

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'C' KOLKATA

[Before Hon'ble Shri S.S.Godara, JM & Shri M.Balaganesh, AM]

ITA.No.284/Kol//2015
Assessment year : 2008-09

I.T.O., Ward-7(1)
Kolkata

(Appellant)

Vs M/s M.S.K.Travels & Tours Ltd.
Kolkata

(PAN: AAECM 6777 F)

(Respondent)

For the Appellant: Shri N.B.Som, Addl. CIT, Sr.DR

For the Respondent: Shri Bikash Chanda, AR

Date of Hearing : 18.06.2018.

Date of Pronouncement :

ORDER

PER S.S.GODARA, JM

This Revenue's appeal for A.Y.2008-09 challenges correctness of the CIT(A)-3, Kolkata's order dated 22.01.2015 passed in Appeal No.01/CIT(A)-3/Ward-7(1)/14-15(10-11)/Kol reversing the Assessing Officer's action disallowing the amount in question of Rs.90,65,000/- on account of payments made to M/s Triginta Travel & Tours of Sweden, involving proceedings u/s 143(3) of the Income Tax Act, 1961 (in short the Act).

2. We find at the outset that the Revenue has raised two substantive grounds in its pleadings seeking to revive the impugned section 40(a)(i) disallowance on account of assessee's failure to deduct TDS on payments made to the swedish entity herein above. It further avers that the CIT(A) has erred in law as well on facts in overriding the amendment brought by the Finance Act, 2010 under Explanation below section 9(2) with retrospective effect. Learned Addl. CIT(DR) points out that the Revenue has also filed additional grounds that the lower appellate authority has erred by giving relief to the assessee on the basis of the 'Most Favoured Nation' clause in the protocol between India and Sweden in light of the corresponding article in Indo – Portugese Double Taxation Avoidance Agreement in absence of any separate notification issued by the Government of India as required u/s 90(1) of the Income Tax Act, 1961 alike in

case of other Most Favoured National countries i.e. Belgium and France. The Revenue's next ground is that income of the recipient assessee has been wrongly held to be not taxable in absence of its permanent establishment in India since it is taxable u/s 9 (2)(vii) Explanation 2 as well as Article 12 of India Sweden Double Taxation Avoidance Agreement. All these substantive grounds are vehemently reiterated during the course of hearing. Learned Addl. CIT (DR) reminds us time and again that the relevant benefits of India Portugal Double Taxation Avoidance Agreement do not apply suo moto in absence of any corresponding notification issued by the Government of India extending the very benefits to other similar countries in absence of a corresponding notification.

3. We now advert to the relevant facts. The assessee has admittedly made the impugned payments to its swedish payee involving the sum ,in question of Rs.90,65,000/- without deducting TDS thereupon. This appears to be the second round of proceedings before the tribunal. The tax payer had earlier filed its appeal ITA No.458/Kol/2012 challenging correctness of the impugned section 40(a)(i) disallowance made in course of assessment framed on 30.12.2010 as affirmed by the CIT(A) in the first round lower appellate order dated 17.02.2012. A coordinate bench restored the assessee's appeal back to the CIT(A) with the following directions:-

"3. So far as the first ground of appeal is concerned, the relevant material facts, as culled out from material on record, are like this. During the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has made a payment of Euros 1,60,440 (equivalent to INR 90,65,000) to a Sweden based entity by the name of Triginta Travels and Tours in respect of all inclusive tour in Scandinavia for 111 adults, 6 children and 1 tour manager. The Assessing officer noted that in terms of the provisions of Section 9(1)(i) of the Income Tax Act, this income was taxable in India and as the income had source in India and arose in India because of the business connection. He further noted that in terms of the provisions of Section 5(2), income originated in India and, for this reason also, it should have been taxed in India. The Assessing Officer further noted that as the assessee did not deduct tax at source from this payment, and thus defaulted in fulfilling its obligations under section 195, the expenditure of Rs 90,65,000 was to be disallowed under section 40(a)(i) of the Act. Aggrieved by this disallowance, assessee carried the matter in appeal before the CIT(A) and contended that the income embedded in payment to the Swedish entity was not taxable in India under the provisions of the Income Tax Act as entire work was

carried outside India. It was also contended that the said income was also not taxable under the provisions of the India Swedish DTAA, as the Swedish company did not have a PE in India and in view of the limited scope of provisions for 'fees for technical services' under the said tax treaty read with the protocol clause therein. None of these submissions, however, impressed the CITCA). The assessee is not satisfied and is in appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

5. We have noted that while CIT(A) has elaborately reproduced the submissions of the assessee so far the taxability of the income embedded in payment to the Swedish company, under the provisions of India Swedish DTAA, is concerned, he has not at all dealt with the same. It is only elementary that the provisions of the Income Tax Act, 1961 can come into play in respect of assessee, who is covered by the provisions of a duly notified double taxation avoidance agreement, only to the extent the same are beneficial to the assessee. In other words, therefore, as long as an income is not taxable under the provisions of the applicable tax treaty, it cannot be taxable under the provisions of the Income Tax Act either. The CIT(A) has simply not examined the taxability under the provisions of the applicable tax treaty. Therefore, his conclusion that the payment to Swedish entity could be disallowed under section 40(a)(i) is quite premature inasmuch as the vicarious provisions of tax deduction at source can only be invoked when there is primary tax liability of the recipient; and when primary tax liability of the recipient has not at all been examined under the provisions of applicable tax treaty, it is premature to hold that the recipient indeed had a tax liability in India. Before invoking the provisions of Section 40(a)(i), it is sine quo non for the Assessing Officer to demonstrate that the non resident recipient of payment was taxable in respect of income embedded in that payment in India, and, in order to arrive at such a finding, it is necessary that the said income was, in addition to taxability under the Income Tax Act, also taxable in India in terms of the provisions of the applicable tax treaty. These aspects have not been examined of the authorities below, and we do not consider it appropriate with these treaty related issues when these issues have not been examined, for whatever reasons, by the authorities below, In this view of the matter, without addressing ourselves to the merits of the arguments advanced before us, we deem it fit and proper to remit the matter to the file of the CIT(A) for fresh adjudication on merits in the light of our observations above, While so adjudicating the matter afresh, the CIT(A) will deal with all the arguments of the assessee by way of a speaking order, in accordance with the law and after giving yet another opportunity of hearing to the assessee.

6. Ground Nos. 1 to 4, which deal with the above grievance, are thus allowed for statistical purposes in the terms indicated above.”

4. The CIT(A) took up consequential proceedings. He holds on merits that the impugned payments are in the nature of fee for technical services. He then concludes that the assessee is entitled to claim benefit of India Portugal Double Taxation avoidance agreement restricting the scope of taxation of fee for technical services to be automatically applicable in Indo-Sweden DTAA in tune with latter's protocol as follows :-

“7. Thus, it can be seen that the appellant has made several contentions on the point that the income under consideration had not accrued or arisen in India -and, therefore, the same was not taxable in India under the domestic tax laws as well as provisions of Indo Swedish DTAA. So far as contention regarding non-taxability under domestic tax laws is concerned, I find that the Ld. CIT(A)-VIII, Kolkata has already given a finding in his order dated 17.02.2012, that the amount was to be deemed to have accrued/arisen in India. In its order, Hon'ble ITAT has not reversed this finding. It is true, that it has set aside the order of CIT(A), but that is for the reason that the applicability of the provisions of DTAA were not examined by the CIT(A). While setting aside the order, it has been clearly mentioned by the IT AT that a fresh adjudication on merit was to be made in the light of the observations of the Income tax on the issue of taxability under DTAA provisions. In other words, the only issue to be examined at this stage is as to whether the payment is taxable under the provisions of Indo Swedish DTAA.

8. On going through DTAA signed by India with Sweden, it is seen that taxability of fee for technical services has been dealt with in Article 12 thereof. Furtherer, there is a Protocol at the end of DTAA which states, that:- .

" In respect of Article-10 (Dividends), 11 (Interest) and 12 (Royalties and fees for technical services)if under any convention, agreement or protocol between India ' and a third state which is a member of the OECD India limits its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower or scope more restricted than the rate or scope provided in this convention for on the said items of income, the same rate or scope as provided for in that convention, agreement or protocol on the said items of income was also apply under this convention. “

It has been brought to my attention that subsequent to signing of the DTAA with Sweden, India has entered into DTAA with Portugal which is also a member of the OECD. In the DTAA with Portugal, taxation of fees for services has been dealt with in Article-12 and the term used therein is 'fees for included services'. The definition of included services' given therein is quite restricted viz. ancillary services for enjoyment of right, property or information or services for making available of technical knowledge, experience, skill or knowhow or process or development and transfer of technical plan or technical design. As per

the Protocol in the Indo- Swedish DTAA, the scope of taxability is to be examined in accordance with the Indo Portugal DTAA. Same view has been taken by Pune bench of tribunal in its decision in the case of M/s. Sandvik AB Vs. Dy.DIT (Internation Taxation)-II, Pune, ITA No. 1720/PN/2011. In the said case, it was held by Hon'ble tribunal, that in view of most favoured nation (MFN) clause in the Protocol between India and Sweden, fee for technical service cannot be taxed in the source country (India), unless it falls within the definition of 'included services' in Indo- Portuguese DTAA. In the appellant's case, the payment to non-resident is for organizing tour in Europe. Such services can, by no stretch of imagination, fall within the definition of 'included services' provided in India Portugal DTAA. Therefore, in view of the Protocol signed between India and Sweden and DTAA between India and Portugal, the payment under consideration cannot be taxed as 'fee for technical services' in India. Also, it is noted that as per Provisions of Indo Swedish DTAA, business income and other income (not covered by any specific Article of DT AA) are to be taxed in the country of residence unless the concerned person has a permanent establishment in the other state. It is undisputed that Triginta is a resident of Sweden without having any permanent establishment in India. As per provisions of Section 90(2) of Income Tax Act, where the Central Government has entered into an agreement for avoidance of double taxation with another country, then in relation to such assessee to whom such agreement applies, the provisions of Income tax Act shall apply to the extent of their being more beneficial to the assessee. In other words, provisions of I.T. Act or those of DT AA, whichever are more beneficial to the assessee, shall apply. It has been discussed - earlier that the payment under consideration was, under the provisions of Indo Swedish DT AA, not taxable in India. Therefore, irrespective of its taxability under domestic tax laws, the same cannot be brought to tax in India. As the logical consequence, appellant was not required to deduct tax at source on such payment and provisions of section 40(a)(i) are also not attracted. Disallowance u/s 40(a)(i) is, therefore, deleted.”

This is what leaves the Revenue aggrieved.

5. We have given our thoughtful consideration to the rival submissions. It emerges first of all that the India-Sweden Double Taxation Avoidance Agreement contains a protocol forming part of case records before us at pages 14 to 15. This protocol clause with reference to Articles 10, 11 and 12 specifically stipulates that if under any Convention, Agreement or Protocol between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the

said items of income shall also apply under this Convention. Article-12 of this India-Sweden DTAA deals with fees for technical services. The assessee is very fair in not challenging the CIT(A)'s former findings on merits holding the payments in question to be fee for technical services. The sole question therefore is whether or not the CIT(A) has rightly held the relevant restricted assessment of fee for technical services in India-Sweden DTAA as stipulated in India Portugal DTAA even in absence of a corresponding notification. Its answer; has to be in assessee's favour in our considered opinion. A coordinate bench in DCIT vs ITC Ltd [2001] 82 ITD 239 (Kol) has already held that a protocol to DTAA is indispensable part of the treaty in question with same binding force as the main clauses carry. Learned coordinate bench thereafter throws light on various nuances of such treaty protocol interpretation vis-a-vis section 90 of the Act as under :-

"5. We have conscientiously heard Smt. Lakra, learned CIT (DR), and Shri Rahul Mitra, learned counsel for the assessee. We have also carefully perused the orders of the authorities below as well as paper book filed by the assessee, and duly deliberated upon the DTAA and judicial precedents cited at the bar. We find that it is an unambiguous legal position that by the virtue of [Section 90\(2\)](#) of the Act, 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 as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply only to the extent they are more beneficial to that assessee. Thus, provisions of such DTAA override the provisions of the Act, to the extent these agreements are more favourable to the assessee. In our considered view, therefore only in the event of assessee's case failing on the provisions of the DTAA, the question of examining provisions under the [IT Act](#) arises. We may, in this regard, quote the following observations made by the Hon'ble jurisdictional High Court in the case of [CIT v. Davy Ashmore India Ltd.](#) (1991) 190 ITR 626 (Cal) :

"..... The conclusion is inescapable that, in case of inconsistency between the terms of Agreement and the taxation statute, the agreement alone would prevail.

The CBDT has issued a Circular No. 333, dt. 2nd April, 1982 [(1982) 137 ITR (St) 1], on the question as to what the AOs will do when they find that the provisions of the DTAA are not in conformity with the provisions of the [IT Act](#), 1961. Then it was laid down by the Board in the said circular as followed :

'The correct legal position is that where a specific provision is made in the DTAA, that provision will prevail over the general provisions contained in the [IT Act](#), 1961. In fact the DTAA which have been entered into by the

Central Government under [Section 90](#) of the IT Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the agreement.

Thus, where a DTAA provided for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the [IT Act](#). Where there is no specific provision in the Agreement it is the basic law, i.e. the [IT Act](#), that will govern the taxation of income.' In our view, the Circular reflected the correct legal position inasmuch as the Convention or Agreement is arrived at by the two contracting Governments in deviation from the general principles of taxation applicable to the Contracting States; otherwise, the double taxation avoidance agreement will have no meaning at all."

6. We will, therefore, firstly examine taxability of impugned payments to Decoufle, in the light of provisions of applicable India-France DTAA. In view of the provisions of [Article 30\(1\)\(a\)\(i\)](#) of India-Prance DTAA dt. 29th Sept., 1992, which came in force on 1st Aug., 1994, this DTAA is applicable with respect to income arising in India in the previous years beginning 1995-96 i.e., fiscal years beginning on or after 1st day of April following the calendar year in which convention enters into force. The DTAA, therefore, is clearly applicable on the present cases which relate to services rendered in the previous year ended 31st March, 1996. We further find that [Article 7\(1\)](#) of the aforementioned DTAA provides that the profits of an enterprise of one of the Contracting States shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. [Art. 5\(3\)](#) of this DTAA provides that a permanent establishment will inter alia include a installation or assembly project only where such site or project continues for a period of more than six months, but, as noted in para 3 above, in none of the cases the installation project continued for a period of more than six months. We also find that the cases before us are admittedly not covered by the scope of any other provisions regarding permanent establishment. However, [Article 7\(6\)](#) of this DTAA clearly provides that where profits include items of income which are dealt with separately in other articles of this convention, then the provisions of those articles shall not be affected by the provisions of this article. [Article 13\(1\)](#) of the DTAA, separately dealing with fees for technical services, further provides that fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may also be taxed in that other Contracting State according to the laws of that Contracting State, though, if the recipient is the beneficial owner of these categories of income the tax so charged shall not exceed 20 per cent of the gross amount of such fees for technical services. Accordingly, in our considered view, so far as the present cases of fees for technical services are concerned, the provisions of [Article 7](#) are not at all relevant. But then the question arises as to what is that connotation and scope of the expression 'fees for technical services'.

7. Art. 13(4) of the aforementioned DTAA defines the term "fees for technical services" as used in this article, to mean payments of any kind to any person, other than payments to an employee of the person making the payments and to any individual for independent personal services mentioned in Article 15, in consideration for services of a managerial, technical or consultancy nature. At this stage, it is also important to refer to an extract from the protocol signed at the time of conclusion of the aforementioned India-France DTAA. The relevant portion is reproduced below :

PROTOCOL

"At the time of proceeding to the signature of the Convention between France and India for the avoidance of double taxation with respect to taxes on income and on capital, the undersigned have agreed on the following provisions which shall form an integral part of the convention.

.....

7. In respect of Article 11 (Dividends), 12 (Interest) and 13 (Royalties, fees for technical services and payments for the use of equipment), if under any Convention, Agreement or Protocol signed after 1st Sept., 1989, between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply under this Convention, with effect from the date on which the present Convention or the relevant India Convention, Agreement or Protocol enters into force, whichever enters into force later."

8. In our considered view, it is settled position in law that protocol is an indispensable part of the treaty with the same binding force as the main clauses therein. Hon'ble Authority for Advance Ruling, relying upon Dr. Klaus Vogel's commentary on Double "Taxation Conventions and as reported in 242 ITR 208 (relevant portion at p. 225), has observed that protocol is an integral part of the treaty and its binding force is equal to that of the principal treaty. The provisions of the aforesaid DTAA are, therefore, required to be read with the protocol clauses and are subject to the provisions contained in such protocol, including the one reproduced above.

9. One of the implications of the above protocol clause is that the scope of expression 'fees for technical services'; so far as Indo-France DTAA is concerned, cannot be wider than the scope of most restrictive DTAA that India has entered into with any OECD member after 1st Sept., 1989. In this context, it has been pointed out to us that, after the cut off date of 1st Sept., 1989 referred to in para 7 of protocol attached to and forming part of Indo-French DTAA, India has signed DTAA's with at least three OECD member countries which have narrower scope of the expression 'fees for technical services'. In all these DTAA's, fees for technical services does not include the fees received for services that are ancillary and subsidiary, as well as

inextricably and essentially linked, to the sale of a property. These agreements are as follows :

Name of country Signing date of DTAA Relevant article Citation United Kingdom 25th Jan., 1993 [Art. 13\(5\)\(a\) \(1994\) 206](#) ITR (St) 235 United States of America 12th Sept., 1989 [Art. 12\(5\)\(a\) \(1991\) 187](#) ITR (St) 102 Switzerland 2nd Nov., 1994 [Art. 12\(5\)\(a\) \(1995\) 214](#) ITR (St) 223

10. In India-United Kingdom DTAA [(1994) 206 ITR (St) 235], [Article 13\(4\)](#) and [13\(5\)](#) provides as follows :

"[Article 13\(4\)](#)

For the purposes of para 2 of this article, and subject to para 5 of this article 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 para 3(a) of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in para 3(b) of this article 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.

[Article 13\(5\)](#) The definitions of fees for technical services in para 4 of this article shall not include amounts paid :

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in para 3(a) of this article;*

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;

(c) for teaching in or by educational institutions ;

(d) for services for the private use of the individual or individuals making the payment; or

(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in [Article 15 \(Independent Personal Services\)](#) of this Convention.

[[Art. 3\(a\)](#) refers to payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic or scientific work, including cinematograph films or work on films, tape or other means or reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.]"*

11. In India-United States DTAA [(1991) 187 TTR (St) 102], [Article 12\(4\)](#) and (5) provides as follows :

"[Article 12\(4\)](#) For the purposes of this article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

*(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in para (3) is received; or
(b) make technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.*

[Article 12\(5\)](#) Notwithstanding para (4), "fees for included services" does not include amounts paid :

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in para (1)(a);
(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic;*

(c) for teaching in or by education institutions;

(d) for services for the personal use of the individual or individuals making the payment; or

(e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in [Article 15 \(Independent Personal Services\)](#).

[[Art. 12\(3\)\(a\)](#) refers to payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof]."*

12. We have also noticed that [Article 12\(4\)](#) and [12\(5\)](#) of the India-Switzerland DTAA provides as follows ;

"[Article 12\(4\)](#) For purposes of this article, the term "fees for included services" means :

(a) payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel), if such services are ancillary and subsidiary to the application or enjoyment of the right, for which a payment described in sub-para (b) of para 3 is received;

(b) payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel), if such services :

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

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

Article 12(5) Notwithstanding para 4, "fees for included services" does not include amounts paid :

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property;

(b) for teaching in or by educational institutions;

(c) for services for the personal use of the individual or individuals making the payment; or

(d) to an employee of the person making the payments or to any individual or firm of individual (other than a company) for professional services falling under Article 14.

[*Art. 12(3)(a) refers to payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience;]

13. One immediately discernible common factor in Indian DTAA's with UK, USA and Switzerland is that in all these treaties 'fees for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property' is outside the scope of 'fees for technical services' liable to separate treatment under the respective DTAA. In other words, in all these treaties, unless the 'fees for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property' is attributable to PE and fulfils the other requirements laid down under the relevant article dealing with business profits, the same cannot be taxed in the source country. The scope of expression 'fees for technical services', in these treaties, appear to be for more restricted than the scope of the same expression in Indo-French DTAA which broadly defines fees for technical services as to mean payments in consideration for services of a managerial, technical or consultancy nature. Therefore, whereas payments for all kind of technical services are to be treated as 'fees for technical services' for the purpose of Article 13(4) of Indo-French DTAA, such payments cannot be treated as to be in the nature of 'fees for technical services', under respective articles in Indo-UK, Indo-US and Indo-Swiss DTAA, in case the same constitutes 'fees for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property'. Clearly, therefore, scope of 'fees for technical services' is much more restricted in Indo-UK, Indo-US and Indo-Swiss DTAA's vis-a-vis the DTAA that India has entered into with France.

14. Our attention has also been invited to the CBDT Notification No. SO 650(E), dt. 10th July, 2000 [(2000) 244 ITR (St) 134] which inter alia states as follows :

Where the Convention between the Republic of India and the French Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and the capital came into force on the 1st Aug., 1994, after the Notification by both the Contracting States to each other of the completion of the procedures required under their laws for bringing into force the said Convention;.....

And whereas para 7 of the Protocol dt. 29th Sept., 1992, to the aforesaid Convention provides that if after the 1st Sept., 1989, under any Convention, Agreement or

Protocol concluded between India and a third State which is a member of the Organization for Economic Cooperation and Development, India should limit its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then, as from the date on which the Convention between India and France or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later, the same rate or scope as provided for in that Convention, Agreement or Protocol on the said items of income shall also apply under this Convention;

And whereas in the Convention between India and Germany which entered into force on the 26th Oct., 1996, and the Convention between India and the United States of America which entered into force on the 18th Dec., 1990, which states are members of the Organisation for Economic Cooperation and Development, the Government of India has limited the taxation at source on dividends, royalties, fees for technical services and payments for the use of equipments to a rate lower or a scope more restricted than that provided in the Convention between India and France on the said items of income;

Now, therefore, in exercise of the powers conferred under [Section 90](#) of the IT Act, 1961 (43 of 1961), the Central Government hereby directs that the following modifications shall be made in the Convention notified by the said Notification which are necessary for implementing the aforesaid Convention between India and France, namely;.....

IV. With effect from the 1st April, 1995, for the existing para 2 of [Article 13](#) relating to 'Royalties and fees for technical services and payments for the use of equipment', the following paragraph shall be read :

"2. However, such royalties, fees and payments may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of these categories of income, the tax so charged shall not exceed :

(a) in the case of royalties and fees 20 per cent of the gross amount of such royalties or fees; and

(b) in the case of payments referred to in para 5 of this [Article 10](#) per cent of the gross amount of such payments."

V. With effect from the 1st April, 1997, for para 2 of [Article 13](#) relating to 'Royalties and fees for technical services and payments for the use of equipment' referred to in para IV above, the following paragraph shall be read :

"2. However, such royalties, fees and payments may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of these categories of income, the tax so charged shall not exceed 10 per cent of the gross amount of such royalties, fees and payments."

15. It has been pointed out by the learned counsel that, so far as 'fees for technical services' are concerned, while the Central Government has made amendment to the

*Indo-French DTAA with respect to the lower rate of withholding tax envisaged in the said tax treaties as compared to the rate of tax contained in Indo-French DTAA with respect to incomes of aforesaid nature, the Central Government has not taken note of the favourable provisions contained in the tax treaties signed by India with the OECD member countries. Our attention has also been invited to DTAA's that India has entered with Philippines and with Switzerland where similar provisions, for incorporation of favourable provisions contained in other tax treaties, are existent, but with the exception that in order to make the incorporation effective, the Governments of two countries should first mutually decide of such incorporation in the form of amendment of tax treaty. It is thus argued that since there is no such requirement under the Indo-French DTAA, there was no need to amend the Indo-French DTAA by resorting to issuance of notification for that purpose. Learned counsel has also made rather elaborate submission about legal infirmities in the above notification and suggested that the amendment in notification is made *ex abundanti cautela* i.e., by way of abundant precaution. It has been contended that [Section 90](#) of the Act does not empower the Central Government to unilaterally amend a tax treaty and therefore a notification amending, in its own right the tax treaty is unsustainable in law. It has been submitted that the present amendment to the India-France DTAA by way of notification dt. 10th July, 2000, is a result of over anxiety of the Central Government to give effect to relevant paragraph of the protocol to the India-France DTAA and the same does not or not undermine the clear and ambiguous provisions of the India-France DTAA. According to the learned counsel, the above notification is clearly redundant and, in any event, does not whittle down or override the benefits which are otherwise envisaged in para 7 of the protocol to the Indo-French DTAA. As an alternate submission, and without prejudice to the above line of argument, reliance was placed on the order passed by a coordinate Bench of this Tribunal in the case [Tata Iron & Steel Co. Ltd. v. Dy. CIT](#) (1998) 62 TTJ (Mumbai) 17 : (1999) 69 ITD 292 (Mumbai) in support of the proposition that executive authority of the Government cannot, by way of a notification, lay down provisions having retrospective effect. It is submitted that by way of notification dt. 20th July, 2000, no amendment allegedly impairing the existing rights guaranteed by the protocol cause in (sic) can be made in a treaty which will adversely affect the taxpayer's rights effective from a date earlier than 20th July, 2000. On the strength of these submissions, learned counsel submitted that the CBDT notification dt. 20th July, 2000 does not adversely affect the position of the assessee. Learned Departmental Representative, however, placed her bland reliance upon the notification issued by the CBDT.*

16. A perusal of the aforesaid notification gives us a prima facie impression that it constitutes Central Government's independent action to implement the understanding arrived at by the virtue of protocol clauses in the India-France DTAA. It is difficult to comprehend as to how the Central Government can unilaterally amend, in exercise of the powers under [Section 90](#) of the IT Act, a bilateral agreement that a DTAA inherently is, but, for the present purposes and for the reasons we shall now state, it is not even necessary to be drawn into that controversy about legality of the aforesaid notification. We have noticed that the

coordinate Bench of this Tribunal, in the case of [Tata Iron & Steel Co. Ltd. v. Dy. CIT](#)(supra), has inter alia observed that :

"The Hon'ble Supreme Court in the case of [Hukumchand v. Union of India](#) (1973) 1 SCR 896, held that even under the rule-making powers, if it is having retrospective effect merely by placing it on the table of Lok Sabha it would not prevent Courts from deciding its vires. In this case there is no question of placing of notification on the table of the House. It is only a question of publishing the same in the Gazette. This power of the Central Government, CBDT & FTD cannot prevent us from reading down the notification with the protocol treaty so that it does not adversely affect the rights of this taxpayer till the date on which protocol is amended. Notification can have the effect from the date of its publication in the Gazette. This power, however, does not include a power to assign the notification with retrospective effect. In this case, as DTAA protocol is an act between two sovereign states, under no circumstances, the notification

'17. In our considered view, therefore, it is clear that a notification cannot adversely affect the rights of this taxpayer with retrospective effect. Since the notification in question was issued on 20th July, 2000, whereas the relevant previous year before us is the year ended 31st March, 1996, the aforesaid notification, in our considered view, does not affect the issue in appeal before us. We, therefore, see no need to address ourselves to the broader questions about legality of the aforesaid notification or to deal with other similar contentions raised by the assessee. In any event, in our considered view, the benefit of lower rate of or restricted scope of 'fees for technical services' under the Indo-French DTAA is not dependent on any further action by the respective Governments, unlike the situation envisaged in, for example, para 4 of protocol to Indo-Philippines DTAA or para 3 of protocol to Indo-Swiss. We leave it at that.

18. In the light of the above discussion, we are of the considered view that the same scope of 'fees for technical services' as provided for in the India DTAA's with UK, USA and Switzerland, which is far more restricted vis-a-vis scope of this expression in Indo-French DTAA, shall also apply under Indo-French DTAA, with effect from the date on which the Indo-French DTAA or such other DTAA enters into force, whichever enters into force later. As all the three DTAA's discussed above entered into force on a date earlier than the commencement of the previous year 1995-96, the scope of technical services, for the purpose of Indo-French DTAA, cannot be broader than that envisaged in the above DTAA's. In this view of the matter, we hold that the 'fees for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property' are outside the scope of technical services so far as Indo-French DTAA is also concerned, even though no such specific exclusion clause is incorporated directly in the treaty itself, right from the time Indo-French DTAA entered into force. Accordingly, in the year in appeal before us, the 'fees for technical services' for the purpose of Indo-French DTAA, did not include 'fees for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property'.

19. Corning back to the facts of the present case, we find that Decoufle had rendered services for installation and commissioning of machines sold by Decoufle to the assessee tax deductor. We have also noticed that proforma invoices issued by the Decoufle (copies placed at pp. 7-8 and 32-33 of the paper book) it is clearly stated that Decoufle was to provide for installation and commissioning services. In any event, installation and commissioning of these machineries, in our considered view, constitutes services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of machines. We are, therefore, of the considered view that these services rendered by Decoufle to the ITC Limited are not covered by the scope of 'fees for technical services' referred to in [Article 13](#) of the India-France DTAA. We have already come to a conclusion, in para 6 above, that in the present cases, the income arising to the French company cannot be said to be includible in 'business profits' within meanings of [Article 7](#) of the DTAA as the same cannot be said to be attributable to permanent establishment referred to in [Article 5](#) of the DTAA. In view of this position, we are of the considered opinion that the installation and commissioning fees received by Decoufle, on the facts of the present cases, were not exigible to tax in India.

20. Under s, 195(1) of the Act, any person making payment in the form of income to a non-resident required to deduct tax at source, from the said income, at the 'rate in force' which, in turn, has been explained under [Section 2\(37A\)\(iii\)](#) as follows :

"for the purposes of deduction of tax under [Section 195](#), the rate or rates of income-tax specified in this behalf in the [Finance Act](#) of the relevant year or the rate or rates of income-tax specified in an agreement entered into by the Central Government under [Section 90](#) whichever is applicable by virtue of the provisions of s.90".

As we have earlier observed, provisions of the DTAA clearly override the provisions of the Act to the extent the provisions in such agreement are more favourable to the assessee. Therefore, in case a DTAA provides for lower rate, which includes 'Nil' rate, of taxes, such a rate will prevail over the rate given in the Act. As a natural corollary to this proposition, when, in terms of the provisions of a DTAA, an income is not exigible to income in India, no tax is required to be deducted under [Section 195](#) from the payment of such income to a non-resident. We have already held that, in terms of the provisions of applicable Indo-French DTAA, the income embedded in impugned payments to Decoufle was not liable to income-tax in India. Accordingly, in our considered view, the assessee tax deductor was not under any obligation to deduct tax at source from related remittances to the French company i.e., Decoufle s.a.r.l.

21. For the detailed reasons set out above, we support the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter."

6. Hon'ble Delhi high court's recent decision in Steria (India) Ltd vs CIT [2016] 72 taxmann.com 1 (Delhi) rejects Revenue's similar grievance in terms of India and France DTAA importing relevant corresponding articles of Indo-UK DTAA regarding taxation fee for technical services. The Revenue's plea therefore that such benefits can be imported from Indo-Portugal DTAA to Indo-Sweden DTAA only after necessary notification u/s 90(1) of the Act is devoid of merit since the protocol itself makes it clear that the said 'MFN' clause "shall apply" in India-Sweden DTAA. Issuance of a notification has nowhere been stipulated as a condition precedent therein. Section 90(1) is very clear that only a DTAA would be notified and not the application of such a 'MFN' clause.

7. The Revenue's next argument seeking to place reliance on section 9(1)(vii) Explanation does not carry any substance since the assessee is already covered under the relevant beneficial provisions of a DTAA. The Revenue has therefore failed to prove that assessee's recipient was assessable to tax in India qua the impugned payments under Chapter-XVII of the Act. Hon'ble apex court's landmark decision in GE India Technology Centre Pvt. Ltd. Vs CIT 327 ITR 456(SC) settles the law that liability to deduct TDS applies only in case the payment in question is assessable to tax in overseas recipient's hands in India under the provision of the Act.

8. Learned Addl CIT DR thereafter submits that the relevant Protocol applies only in case of India sign any tax treaty incorporating were beneficial assessment with any third country who happens to be OECD. (Organisation of Economic Co-operation and Development.)'s member and not otherwise. We see no merit in Revenue's instant last plea since Portugal is admittedly 'OECD' member since 1961. We conclude therefore that the CIT(A) has rightly deleted the impugned disallowance of Rs.90,65,000/- made by the Assessing Officer u/s 40(a)(i) of the Act. The Revenue's all substantive grounds as well as its additional grounds are declined.

9. This Revenue's appeal is dismissed.

Order pronounced in the Court on 22.06.2018.

Sd/-
[M.Balaganesh]
Accountant Member

Sd/-
[S.S.Godhara]
Judicial Member

Dated : 22.06.2018.

[RG Sr.PS]

Copy of the order forwarded to:

- 1.M/s M.S.K.Travels & Tours Ltd., Flat No.28B, 7E, Neelambar, Shakespeare Sarani, Kolkata-700017.
2. I.T.O., Ward-7 (1), Kolkata.
3. C.I.T.(A)- 3, Kolkata 4. C.I.T-3, Kolkata
5. CIT(DR), Kolkata Benches, Kolkata.

True Copy

By order,

Senior Private Secretary
Head of Office/D.D.O, ITAT Kolkata Benches