आयकर अपीलीय अधिकरण "L" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L", MUMBAI

श्री डी. करूणाकर रावु, लेखा सदस्य , एवं श्री विवेक वर्मा, न्यायिक सदस्य के समक्ष ।

BEFORE SHRI D. KARUNAKARA RAO, AM AND
SHRI VIVEK VARMA, JM

ITA No. : 57/Mum/2009

(Assessment year: 2007-08)

ITO(IT)- TDS-3, Ist Floor, Scindia House, Ballard Pier, Mumbai -400 038	Vs	M/s Bennet Coleman & Co. Ltd., Times of India Bldg., D. N. Road, Fort, Mumbai -400 001 स्थयी लेखा सं.:PAN: **AAACB 4373 G**
अपीलार्थी(Appellant)		प्रत्यर्थी(Respondent)

ITA No. : 7315/Mum/2008

(Assessment year: 2007-08)

M/s Bennet Coleman & Co. Ltd., Times of India Bldg., D. N. Road, Fort, Mumbai -400 001 स्थयी लेखा सं.:PAN: **AAACB 4373 G**	Vs	ITO(IT)- TDS-3, Ist Floor, Scindia House, Ballard Pier, Mumbai -400 038
अपीलार्थी(Appellant)		प्रत्यर्थी(Respondent)
Assessee-appellant by	:	Shri S Venkatraman
Respondent-revenue by	:	Shri S K Mahapatra

सुनवाईकीतारीख /Date of Hearing : 28-08-2014

घोषणाकीतारीख/Date of Pronouncement : 12-11-2014

आ दे श

O R D E R

श्री विवेक वर्मा, न्या. स.

PER VIVEK VARMA, J.M.:

Instant appeals are filed against the order of CIT(A) XXXIII, Mumbai, dated 20.08.2008. Since both the appeals emanate from the same order of the CIT(A), we are disposing off both the appeals through the common and consolidated order for the sake of convenience and brevity.

2. Since the grounds raised in both the appeals are emerging from one issue, we are taking up both the appeals together for disposal.

3. The facts are that the assessee is a company engaged in the business of printing and publishing of newspapers, such as, Times of India, Economic Times, Nav Bharat Times etc. It has a printing press at Kandivali in the suburbs of Mumbai. The assessee has to conclude the printing of newspapers around middle of the night, to ensure delivery to the vendors, to be delivered to the readers between 5.00 a.m. and 7.00 a.m. in the morning. For this purpose, it needed a sophisticated plant and machinery (commonly known as mail room equipment') that could collate the various pages of the newspaper, which assisted in printing, picking and stacking them and pack the news papers for timely delivery within the shortest time to its readers. The mail room equipment, therefore, required a complex plant with installed machinery, complete with conveyor belt, which could collate various pages of the newspaper for fast packing for delivery.

4. To acquire such a plant and machinery, the assessee called for global bids for supply, delivery and installation of the plant and machinery *and* training of its staff. The bid was closed in favour of M/s FERAG AG, Switzerland.

5. The assessee, therefore, entered into two contracts on 8th February 2005 with M/s FERAG AG, Switzerland, a company registered in Switzerland, aggregating to CHF 7,915,000/- (best price, APB 21), of which one for the supply of the various components/units of the mail room equipment, and second for installation and commissioning of the components/units of the mail room equipment in the premises of the assessee and training of the staff of the company for operation of this equipment to be supplied. In so far as

the instant cases are concerned, there is no dispute with regard to the agreement concerning quantum of payment concerning supply of equipment of mailroom and its components.

6. The assessee company paid in aggregate CHF 664,000/- (Swiss Francs) equivalent to Rs. 2,73,32,300/- towards installation and commissioning of the various components/units, as well as for training of the employees of the assessee. The entire payment was made without deduction of tax at source (TAS). The AO, came to the conclusion that the payments made by the assessee, were liable to withholding tax in the hands of FERAG AG, as "Fees for Technical Services" and since the assessee failed to deduct TAS on the said remittance, AO invoked the provisions of section 201 read with section 195 of the Income Tax Act, 1961. He, therefore, directed the assessee to pay Rs. 27,33,320/- under section 201(1) of the Act, vide order dated 18.02.2008 along with interest under section 201(1A) of the Act aggregating to Rs. 30,88,550/-.

7. The assessee approached the CIT(A), before whom the assessee submitted that the remittance made towards installation and commissioning of the components/units of the mail room equipment *and* towards training of the staff of the assessee, here in India, were not chargeable to tax in the hands of FERAG AG. The assessee made three pronged submissions to support its contentions, before the CIT(A):-

> *(a) The services rendered by FERAG AG, Switzerland, in regard to installation and commissioning of the mail room equipment and training of the assessee's employees were inextricably and essentially linked to the supply of the said equipment and hence the remittance towards the same cannot be viewed in isolation so as to be separately subjected to tax as "Fees for Technical Services" in the hands of the FERAG AG, Switzerland;*

(b) In the alternative, the installation, commissioning of the components/units of the mail room equipment and the training of the employees of the assessee falls within the expression "construction, assembly or like project" appearing in Explanation 2 to Section 9(1)(vii) of the Act and, consequently, would be exempt from chargeability to tax in the hands of FERAG AG, Switzerland.

(c) Assuming, that the payment made towards installation and commissioning of the components/units of the mail room equipment and training of the employees are chargeable to tax under the Income Tax Act in the hands of FERAG AG, Switzerland, the said services are covered by Article 14 of the Double Tax Avoidance Agreement between India and the Swiss Confederation and therefore was only chargeable to tax in the hands of FERAG AG, Switzerland in Switzerland.

8. The CIT(A), while negating the submissions advanced by the assessee in the alternative as in 7(a) and (c) above, upheld the submission as in para 7(b) above. To come to this conclusion, the CIT(A) relied upon the definition of the expression "assembly" as appearing in Black's Law Dictionary, The New International Webster's Students Dictionary and Little Oxford Dictionary, and held that the installation and commissioning of the components/units of the mail room equipment was "assembly" under Explanation 2 to Section 9(1)(vii) of the Act. In so holding, he placed reliance on the decision of the coordinate Bench of the ITAT, Hyderabad Bench, in the case of ITO vs National Mineral Development Corporation Ltd., reported in 42 ITD 570. He, therefore, came to the conclusion that 75% of the remittance made by the assessee was towards installation and commissioning and hence was not "Fees for Technical Services" as defined in Explanation 2 to Section 9(1)(vii) of the Act and therefore, not chargeable to tax in the hands of FERAG AG. But he concluded that the balance 25% of the remittance was towards training of the assessee's staff, which was chargeable to tax as FTS.

9. Against this order of the CIT(A) giving relief to the assessee to the extent of 75%, department is in appeal before the ITAT and the assessee is in appeal against the sustaining estimated 25% of payment made towards training of the employees as FTS.

10. Before us, the AR made detailed submissions/arguments on the solitary issue impugned in the two appeals. He referred to pages 1 to 11 of the APB, which dealt with the Invitation of Bids for sourcing the mail room equipment. At page 5 the scope of work referred to the various components/units of the mail room equipment that was supplied and which comprised of the pickup station, the gripper conveyor, stackers, automatic bundle addressing system, etc. At APB 6, Bid document read as

> *"the equipment will be installed and commissioned by trained and qualified personnel from your organization only. You will also provide hands-on as well as classroom training for operation and maintenance of your equipment".*

The AR, further referred to the quotation of the supplier, FERAG AG, at APB 12 to 30, which included the quotation of various components/units, which formed part of the mail room equipment. At APB 21, referred to the financials in CHF 7,915,000/-, which specifically included freight and installation. At APB 23, the quotation under the para "installation" referred to the fact that

> *"the total price includes the mechanical installation, the commissioning, the training of customer's personnel and the production supervision during a maximum of 2 weeks".*

11. The AR, referred to the relevant clauses of the agreement, which pertained to supply. This agreement was signed on 8th February 2005. In the agreement, he specifically referred to Para 8, which dealt with the warranty and guarantee on the machinery supplied, and also in para 8.6(a) at page 42 which stated that :-

> *"The company may only claim the vendor's warranty if –*
> *(a) the supplied goods were installed and put into operation by the vendor certified personnel."*

12. The AR, then, referred to the agreement of installation, commissioning and training (called Service Contract), which was also signed on 8th February, 2005, which formed part of the APB at pages 56 to 79. He specifically referred to paras 3.2 and 3.3 at APB 60, which referred to the activity of installation and commissioning in the following words:

- *Bringing and positioning the various components of the equipment;*
- *Properly aligning the entire equipment;*
- *Properly connecting the individual units;*
- *Ensuring that unnecessary vibrations, heat generation is avoided;*
- *Ensuring that all safety features provided by the vendor are properly erected and found to be delivering the desired results;*
- *Testing the mechanical, electrical and control functions to ensure that :*
- *All the components are working in unison as per the design of the vendor;*
- *Individually and collectively the components are working to the maximum rated capacity;*
- *The power drawn by the various components are within the limits prescribed;*
- *To undertake the necessary white paper runs are working optimally; and*
- *To undertake the necessary test runs with printed paper to ensure proper functioning of the equipment.*

13. The AR, thereafter, referred to para 3.6 at APB 61, which defined "Installation and Commissioning" as follows:

> *"Installation and Commissioning shall extend from the positioning of the consignments at the specified locations in the company's site to the time the equipment is handed over to the company after successful completion of Acceptance Test".*

14. Based on the above, the AR, submitted that a conjoint and harmonious reading of the invitation to *bid, the quotation* and *both the agreements* would show that both the agreements were part and parcel of one activity, i.e. supply, installation, commissioning and training. The supply of mail room equipment, was entirely dependent upon its installation and commissioning by the bidder, i.e. FERAG AG. But for

which it would not be possible for the assessee to claim warranties and specific guarantees – Page 42 of APB, para 8.6 (a) of the Supply Agreement. It was therefore, argued that the installation and commissioning and training of the staff was inextricably and essentially linked to the sole purpose and desire of the assessee to modernise the mail room equipment. Therefore, the two agreements were actually one comprehensive activity and could not be separated, as supply and FTS**.**

In this factual background, the AR placed reliance on the following judicial pronouncements:

> *CIT vs Sundwiger EMFG & Co. (262 ITR 110) (AP High Court)*
> *Mahindra Forgings Ltd. vs ADIT (Intl. Tax)-1, Pune ITAT (ITA Nos.2563, 64 & 65/PN/2012)*

15. The AR, to explain his case, referred to the definition of "Fees for Technical Services" appearing in Explanation 2 to Section 9(1)(vii) of the Act as follows:

> *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".*

16. The AR submitted that various components/units that formed part of the mail room equipment were positioned, aligned and properly connected individually, keeping in mind that safety is to be ensured, so that vibrations ceased to exist and the power consumption was not compromised when the machines and components were to be individually and/or collectively working to maximum capacity. The detailed activity was prototyped by the engineers deputed by FERAG AG, as enumerated in paras 3.2 and 3.3 of the Contract of Service. The entire activity was carried out over a period of 106 days. He, therefore,

submitted that the services carried out by FERAG AG, by way of installation and commissioning were in the nature of "construction, assembly" as appearing as the exclusions in the definition of "Fees for Technical Services" under Explanation 2 to Section 9(1)(vii) of the Income Tax Act and hence the consideration paid to FERAG AG, was not chargeable to tax as FTS.

17. In this connection, the AR relied upon the decision of the Hon'ble ITAT, Hyderabad Bench in the case of ITO vs National Mineral Development Corporation Ltd., reported in 42 ITD 570. He argued that the facts in the said case were identical as that of the assessee and referred to the following para appearing at page 580 of the decision:

> *"From the facts and circumstances before us it cannot be said that the NR simply agreed to provide service of its technical personnel only.It had undertaken to complete erection, commissioning and maintenance. Erecting a conveyor belt is a form of construction. There is nothing to suggest what type of construction is contemplated by that word used in section 9(1)(vii). If loose parts of a machinery are assembled it can also be called as construction of the machine. In this section both construction as well as assembly was used. Even if these words like construction and assembling are to be understood as per ejusdem generis rule to assemble or to construct a conveyor belt is itself a project of a big magnitude. The cost of the conveyor belt as given in Annexure-I to the agreement dated 17.1.1985 is 25,70,400 DM FOB. Such heavy machinery costing crores of rupees were assembled at the Project site and an integrated conveyor belt was constructed at the Project site at a cost of 1,07,000 DM. Under these circumstances can we say that the charge for assembling or construction of the conveyor belt is simply for supervising the act of construction or assembling or for setting up of the conveyor belt? It is no doubt that the NR itself was not engaged in any mining work. But that by itself does not make the erection of a huge conveyor belt costing crores of rupees in a project area cannot itself be called a project. Therefore, we have no hesitation to hold that the assessee is engaged in a project of either constructing a conveyor belt or assembling a conveyor belt at the Project site which is intended to convey the iron ore mined in Bailadila, Madhya Pradesh. Therefore, we hold that the assessee would come within Explanation-2 to Section 9(1)(vii) and the payments sought to be for which no objection*

> *certificates were sought to be obtained for assessment years 1985-86 and 1986-87 cannot be said to be fees for technical services. In view of the Andhra Pradesh High Court's decision in Hindustan Shipyard's case cited supra, these amounts which are sought to be sent for assessment years 1985-86 and 1986-87 cannot also be considered as income earned in India by the NR. It is significant that under the Explanation to Section 44D or the Explanation provided under Section 115A, it is said that the words "fees for technical services" should bear the same meaning as was given in Explanation 2 to Section (1)(vii)".*

18. Submitting further, the AR pleaded, assuming, without admitting, that the consideration was chargeable to tax as *"Fees for Technical Services"* under the Act, the said services fell within the ambit of independent personal services as defined in Article 14 of the DTAA between the Government of India and the Swiss Confederation, as notified on 21st April 1995. Hence, the said consideration was only taxable in Switzerland and not in India.

19. He, therefore, drew our attention to the said Treaty appearing at pages 80 to 91 of the Paper Book. Para (5) of Article 12 of the said Treaty appearing at page 85 read as follows:

> "Notwithstanding paragraph 4, "Fees for Technical Services" does not include amounts paid:
> a) *For teaching in or by educational institutions;*
> b) *For services covered by Article 14 or Article 15 as the case may be.*

20. Relying on the above, the AR submitted, that though the services rendered by FERAG AG, towards installation, commissioning and training, would fall within the expression *"Fees for Technical Services"* as defined in Para (4) of Article 12 of the Treaty, but in view of para (5)(b) of Article 12, the definition of the term *"Fees for Technical Services"*, did not cover such services as stated in Article 14.

21. The AR, then, referred to Article 14 of the Treaty appearing at APB 86, which read as follows:

"ARTICLE 14 – Independent personal services
1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State :
(a) if he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State; or
(b) if his stay in the other State is for a period or periods aggregating to 183 days or more in any 12 month period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.
2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, surgeons, dentists and accountants".

22. Based on the above definition of the term *"professional services"* appearing in Para 2 of Article 14 of the Treaty, the AR argued that professional services also included independent activities of engineers. FERAG AG, being an engineering concern, it was submitted that the services of installation, commissioning of the mail-room equipment and the training of the employees of the Assessee constituted independent activities of engineers carried out by the said Swiss entity and, therefore, fell within the extended definition of *"professional services"***.** The AR further submitted that, since FERAG AG, did not have a fixed base in India and also that since, the engineers deployed by them for installation and commissioning of the mail-room equipment as well as training, stayed in India for an aggregate period of 106 days in the 12 month period, the consideration paid by the assessee to FERAG AG, towards these professional services, was only taxable in Switzerland, in terms of para (1) of Article 14 of the Treaty.

23. The AR then referred to the observations of the eminent authors, Dr. S. Rajaratnam and Mr. B.V. Venkataramiah, in their commentary

on Double Tax Treaties to substantiate that the engineering services rendered by FERAG AG would fall under Article 14 of the Treaty and not under Article 12 :-

> *"An engineer may offer engineering services, which is ordinarily understood as a technical service, but as long as the assignment is a professional one in the nature of independent service, it will more readily fall under this Article than the Article relating to technical service, especially in the context of technical service being understood as parting with technology."*

24. As regards the appeal filed by the assessee against the finding of the CIT(A) that 25% of the consideration is attributable towards training and hence exigible to tax as "*Fees for Technical Services",* the AR submitted that the estimation made by the CIT(A) of 25% of CHF 664,000/- towards training was highly excessive. In this connection, the AR filed the break-up of CHF 664,000/- given by FERAG AG, according to which, only CHF 17,500/- was the attributable towards training. Based on this fact, as per the agreements and the details, as provided by FERAG AG, that at the most the amount of CHF 17,500/- could only be qualified towards training.

25. The AR, therefore, submitted that in so far as the deletion of 75% of the amount added, the order of the CIT(A) was correct and no infirmity could be seen, but in so far as the sustaining the 25% of training amount, the AR pleaded that though the sum is not sustainable, but if at all the addition has to be made, then, 25% of CHF 17,500/- could only qualify for such an addition.

26. On the other hand, the DR while supporting the order passed under Section 201 read with section 195 by the AO, submitted that the scope of the services of installation, commissioning and training were narrated in a separate contract which clearly showed that the payment made was in the nature of *"Fees for Technical Services".* He

submitted that the contract for services being a separate contract has to be considered independently from the chargeability perspective.

27. The DR also submitted his written submissions during the course of the proceedings relying upon various case laws in support of the stand taken by the AO. In the written submissions, it was also argued that Article 14 of the Treaty with the Swiss Confederation did not support the assessee's stand, therefore, unlike commercial or business activities, where capital requirement is significant and critical, independent personal services, as in the instant scenario, do not require huge capital but high amount of intellectual and personnel expertise. In this connection, it was submitted that in both sub-paras (a) and (b) of Para 1 of Article 14, there was the use the phrase *"He"* and *"His",* and in this context it was urged, following the decision of the Mumbai ITAT, in Christiani & Nielsen, reported in 39 ITD 355, that on independent personal services, Article 14 gets attracted only when an individual renders services and not otherwise.

28. The AR, in his rejoinder, referred to the following case laws relied upon by the DR in his note.

(a) CGG Veritas Serives SA vs Addl. DIT (Int. Taxation) (50 SOT 335);
(b) Jindal Tractebal Power Co. Ltd. vs DCIT (106 ITD 227);
(c) AEG Aktiengesselschaft vs IAC (48 ITD 359);

29. The AR filed copies of the above decisions during the course of the hearing as relied upon by the DR and sought to distinguish the same as follows:

(a) In CGG Veritas Services SA., vs Addl. DIT (Intl. Taxation), the recipient of the consideration, was engaged in providing geological and geo-physical services in the form of seismic surveys in the offshore waters under contract with ONGC. The consideration

received by the recipient was hitherto taxed under Section 44BB of the Act but, however, in the assessment year involved the AO invoked Explanation 2 to Section 9(1)(vii) of the Act and sought to tax the consideration as *"Fees for Technical Services"*. The Assessee in the said case had taken shelter that the project being a mining project, it fell within the exception provided under Explanation 2 of Section 9(1)(vii) of the Act. The AR invited pointed out that in para 21 of the order in which the reason as to why this argument did not find favour with the Bench was indicated. From the same, the AR argued that it was apparent that though the assessee in the said case carried on a mining project, the additional condition that *"Project should be undertaken by the assessee"* was not satisfied in order to avail of the exception. In the present case, the AR submitted that the project of assembling the mail-room equipment was, in fact, undertaken by FERAG AG and, consequently, the conditions, i.e. assembling, installation and training of personal was the indivisible part of the project being undertaken by FERAG AG, and therefore, the referred case by the DR was inapplicable.

(b) The AR referred the case of Jindal Tractebal Power Co. Ltd. vs DCIT, reported in 106 ITD 227,relied upon by the DR, and submitted that the DR based his arguments on para 3, which gave the facts of the case. It was submitted that it was only supply of equipment and start-up was involved and there was no assembly or construction or mining project involved. The AR, pointing out the distinction, referred to para 7.2 of the said decision, wherein the coordinate Bench also noted the claim fell within the exception of Explanation 2 to Section 9(1)(vii) of the Act. He, therefore, submitted that this decision, was also inapplicable.

(c) In AEG Aktiengesselschaft vs IAC, reported in 48 ITD 359 also from Para 2 it could be seen that no construction, assembly was involved

and hence in para 7.2 the Bench negatived the argument that it was not *"Fees for Technical Services"*.

29. As regards the DR's reliance on the decision of the Mumbai ITAT in Christiani & Nielsen, reported in 39 ITD 355, that Article 14 of the DTAA applied only to individuals, the AR drew the attention to the fact that Article 14 of the Treaty between India and Denmark, which was considered by the Hon'ble Mumbai ITAT while referring to "Independent Personnel Services", specified that it only applied to *"Income derived by an Individual"*. However, in the present instance, Article 14 of the Treaty between India and Swiss Confederation used the expression *"Income derived by a resident of a contracting state"*. Further, in para 3 of Article 4 of the Swiss Treaty specifically states that *"where a person other than an individual is a resident of both contracting states, then it shall be deemed to be a resident of the contracting state in which its place of effective management is situated"*. It was therefore, argued by AR that Article 14 of the Swiss Treaty applied not only to individuals, as argued by DR, but to all residents of a contracting state. In this connection, he relied upon the decision of the Mumbai ITAT in MSEB vs Dy. CIT, reported in 90 ITD 793, where at pages 802 and 803 the coordinate Bench of the ITAT interpreted similar provisions of the erstwhile India UK Treaty, to hold that the relevant Article was applicable to all residents of a contracting state.

30. In the circumstances, the AR submitted that in accordance with India Swiss Treaty, Article 14, applied to FERAG AG, and, consequently, the consideration paid towards installation, commissioning and training qualified as *"Independent Personal Services"* and was therefore, taxable only in Switzerland.

31. We have considered the rival submissions and also perused the relevant materials on record. It is undisputed that the mailroom equipment comprised of various units and was hence a complex equipment. The bid document clearly stipulated that the units/components of the mailroom equipment would have to be installed and commissioned by trained and qualified personnel of the supplier, who shall, then provide training to the assessee's employees, on the operation and maintenance of mailroom equipment. *The price quoted included installation, commissioning and training.* The mere fact, that both the contracts, i.e. for supply of the mailroom equipment and its installation, commissioning *and* training were entered into on the same date would not lead to an automatic conclusion that they should be read in isolation with the other. In this connection, we can safely take the advantage of the observations of the Hon'ble Supreme Court at page 429 in Ishikawajima-Harima Heavy Industries vs Director of Income Tax, reported in 288 ITR 408, wherein the Hon'ble Supreme Court observed,

> *"The contract is a complex arrangement. Petronet and the assessee are not the only parties thereto, there are other members of the consortium who are required to carry out different parts of the contract. The consortium included an Indian company. The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. The project is a turnkey project. The contract may also be a turnkey contract, but the same by itself, would not mean that even for the purpose of taxability the entire contract must be considered to be an integrated one so as to make the assessee to pay tax in India. The taxable events in execution of a contract may arise at several stages in several years. The liability of the parties may also arise at several stages. The obligations under the contract are distinct ones. The supply obligation is distinct and separate from the service obligation. The price for each of the component of the contract is separate. Similarly, offshore supply and offshore services have separately been dealt with. The prices in each of the segment are also different.*
> *The very fact that in the contract, the supply segment and service segment have been specified in different parts of the contract is a pointer to show that the liability of the assessee thereunder would also be different".*

32. In the instant case in hand, we cannot ignore the ground reality that, in fact the assessee has entered into two contracts, one for the supply and one for the services. The price for supply is separately indicated in the contract for supply and that for the services in the contract for services. The obligations under the contract for services are distinct. Further, in the contract for supply, Para 8.6 lays down that the warranty can be claimed by the assessee only if the mailroom equipment were installed and put into operation by Vendor Certified Personnel. In other words, the equipment could be installed by anybody, with the only requirement, that the person who installs the equipment, should be certified by the vendor, as qualified to install the same. This is not the same as saying that qualified personnel of the vendor should install the equipment as is only indicated in the bid document and not in the contract signed by the assessee. In the circumstances, the first contention of the AR that the services rendered by FERAG AG, by way of installation, commissioning of the mailroom equipment and the training of the assessee's employees as inextricably and essentially linked to the sale of the mailroom equipment and hence not taxable separately as *"Fees for Technical Services",* cannot be accepted.

33. The next contention of the assessee was that the consideration towards installation and commissioning of the mailroom equipment and training of the employees of the assessee does not fall within the definition of the expression *"Fees for Technical Services"* under Explanation 2 to Section 9(1)(vii) of the Act. This argument of the AR is based on the view that the services rendered by FERAG AG, will fall within the purview of the word *"Assembly"* appearing in the expression *"construction, assembly or like project undertaken by the recipient".* This argument found favour with the CIT(A). In support of the same,

the AR has heavily relied on the decision of the coordinate Bench at Hyderabad, in National Mineral Development Corporation Ltd. *(supra)*. The CIT(A) while upholding this argument of the assessee relied upon the definition of the expression *"Assembly"* appearing in Black's Law Dictionary and in The New International Webster's Students Dictionary and the Little Oxford Dictionary.

34. The services enumerated in paras 3.2 and 3.3 of the agreement for services indicate very clearly that the scope involved, was bringing and positioning various components, properly aligning them, connecting the individual units, ensuring that vibrations and heat generation is avoided, safety features are properly erected, testing the mechanical, electrical and control functions, with a view to ensuring that all the components are working in unison, both individually and collectively, as per the design and at maximum capacity and that the power consumed is as prescribed. FERAG AG, had, in fact, supplied a pickup station, a gripper conveyor, stacker and automatic bundle addressing system, plastic film wrappers and strappers. All these units and components had to be fitted together in a manner that they were properly positioned, aligned and, connected to ensure optimum functioning, in the shortest duration. This activity can certainly be called *"assembly"*. The definition of the word *"assembly"* does not appear in the Act and hence the word has to be interpreted as understood in common parlance. The dictionary meanings relied upon by the CIT(A) also go to support the above view. When a collection of units or components are aligned and positioned after being put together so as to ensure their proper operation and functioning it would certainly qualify as *"assembly"*. This contention of the assessee which also found favour with the CIT(A) is, therefore, upheld. However, the services rendered by FERAG AG, towards training the employees of

the assessee, can by no stretch of imagination, be said to fall within the ambit of the expression *"assembly".* Consequently, insofar as the consideration paid to FERAG AG, related to installation and commissioning of the units and components of the mailroom equipment, the same will not fall within the purview of *'Fees for Technical Services"* as defined in Explanation 2 to Section 9(1)(vii) of the Act.

35. We find that the services rendered by FERAG AG, towards installation and commissioning of the mailroom equipment and training are *"Fees for Technical Services"* as defined under the Act, the consideration paid towards these services are only taxable in Switzerland in the hands of FERAG AG, by virtue of the provisions of Article 14 of the DTAA between India and the Swiss Confederation. It is seen that though, the Treaty between India and Swiss Confederation in Article 12(4) defines *"Fees for Technical Services",* as including the services rendered by FERAG AG, towards installation and commissioning and training, Article 12(5) provides that services covered under Article 14 of the Treaty will not qualify for *"Fees for Technical Services".* Article 14 of the Treaty, though, overrides Article 12(4) while defining the term *"Professional Services",* includes independent activities of engineers. Such independent engineering activities would not cover training given to the employees of the assessee. Though a training activity may be connected to an engineering concern, that by itself, would not constitute training, to be an engineering activity so as to fall within *"professional services"* under Article 14 of the Treaty.

36. It is also common ground that FERAG AG, does not have a fixed base in India for performing its engineering activities and that the

engineers sent from abroad stayed in India for training purposes for an aggregate period of 106 days, hence, taxable. The argument of the department, that Article 14 applies only to individuals, is misconceived in the light of the wording in the Treaty between India and Swiss Confederation that refers to *"residents of a contracting state"* and hence it is not restricted to individuals as was the case in the India Denmark Treaty that came up for consideration before the Mumbai ITAT, in Christiani & Nielsen *(supra)*.

37. Consequently, the argument of the AR that Article 14 of the Treaty applies to the services rendered by FERAG AG, and the consideration relating to installation and commissioning of units of the mailroom equipment is taxable in Switzerland, is upheld.

38. On the issue of CIT(A), estimating 25% of CHF 664,000/-, as attributable towards training the employees of the assessee, would constitutes *"Fees for Technical Services", this,* we find is on ahigher side and also against the facts, as submitted by the AR in the course of hearing and which has not been controverted by the DR. We, therefore, accept that training part costed only CHF 17,500/-, as given in the break up provided by the vendor.

39. Keeping in mind the fact that the training period would not have been substantial and that too not essentially shop floor training, as to how to operate the mail room equipment, which would have been training on the machine, Article 12 shall apply on class room training. In these circumstances, we are of the view that an estimate of 25% of CHF 17,500/-, as attributable to training, would be reasonable.

40. Keeping in view the common observations in both the cases, as impugned before us, we hold that

the appeal of the Revenue is dismissed and

the appeal filed by the assessee is partly allowed.

Order pronounced in the open Court on 12th November, 2014.

Sd/-	**Sd/-**
(डी. करूणाकर रावु)	(श्री विवेक वर्मा)
लेखा सदस्य	न्यायिक सदस्य
(D. KARUNAKARA RAO)	**(VIVEK VARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: **12th November, 2014**

प्रति/Copy to:-

1) अपीलार्थी/The Applicant.
2) प्रत्यर्थी/The Respondent.
3) The CIT (A)-33/XXXIII, Mumbai.
4) The DIT-(Int. Tax), Mumbai.
5) विभागीयप्रतिनिधि "A" आयकरअपीलीयअधिकरण,मुंबई
   The D.R. "A" Bench, Mumbai.
6) गार्डफाईल
   Copy to Guard File.

आदेशानुसार/By Order

/ / True Copy / /

उप/सहायकपंजीकार
आयकरअपीलीयअधिकरण,मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हानव.नि.स

*Chavan, Sr. PS