आयकर अपीलीय अधिकरण, 'एल' खंडपीठ मुंबई

INCOME TAX APPELLATE TRIBUNAL,MUMBAI "L" BENCH

सर्वश्री राजेन्द्र, लेखा सदस्य एवं राम लाल नेगी, न्यायिक सदस्य

Before S/Sh. Rajendra,Accountant Member & Ram Lal Negi,Judicial Member

आयकर अपील सं/.ITA No.8567/Mum/2010,निर्धारण वर्ष/Assessment Year-1998-99

Raytheon Ebasco Overseas Ltd. C/o, Pricewaterhouse Coopers Private Ltd., 6the Floor, Tower "D", The Millenia, 1&2 Murphy Road, Ulsoor, Bangalore 560 008 **PAN No.AAFCR 0222 H**	Vs.	Dy.CIT-11 Circle-2(1) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : S/Shri Kanchan Kaushal, Dhanesh Bafna

राजस्व की ओर से/ **Revenue by : Shri Jasbir Chauhan**

सुनवाई की तारीख/ Date of Hearing : 03.02.2016

घोषणा की तारीख / Date of Pronouncement **: 11.03.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

<u>लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM</u>-

Challenging the order dated 30.8.2010 of CIT(A)-Mumbai, the assessee had filed the present appeal.

2.The assessee-company filed its return of income on 31.3.1991,declaring total income at Rs.nil.The Assessing Officer (AO) competed the assessment ,u/s. 143(3) of the Act,on 27.3.2001 determining the income of the assessee at Rs.1,30,96,76,526/-.

3.The effective Ground of appeal is about payment received by assessee from Jindal Tractebel Power Company Limited (JTPCL).During the assessment proceedings,the AO found that the assessee had entered into a contract with JTPCL to set up a power plant in Karnataka. The nature of services rendered to JTPCL included providing of engineering and designing work, providing material based on overall design, providing quotations based on specifications developed by the assessee for the power plant, supplying drawing review to enable integration of the equipment and undertaking document of designs, that the services were split up under the head technical services, start-up services and overall responsibilities. The assessee submitted before the that AO the overall responsibility and management of the project was carried out by the assessee from outside India,that no Permanent Establishment(PE)was created in India, that the amounts received by the assessee for undertaking overall responsibility did not amount to transfer of technology/technical knowhow to JTPCL,that no technical services/included services were provided by the assessee to JTPCL as envisaged by the Act/DTAA. It was further argued that in case of supply of equipment and essential spares no part of the activities was carried out in India, that as per the terms of the contract the title of all the equipments and spares was transferred to JTPCL at the port of shipment i.e. overseas, that the payment of supply of equipments etc. was received outside India, that portion of the amount received on account of supply of equipment/ spares was not assessable to tax in India either on receipt basis or on accrual /arising basis, that

no part of the activity or the receipt was deemed to accrue or arise or was received in India.With regard to technical services it was stated that the entire conceptualisation of the project took place outside India, that the amounts payable related to the services rendered was to be paid outside India, that there was no consideration for any right/property/information used for the purpose of business carried on by such person in India, that the clause relating to transfer of information were mentioned in clause.6.5 and 6.6 of the contract, that the information imparted by the assessee related to information on erection and the operation/maintenance manual, that the consideration would not fall under the scope of income deemed to accrue or arise in India, that the contractual obligation of the assessee did not require the assessee to transfer the technology to JTPCL,that no technology,per se,was transferred to JTPCL,that the receipt would not be liable to tax in India.With regard to start up services the assessee contended that such services would arise only after JTPCL had imported the equipments,that the consideration would not involve any transfer of technology by the assessee,that in the absence of a PE the amount received by the assessee for providing start up support would not be taxable in India. It was further argued that payments made for rendering consultancy services were not technical in nature, that they would not fall under the purview of included services that same would be liable for taxation in terms of provisions contained in the Article 7 of the DTAA, that there was no continuity of business relationship between JPTCL and the assessee.

3.1. However,the AO held that as per section 9(1)(vii) and Article -12(4)(b) of DTAA the place that was relevant for taxation purposes was the place where the services had been actually utilised,that if the fee received by the assessee was for the services utilised in India income would deem to accrue and arise in India,that the Act used the words 'fee for services utilised in India'and not the words 'fees for services rendered in India',that the power plant had been erected as per the requirements of the Indian Co.,that the requirement of JTPCL involved services of the nature needing great technical skill/ know-how/experience, that the services provided by the assessee could not have been provided through books and literature by giving designs and drawing,that assessee had made technology available to the Indian company, that the technology involved complete engineering of the power plant and could not be related only to equipment and design supply,that the scope of work covered supply of basic design engineering, technical specification, integration of design at various level of construction of the plant, that the plant was one of the first that used corex gas, that it involved technology which was not available in India, that such a plant could not be made from specification sent in manuals or through occasional visits of personnel. With regard to, services under the head overall responsibility, the AO held that same were not just management responsibility, that the technical services could not be provided by the assessee from US, that the employees of the assessee had visited India for 43 days, that there were several Indian technicians who worked under the supervision of American employees, that the receipt in the hands of the assessee was nothing but in the form of technical information that was utilised in business carried out in India.He referred to Article 12(2), 12(4) of the DTAA and further held that income received by the assessee for technical services, start up and overall responsibility were clearly chargeable to tax both under the Act and the Treaty, as fee for "included services",that the assessee was supplying drawings/ designs relating to construction of the power plant, that it was involved in the operation, maintenance, training of Indian employees, that all these services were made available,that the assessee had also made available technical plans and designs,that same was to be assessed as fees for included services.

Finally,he held that services rendered by the assessee were fee for included services(FIS)as per Article 12 of the treaty.

4.Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him,it was argued that it had not undertaken the responsibility of either carrying out the installation or assembling of the project or supervising such activities of installation /assembling, that the payment received by it from JTPCL under the contract was not exigible to tax in India,that it was engaged in general business of supplying equipment and rendering services as desired by its clients, that the payments received by it as per the agreement with JTPCL constituted business profit in its hand as per the provisions of Article 7 of Indo-US Tax Treaty, that the payment for rendering services had to be judged in the light of provisions of Article 12(4) of the Treaty,that the assessee had not received any royalty from JTPCL, that rendering of various services would not constitute "included services", that the assessee had not made available technical knowledge/experience/skill to JTPCL,that it did not develop/transfer any technical plan/design, that the fee received by it for rendering technical and start up services in favour of JTPCL under the contract could not be held to constitute fee for included services, that the same were in the nature of business and had to be taxed as per provisions of Article 7 of the Treaty.

4.1. After considering the submission of the assessee and the assessment order,the FAA held that income had accrued and arisen in India to the assessee as per the amended provisions of section 9(2)of the Act,that FIS had been defined in the tax treaty to mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services, that the payment made by Indian company to the assessee for obtaining engineering and design work fell within the definition of FIS under article 12(4)(b) of the treaty,that unless the assessee had provided and made available technical plant/technical design for setting up power plant it would have not been possible for the Indian company to set up the power plant on its own, that the technical plant/designs made available by the assessee helped JTPCL to apply the technology for generation of power,that under paragraph4(b)of the agreement the assessee was to make available technical and consultancy services to JTPCL,that the agreement dated 20/09/1995 showed that the assessee had supplied drawings,samples and models and had also provided instructions and training for operation and maintenance of the plant,that in view of technical knowledge,experience and skill made available by the assessee to JTPCL through technical design and client it could be concluded that the assessee had earned FIS,that total income of the assessee was taxable in India as per the provisions of article 12 (4)(b) of the DTAA,that the AO had rightly assessed such FIS at the rate of 15%.

5.Before us,the Authorised Representative(AR)argued that most of the services had been rendered from outside India, that the entire conceptualisation of the project had taken place outside India,that the services were rendered by sending designs, manuals and documents by telex and faxes, that the personnel of the assessee visited occasionally only, that assessee was a resident of USA, that phrase 'managerial services'was not part of the Article-12(4)(b) of the DTAA,that the AO/FAA had not looked into the provisions of tax-treaty and had deliberated upon only on applicability of provisions of section 9(1)(viii) of the Act, that the AO had not discussed as to how the services were made available,that the overall responsibilities were not on technical side and therefore same were not covered by the DTAA,that the assessee had not parted with any knowledge or drawing/design.Alternatively, it was argued that even if services were made available as envisaged under Article 12(4) of the Treaty, same was covered by the

provisions of Article-12(5)(a) of the Article. AR relied upon the cases of Wockhardt Ltd. (10 taxmann.com208);De Beers India Minerals (P.) Ltd.(21taxmann.com 214) and Birla Corporation Ltd.(ITA251-52/Jab/13-AY.10-11 and 11-12 dt.24.12.2014).The Departmental Represnetative (DR)contended that it was not the case of sale of equipment, that technical and consultancy services made available to the assessee,that they would include managerial services also, that services were provided not only for installation of the project but to run the project, that comprehensive knowledge was made available to the assessee.

5.We have heard the rival submission and perused the material before us. We find that JTPCL had invited bids for a installing a power plant in Karnataka,that the assessee had submitted bids that were accepted by JTPCL,that as per the bid letter the assessee was responsible for carrying out procuring of plant and equipment,basic engineering,review of detailed engineering and construction work at site including erection and commission of the plant,that the off shore equipment supply and related services contract was given to the assessee,that in the notes to the accounts the assessee had given details of services rendered by it,that it had split the services under three heads i.e. technical services, start up services and over all responsibility,that the scope of technical services related to conceptualisation of a detailed and complete power plant design,that it had to prescribe the specification of equipments that were necessary for a power plant,that the equipments were to be designed by the identified manufacturers as suggested by the assessee,that it had to ensure that each section of the supply would be designed, specified and manufactured with the skill and care,that it had to ensure and co-ordinate the design of each section and equipment, that under the head 'start up services' it had to deal with the complexities involved in executing the project, that the services under the head 'start up services' included making available persons original supplier to ensure smooth start up and commissioning of the plant, that the startup services included equipment,installation,operation and maintenance, training of personnel and assistance/advise on commissioning and start-up,that the overall responsibility services included incorporation of equipment as per the design under the contract, , that the total consideration payable by JTPCL was US$ 2,70,33,664 for equipment supply and US$3,02,94,536 for rendering services,that JTPCL approached the AO to issue a certificate, u/s.195(2)of the Act,to make payment to the assessee without deducting tax,that the AO concerned directed JTPCL to deduct tax at certain rates,that during the assessment proceedings the AO held that income amounting to Rs.130.96 Crores was taxable under the head FIS as per the provisions of Article 12(4)(b)of the Indo-US DTAA r.w.s.9(1)(vii),that the FAA upheld the order of the AO.

5.1. Before proceeding further,it would be useful to find out as to what services were rendered by the assessee to JTPCL.As per the contract following technical services were provided to JTPCL:

i.Engineering and design work relating to conceptualisation of the power plant
ii.providing specification regarding the material required for the power plant
iii.providing suppliers quotations and reviewing documents to enable compliance with specification developed by the assessee for the power plant
iv.previewing drawings to unable integration of the equipment to be supplied to JTPCL
v.undertaking preparation of final document of the design of the plant and equipment necessary for the power plant

The start-up-services provided by the assessee,under the contract,included the following:

i).development of packages thereby the various instrumentation, electrical, mechanical and equipment listing were drawn up and were further broken down into subsystems for the purpose of commissioning by the start-up contract

ii).laying out of test procedures for the various subsystems equipment and components.

We are of the opinion that technical services or the start-up services,provided by the assessee,did not include any construction,assembly mining or like projects and therefore the payment received by it would not constitute FTS as per the provisions of the Act.Here,we would like to refer to the decision of the Hon'ble Madras High Court delivered in the case of Neyveli Lignite Corporation (243ITR459).In that case the assessee was engaged in the mining of lignite.It had entered in to an agreement with a Hungarian company for acquiring steam generating plant for more efficient running of its business.The AO held that income had accrued to Hungarian company in India and hence the Indian company was liable for deduction of tax.The Hon'ble court decided the issue in favour of the assessee and held that receipts could not be brought to tax in India,that the payments made by it were not taxable under the provisions of section 9 of the Act.

5.2. We would also like to refer to the decision of the Hon'ble Supreme Court delivered in the case of Ichikawajama-Harima Heavy Industries Ltd.(288 ITR 408).The facts of the case were that the assessee had entered into an agreement for a turnkey project with Petronet LNG for setting up an LNG receiving, storing and re-gasification unit,that the roles and responsibilities of each member of the consortium were well-defined with separate consideration,that the agreement was for development,designing,engineering and procuring of equipments and to erect storage tank, that the contract involved offshore and onshore supply of equipments as well as offshore/ onshore supply of services.The Hon'ble Supreme Court deciding the special leave petition filed by the assessee,against the ruling of the AAR,held that merely because the contract had been designed as turnkey it would not mean that entire contract must be considered as an integrated one for the purpose of taxation, that the taxable events in execution of a contract might rise at several stages in several years and consequent liability as well might arise at several stages,that the contractual obligation were distinct with clear demarcation as supplies and services and as onshore/offshore with separate consideration for each agreement,that as far as offshore services were concerned the services had to be rendered and utilised in India to be taxable in India,that there must be sufficient territorial nexus with India with the services rendered,that distinction had to be made between rendition of services and utilisation thereof,that as per section 9 (1) (vii) deemed fees for technical services would accrue in India when such fees were paid by a resident,that the said section could not be interpreted so widely to bring to tax the income of a non-resident entity received outside India from a resident for services rendered outside India,that the test of residence was that of taxpayer and not that of the recipient of such services,that for section 9(1) to be applicable it was necessary that the services were not only utilised in India but also were rendered in India ought to have a live link with India that the entire income from fees as envisaged in Article 12 of DTAA would become taxable in India. In short,the Hon'ble court held that unless the services were rendered and utilised in India the income could not be taxed in India.We would like to reproduce paragraphs 68-72 of the judgments and same read as under:

"*68.Global income of a resident although is subjected to tax, global income of a non-resident may not be. The answer to the question would depend upon the nature of the contract and the provisions of DTAA.*

69. What is relevant is receipt or accrual of income, as would be evident from a plain reading of s. 5(2) of the Act. The legal fiction created although in a given case may be held to be of wide

import, but it is trite that the terms of a contract are required to be construed having regard to the international covenants and conventions. In a case of this nature, interpretation with reference to the nexus to tax territories will also assume significance. Territorial nexus for the purpose of determining the tax liability is an internationally accepted principle. An endeavour should, thus, be made to construe the taxability of a non-resident in respect of income derived by it. Having regard to the internationally accepted principle and DTAA, it may not be possible to give an extended meaning to the words 'income deemed to accrue or arise in India' as expressed in s. 9 of the Act. Sec. 9 incorporated various heads of income on which tax is sought to be levied by the Republic of India. Whatever is payable by a resident to a non-resident by way of fees for technical services, thus, would not always come within the purview of s. 9(1)(vii) of the Act. It must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax. Whereas a resident would come within the purview of s. 9(1)(vii) of the Act, a non-resident would not, as services of a non-resident to a resident utilized in India may not have much relevance in determining whether the income of the non-resident accrues or arises in India. It must have a direct live link between the services rendered in India, when such a link is established, the same may again be subjected to any relief under DTAA. A distinction may also be made between rendition of services and utilization thereof.

70. Sec. 9(1)(vii)(c) clearly states "where the fees are payable in respect of services utilized in a business or profession carried on by such person in India." It is evident that s. 9(1)(vii), read in its plain, same envisages the fulfilment of two conditions : services, which are source of income sought to be taxed in India must be (i) utilized in India and (ii) rendered in India. In the present case, both these conditions have not been satisfied simultaneously.

71. The provisions of s. 9(1)(vii) of the Act are plain and capable of being given a meaning. There, therefore, may not be any reason not to give full effect thereto. However, even in relation to such income, the provisions of art. 7 of the DTAA would be applicable, as services rendered outside India would have nothing to do with permanent establishment in India. Thus, if any services have been rendered by the head office of appellant outside India, only because they were connected with permanent establishment. Even in relation thereto, principle of apportionment shall apply.

72. The Authority, in our opinion, has committed an error in this behalf, as if services rendered by the head office are considered to be the services rendered by the permanent establishment, the distinction between Indian and foreign operations and the apportionment of the income of the operations shall stand obliterated. It would be contrary to the intent and purport of the Double Taxation Convention which is a part of the scheme under the IT Act.

73. We, therefore, hold as under :

Re : Offshore supply :

(1) That only such part of the income, as is attributable to the operations carried out in India can be taxed in India.

(2) Since all parts of the transaction in question, i.e. the transfer of property in goods as well as the payment, were carried on outside the Indian soil, the transaction could not have been taxed in India.

(3) The principle of apportionment, wherein the territorial jurisdiction of a particular State determines its capacity to tax an event, has to be followed.

(4) The fact that the contract was signed in India is of no material consequence, since all activities in connection with the offshore supply were outside India, and therefore cannot be deemed to accrue or arise in the country.

(5) There exists a distinction between a business connection and a permanent establishment. As the permanent establishment cannot be said to be involved in the transaction, the aforementioned provision will have no application. The permanent establishment cannot be equated to a business

connection, since the former is for the purpose of assessment of income of a non-resident under a DTAA, and the latter is for the application of s. 9 of the IT Act.
(6) Clause (a) of Expln. 1 to s. 9(1)(i) states that only such part of the income as is attributable to the operations carried out in India, are taxable in India.
(7) The existence of a permanent establishment would not constitute sufficient 'business connection', and the permanent establishment would be the taxable entity. The fiscal jurisdiction of a country would not extend to the taxing entire income attributable to the permanent establishment.
(8) There exists a difference between the existence of a business connection and the income accruing or arising out of such business connection.
(9) Paragraph 6 of the protocol to the DTAA is not applicable, because, for the profits to be 'attributable directly or indirectly', the permanent establishment must be involved in the activity giving rise to the profits.
Re : Offshore services :
(1) Sufficient territorial nexus between the rendition of services and territorial limits of India is necessary to make the income taxable.
(2) The entire contract would not be attributable to the operations in India viz. the place of execution of the contract, assuming the offshore elements form an integral part of the contract.
(3) Sec. 9(1)(vii) of the Act read with memo cannot be given a wide meaning so as to hold that the amendment was only to include the income of non-resident taxpayers received by them outside India from Indian concerns for services rendered outside India.
(4) The test of residence, as applied in international law also, is that of the taxpayer and not that of the recipient of such services.
(5) For s. 9(1)(vii) to be applicable, it is necessary that the services not only be utilized within India, but also be rendered in India or have such a "live link" with India that the entire income from fees as envisaged in art. 12 of DTAA becomes taxable in India.
(6) The terms 'effectively connected' and 'attributable to' are to be construed differently even if the offshore services and the permanent establishment were connected.
(7) Sec. 9(1)(vii)(c) of the Act in this case would have no application as there is nothing to show that the income derived by a non-resident company irrespective of where rendered, was utilized in India.
(8) Article 7 of the DTAA is applicable in this case, and it limits the tax on business profits to that arising from the operations of the permanent establishment. In this case, the entire services have been rendered outside India, and have nothing to do with the permanent establishment, and can thus not be attributable to the permanent establishment and therefore not taxable in India.
(9) Applying the principle of apportionment to composite transactions which have some operations in one territory and some in others, is essential to determine the taxability of various operations.
(10) The location of the source of income within India would not render sufficient nexus to tax the income from that source.
(11) If the test applied by the Authority for Advanced Rulings is to be adopted here too, then it would eliminate the difference between the connection between Indian and foreign operations, and the apportionment of income accordingly.
(12) The services are inextricably linked to the supply of goods, and it must be considered in the same manner."

In our opinion,considering the above judgments,it can safely be held that services rendered by the assessee cannot be taxed u/s.9(1)(vii)of the Act.

6.Now,we would like to decide the issue as to whether the services rendered by the assessee could be termed FIS as per the provisions of Article 12 of the DTAA.At paragraph 5.1 of our

order, we have given the details of services provided by the assessee under the heads 'Technical services' and 'start-up services'.We find that start-up services were carried out on site by the start-up contractors, that all the services were provided from overseas and that no part of it was carried out in India.Though some of the employees of the assessee visited India,but there is no proof that there was any transfer of technology or technical know-how to the JTPCL.As per the Article 12(4) of the tax treaty for a payment to be considered as FTS following conditions have to fulfilled

i. *the payments has to be in consideration for services of a managerial/technical/ consultancy nature*
ii. *the services should fulfill the condition set out in any of the clause a or b of the Article.*

In our opinion,it will be useful to refer to the memorandum of understanding dated 15/5/1989 to the DTAA. As per the MOU technical and consultancy services are considered included services only to the following extent:

i. *if they are ancillary and subsidiary to the application or enjoyment of right/ property/ information for which a royalty payment is made or*
ii. *if they make available technical knowledge/experience/skill/know-how or process or consists of development and transfer of technical plan/technical design.*

In short,under paragraph 4(b)consultancy services which are not of technical nature cannot be treated as included services.

We would also like to refer to the Example 2 to MoU that deals with paragraph 12 (4)(b) of the tax treaty and same reads as under:

> *"Paragraph of article 12 refers to technical or consultancy services that make available to the person acquiring the service, technical knowledge is, experience, skill, know-how or processes or consists of the development and transfer of technical plan or technical design to such person..... This category is narrower than the category described in paragraph 4(a) because it excludes any services that does not make technology available to the person acquiring the service. Generally speaking, technology will be considered made available when the person acquiring the service is enabled to apply the technology. The fact that provisions of the service may require technical input by the person providing the service does not per se mean that technical knowledge, skill etc. are made available to the person purchasing the service within the meaning of paragraph 4(b)."*

From the above discussion,it is clear that to be classified as FTS the services should enable the service receiver to carry out services by obtaining the technical knowledge/ experience/ skill possessed by the service provider.It is possible that service provider may utilise its own technical knowledge in providing the services but that in itself would not render the services being treated as making available to the service receiver. We would like to refer to the judgement of De Beers India Minerals(P)Ltd.(346ITR467),wherein the world make available has been defined 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, skill?, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is*

enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."

If the twin test envisaged by the above judgment is applied to the facts of the case it has to be held that perusal of the contracts,entered into by the assessee with JTPCL,reveal that the services provided by it under the contracts did not in any way make available technical knowledge and experience skill or know-how to the Indian Compnay.It had supplied the equipments to Indian company outside India,so the payments made by JTPCL to the assessee would not constitute FIS,as per Article 12 of the Treaty.

Services mentioned in Examples 4 and 7 of the MoU are more or less similar to the services rendered by the assessee.We have also taken note of Article 12 (5)of the Treaty which stipulates that FIS would not include the amounts if same are inextricably and essentially linked to the sale of property.In the case under consideration, in our opinion, the services provided by the assessee were linked inextricably and essentially to the start-up services and sale of equipment to JTPCL.

Therefore,the payment received by it cannot be treated as FIS.In our opinion,payment received by the assessee under the contract constituted business profit within the meaning of article 7 of the Tax-treaty.As per article 7(1) of the treaty business profit of an assessee can be taxed in India only if it has a PE in India.In the case under consideration the assessee is not having PE in India-whether fixed or otherwise.

Finally,we would like to rely upon the case of Wockhardt Ltd.(supra).Facts of the case were that The facts of the case were that the assessee company had invited professional from a non-resident company(CKP Inc.of USA) to address conference on future strategy for an effect of its employee, that it made payment to the non-resident company for the said services without deducting tax at source, that the AO held the assessee to be in default under section 201 of the Act.The assessee argued that the US company was a tax resident of the USA, that it did not have any permanent establishment in India during the year under consideration as contemplated by article 5 of the DTAA,that the US company did not make available any technical knowledge to the assessee, that the payment made by it to the non-resident company was not taxable in India. The AO and the FAA did not agree with the assessee.The Tribunal deciding the matter in favour of the assessee,held as under:

"As per the provisions of section 90, an assessee is eligible to adopt provisions of tax treaties if the same are more beneficial to the assessee. As per article 12 of the India – US tax treaty, the definition of fees for included service is restricted to technical or consultancy services and since the managerial services are not covered in the said definition, the same cannot be taxed in India. It was,therefore, necessary to ascertain whether the services rendered by could be termed as technical or consultancy services. In this regard it was observed that was a management guru. A perusal of the presentation made by him showed that the services rendered by were essentially in the nature of shading management experiences and business strategies and it had nothing to do with the Pharma industry in particular. The services rendered by CKP Inc.,could not be termed as technical services is no technical knowledge had been made available to the assessee. It was pertinent to note here that provisions of article 12 (4)(b) of the treaty cover only such technical or consultancy services which make available technical knowledge, experience, skill or know-how etc.,so as to unable the recipient of services to apply the said technology independently in its business. In the instant case, no such technology could be said to have been made available to the assessee company by CKP, as the services rendered by it to the assessee company were merely in

the nature of sharing management experience and business strategies…….. As per memorandum of understanding (MoU)to the India-US tax treaty consultancy services would fall in the definition of fees for technical services only if the same are technical in nature. Consultancy services which are non-technical in nature would not be covered by definition of fees for included services…. In view of the aforesaid, it was to be held that the nature of services rendered by CK P to the assessee-company was such that the same could not be regarded as technical or consultancy services so as to fall within the definition of fees for included services as given in article 12 of the Indo-US tax treaty. The payment made for the said services was in the nature of business profits in the hands of CKP Inc.is covered under article 7 of the treaty and the said party, admittedly, having no PE in India in the year under consideration the same was not chargeable to tax in its and in India consequently, the assessee company was not liable to deduct tax at source from the payment made to CKP and no liability could be fastened it under section 201/201 (1A). Therefore the impugned order of the Commissioner (Appeals) upholding the order of the assessing officer was to be reversed and the appeal of the assessee was to be allowed."

The second issue was about payments made by the assessee to various non-resident entity is on account of bio-equivalence study, analysis charges, testing charges sub-chronic toxicity study charges etc. the Tribunal,discussed the facts of the case in short and held as under;

"The assessee, in the instant case, was a pharmaceutical company having in-house research facility. In order to place/and newly developed villagers was equivalent to original reference drug, it had to produce evidence in the form of certificates from CRO. The generator developed by the assessee – company were sent for testing at laboratories of CRO abroad. CRO conducted tests and experiments on these drugs and sent back analysis report containing results of such tests and experiments. As rightly observed by the Commissioner (appeals), the CROs, thus, use their own skill equipment etc. to prepare the report. However, what they ultimately supplied to the assessee-company was analysis report and there was no party with their skills and know-how to the assessee-company. The services rendered by CROs, thus, were not technical in nature but were merely in the nature of commercial services. The fees paid for such services, therefore, did not amount to fees paid for technical services or fees paid for making available any technology to the assessee company in order to enable it to apply the sales for developing/inventing new drugs in future.

Keeping in view all the facts of the case, it was to be opined that the nature of services rendered by CROs, to the assessee/company was such that the same could not be regarded as technical or consultancy services so as to fall within the definition of fees for included services and the payment made for such services therefore, was not chargeable to tax in India in the hands of the concerned CROs. Consequently, the assessee company was not liable to deduct tax at source from the said payment made to CROs….."

Considering the above,we are of the opinion that the order of the FAA cannot be sustained.So, reversing his order,we decide effective ground of appeal in favour of the assessee.

As a result,appeal filed by the assessee stands allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील मंजूर की जाती है.

Order pronounced in the open court on 11th March, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 11 मार्च, 2016 को की गई।

Sd/-	**Sd/-**
(राम लाल नेगी /Ram Lal Negi)	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई/Mumbai,दिनांक/Date: 11.03. 2016

व.नि.स.*Jv.Sr.PS.*

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR L Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**, ए** खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार**/ BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**