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

BEFORE SHRI R.S. SYAL, AM AND SHRI A.T. VARKEY, JM

ITA No.1177/Del/2013
Assessment Year : 2009-10

Outotec India Pvt. Ltd., 8, Community Centre, 2nd Floor, New Friends Colony, New Delhi.	Vs.	ACIT, Circle 13(1), New Delhi.

PAN: AAACO9433A

(Appellant) (Respondent)

Assessee By	:	Shri Ravi Sharma, Advocate
Department By	:	Shri P. Dam Kanunjna, Sr. DR

Date of Hearing	:	06.07.2015
Date of Pronouncement	:	08 .07.2015

ORDER

PER R.S. SYAL, AM:

This appeal by the assessee arises out of the order passed by the CIT(A) on 28.12.2012 in relation to the assessment year 2009-10.

2. The only issue raised in this appeal is against the confirmation of disallowance made by the Assessing Officer (AO) for non-deduction of tax at source in terms of section 195 of the Income-tax Act, 1961 (hereinafter also called 'the Act') on expenses incurred by the assessee amounting to Rs.1,92,86,815/- to International Project Services Oy. (IPS)

3. Briefly stated, the facts of the case are that the assessee, an Indian company, is engaged in the business of providing marketing, supervision and support services for the mining metallurgical as well as metals, minerals and chemical processing industry. A sum of Rs.1,92,86,815/- was claimed as deduction under the head 'Supervision charges.' On being called upon to explain as to why no deduction of tax at source was made in respect of such payments credited to non-resident, the assessee stated that such amount was not chargeable to tax in the hands of the recipient as per Article 13 of the Double Taxation Avoidance Agreement between India and Finland (hereinafter called 'DTAA') and as such there was no obligation to deduct tax at source. At the same time, the

assessee admitted the taxability of the amount in the hands of the payee in terms of section 9 of the Act. The AO observed that the assessee started deducting tax at source after 1.4.2011 on payments made to this resident of Finland, for similar services at the applicable rates of tax. The assessee's contention that deduction of tax at source was started after 1.4.2011 because of the later amendment in the DTAA, did not persuade the AO. In the final analysis, the AO came to hold that the amount of Rs.1.92 crore incurred for supervisory services was deemed income accruing or arising in India to the resident of Finland and, hence, was chargeable to tax. In the absence of the assessee deducting tax at source u/s 195 of the Act, the AO held that the provisions of section 40(a)(i) were attracted. He, therefore, made an addition for the said sum of Rs.1.92 crore. The assessee reiterated similar submissions before the ld. first appellate authority in support of the contention that such expenses incurred by it were not chargeable to tax in India as income in the hands of IPS in terms of Article 13 of the DTAA. The ld. CIT(A) examined the Agreement dated 21.11.2008 between the assessee and M/s Sterlite, pursuant to which the assessee was to render supervisory

services for erection, commissioning and training for the Dore metal plant of Sterlite in Tuticorin. He required the assessee to produce the Agreement dated 1.11.2008 with IPS under which the services required to be rendered to Sterlite were outsourced from IPS for a consideration of Rs.1.92 crore. The ld. CIT(A) went through the Agreement between the assessee and Sterlite and noted the scope of services to be provided. He also took into consideration a copy of the so-called Agreement dated 1.11.2008 between the assessee and IPS, under which the assessee claimed to have outsourced such services from IPS to be provided to Sterlite. A copy of such four-page document claimed as Agreement, produced before the ld. CIT(A), had first two pages which did not bear any signature, stamp or seal of the parties. He required the assessee to produce the original Agreement, which the assessee failed to comply with. The ld. CIT(A) observed that the main terms and conditions of the Agreement were appearing on the first two pages, which were unsigned plain papers without any page number, date, seal or stamp. He, therefore, refused to accept the authenticity and genuineness of such Agreement. The assessee was called upon to furnish the weekly time

sheets in respect of the services rendered by IPS, Finlay, which was supposed to be approved by the assessee. In view of the fact that such weekly time sheets were the only pieces of evidence of rendering of actual services, the ld. CIT(A) insisted on its production, which the assessee failed to submit. Then, the assessee was required to furnish the details of payments made to IPS as per the terms of the so-called Agreement, which stipulated for the release of payment within 15 days from the date of receipt of invoice. The assessee submitted that no payment was made to IPS and the entire amount of Rs.1.92 crore was outstanding at the end of the year. In view of the fact that the so-called agreement provided for realizing payment within 15 days from the date of receipt of invoices and there was no payment whatsoever made by the assessee to IPS throughout the year, the ld. CIT(A), *prima facie,* inferred that there was no evidence of rendering of any services by IPS. Then, the ld. CIT(A) required the assessee to furnish copies of its correspondence with IPS about the requirement of services to be rendered, nature of services rendered and the correspondence during and after the rendition of services. The assessee admitted that no such

correspondence was available. The ld. CIT(A) noticed that the aspect of rendition of actual services by IPS was not examined by the AO. He further noticed an inconsistency in the date of the so-called Agreement between the assessee and IPS, being 1.11.2008, which was prior to the Agreement between the assessee and Sterlite dated 21.11.2008 for providing the supervisory services. The ld. CIT(A) wondered as to how an Agreement between the assessee and IPS could be made much in advance on 1.11.2008 for outsourcing the services which were to be rendered in pursuance of Agreement with Sterlite, which itself was dated 21.11.2008. Under such circumstances, he refused to accept the genuineness of the Agreement with IPS and treated it as a camouflage. The contention of the assessee that the invoices were raised by IPS and hence the assessee was absolved from discharging the burden cast upon it to establish that the services were rendered by IPS, was also held to be of no substance. Considering the totality of the facts, it was held that a copy of the so-called Agreement between the assessee and IPS was not genuine and it was simply a make-believe arrangement aimed at defrauding the Revenue. During the course of hearing before the ld.

CIT(A), the assessee submitted a copy of the Certificate issued by IPS containing names of five engineers who were claimed to have been sent by it to Sterlite for rendering supervisory services. This certificate, again undated, was held to be self serving and hence unreliable. In the backdrop of such facts, the ld. CIT(A) reached a conclusion that no services were provided by IPS. However, from the weekly time sheets issued by the assessee and approved by Sterlite and the invoices raised by the assessee on Sterlite, he observed that the services were rendered by these five engineers, residents of Finland, from 24.11.2008 to 24.04.2009. The factum of rendering of actual supervisory services by the above five engineers from Finland and the absence of any services given by IPS, led the ld. CIT(A) to conclude that the services given by five engineers from Finland were in the nature of `Independent personal services' covered under Article 15 of the DTAA. As the services were performed by these engineers in India by remaining present from 24.11.2008 to 24.04.2009, being a period of more than 90 days, the ld. CIT(A) held that such income was chargeable to tax in India in their hands under Article 15 of the DTAA. As the income was chargeable to

tax in India, the assessee was held to be liable for withholding of tax at source. In view of the non-deduction of tax at source, the ld. CIT(A) held that the provisions of section 40(a)(i) were attracted and, consequently, the disallowance of Rs.1.92 crore was upheld. The assessee is aggrieved against the sustenance of this addition.

4. We have heard the rival submissions and perused the relevant material on record. The short controversy in this appeal is the sustainability or otherwise of disallowance of Rs.1.92 crore made u/s 40(a)(i) of the Act. The factual matrix in a nutshell is that the assessee received a sum of Rs.2.41 crore from Sterlite Industries (I) Ltd., for rendering of supervisory services in connection with erection, commissioning and training for their plant in Tuticorin. Such services were provided by the assessee by outsourcing the same and a sum of Rs.1.92 crore was paid for that. The assessee claimed deduction for Rs.1.92 crore, which the AO disallowed u/s 40(a)(i) as, in his opinion, the amount so paid was chargeable to tax in the hands of the recipient

and, on the failure of the assessee to deduct tax at source in terms of section 195 of the Act, the disallowance was called for u/s 40(a)(i).

5. At this juncture, it is relevant to note the mandate of section 40(a)(i), which provides that notwithstanding anything to the contrary in sections 30 to 38, no deduction shall be allowed to an assessee in the computation of income under the head 'Profits and gains of business or profession' in respect of interest, royalty, fees for technical services or other sum chargeable under this Act, which is payable outside India or in India to a non-resident, not being a company or to a foreign company, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or after deduction, has not been paid during the previous year or in the subsequent year before the expiry of the time prescribed u/s 200(1) of the Act. Clause (B) of the Explanation to this provision states that: 'Fees for technical services' shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9. The crux of this provision is that if any interest, royalty, fees for technical services *or any other sum chargeable under this Act* is payable

outside India or in India to a non-resident on which tax has not been deducted at source, etc., then, no deduction for such expenditure shall be allowed in the computation of Business income of the payer.

6. Section 195(1) provides that: `Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest ….. *or any other sum chargeable under the provisions of this Act* (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force….'. A conjoint reading of sections 40(a)(i) and 195 brings to the fore that it is a duty of the person responsible for paying, to deduct income-tax at source from any amount paid/payable to a non-resident or a foreign company which is '*chargeable under the provisions of this Act*.' If the person responsible fails to deduct tax at source on any such amount paid/payable to a non-resident or to a foreign company without deduction of tax at source or fails to deposit the same after due

deduction, then, the amount of expenditure incurred by such person responsible, ceases to be deductible in the computation of his total income under the head 'Profits and gains of business or profession.'

7. Coming back to the facts of the instant case, it is observed that the assessee did credit a sum of Rs.1.92 crore payable outside India without deduction of tax at source for which the AO invoked the provisions of section 40(a)(i) of the Act. The claim of the assessee is that the expense so incurred payable in Finland is not chargeable to tax in the hands of IPS. On the other hand, the AO has made out a case that the amount in question is income of the Finland resident by way of `fees for technical services' in terms of section 9(1)(vii) read with section 5 of the Act. In order to appreciate the rival claims, it is befitting to take note of the prescription of section 9(1)(vii) of the Act, which provides that any income by way of fees for technical services payable, *inter alia,* by: `(b) a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from

any source outside India' shall be deemed to accrue or arise in India. Explanation 2 to section 9(1)(vii) gives meaning to the expression 'fees for technical services', as under:-

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

8. On circumspection of Explanation 2 to section 9(1)(vii), it transpires that 'fees for technical services' means any consideration for the rendering of any managerial, technical or consultancy services. When we consider the nature of services provided to Sterlite by the non-resident, being the 'supervisory services for erection, commissioning and training' for setting up a plant of M/s Sterlite Industries, it becomes patent that such services fall within the ambit of Explanation 2 to section 9(1)(vii), thereby making the payment of Rs.1.92 crore as 'fees for technical services' covered u/s 9(1)(vii) of the Act. Once an Indian enterprise pays fees for technical services to a non-resident, the amount

so paid becomes chargeable to tax in the hands of such non-resident and the failure to withhold tax from such payment magnetizes the disallowance u/s 40(a)(i) of the Act. The ld. AR was fair enough to candidly concede that the amount payable by the assessee to the non-resident is in the nature of 'fees for technical services' as per section 9(1)(vii) of the Act. He, however, contended that there was no liability of the assessee to deduct tax at source from such amount because of the applicability of DTAA which immunes from tax the amount towards fees for technical services as paid in the present circumstances to the non-resident.

9. Sub-section (1) of section 90 of the Act provides that the Central Government may enter into an agreement with the Government of any other country for the granting of relief of tax in respect of income on which tax has been paid in two different tax jurisdictions. Sub-section (2) of section 90 unequivocally provides that where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax or

for avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, `*the provisions of this Act shall apply to the extent they are more beneficial to that assessee*'. The crux of sub-section (2) is that where a DTAA has been entered into with another country, then the provisions of the Act shall apply only if they are more beneficial to the assessee. In simple words, if there is a conflict between the provisions under the Act and the DTAA on a point, the assessee will be entitled to be subjected to the more beneficial provision out of the two. If the provision of the Act on a particular issue is more beneficial to the assessee *vis-a-vis* that in the DTAA, then such provision of the Act shall apply and *vice versa*. The Hon'ble Supreme Court in the case of *CIT v. P.V.A.L. Kulandagan Chettiar [(2004) 267 ITR 654 (SC)]* has held that the provisions of sections 4 and 5 are subject to the contrary provision, if any, in DTAA. Such provisions of a DTAA shall prevail over the Act and work as an exception to or modification of sections 4 and 5. Similar view has been taken by the Hon'ble Bombay High Court in *CIT v. Siemens Aktiongesellschaft [(2009) 310 ITR 320 (Bom.)]*. In the light of the foregoing discussion it is discernible that if the

provisions of the Treaty are more beneficial to the assessee *vis-a-vis* its counterpart in the Act, then the assessee shall be entitled to be ruled by the provisions of the Treaty.

10. Now, the question arises as to whether the 'fees for technical services' payable by the assessee to the resident of Finland is chargeable to tax under the DTAA? Article 13 of the DTAA deals with 'Royalties and fees for technical services.' The relevant part of the Article is reproduced hereunder:-

`ARTICLE 13

Royalties and fees for technical services

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but the tax so charged shall not exceed.....

3. .....

4. For the purposes 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.

5. The definitions of fees for technical services in paragraph 4 shall not include amounts paid:

(a), (b), (c), (d),.....

(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 15".

6.....'.

11. A perusal of the above Article deciphers that 'fees for technical services' arising in India and paid to a resident of Finland may also be taxed in India. The term 'fees for technical services', which is relevant for Article 13, has been defined in para 4 of the Article to mean payment in consideration for rendering of any technical or consultancy services which: `(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.' It is not the case of the Revenue that clauses (a) and (b) of para 4 of Article 13 are attracted in this case. The above definition of 'fees for technical services' for the purposes of the DTAA makes it vivid that it refers to payment of any kind for rendering of any technical or consultancy services which *make available* technical knowledge, skill or know how, etc. to the payer.

12. The expression '*make available*' in the context of 'fees for technical services' contemplates that the technical services should be of such a nature that the payer of the services comes to possess the technical knowledge so provided which enables it to utilize the same thereafter. The Hon'ble Karnatka High Court in the case of *CIT & Ors. Vs. De Beers India Minerals Pvt. Ltd. [2012 (346 ITR 467) (Karn)]* has dealt with the concept of 'make available' in the context of fees for technical services. It has been held that : "The expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or know-how in future on his own. By making available the

technical skills or know- how, the recipient of the same will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider …….". From the above enunciation of law by the Hon'ble Karnataka High Court, it is palpable that the technical knowledge will be considered as `made available' when the person acquiring such knowledge is possessed of the same enabling him to apply it in future at his own. If the services are consumed in the provision without leaving anything tangible with the payer for use in future, then it will not be characterized as `making available' of the technical services, notwithstanding the fact that its benefit flowed directly and solely to the payer of the services,. The Special bench of the tribunal in *Mahindra & Mahindra Ltd. VS. DCIT (2009) 122 TTJ (MUM)(SB) 577* has discussed the concept of `make available'. In that case, the lead managers had rendered technical, managerial or consultancy services in the GDR issue, which services were not made available to the assessee inasmuch as the payer only derived the benefit from the technical services provided by the lead managers without getting any technical knowledge, experience or skill

in its possession for use in future. In that view of the mater, it was held that the `management and selling commission' could not be taxed in India as per the DTAA because nothing was made available to the payer. It follows that in order to be covered within the expression 'make available', what is necessary is that the service provider should transmit the technical knowledge etc. to the payer so that the payer may use such technical knowledge in future without involvement of the service provider.

13. Adverting to the facts of the instant case, we find that the technical services provided by the non-resident are simply in the nature of supervisory services by the engineers for erection, commissioning of the plant of M/s Sterlite in Tuticorin. By rendering such services, nothing has been made available by the payee to the assessee/Sterlite, which could be used in future without involvement of such residents of Finland. Once the plant is erected and commissioned, the supervisory engineering services rendered by the Finland residents during the course of such erection and commissioning get consumed in the process and

there remains nothing capable of any use in future. Going by the scope of Article 13 *vis-à-vis* the nature of actual services provided by the payees, it is manifested that such technical services do not fall within the purview of the definition of 'fees for technical services' as given in para 4 of this Article, as nothing has been `made available' by the rendition of technical services for any future use. If the provisions of Article 13 of DTAA are exhausted and it is not the case of the AO that the amount be considered under any other Article of the DTAA, it would mean that *albeit* the amount is chargeable to tax in the hands of the non-residents as per section 9(1)(vii) read with section 5(2) of the Act, but, the chargeability will be waived because of the inapplicability of Article 13 of the DTAA, which is a more beneficial provision than section 9 read with section 5 of the Act. In that view of the matter, the assessment order considering payment of Rs.1.92 crore to M/s IPS Finland for technical services as violating the provisions of section 195, thereby resulting into disallowance u/s 40(a)(i), cannot be countenanced.

14. It is noticed that when the matter was carried by the assessee in

appeal before the ld. CIT(A), the latter opined that there was no genuine agreement between the assessee and the IPS Finland. In view of the fact that the assessee did incur Rs.1.92 crore to certain persons which was duly confirmed by M/s Sterlite, the ld. CIT(A) attributed the amount to the five engineers of Finland, covered under Article 15 of the DTAA.

15. In principle, we do not find any infirmity in the order of the ld. CIT(A) in examining the genuineness of the Agreement with IPS Finland and then finally holding the amount payable by the assessee to the five engineers as covered under Article 15 of the DTAA, thereby changing the point of the view of the AO on the same issue. It goes without saying that the powers of the CIT(A) are co-terminus with that of the AO inasmuch as he, while hearing an appeal against the assessment order, has all the powers which vest with the AO on the issue before him. The Hon'ble Summit Court in *Jute Corp. of India Ltd. Vs. CIT (1991) 187 ITR 688 (SC)* has held so. Even otherwise, section 251 dealing with the powers of the CIT(A) provides through sub-section (1) that : ` In disposing of an appeal, the Commissioner (Appeals) shall

have the following powers— (a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment…..'. As such, we do not see any embargo on the power of the CIT(A) in approaching the issue before him in a different manner from that of the AO.

16. As the assessee has assailed the findings given by the ld. CIT(A) with regard to the credibility of the Agreement with IPS, it becomes imperative for us to decide about the genuineness or otherwise of the so-called Agreement between the assessee and IPS, a copy of which has been placed on pages 119 to 122 in the paper book. It can be observed that this document running into four pages is on plain papers. First two pages of this document do not bear signature of any party. These pages, in fact, define the scope of services and all other major terms and conditions. Going by this so-called Agreement, Clause 3 with the caption 'Terms of payment' provides that: "All payments shall be released within 15 days from the date of receipt of invoice." On a specific query, it was accepted by the ld. AR that IPS Finland is a non-

related party. Despite there being a specific Clause for making payment within 15 days from the date of receipt of invoice, the assessee admitted before the authorities below that no amount was paid to IPS during the whole of the year and the entire amount of Rs. 1.92 crore was payable. Page 153 of the paper book is a copy of a certificate allegedly issued by IPS Finland stating that five of its employees were sent to India at the instance of the assessee. This document has been purportedly signed by one Mr. Erkko Virrankoski, the President of IPS, Finland. When we compare the signature on this supposed certificate with the signatures made on pages 3 and 4 of the so-called agreement, it can be easily deduced that both the signatures are entirely different. Apart from that, if IPS was to render services on a regular basis to Sterlite at the instance of the assessee, it is but natural that the assessee would have assigned some duties in specific and monitored regularly by interacting with the Finland concern. As against that, the assessee miserably failed to place copies of any correspondence whatsoever with IPS. The assessee admitted before the ld. CIT(A) that no such correspondence in the form of letters or e-mails was available. We are at loss to appreciate as to how

is it possible that a party to whom the assessee was to allegedly pay a sum of Rs.1.92 crore, did not correspond at all on any aspect of the work assigned or to ascertain the progress of the work on a periodic basis. There is another interesting aspect of the matter. The assessee entered into Agreement with M/s Sterlite for providing supervisory services for erection and commissioning of their plant. There is no reference whatsoever in this Agreement with Sterlite that the services to be provided by the assessee could be sub-contracted or outsourced from some third party. If such services in erection and commissioning of plant were actually to be provided by IPS to Sterlite, then, there should have been some tripartite agreement amongst the assessee, Sterlite and IPS, which is actually not the case. There is one more aspect. The so-called four-paged Agreement between the assessee and IPS is dated 1.11.2008. We are at loss to comprehend as to how the assessee could enter into agreement with IPS for rendering supervisory services on 1.11.2008, when the agreement with Sterlite was itself signed, much later, on 21.11.08. The ld. AR was specifically asked if he could produce Agreement with IPS in original, which was responded in

negative. To be precise, there is no documentary evidence divulging the rendering of services by IPS Finland in the erection and commissioning of plant of Sterlite. The above discussion leads us to an irresistible conclusion that IPS was nowhere involved in providing supervisory services to Sterlite for and on behalf of the assessee. The view canvassed by the ld. CIT(A) on this aspect of the matter is, ergo, upheld.

17. Be that as it may, there is no denial of fact that the assessee, in fact, caused to be provided services to M/s Sterlite for which it received a sum of Rs.2.41 crore. Discussion in the immediately preceding para divulges that no services were rendered by IPS. From the weekly time sheets issued by the assessee and approved by M/s Sterlite, it is clear that the services were rendered by five engineers from Finland during the period 24.11.08 to 24.4.2009. Once it is established that certain individuals from Finland rendered engineering supervisory services in the erection and commissioning of the plant in Tuticorin, the amount

payable to such residents of Finland falls for consideration under Article 15 of the DTAA, which reads as under:-

ARTICLE 15

Independent personal services

1. Income derived by a resident of a Contracting State in respect of professional services or other independent activities of a similar character may be taxed in that State. Such income may also be taxed in the other Contracting State if such services are performed in that other State and if:

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

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

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

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

18. On going through the mandate of Article 15 of the DTAA, it can be seen that it covers professional services or other independent activities of similar character. The term `professional services', *inter alia,* includes independent activities of engineers. Five engineers from Finland rendered engineering services in the erection and

commissioning of the plant of Sterlite. Such services fall within the domain of the `Professional services' of Article 15 of the DTAA.

19. The ld. AR contended that since the services contracted for the by the assessee with non-residents fall within the meaning of Article 13 but get excluded because of not `making available' any technical knowledge etc., then such services cannot be once again considered under Article 15. This argument was countered by the ld. DR by contending that the amount in question directly falls under Article 15 and hence the same should be retained here alone.

20. The argument of the ld. AR though looks attractive at the first blush but falls to the ground on a closer examination. The precise question is that which of the two Articles, namely, 13 or 15, should have primacy in the facts and circumstances as are instantly prevailing? In our considered opinion, the answer to this question is not too far to seek. Relevant part of Para 5 of Article 13, as reproduced above, unambiguously states that the definition of fees for technical services in paragraph 4 shall not include amounts paid `….. *(e) to any individual* ….

for professional services as defined in Article 15". When we read para 5 of Article 13 in conjunction with Article 15, there remains absolutely no doubt that the amount payable by the assessee to certain individual residents from Finland is covered only under Article 15 and not Article 13 of the DTAA.

21. Delving into the mandate of para 1 of Article 15 of the DTAA, we find that the income derived by a resident of Finland in respect of professional services or other independent activities of a similar character performed in India can be taxed in India if he is present in India for a period or periods aggregating to 90 days or more in the relevant fiscal year or has a fixed base regularly available to him in India for the purpose of performing his activities. It is noticed that the ld. CIT(A) has computed the period of 90 days by considering the presence of these persons in India from 24.11.2008 to 24.4.2009. The ld. AR contended that the ld. CIT(A) has considered total period of stay of all the five persons taken together without considering it on individual basis. We find force in the submission of the ld. AR in this regard.

Once it is held that five individuals from Finland were not representing IPS and, in fact, there was no valid agreement between the assessee and IPS, then, what remains to be examined is such five residents of Finland on individual basis. The amounts payable to each of such five persons satisfying the duration test on individual basis would enable the ultimate triggering of Article 15 of the DTAA. In other words, only those Finland residents out of such five persons who independently and individually satisfy the condition about their presence in India for a period of 90 days or more in the relevant fiscal year or having a fixed place regularly available to them in India for the purpose of performing the supervisory functions, can be brought within the purview of Article 15. If, however, this condition is found wanting *qua* some individuals, then the amount payable to such individual residents of Finland, would cease to be chargeable to tax in terms of Article 15 of the DTAA notwithstanding its taxability under section 9(1)(vii) read with section 5 of the Act. Since the relevant information for ascertaining the duration of stay of such residents of Finland in India is not available on record and, further, it is not clear whether they had a fixed base regularly

available to them in India for performing such services, we cannot forthwith ascertain whether or not such a pre-requisite condition is fulfilled. Under such circumstances, we set aside the impugned order and remit the matter to the file of the ld. CIT(A) for deciding this aspect of the matter and, thereafter, determining the question of disallowance u/s 40(a)(i) of the Act. Needless to say, the assessee would be allowed a reasonable opportunity of hearing in such proceedings.

22. In the result, the appeal is allowed for statistical purposes.

The order pronounced in the open court on 08.07.2015.

Sd/-	Sd/-
[A.T. VARKEY] JUDICIAL MEMBER	[R.S. SYAL] ACCOUNTANT MEMBER

Dated, 08th July, 2015.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.