. The main contention of the respondent-assessee company before the Ld. TDS Officer was that the above services do not come within the purview of Article 13(4) (c) of the DTAA between India and Finland as technical services. It was further contended that the services rendered cannot be even be taxed under Article 7 read with Article 5 of the DTAA in the absence of PE of Olof in India. However, the TDS Officer had not agreed with the above submissions and held that the services

rendered by Olof Granlund are in the nature of technical services and further held that the respondent-assessee company is deemed to be assessee in default u/s 201(1) for non deduction of tax at source u/s 195 of the Act at source u/s 195 of the Act and while coming to this conclusion the AO had placed heavy reliance on the basis of Hon'ble Supreme Court in the case of Transmission Corporation of AP Ltd. vs. CIT (1999) (239 ITR 587) and demanded a tax of Rs. 13,34,198/- + interest of Rs. 1,47,263/- u/s 201(IA) of the Act vide his order dated 28.11.2006.

6. Being aggrieved with the above order respondent-assessee filed an appeal before Commissioner of Income Tax –XXIX, New Delhi ,who vide his order dated 28th February, 2012 allowed the appeal. It was contended before the CIT(A) that the scope of services rendered by M/s. Olof Grandlund Oy, Finland is limited to design review and other related services and no technical knowledge skill, know how had been made available to the respondent-assessee company and further submitted that no technical plan design had been transferred by the said Olof Granlund Oy to the respondent-assessee company and therefore the services rendered does not qualify as FTS for technical services under the India Finland Tax Treaty and it was further submitted that the

services were rendered from outside India and the payments are in the nature of business receipts and are not liable to taxable in India in the absence of permanent establishment of Olof Granlund Oy and this fact had not been disputed by the TDS Officer. In view of these, it was submitted that the subject payments are not liable to tax in India and therefore there was no liability for deduction of tax at source under provision of section 195 of the Act. In support of the above contention and for the purpose of definition of the term "make available" the reliance was placed on the decision of Raymond Limited vs. DCIT in 80 TTJ 120 (Mum) . The Ld. CIT(A) after considering the submissions made on behalf of the assessee- respondent company allowed the appeal vide para 5.2 to 5.4 of his order by holding as under :-

~5.2 *"As per provisions of section 195, if a person pays to a non-resident any sum chargeable under provisions of IT Act, then payer has to deduct tax at source as per prescribed rates. Therefore, the trigger for applicability of section 195 is that the sum paid to a non-resident should be chargeable to tax in India as per provisions of IT Act. In the present case, the services provided by non-resident company are technical by nature as per provisions of section 9(l)(vii) of IT Act. Now, we have to see whether these services could be termed as technical services as per Article 13(4) as reproduced above. According to AO, these services are in nature of technical services as per Article 13(4)(c) of the treaty. It is seen that clause (c) of Article 13(4) consists of two limbs, and there is a word "or" between two limbs. The*

services should fall in category of either of two limbs before these could be termed as technical services. The appellant has furnished copy of proposal / agreement with Olof Granlund Oy and Leighton Contractors (India) Private Ltd. The services provided by Olof Granlund Oy are mentioned in clause I or proposal dated 01-02-2005, which is scope of work. Further, clause C 1 of the agreement entered into by the appellant with Leighton Contractors (India) Private Ltd. is Contractor's obligations. Combined reading of the relevant clauses of these two agreements indicate that designs and technical plans are provided by Leighton Contractors (India) Private Ltd. and design review services are provided by Olof Granlund Oy. Therefore, the nature of services provided by non- resident OlofGranlund Oy do not fall in second limb of article 13(4)(c). In the first limb of the said article, the words 'make available' qualify the technical services and unless this qualification is satisfied, the services which are otherwise technical in nature can not be termed as technical services under the said article of treaty. The meaning of the qualification i.e. make available has been provided by various case laws as relied upon by the appellant. I have gone through those case laws carefully. The ratio decidendi of various case laws as relied upon by the appellant and mentioned supra has been clearly laid in case of Rayrnond Ltd Vs DCIT reported in 86 ITD 761 (Mumbai) as below :-

..... mere rendering of services is not roped in unless the person utilizing the service is able to make use of the technical knowledge etc by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill etc .must remain with the person utilizing the services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skills etc from the person rendering the services to the person utilizing the same is contemplated by the article ... "

5.3 Therefore, unless the person receiving services is in a position to use that technological knowledge in future on its own without resorting to the initial service provider, it can not be said that the services have been made available. In present case under consideration, Olof Granlund Oy has provided mainly design review services. The AO has not established that this technical knowledge, experience, skill, know-how or processes has been transmitted to the appellant and the appellant is now equipped to use it in future without resorting to the non-resident service provider. In the absence of this key element, the services provided by the non-resident do not fall within meaning of the first limb of artlcle 13(4)(c). Therefore, it is held that services provided by Olof Granlund Oy to the appellant can not be characterized as technical services and hence payments made by the appellant do not bear the character of FTS. Further, it is admitted position that non-resident Olof Granlund Oy do not have any PE in India and therefore, these payments are not taxable as business receipts under article 7 of the treaty.

5.4 As discussed supra, the payments made by the appellant to Olof Granlund Oy are not chargeable to tax in India either as FTS or as business income under relevant articles of India-Finland treaty. Therefore, provisions of section 195 of IT Act, 1965 are not triggered. It is consequently held that the appellant is not liable to deduct any tax on payments made to Olof Granlund Oy and impugned order u/s 201 & 201(A) stand quashed. This dispose off the grounds of appeal no. 1 to 4."

7. Aggrieved by this above order the revenue had come up with the present appeal. Ld. DR had relied upon on the order of TDS Officer. On the other hand the Ld. Counsel for the assessee respondent company had drawn our attention to the orders of Hon'ble Delhi High Court in the case of Director of Income Tax vs. Guy Carpenter & Co. Ltd. and decision of Karnataka High Court in the case of CIT vs. M/s. De Beers

India Minerals Pvt. Ltd. where the term "make available" was interpreted and he also placed heavy reliance on the orders of CIT(A).

8. We have heard the rival submissions and perused the material on record. The undisputed facts of the case are that the nature of services rendered by Olof Granlund Finland to the assessee respondent company are as under :-

a) Review of systems description, diagrams, cost estimates, building designs etc.

b) Review of preliminary system design and quality control

c) Review of equipment list/selections, lay out proposals, conducting inspections etc.

9. Now we are called upon to examine whether the nature of above services fall within the scope of the 'fees for technical services'. Undisputedly the recipient of the payment is a resident of Finland. And therefore he is entitled to be governed by the provisions of DTAA of India with Finland. The Term fees for technical services was defined in Article 13 in DTAA to the extent relevant to the present case, is reproduced below :-

> *"4. For the purpose of paragraph 2, and subject to paragraph 5, the term 'fees for technical services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including*

the provision of services of technical or other personnel) which :

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

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in sub-paragraph (b) of paragraph 3 is received : or

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

In the present case, clause (a) & (b) would not be applicable given that Olof Granlund is providing consultancy services independent of supply of any property, right or information in respect of which consideration had been received by Olof Granlund.

In order to determine whether payments made to Olof Granlund fall under Article 13(4)(c), it is imperative to determine whether these services 'make available' any technical knowledge, experience, skill, etc. to the recipient of the service or involves development and transfer of technical plan or design to the recipient of services.

The India-Finland tax treaty does not specifically define the term ' make available'. Accordingly, in absence thereof reliance may be placed on the meaning assigned to the said term under the MoU to India-USA Double

Taxation Avoidance Agreement (hereinafter referred to as India-US Treaty), which serves as an official guide to interpreting India-US tax treaty and reflects the policies, understanding reached with respect to the application and interpretation of India-USA Treaty.

In this regard, it is pertinent to mention the Mumbai Tax Tribunal in the case of Raymond Limited Vs Deputy Commissioner of Income-tax reported in 80 TTJ 120 (Mum), has clarified that meaning of the term 'make available' under India-UK Double Taxation A voidance Agreement may be inferred from the MoU to India-US Treaty. This equally and expressly follows that the Honorable Tribunal has accepted the concept of parallel treaty interpretation. The ITA T held as under:

"The MOU appended to the DTAA with USA and the Singapore DTAA can be looked into as aids to the construction of the UK DTAA. They deal with the same subject (fees for technical services, referred to in the US agreement as "fees for included services"). As noted earlier, it cannot be said that different meanings should be assigned to the US and UK agreements merely because of the MOU despite the fact that the subject-matter dealt with is the same and both have been entered into by the same country on one side (India). The MOU supports the contention of the assessee regarding the interpretation of the words

"make available ". The portions of the MoU explaining para 4(b) of the relevant article, which we have extracted earlier in our order while adverting to the contentions of the assessee, fully support its interpretation. Example (4) given in the MOU also supports it. This is of a US company manufacturing wellboard for the assesee using assessee's raw material but using its own Plant. No technical knowledge, experience, skills, plan or design is held to have been made available in such a case. However, in contrast, example (5) is of a US company rendering certain services in connection with modifying the software used by the Indian company to suit particular purpose. A modified computer software programmme is supplied by the US company to the Indian company. It is, therefore, held that there is a transfer of a technical plan (i.e., computer software) which the US company has developed and made available to the Indian company. The fees are chargeable. These examples affirm the position taken by the assessee-company before us as to the interpretation of the words "make available".

In fact, it has been held by various courts that the principle of parallel treaty interpretation is permissible where language of the two treaties is similarly worded and one treaty clarifies meaning of the terms (or

language) used. The above view has been affirmed by the subsequent pronouncements in the following cases:

(a) National Organic Chemicals Industries Ltd vs DCIT (96 TTJ 765) (Mumbai IT AT)

(b) CESC vs CIT(80 TTJ 806) (Calcutta ITAT).

(c) DDIT v Preroy A.G. (2010) 39 SOT 187 (Mum)

(d) Intertek Testing Services India (P) Ltd., In re (2008) 307 ITR 418 (AAR)

MEANING OF THE TERM 'MAKE AVAILABLE'

Under the MoU to India-US tax treaty, it has been clarified that:

"Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skills, etc. are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product, which embodies technology, shall not per se be considered to make the technology available."

In other words, the MoU seeks to clarify that the services are considered to be made available only where the services leads to transfer/

imparting of technical knowledge, experience, ski 11, know-how, or processes to the recipient which enables the recipient to apply the same on his own.

Further, on page 790 of Klaus Vogel on Double taxation conventions - Third edition, Vogel comments that the criterion used to distinguish the provision of know-how from rendering advisory services is the concept of imparting. The relevant extract of the commentary has been reproduced below:

> "Imparting of experience: Whenever the term royalties relates to payments in respect of experience (know-how'), the condition for applying Article 12 is that the remuneration is being paid for 'imparting' such know-how ..... .

..... in contrast, the criterion used to distinguish the provision of know-how from rendering advisory services is the concept of 'imparting'. An advisor or consultant, rather than imparting his experience, uses it himself (BFH BstBl II 235 (1971),' Ministre des Relations exterieures, Response a M Bockel, 36 Dr. Fisc. Comm. 1956 (1984)). All that he imparts is a conclusion that he draws - inter alia - from his own experience. His obligation to observe secrets, or even his own interest in

retaining his 'means of production', will already prevent a consultant from imparting his experience. In contrast to a person using his own know-how in providing advisory services, a grantor of know-how has nothing to do with the use the recipient makes of it.. ....

The term 'make available' had come for interpretation before Hon'ble Jurisdiction High Court in the case of Director of Income Tax vs. Guy Carpenter & Co. Ltd. ITA No. 202/2012 dated 23.4.2012 which held as under :-

> *"9. A plain reading of Article 13(4)(c) of the DTAA indicates that 'fees for technical services' would mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services which, inter alia, "makes available" technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design. According to the Tribunal this "make available" condition has not been satisfied inasmuch as no technical knowledge, experience, skill, know-how, processes, have been made available by the assessee to the insurance companies operating in India. It also does not consist of the development and transfer of any technical plan or technical design.*
>
> *10. The Tribunal examined the evidence available on record in order to return a finding on the issue as to whether the payments received by the assessee from the insurance companies operating in India would fall within the expression 'fees for technical services' as appearing in article 13(4)(c) of the DTAA read with section 9(1)(vii) of the said Act. While doing so the Tribunal, inter alia, found that the assessee company was an international re insurance intermediary (broker) and was a tax resident of United Kingdom. Further, that it was a recognized broker by the financial service authority of United Kingdom. It was also an admitted position that the assessee did not maintain any office in India and that it had a referral relationship with J.B. Boda reinsurance (Broker) Pvt. Ltd of Mumbai and that J.B. Boda was duly licenced*

by the Insurance Regulatory & Development Authority to transact re insurance business in India.

11. The Tribunal also observed as under.-

"27. In the illustrative transaction, New India Insurance Co. Ltd. in India has entered into an agreement to reinsure on an Excess Loss basis the catastrophe risk arising from its primary insurance cover in conjunction with lB. Boda and Alsford Page and gems Ltd. (the reinsurance brokers). The terms of the agreement specifies that the assessee in conjunction with J.B. Boda are recognized as intermediary, through whom all communications relating to this agreement shall pass. The terms of the agreement further provides that the assessee will provide all the details of agreed endorsements to the re insurers bye-mail or facsimile and shall submit the slip policy to XIS (Lloyd's processing market) for signing. The assessee will act as a claim administrator and will submit claims advices to relevant . market systems. For the services rendered, the assessee along with the other reinsurance brokers acting as an intermediary in the reinsurance process for New India Assurance Co. will be entitled to 10% brokerage. From the role played by the assessee in the re insurance process as discussed above, it is evident to us that the assessee was rendering only intermediary services while acting as an intermediary/facilitator in getting the reinsurance cover for New India Insurance Co. There exists no material or basis on the basis of which, it would be said that the assessee was rendering any kind of technicall consultancy service within the meaning of Article 13 of Indo-UK treaty. The consideration received by the assessee acting as an intermediary in the reinsurance process cannot, by any stretch of imagination, be qualified as a consideration received for rendering any financial analysis related consultancy services, rating agency advisory services, risk based capital analysis etc. as alleged by the A.O."

The Tribunal also noted the process by which the transaction takes place. It has been pointed out that the originating insurer in India would contact J.B. Boda/ M.B. Boda for placing identified risks/ class of risks with international reinsurers. J.B. Boda, in turn, would contact one or more international firm(s) of re insurance broker(s) like the assessee for competitive proposals from the international reinsurer. Then, the international reinsurance brokers like the assessee would contact other primary brokers and various syndicates in the Lloyds market for competitive proposals. Based on the various offers or proposals given by the international reinsurance brokers, like the assessee, to J.B. Boda, the latter would present various options to the originating insurer in India, which would take a final decision in the matter. Based on the decision of the originating insurer in India, the policy terms would then be

agreed upon and the risk would be placed with the international reinsurer. It was also pointed out that as per the normal industry practice, the reinsurance premium net of brokerage of 10% as per the policy contract is remitted to the assessee, i.e., reinsurance brokers, for onward transmission to international reinsurers. The intermediation fee which is another word for brokerage is paid separately by the originating insurance in India to J.B. Boda, the international re insurance brokers like the assessee and other intermediaries, based on a mutually agreed ratio which accounts for their relative contribution in the reinsurance process.

12. Based on this manner of transacting, the Tribunal came to a conclusion that the payment received by the assessee could not be regarded as 'fees for technical services'. Further, more, the Tribunal also held that such receipts would not amount to fees for technical services as the "make available" clause contained in article 13(4)(c) had not been satisfied in the facts and circumstances of the present case.

13. In our view, the Tribunal has arrived at these conclusions purely on assessing the factual matrix of the case at hand. The findings are in the nature of factual findings and, therefore, according to us, no substantial question of law arises for our consideration, particularly, because the learned counsel for the Revenue was unable to point out any perversity in the recording of such findings. As such no substantial question of law arises for our consideration. The appeal is dismissed. There shall be no order as to costs."

Even Hon'ble Karnataka High Court in the case of CIT vs. De Beers India Minerals (P) Ltd. (2012) 346 ITR 467 (Kar.) had interpreted the term 'make available' as under :-

"22. What Is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that It "makes available" to the recipient. Technical knowledge, know-how and the like., The service should be aimed at and result in transmitting technical knowledge, etc ..so that the payer of the service could derive an enduring benefit and utilize the knowledge or know how on his own in future without the aid, of the service

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

In view of the above, it can be concluded that rendering of technical services leads to transfer/ imparting of technical knowledge, experience, skill, know-how, or processes to the recipient which enables the recipient to apply the same on his own. In other words, the recipient acquires a means to an end, i.e he acquires the technical knowledge, experience, skills, know-how or processes from the provider which acts as a means and enables him to use the same for achieving a further end. In a service which does not qualify as technical services, the services itself serves as an end for the recipient since he does not

acquire any technical knowledge, experience, skill, know-how, or processes from the service provider.

In light of the judicial pronouncements highlighted above (which have affirmed the principle of parallel treaty interpretation, especially as regards the meaning of the term 'make available'), considering the interpretation provided in the MoU to India-US tax treaty,services can be said to 'make available' technical knowledge etc, where such technical knowledge is transferred to the person utilizing the service (Le the appellant in the instant case) and such person is able to make use of the technical knowledge etc, by himself in his business or for his own benefit and without recourse to the performer of services (i.e OlofGranlund) in the future. The mere fact that provision of service may require technical knowledge by the person providing the service would not per se mean that knowledge has been made available.

The learned assessing officer has in the impugned order accepted the position that recourse should be made to the interpretation provided under the MoU to India-US tax treaty to determine whether payments made by the appellant qualify as FTS under the provisions of India-Finland tax treaty. However, the learned assessing officer has erroneously relied on certain examples provided under the MoU to

conclude that payments made by the assessee qualify as FTS under provisions of India- Finland tax treaty.

Further, the term 'make available' in the context of consultancy services has been subject matter of consideration before various appellate authorities, which have concurred with the above position. In this regard, the reliance can be made on the following decisions, which are squarely applicable to the case on hand:-

- **Mckinsey and Co. Inc. and Ors. Vs ADIT reported in 99 IT]) 549 (Mumbai)**

  In the above case as well, Mckinsey and Co Inc was engaged in providing strategic consultancy services, the Honorable Tribunal has held as under: -

  "Merely because the assessee have rendered certain consultancy services to the McKinsey India does not by itself can be reason enough to conclude that the consideration (or such consultancy services is taxable in India under art. 12(4)(b) as 'fees for included services".

  " ... generally speaking. technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology and various Benches of the Tribunal have consistently taken that view of the matter. "

  "..... When a patient visits a doctor and doctor advices him to undergo various tests. The patient does so. In the course of performing the scan tests, the scan centre used certain equipment. The scan centre actually provided the service. The patient, is interested in the end result i. e. report of the test

and not in technical know-how that is used in the scan report. Such technical knowledge is not passed on to the patient. If the patient requires the scan report again, he would require to get the report done once again and he cannot do it by himself. Technical skill, knowledge, know-how or experience is not passed on, though it is utilized in preparing the report. "

The above propositions have been reiterated in the following cases also :-

- CESC Ltd Vs DCIT reported in 275 ITR 15 (Cal);
- Raymond Ltd Vs DCIT reported in 86 ITD 761 (Mumbai);
- Deputy Commissioner of Income Tax vs Boston Consulting Group Pte Limited (93 TTJ 293), Mumbai ITAT;
- JCIT vs Essar Oil Limited (7 SOT 216), Mumbai ITAT; and
- National Organic Chemical Industries Ltd vs DCIT reported in 96 TT J 765

Additionally, it can be seen that under the provisions of Article 13 of India-Finland tax treaty, provision of services shall qualify as FTS where the same consist the development and transfer of a technical plan or technical design to the recipient of the services. For the services to qualify as FTS the provider must itself develop the technical plan or design and then transfers the same to the recipient of the services.

APPLYING THE ABVOE PRINCIPLES TO THE FACTS TO THE CASE ON HAND

As extracted above , in the instant case, Olof Granlund merely provided services to ensure that the HV AC, Electrical and Fire Protection systems to be installed at the respondent's factory in Chennai are of the right design and quality. The scope of work performed by Olof Granlund clearly lays down that Olof Granlund shall be responsible for providing following quality and design control services to the appellant:

a) Review of systems description, diagrams, cost estimates, building designs etc;

b) Review of preliminary system design and quality control;

c) Review of equipment list/. selections, layout proposals, conducting inspections etc;

and

d) Holding meetings in India and Finland, in connection with the above.

As is evident from the above, Olof Granlund's services to the respondent were not driven towards imparting any technical knowledge or experience to the appellant that could be used by the respondent independently in its business and without recourse to Olof Granlund. These services were neither geared to nor did they 'make available' any technical knowledge, skill or experience to the respondent or consisted of development and transfer of a technical plan or technical design to the appellant.

Given that the term 'make available' envisages a situation where the service recipient (i.e the respondent) is able to make use of the technical knowledge inherent in the services provided to him independently in his business or for his own benefit and without recourse to the service provider (i.e Olof Granlund), payments made by the respondent to Olof Granlund for provision of above services do not constitute FTS under narrower provisions of Article 13 of the India-Finland tax treaty. Further, the services rendered by OlofGranlund are restricted o the review of design, drawings, cost estimates etc prepared! developed by the contractor of the assessee, to check whether the same are as per Nokia group's standard. Olof Granlund 'as not responsible for preparation of any design, diagram etc for the appellant and accordingly the services provided by it does not involve development and transfer of technical plan or design.

Accordingly, we hold that the payments made by the respondent to Olof Granlund do not qualify as FTS under the provisions of India-Finland tax treaty.

Further, as per the provisions of India-Finland tax treaty, where the service do not qualify as FTS, Article 13 would not be applicable to the

Finnish enterprise and its taxability would need to be examined as per Article 7 (read with Article 5) of the India-Finland tax treaty.

As per Article 7(1) of the tax treaty, 'Business Profits' earned by a Finnish Enterprise is taxable in India only if that Finnish enterprise carries on business in India through a PE in India. The term PE has been defined in Article 5 of the India-Finland tax treaty to include a branch, office, factory, workshop, etc of the Finnish enterprise in India. Where the Finnish enterprise does not have a PE in India under the provisions of Article 5 of the India-Finland treaty, no portion of the income from services provided to a customer in India are liable to taxation in India.

In the instant case, admittedly Olof Granlund did not have any office/ place of business in India. Further, the services were performed by Olof Granlund primarily from outside India and its employees made intermittent visits to India only for the purpose of attending meetings with the respondent.

Accordingly, Olof Granlund Oy did not have a PE in India under the provisions of Article 5 of the India-Finland tax treaty during the subject period. Certificate obtained by the respondent from Olof Granlund in this regard is on record.

In light of the above, we are of the considered opinion that the payments received by Olof Granlund from the respondent for provision of services are not liable to taxation in India under the narrower provisions of the India-Finland tax treaty.

Now the issue that comes up for consideration is when the payment made by respondent-assessee is not taxable under the provisions of Income Tax Act 1961, whether he is still required to deduct the tax at source on such payments. The issue is no more *res integra* and covered by the decision of Hon'ble Supreme Court in the case of GE India Technology Centre P. Ltd. Vs. CIT and another 327 ITR 456 (SC) wherein the Hon'ble Supreme Court held that if payment is not assessable to tax there is no question of tax at source being deducted. The relevant portion of the judgment is reproduced as under :-

> *"If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in section 195(1). The said expression in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TAS only if the tax is assessable in India. If tax is not so assessable, there is no question of TAS being deducted.*
>
> *One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various*

provisions of Chapter XVII one finds use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in section 195. For example, section 194C casts an obligation to deduct TAS in respect of " any sum paid to any resident". Similarly, sections 194EE and 194F, inter alia, provide for deduction of tax in respect of " any amount" referred to in the specified provisions. In none of the provisions we find the expression " sum chargeable under the provisions of the Act", which as stated above, is an expression used only in section 195(1). Therefore this court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the Income tax Officer (TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, section 195 has to be read in conformity with the charging provisions, i.e section 4,5 and 9. This reasoning flows from the words " sum chargeable under the provisions of the Act" in section 195 (1). The fact that the Revenue has not obtained any information per se cannot be a ground to construe section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression " sum chargeable under the provisions of the Act" from section 195(1). While interpreting a section one has to give weightage to every word used in that section. While interpreting the provisions of the Income Tax Act one can not read the charging sections of that Act de hors the machinery sections. The Act is to be read as an integrated code. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of CIT vs. Eli Lilly and Co. (India) (P) Ltd. (2009) 312 ITR 225 the provisions for deduction of TAS which are in Chapter XVII dealing with collection of taxes and the charging provisions of the Income Tax Act form one single integral, inseparable code and, therefore, the provisions relating to TDS apply only to those sums which are " chargeable to tax" under the Income-Tax Act. It is true that the judgment in Eli Lilly (2009) 312 ITR 225 was confined to section 192 of the Income Tax Act. However, there is some similarity between the two. If one looks

at section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head salaries". Similarly section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum " chargeable under the provisions of the Act". Which expression, as stated above, do not find place in other sections of Chapter XVII. It is in this sense that we hold that the Income Tax Act constitutes one single integral inseparable code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the Income tax Act. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the Income-tax Act by which a payer can obtain refund. Section 237 read with section 199 implies that only the recipient of the sum i.e. the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments, the payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words " chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable" where a proportion of the sum so chargeable is liable to tax. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department, huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the case of the Department that section 195(2) , as interpreted by the High Court would plug the loophole as the said interpretation requires the payer to make a declaration before the Income tax Officer (TDS) of payments made to non-residents. In other words, according to the Department, section 195(2) is a provision by which the payer is required to inform the Department of the remittances he makes to non-residents by which the Department is able to keep track

of the remittances being made to non-residents outside India. We find no merit in these contentions. As stated hereinabove, section 195(1) uses the expression " sum chargeable under the provisions of the Act". We need to give weightage to those words. Further, section 195 uses the word "payer" and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfil the statutory obligation under section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The above-mentioned contention of the Department is based on an apprehension which is ill-founded. The payer is also an assessee under the ordinary provisions of the Income Tax Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income Tax Act for the said sum as an ' expenditure' . Under Section 40(a)(i), inserted, vide Finance Act, 1988, with effect from April 1, 1989, payment in respect of royalty, fees for technical services or other sums chargeable under the Income Tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the Income-tax Act. This provision ensures effective compliance with section 195 of the Income tax Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the Income Tax Act. In a given case where the payer is an assessee he will definitely claim deduction under the Income-tax Act for such remittance and on inquiry if the Assessing Officer finds that the sums remitted outside India come within the definition of royalty or fees for technical service or other sums chargeable under the Income-tax Act then it would be open to the Assessing Officer to disallow such claim for deduction. Similarly, vide the Finance Act, 2008, with effect from April 1, 2008, sub-section (6) has been inserted in section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from April 1, 2008. It will only apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage.

Applicability of the judgment in the case of Transmission Corporation (supra)

In Transmission Corporation's case (1999) 239 ITR 587(SC) a non-resident had entered into a composite contract with the resident party

making the payments. The said composite contract not only comprised supply of plant, machinery and equipment in India, but also comprised the installation and commissioning of the same in India. It was admitted that the erection and commissioning of plant and machinery in India gave rise to income taxable in India. It was, therefore, clear even to the payer that payments required to be made by him to the non-resident included an element of income which was exigible to tax in India. The only issue raised in that case was whether TDS was applicable only to pure income payments and not to composite payments which had an element of income embedded or incorporated in them. The controversy before us in this batch of cases is, therefore, quite different. In Transmission Corporation case (1999) 239 ITR 587 (SC) it was held that TAS was liable to be deducted by the payer on the gross amount if such payment included in it an amount which was exigible to tax in India. It was held that if the payer wanted to deduct TAS not on the gross amount but on the lesser amount on the footing that only a portion of the payment made represented ' income chargeable to tax in India' then it was necessary for him to make an application under section 195(2) of the Act to the Income Tax Officer (TDS) and obtain his permission for deducting TAS at lesser amount. Thus, it was held by this court that if the payer had a doubt as to the amount to be deducted as TAS he could approach the Income-tax Officer (TDS) to compute the amount which was liable to be deducted at source. In our view , section 195(2) is based on the "principle of proportionality"". The said sub section gets attracted only in cases where the payment made is a composite payment in which a certain proportion of payment has an element of 'income' chargeable to tax in India. It is in this context that the Supreme Court stated, 'if no such application is filed, income tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such 'sum' to deduct tax thereon before making payment. He has to discharge the obligation to TDS". If one reads the observation of the Supreme Court, the words ' such sum' clearly indicate that the observation refers to a case of composite payment where the payer has a doubt regarding the inclusion of an amount in such payment which is exigible to tax in India. In our view, the above observations of this court in Transmission Corporation case (1999) 239 ITR 587 (SC) which are put in italics have been completely, with respect misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the non-resident is not at all ' chargeable to tax in India'., then no TAS is required to be deducted from such payment. This

interpretation of the High Court completely loses sight of the plain words of section 195(1) which in clear terms lay down that tax at source is deductable only from " sums chargeable" under the provisions of the Income Tax Act, i.e. chargeable under sections 4,5 and 9 of the Income Tax Act."

10. Following the ratio laid down by the Hon'ble Apex Court in the above case, we hold that the question of deduction of tax at source on the impugned payments does not arise. The CIT(A) on the same parity of reasoning allowed the appeal. Therefore, we dismiss the grounds of appeal filed by the revenue.

11. In the result appeal filed by the revenue is dismissed.

Order pronounced in the open court on 8th July, 2015.

sd/-	sd/-
(I.C. SUDHIR)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: the 8th July, 2015

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Copy of the Order forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard File

By order

Dy. Registrar