IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D', NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.1630/Del./2015
Assessment Year: 2011-12
And
ITA No.1552/Del/2016
Assessment Year: 2012-13

M/s. JCDecaux S.A., C/o. JCDecaux Advertising India Pvt. Ltd., 231, Okhla Industrial Estate, Phase-III, New Delhi	**Vs.**	ACIT/DCIT, Circle-2(1)(2), International Taxation, New Delhi
PAN :AACCJ8567A		
(Appellant)		**(Respondent)**

Appellant by	Shri K.M. Gupta, Adv.
Respondent by	Shri Satpal Gulati, CIT(DR)

Date of hearing	13.01.2020
Date of pronouncement	20.03.2020

ORDER

PER O.P. KANT, AM:

These two appeals by the assessee have been preferred against two separate final assessment orders dated 29/01/2015 and 25/01/2016 passed by the Deputy/Assistant Commissioner of Income Tax, Circle-2(1)(2), International taxation, New Delhi (in short 'the Assessing Officer') for assessment year 2011-12 and 2012-13 respectively, framed under section 144C(13) read with

section 143 (3) of the Income-tax Act, 1961 (in short 'the Act') pursuant to the directions of the Learned Dispute Resolution Panel in respective years. The issues raised in both the appeals being identical in nature in same set of facts and circumstances and, therefore, these both appeals have been heard together and disposed off by way of this consolidated order for convenience.

2. The grounds raised in ITA No. 1630/Del/2015 for assessment year 2011-12 are reproduced as under:

1. *On the facts and in the circumstances of the case and in law, the Ld. Assessing Officer ('AO') erred in assessing the income of the appellant at Rs.1,14,66,317 as against returned income of Rs. 34,36,830.*

2. *On the facts and in the circumstances of the case and in law, the Ld. AO and Ld. Dispute Resolution Panel ('DRP'), have grossly erred in holding that the 'Management Fee' is taxable as 'Fees for Technical Services' ('FTS') under Article 13 of Double Taxation Avoidance Agreement between India-France ('DTAA') read with Protocol to the DTAA.*

3. *On the facts and in the circumstances of the case and in law, the Ld. AO and DRP erred in holding that Corporate Guarantee Fee is taxable as 'Fee for Technical Services' under Article 13 of India France DTAA on extraneous and vague reasons.*

4. *On the facts and in the circumstances of the case and in law, the Ld. AO, pursuant to directions of the DRP, grossly erred in confirming the addition of Rs.24,26,660 by characterizing pure reimbursements of disbursements made by the Appellant towards social security contributions as Fee for technical services under Article 13 of India France DTAA on extraneous and vague reasons.*

5. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying Surcharge and Education Cess on receipts in the nature of Royalties and reimbursements of other expenses, which was offered to tax by the Appellant on gross basis under the India - France DTAA.*

6. On the facts and in the circumstances of the case and in law, the Ld. AO grossly erred in not allowing the credit of tax deducted at source by JCD India while calculating the tax liability of Appellant.

7 On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest of Rs.720,023 under Section 234A, 234B and 234C of the Act while calculating the tax.

The above grounds of appeals are independent of, and without prejudice to each other.

The appellant craves leave to add, alter, amend or vary from the above grounds of appeal on or before the time of hearing."

2.1 Identical grounds have been raised in ITA No. 1552/Del/2016 for assessment year 2012-13.

3. Briefly stated facts of the case are that the assessee is a company incorporated under the laws of France. The assessee is a holding company of "JCDecaux" group. During the relevant period, the assessee company was engaged in the field of 'outdoor advertising'. The assessee is owner of all intellectual property rights including copyrights in 'drawings and models', 'trademarks', 'patents', 'domain names' and 'know-how' developed and used by the JCDecaux group across the globe. Before the lower authorities, the assessee has submitted of engaged in providing following services:

- *Operation use and maintenance of advertising means and operating tools;*
- *Preparation of bids in their technical aspects, as part of calls for tenders and competitive bidding;*
- *Setting-up, follow-up and co-ordination of technical alternatives in relation with the customer's business;*
- *Computer support, in particulars management of computer projects, software/hardware selection, maintenance of servicing; application development.*

3.1 The assessee filed return of income for assessment year 2011-12 on 28/09/2012 showing income of ₹ 34,36,830/-, which was taxed at the rate of the 10% on gross basis. Similarly, the return of income for assessment year 2012-13 was filed on 28/09/2012, declaring income of ₹ 68,26,471/- and taxed at the rate of 10% on the same on the gross basis. The returns filed for both the years were selected for scrutiny assessment. The Assessing Officer issued draft assessment orders for assessment year 2011-12 on 28/03/2014. Similarly, the draft assessment order for assessment year 2012-13 was issued on 10/03/2015. In both the draft assessment orders, identical additions were proposed. The assessee filed objection against the draft assessment orders before the learned Dispute Resolution Panel (DRP). The learned DRP issued directions to the Assessing Officer in both assessment years and pursuant to those directions, the Assessing Officer issued impugned final assessment year in assessment year 2011-12 and 2012-13.

3.2 During the years under consideration, the assessee entered into certain transaction with its Associated Enterprises (AE), namely, JCD Advertising India Private Limited ('JCD India') for providing various functional and management supports. Such transactions with the 'JCD India' and its tax treatment by the assessee in the return of income and by the Assessing Officer in the impugned orders are summarized as under:

S. No.	Nature of receipts as per the assessee	Amount in Rs. (AY 2011-12)	Amount in Rs.(AY 2012-13)	Treatment by the Assessee	Treatment by the Assessing officer
1	Offshore sale of IT equipments and advertising structure	1,11,05,035	7,43,242	Not taxable	Not taxable
2.	Royalty receivable from the JCD India for the use of trademarks and know-how	30,97,149	58,72,637	Offered to tax and royalty	Taxed As royalty
3.	Management fee receivable from the JCD India	13,24,838	26,50,996	Not taxable	Taxed as FTS
4.	Corporate guarantee fee receivable from the JCD India	42,77,989	28,52,732	Not taxable	Taxed as FTS
5.	Reimbursement of Social Security contribution expenses incurred on behalf of the JCD India in France	24,26,660	41,99,826	Not taxable	Taxed as FTS
6.	Reimbursement of other expenses by JCD India	3,39,683	9,58,833 the law however, make	Offered to tax as FTS/Royalty	Taxed as FTS/Royalty.

3.3 In both the appeals, additions made in respect of management fee, corporate guarantee fee and reimbursement of Social Security contribution have been disputed by the assessee.

4. The ground No. 1 in both appeals is general in nature, therefore we are not required to adjudicate upon separately.

5. The ground No. 2, in both appeals is related to holding the management fee as taxable as the Fee for Technical Services (FTS) under article 13 of Double Taxation Avoidance Agreement between India-France read with protocol to the DTAA.

5.1 Facts in brief qua the issue in dispute are that the assessee entered into an agreement with the 'JCD India', for providing various functional and management support. The management fee has been received by the assessee during assessment year 2011-12 and 2012-13. The Assessing Officer relied on the

decision of the Authority of Advance Rulings (AAR) in case of Perfetti Van Melle Holding BV (2012) 342 ITR 0200 (AAR) and the decision of the Hon'ble Supreme Court in the case of CBDT Vs Oberoi (India) P Ltd, 97 Taxman 453 (SC), held that nature of management services rendered by the assessee to the 'JCD India' are highly technical and of specialized nature, therefore, the sums received in lieu thereof by the assessee were nothing but Fee for Technical Services (FTS) as per section 9(1)(vii) as well as under the India France DTAA.

5.2 In assessment year 2011-12, before the learned DRP, the assessee submitted that combined reading of Article 13 and clause 7 of the MFN clause of India France DTAA makes it clear that where India has entered into DTAA with the third state (which is a member of the OECD) after 01/09/1989 and India limits its scope for taxation of fee for technical services:

A) to a rate lower or;

B) a scope more restricted than the rate of the scope provided for in India France DTAA

then, such lower rate or restricted scope as provided for in such of the DTAA shall also apply to the DTAA between India and the France.

The assessee has relied upon the restricted scope of Article-13 of India-UK, DTAA [since, UK is an OECD member and the India-UK DTAA has been entered into force on 26th October, 1993 (i.e. after 1- 9-1989)], wherein the scope of 'Fee for Technical Services' is more restricted.

5.3 The Assessee submitted that 'management fees' is not covered within the scope of Article 13 of India - UK DTAA as Article 13(4) of the India - UK DTAA specifically excludes "managerial services". Thus managerial services are not intended to be covered therein. Without prejudice to the aforesaid, even if for the sake of argument it is assumed but without admitting, managerial services are covered within term "technical or counseltancy services", even then such managerial services would not make available technical knowledge or skill to service receiver and, therefore, it would not be covered within the scope of Fee for technical services under Article 13(4) of the India-UK DTAA.

5.4 The assessee further submitted that the term 'make available' has not been defined under India-UK DTAA and hence reference is made to the Memorandum of Understanding to the India-USA DTAA ('MoU') to understand the meaning of the said term. This view is inter alia supported by the decision of Mumbai ITAT in the case of Raymonds Limited v. DCIT [2003] 86 ITD 791 (Mumbai-ITAT). The Assessee relied upon various judicial precedents which have explained the meaning of 'Make available'. The crux of those pronouncements is as under:

a) *'Make available' should enable the person utilising the services to make use of the technical knowledge, etc. on his own;*
b) *Mere rendering of services does not tantamount to making available any expertise, skill or knowledge unless the person utilizing the services is able to make use of the technical knowledge, etc. by himself in his business or for his own benefit and without recourse to the performer of the services in future.*

c) The technical knowledge, experience, skill, etc. must remain with the person utilising the services even after the rendering of the services has come to an end.

d) The fruits of the services should remain available to the person utilising the services in some concrete shape such as technical knowledge, experience, skills, etc.

e) 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 future without depending on the provider.

5.5 The Assessee alternatively placed reliance on Article 12 of the India-USA DTAA too, which can be read into India-France DTAA [as the USA is also an OECD member and India-USA DTAA was entered on 18th December 1990 (i.e. after 1 September 1989)], and in that case also captioned payment would not be covered within the scope of Article 12 of India-USA DTAA.

5.6 The assessee relied on the decision of Mumbai ITAT in the case of DDIT vs. IATA BSP India (2014) 64 SOT 290 wherein the benefit of make available clause under India USA DTAA has been allowed and held that services provided to the Appellant were not in the nature of 'fees' for included services' within the meaning of Article 13 of India-France DTAA, read with clause 7, of protocol thereto.

5.7 The learned DRP, rejected the contention of the assessee that management fee does not fall in restrictive definition of the FTS in DTAA read with protocol. According to the learned DRP, the managerial, technical and counseltancy services are bound to be given through the employees of JCD India and therefore in such circumstances, the managerial, technical and consultancy

services would develop the skill of the employees of the JCD India and thus it would remain available to a large extent with them.

5.8 In assessment year 2012-13, the DRP disputed the invoking of protocol into the India France DTAA. According to the learned DRP, in bilateral treaties such as the DTAA a particular privilege granted by one party only extend with the other parties, who reciprocate the privilege at the time the treaty was negotiated. The learned DRP also referred to the decision of the AAR in the case of Steria (India) Limited AAR No. 1055/2011, wherein it is held that restriction on the rates and "make available clause" cannot be read in the items. Without prejudice to the above, the learned DRP, held that technical knowledge has been made available by the assessee to 'JCD India' while providing management services, as the management tools provided by the assessee would remain with JCD India. The relevant finding of the DRP is reproduced as under:

> *"Without prejudice to the above even if it is held that the benefit of make available is admissible to the taxpayer then the nature of the services provided under the Functional and Technical Support Agreement" with JCD India details of which have been enumerated supra, and reference is invited to the copy placed at Annexure-1, perusal of which will show that, these would still be covered in the ambit of FTS as these would make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or technical design. Also as in the case of Organisation Development Pvt Ltd v DDIT the use of most of the management tools such as reporting tools for internal audit financial and accounting matters, management resources, legal and tax matters, tenders and bids, growth projects, preparation of legal documentation etc would continue with Indian clients; and technical knowledge and skill for use will remained with such client thus making available technical knowledge."*

5.9 For interpretation of the term "make available" the learned DRP also relied on following judicial pronouncement:

(i) ToughtBuzz(P) Ltd In re 346 ITR 345 2012(AAR) New Delhi

(ii) Organisation development private limited Vs DDIT International taxation 17 ITR (T) 341 Chennai (2012) dated 09/02/2012

(iii) Centrica India offshore private limited, Delhi High Court ruling [TS-237-HC-2014(DEL)] confirmed in TS 642 Supreme Court 2014

(iv) Sargent and Lundy LLC USA Vs additional CIT Range -2 , 158 TTJ 453 (Mumbai-Tribunal) 2013 dated 24/07/2013

(v) Avion Systems Inc. Vs Deputy director of income tax (IT) - 1(1) , Mumbai 138 ITd 57 (Mumbai) 2012

(vi) Guangzhou Usha International Ltd AAR No. 1508 of 2013 vide order dated 28th day of Sep. 2015.

5.10 In view of the above, the learned DRP rejected the objection of the assessee observing as under:

> *"Perusal of the services performed by the taxpayer under the Functional and Technical Support Agreement" (FTSA henceforth) with JCD India and the updated jurisprudence supra, leave no doubt that the services rendered "make available" technical knowledge, experience, skill, know-how or processes, which enable the person acquiring the services to apply the technology contained therein; even within the meaning of Article 12(4) of the India UK DTAA on a without prejudice basis and are thus taxable as FTS.*
>
> *It is, however, the affirmed contention of the DRP that the India France DTC quite simply states that fees for technical services means for technical services means payments of any kind to any person, in consideration for services of a managerial, technical or counseltancy nature and the nature of services provided under the "Functional and Technical Support Agreement" (FTSA henceforth) with JCD India is taxable as FTS under the India France treaty article 13(3) and u/s 9(1)(vii) of the Income Tax Act, 1961 without resorting to import of make available interpretations. The objections of the taxpayer are dismissed and the order of the AO is approved."*

5.11 Before us, the learned Counsel of the assessee relied on the submission made before the lower authorities and filed paper-book into volumes containing pages from 1 to 171 and 172 to 290. The learned Counsel invoked India UK DTAA in view of the India France DTAA and the protocol to it and submitted that the taxability of services is to be on restricted basis, which only include technical and consultancy services. Further, the learned Counsel argued that such services do not satisfy 'make available' clause of the DTAA. According to him, in the functional and technical support provided to 'JCD India', no technical knowledge, experience, skill, know-how or process has been made available so as to enable the 'JCD India' to apply the technology contained therein.

5.12 on the contrary, the Learned DR submitted that documentation to evidence the nature of services in the process of delivery of services is concerned, the assessee only submitted a copy of the agreement and no other documents have been submitted. According to him, it is a case where the assessee is in receipt of the royalty from the Indian AE and same has been offered to tax and the services rendered are ancillary and subsidiary to the royalty payment. The learned DR emphasized terms of agreement to highlight that the services rendered are in the nature of the technical or consultancy.

5.13 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The contention of the Revenue, that only detail in respect of the services rendered provided by the assessee is the copy of the

agreement between the assessee and the Indian entity. For adjudicating the issue, the relevant part of the 'functional and technical support' agreement between the assessee and the JCD India, are reproduced as under:

> *"Whereas the service provider directly or indirectly holds a constituted panel of economic operations ('the customer companies' or 'the customers'), all the being active in outdoor communications and related trades:*
>
> *Whereas the service provider, on the basis of both its own resources and such resources as made available and charged to the service provider by some customer companies, centralizes functional and technical capabilities that are not likely to be procured from third parties under satisfactory conditions of specialization, confidentiality and price:*
>
> *Whereas, due to the expertise thus acquired by the service provider, it appeared that shared use of services would result in cost saving, economies of scale method rationalization for each customer company.*
>
> *The purpose of this Agreement is to formalize and set forth in writing previous oral agreements between the service provider and the customer in relation to the nature, content, and performance/ payment procedures for the services (as defined below) the service provider will supply to the customer and likely to fall within the following areas.*
>
> *Now therefore,*
> *THE PARTIES HAVE AGREED AS FOLLOWS:*
> *ARTICLE 1 GENERAL SUPPORT:*
>
> *-Management; resource optimization; recommending an organization to support corporate management; assistance in defining and implementing strategy and development (advice, recommendations, reports etc.)*
>
> *-Financial and accounting matters, in particular:*
> - *General financial matters; relations with financial institutions and the financial press;*
> - *Reviewing financing requirements et resources;*
> - *Statistic and economic information regarding trends in exchange rates and exposure;*

- *Analysis and research for setting up guarantees for customer transactions;*
- *Information and advice in matters of international accounting regulations, in particular for the customer's line of business.*

Controlling and internal audit, in particular:

- *Defining controlling methods, and assisting in the definition and setting-up or reporting tools and other tools;*
- *Assisting in the closing of accounts,*
- *Assisting in relations with external auditors;*
- *Setting up and reviewing procedures aiming at ensuring control and appropriateness of transactions;*
- *Performing internal audits at the customer's request, in particular in operational and financial matters.*

Legal and tax matters, in particular:

- *Reviewing, drafting and negotiating agreements of all kinds, in particular joint- venture, procurement and contract agreements; managing and monitoring said agreements, and maintaining relations with the customer base, both public and private; and coordinating local consultants;*
- *Designing external growth projects; preparation of the legal documentation; performing audits; coordinating with counsels;*
- *Reviewing disputes and assisting in the conduct of lawsuits before any court; advising and supporting with regard to claims relates to contract awarding and*
- *Assisting in matters of corporate secretariat, shareholders meetings committee meetings, and corporate transactions;*
- *Designing and setting up all of the customer's insurance plans (excepting motor insurance, health and welfare benefit plans and pension plans);*
- *Assisting in tax matters, in particular on the occasion of tax audits, determination of taxable income, and formalities provided for by bilateral conventions and multilateral conventions regarding double taxation relief.*

In addition to the services described above, the service provider may provide services in the field of intellectual property which will be covered by a separate agreement.

- Preparation of answers to calls for tenders; analysis of calls for tenders; preparation of bids.

1.2. Technical support

Support by technical services centralized or coordinated by the service provider in the following fields:

- *Operational use and maintenance of advertising means and operating tools;*
- *Preparation of bids in their technical aspects, as part of calls for tenders and competitive bidding.*
- *Setting-up, follow-up and coordination of technical alternatives in relation with the customer's business;*
- *Computer support, in particular: management of computer projects; software/hardware selection, maintenance and servicing; application development.*

ARTICLE 2- SPECIFIC SUPPORT

2.1 The parties agree that the customer may use the service provider's services both for itself and on behalf o f a panel of economic operations having legal entity status and active in the same geographic are as the customers.

2.2 Furthermore, the service provider may perform, on customer's request and behalf, specific assignments outside the usual scope of the services listed in Article 1. Such specific services shall be subject to specific compensation on a case-by -case basis and different from the compensation as specified in Article 3."

5.14 The assessee in the instant case, being a French entity, is covered by the Indo-French DTAA and in view of MFN clause, the restricted provisions of India-UK DTAA have been invoked by the assessee. The relevant article of the protocol to the treaty is reproduced as under:

"7. In respect of articles 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 1-9-1989, 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 income shall also apply under this Convention, with effect from the date on which the

present Convention or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later."

5.15 The definition of fee for technical services provided in the DTAA between India and the France, reads as under:

"ARTICLE 13
ROYALTIES AND FEES FOR TECHNICAL SERVICES AND PAYMENTS FOR THE USE OF EQUIPMENT

1. Royalties, fees for technical services and payments for the use of equipment arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.
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 charges shall not exceed 10 per cent of the gross amount of such royalties, fees and payments]
3. The term "royalties" as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

4. The term "fees for technical services" as used in this Article means 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.

*5. The term "payments for the use of equipment" as*used in this Article means payments of any kind received as ;V consideration for the use of, or the right to use, industrial, commercial or scientific equipment.*

6. The provisions of paragraphs I and 2 shall not apply if the beneficial owner of the royalties, fees for technical services or the payments for the use of equipment being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties, fees for the technical services or the payments for the use of equipment arises, through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the

royalties, fees for technical services or the payments for the use of equipment are effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 15, as the case may be, shall apply.

7. Royalties, fees for technical services or payments for the use of equipment shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political sub-division, a local authority or a resident of that Contracting State. Where, however the person paying the royalties, fees for technical services or the payments for the use of equipment, whether he is a resident of a Contracting State or not has in a Contracting State a permanent establishment or a fixed base in connection with which the contract under which the royalties, fees for technical services or the payments for the use of equipment, are paid was concluded and such royalties, fees for technical services or payments for the use of equipment, are borne by such permanent establishment or fixed base, then such royalties, fees for technical services or payments for the use of equipment shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

8.. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, fees for technical services or the payments for the use of equipment, having regard to the royalties, technic.nl services or the use of equipment for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payment shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.
1. Substituted by Notification No. S.O. 2106(E), dated 12-8-2009."

(4) The term "fees for technical services" as used in this Article means 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."

5.16 The corresponding provision in the DTAA between India and the UK reads as under:

"ARTICLE 13- Royalties and fees for technical services-
** **

4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term "fees for technical services" means repayments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a 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 paragraph 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 paragraph 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.

5. The definition of fees for technical services in paragraph 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 paragraph 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 Contention.

5.17 As far as the applicability of the protocol on the DTAA is concerned, same has not been challenged before us by the parties and therefore, we are restricting our adjudication on the following three issues

i. First, whether the services falls under the restrictive clause of India UK DTAA and are in the nature of technical/consultancy services and

ii. Secondly, whether said services satisfy the condition of Article 13(4)(a) & (b) of the India UK DTAA. i.e, services are ancillary and subsidiary to the application of the enjoyment of the right, property or information;

iii. Thirdly, whether the said services satisfies the condition of Article 13(4)(c) of the India UK DTAA i.e. make available technical knowledge, experience, skill, know-how or process or consist of the development and transfer of a technical plan or technical design.

5.18 This is evident from the definition clause of the fee for technical services under the Article 13(4) of the Indo-UK DTAA that management services are excluded. In view of the above position, the assessee has claimed that management services rendered by it are not covered under fee for technical services, whereas contention of the Revenue is that services are in the nature of technical/consultancy and therefore cannot escape taxation even under the Indo UK DTAA.

5.19 The learned DR submitted that ordinarily, the managerial services mean managing the affairs in tune with the given policies, standard procedures and evaluating the actual performance, in the light of the procedure so laid down, however in the instant case services have been rendered to impart the "advice" to the Indian AE resources in order to give them to meet the policies, standards and procedures developed by the assessee. The service contain element of development of policies and strategies and therefore the same were imparted to ensure its effective implementation throughout the organization. In support

of the contention, the Learned DR relied on the decision of the Hon'ble Supreme Court in the case of Central Board of direct taxes versus Oberoi Hotels (India) (P) Ltd 231 ITR 148, wherein the Hon'ble High Court has hold that professional services provided in the hotel industry are technical in nature. The relevant finding of the Hon'ble Supreme Court is reproduced as under:

> *"There is no gain-saying that running a well equipped modern hotel is no ordinary affair. One needs a great deal of expertise skill and technical knowledge for the purpose. In the instant case, the agreement provided for rendering of technical services and also professional services for operation of hotel, a foreign enterprise. The CBDT fell into an error in considering particularly the clause in the agreement which provided for operation of the hotel by the assessee. The agreement had to be seen as a whole and when so examined it was quite apparent that it provided for rendering of not only technical services for operating the hotel of the foreign enterprise but also providing for professional and other services in connection with operating of the hotel. Section 80-0 was enacted with the twin objects of encouraging the export of Indian technical know-how and augmentation of foreign exchange resources of the country. After the amendment of section 80-0 by Finance (No. 2) Act, 1991 the words 'technical or professional services' have been inserted in place of the words 'technical services'. But the Supreme Court in Continental Construction Ltd. (in fra), case took the view that the amendment was only of clarificatory nature and the term 'technical services' always included within it professional services as well. The Supreme Court had gone even to the extent that when a person consults the lawyer and seeks his opinion on certain issue the advice rendered by the lawyer would be a piece of technical service. Considering scope of agreement and width of section 80-0, it could be said that agreement provided for 'information concerning industrial, commercial or scientific knowledge, experience or skill mode available' by the assessee to the foreign enterprise for running of the hotel.*
>
> *In view of the judgment of the Supreme Court in Continental Construction Ltd., case Circular No. 187, dated 23-12-1975 of the CBDT may perhaps require certain changes so as it is in conformity with section 80-0.*
>
> *The royalties commission or fees can be in terms of percentage of profits earned by the foreign enterprise on account of services*

rendered by the Indian Company. It is substance of the case which matters and not the name. The view that remuneration obtained by running or managing a foreign company could be in the nature of profits while section 80-0 deliberately restricted itself to income by way of royalty, commission or fees and included other types of remunerations, is not correct.

Applying the principle of law laid down by the Supreme Court in Continental Construction Ltd.'s case (in fra) and the term 'technical services' which included 'professional services' and the nature of services agreed to be rendered by the assessee to the foreign enterprise it was to be held that CBDT was not right in not granting approval of the agreement to the respondent under section 80-0.

Therefore, the High Court was justified in holding that the services rendered by the assessee would fall within the purview of section 80-0 and the CBDT was wrong in not approving the agreement as required under section 80-0."

5.20 The learned DR also referred to MOU to India USA DTAA where technical services and consultancy services have been described as services requiring expertise in the technology and advisory services respectively. The learned DR submitted that services which involves advice and recommendation is in the nature of the consultancy service and thus services in the instant case are in the nature of technical/consultancy.

5.21 Further, in view of article 13(4)(a) of the India UK DTAA, reproduced above, the learned DR submitted that the assessment order specifically mentioned that royalty was received in this case by the assessee from the Indian AE , therefore going by the clause of India UK DTAA, the services ancillary and subsidiary to the application or enjoyment of the right are in the nature of fee for technical services. According to the learned DR, this clause is independent of condition of make available.

5.22 Further, as regard to the fact of the services are in the nature of the make available in view of article 13(4)(b) of the India UK, DTAA, learned DR referred to various clauses of the agreement , like article 1-general support, clauses related to financial and accounting matters, clauses related to controlling internal audit, clauses related to legal and tax matters etc and submitted that the services has made available skill and knowledge to the Indian AE. The relevant submission of Learned DR is reproduced as under:

> *"15. As regards the fact of services in the nature of "make available", it is relevant to note that the agreement provides for assistance in defining and implementing strategy and development. The relevant clause reads as under:*
>
> ***Article 1 General Support:***
>
> ***Management; resource optimization; recommending an organization to support corporate management; assistance in defining and implementing strategy and development (advice, recommendations, reports etc.)***
>
> *Comments:*
>
> *16. The service which involves advice and recommendation is in the nature of "consultancy service". This flows from the guidance as per MOU to India USA DTAA which describes that*
>
> - ***Technical services, we mean in this context services requiring expertise in a technology.***
> - ***By consultancy services, we mean in this context advisory services***
>
> *17. Going by the above definition, the service in this case is in the nature of "consultancy service". Further, the "make available" aspect is evident from the fact of "assistance in defining and implementing strategy and development". Mere furnishing of strategy report is an example of consultancy service which does not involve make available of knowledge as it only submits final report. However, where the service provider does not stop at strategy report but also assists in first defining the strategy and then implementing the same in the organization through imparting the knowledge base, it is a clear cut case of ensuring the implementation of strategy through a process of handholding. The case in hand does involve the fact of implementation of strategy. It is a case where the parent entity is imparting the knowledge base because the Indian resources need to*

be equipped to deliver the quality of services in line with the quality standards maintained at group level.

Agreement Clause-Financial and accounting matters, in particular:

- *General financial matters; relations with financial institutions and the financial press;*
- *Reviewing financing requirements et resources;*
- *Statistic and economic information regarding trends in exchange rates and exposure;*
- *Analysis and research for setting up guarantees for customer transactions;*
- *Information and advice in matters of international accounting regulations, in particular for the customer's line of business.*

Comments:

18. The aforesaid service has element of "review" of financing requirements. It also includes element of ,advice/in accounting regulations. It is a case where the 'advice'is with an intention to ensure its implementation in the organization at global level to ensure uniformity of standards and practices. It is reiterated that the appellant is providing services to its group company and the services are to ensure its implementation as against mere submission of a report. Thus, it is a case where the parent entity is imparting the knowledge base because the Indian resources need to be equipped to deliver the quality of services in line with the quality standards maintained at group level.

Agreement Clause-Controlling and internal audit, in particular:

- ***Defining controlling methods, and assisting in the definition and setting-up or reporting tools and other tools;***
- ***Assisting in the dosing of accounts,***
- ***Assisting in relations with external auditors;***
- ***Setting up and reviewing procedures aiming at ensuring control and appropriateness of transactions;***
- ***Performing internal audits at the customer's request, in particular in operational and financial matters.***

19. In the aforesaid services, the element of "defining", "assisting" and "setting up" are clearly indicative of "make available" of skill and knowledge because one cannot assist the other without imparting knowledge.

Agreement Clause -Legal and tax matters, in particular:
Reviewing, drafting and negotiating agreements of all kinds, in particular joint venture, procurement and contract agreements; managing and monitoring said agreements, and maintaining relations with the customer base, both public and private; and coordinating local consultants;

> ***Designing external growth projects; preparation of the legal documentation; s performing audits; coordinating with counsels;***
> ***Reviewing disputes and assisting in the conduct of lawsuits before any court; advising and supporting with regard to claims relates to contract awarding and contracts;***
> ***Assisting in matters of corporate secretariat, shareholders meetings committee meetings, and corporate transactions;***
> ***• Designing and setting up all of the customer's insurance plans (excepting motor insurance, health and welfare benefit plans and pension plans);***
>
> *20. In the aforesaid services, the element of "reviewing", "assisting" and "designing and setting up" are clearly indicative of "make available" of skill and knowledge because one cannot assist the other without imparting knowledge. The "review" element does reflect that one resource may prepare the draft document and the second resource does its review and modifies as a part of review. The first resource involved in preparation of draft document does gain skill and knowledge to the extent of modifications made in the document by the second resource."*

5.23 Lastly, the learned DR further submitted that it was not possible to decide whether the services are capable of "Make available" or not, without looking at the whole gamut nature of the services rendered by the assessee to the service recipient. He further submitted that one needs to first examine with respect to the nature of the services, various correspondence, conduct of the assessee, conduct of the service recipient and the services involved. He submitted that in the case, the assessee has not provided any documentation to demonstrate that services are not in the nature of make available, the claim of the assessee might be rejected, relying on the decision of the Tribunal in the case of Ceva Asia Pacific Holdings Vs DDIT New Delhi (ITA No. 1503/Del/2014 - assessment year 2010-11).

5.24 In view of the above arguments of the Learned DR, it is evident that the assessee has not provided the entire correspondence regarding the services rendered by the assessee

to the Indian entity and in absence of which lower authorities has decided all the three issues on the basis of agreement only i.e. firstly, whether the services are purely managerial or falling under the technical/consultancy services; secondly, services are ancillary and subsidiary to the application or enjoyment of the right, property, information and thirdly, services make available technical knowledge, experience, skill, know-how etc. No other documents have been produced by the assessee in relation to the actual services rendered. This submission of learned DR has not been disputed by the learned counsel of the assessee. In our opinion, decision arrived by the lower authorities is not based on proper appreciation of the facts required for examining of the treaty provisions applicable in the case of the assessee, and therefore we feel it appropriate to restore this issue back to the file of the Assessing Officer for deciding afresh, with the direction to the assessee to furnish all the necessary documentary evidence in support of the services rendered by the assessee to the Indian entity including the correspondence in respect of the services provided so as to enable the Assessing Officer to decide the issue in dispute in accordance with law. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard. The ground No. 2 of both of the appeals is accordingly allowed for statistical purposes.

6. The ground No. 3 in both the appeals, relates to the issue of corporate guarantee fee held as fee for technical services under article 13 of the India France DTAA and section 9(1)(vii) of the Act.

6.1 The briefly stated facts qua the issue in dispute are that the assessee in assessment year 2011-12, stated to have provided corporate guarantee to foreign banks for money borrowed by the 'JCD India' from them and the assessee charged a sum of ₹ 42,77,989/- from the 'JCD India' for such facility. The Assessing Officer held that the said corporate guarantee fee received by the assessee from the 'JCD India' was actually in lieu of services rendered though it has been paid in the guise of corporate guarantee fee and therefore its actual nature is FTS. The assessee filed objection before the learned DRP and submitted that the assessee has not landed any money to the 'JCD India' and said fee was purely relation to provision of corporate guarantee to foreign banks. The assessee referred the Article 12 of the India France DTAA as per which a receipt, can be classified as 'interest' only if there exist some debt-claim between the payee and the payer. According to the assessee, the remuneration for facilitating or guarantying a credit facility cannot be characterized as "interest". The assessee submitted that by any stretch of interpretation, fee for corporate guarantee cannot be characterized as fee for technical services under article 13 of the DTAA. The learned DRP, however, directed the Assessing Officer to verify whether the assessee has charged any corporate guarantee fee from any of its other AE and if so then any sum received over and above the average rate of foreign guarantee fee should be held taxable by way of adjustment under the transfer pricing. In case, no corporate guarantee fee has been charged from any of it AE, then the action of taxing the said corporate guarantee fee was held to be justified. In the final assessment

order, the Assessing Officer held the corporate guarantee fee as 'FTS' on the ground that the assessee failed to submit duly signed agreements with other AEs. The relevant finding of the Assessing Officer is reproduced as under:

> *"6.4 The submission of the assessee having regard to corporate guarantee fee is duly considered and cannot be accepted for the following reasons:*
>
> *The assessee has not placed any documents on record to substantiate its claim that any corporate guarantee fee was received from its other AE's wherein the loan has been availed by that AE on the corporate guarantee of the assessee. Further, the assessee submitted agreements with its AEs which are not signed. This implies that this is merely a proposal made by the assessee to its AEs and the veracity of the document cannot be verified. Hence, reliance cannot be placed on such documents. Thus, as nothing is placed on record to prove that the assessee has derived any corporate guarantee fee in the same vein as that of other AEs. Therefore, since the assessee has failed to prove that it received any corporate guarantee fee from its AEs, the entire amount received as corporate guarantee fee from M/s. JCD India is treated as FTS and taxed accordingly."*

6.2 In assessment year 2012-13, in the draft assessment order the Assessing Officer followed the finding of the Assessing Officer in final assessment order for AY 2011-12 and due to failure on the part of the assessee to submit duly signed agreements of corporate guarantee with other AEs, the Assessing Officer in the draft assessment order, proposed the corporate guarantee fee as fee for technical services. The learned DRP observed that corporate guarantee given by the assessee has enabled the JCD India to avail higher credit rating and obtain loan at a lower interest rate, which otherwise might not have been possible. According to the learned DRP, those were certainly services of a managerial, technical consultancy nature taxable as FTS under

the India France Treaty Article 13(4) and under section 9(1)(vii) of the Act.

6.3 Before us, the Learned Counsel of the assessee relied on the submissions made before the lower authorities and submitted that no managerial, technical or consultancy services have been provided by the assessee by way of providing corporate guarantee and charging a fee for the same. The learned Counsel has further submitted that the assessee has provided the necessary documents in compliance to the direction of the learned DRP for assessment year 2011-12, however the Assessing Officer had not taken those documents on record.

6.4 The Learned DR, on the other hand, relied on the order of the lower authorities.

6.5 We have heard the rival submission and perused the relevant material on record. The Assessing Officer held that corporate guarantee fee was in lieu of the services rendered for assisting the AE in providing loan from foreign banks, but no detail of kinds of services and evidence in this regard have been brought on record by the Assessing Officer and therefore this contention of the Assessing Officer that the guarantee fee was received in lieu of the services rendered, is rejected. In our opinion, services of corporate guarantee by the assessee not being in the nature of services of managerial, technical or consultancy, the corporate guarantee fee received by the assessee cannot be termed as fee for technical services either under the section 9(1)(vii) or under article of the DTAA. The ground No. 3 raised in both the appeals are accordingly allowed.

7. The ground No.4, in both the appeals relates to characterizing reimbursement of Social Security Contribution to the assessee as fee for technical services under article 13 of India France DTAA.

7.1 The brief facts qua the issue in dispute are that during the period relevant to assessment year 2011-12, the 'JCD India' had certain employees, who were French nationals and as per the terms of employment of the said employees with JCD India, the JCD India was required to contribute certain amount toward their Social Security contribution in France. In order to contribute Social Security contribution of such French employees , JCD India entered into agreement with the assessee, wherein the assessee dispersed the amount of Social Security contribution to the respective funds of the said employees and subsequently, JCD India reimbursed the said amount to the assessee (without any markup). Such Reimbursement of ₹ 24, 26, 660/-of Social Security contribution of French employees of JCD India through the assessee has been held by the AO is FTS, as according to him, it was actually received by the assessee in view of the services rendered though it has been paid in the guise of Social Security contribution. Before the learned DRP the assessee submitted that said amount represents pure reimbursement of the amount disbursed by the assessee on behalf of JCD India and same did not have any element of income embedded in it. The assessee placed reliance on various judicial pronouncements and submitted that said amount not having any component of the income, it was not taxable in India. The learned DRP however directed the Assessing Officer to verify the agreement in relation

to payment of Social Security contribution of three French employees of the JCD India and also to find out whether the JCD India has taken into account this payment as salary to those employees for deduction of tax at source while making the payment, as tax on this payment was to be paid in India, in case not by the assessee then by such employees. The direction of the learned DRP are reproduced as under:

> *"5.4.1 According to us, prima-facie, the above sum is taxable in the hands of employees and the TDS/withholding tax credit shall not be given here. However, on protective basis, the addition on this score has to be made in the hands of the assessee. For verifying the above facts and giving clear finding in the final order on this score, the AO is directed to verify the above after calling all details as considered necessary from the assessee. The assessee is also directed to make available the details/documents, etc. preferably within a week after receipt of this order. Accordingly, this ground of objection is disposed of.*
>
> *5.5 As regards the case law relied upon by the assessee, it may be mentioned that these case laws are distinguishable on facts and do not apply to the assessee's case. The question is one of applicability of the principles to the facts in a given case. It has been a well-settled view that the ratio of any decision must be understood in the background of that case. What is of essence in a decision is its ratio and not every observation found therein nor what legally follows from the various observations made in it. It is not a profitable task to extract a suitable sentence here and there from a judgement and to build upon it (Ambica Quarry Works AIR 1987 Supreme Court 1073)."*

7.2 In final assessment order, however, the Assessing Officer retained the addition on the ground that no records were produced by the assessee to verify the directions of the learned DRP. The relevant finding of the Assessing Officer is reproduced as under:

> *"6.6 The submission of the assessee having regard to social security contribution is duly considered and cannot be accepted for the following reasons:*

The assessee has produced nothing on record to prove that the said expenses as claimed by the assessee are in the nature of reimbursement of expenses. Further, the assessee also did not substantiate the fact as to whether JCD India has deducted tax on the said payments. Thus, the same cannot be taxed as salary in India. Also, the agreement as submitted by the assessee is neither signed nor dated. Hence, the contention of the assessee cannot be accepted, and the amount claimed to be received as contribution towards social security is treated as FTS and taxed accordingly."

7.3 In assessment year 2012-13, the Assessing Officer in the draft assessment order has given finding identical to the finding of the Assessing Officer in final assessment order for assessment year 2011-12. The relevant findings in the draft assessment order are reproduced as under:

"8.1 Based on the above and after going through the submission of the assessee, it is settled that the reimbursement of expenses incurred on behalf of JCD India in France is nothing but the payments made in relation to the services rendered by assessee company to M/s JCD India. Therefore, as FTS is taxed on gross basis these payments also need to be clubbed with the fee received in lieu of rendering technical services.

Further, the assessee has produced nothing on record to prove that the said expenses as claimed by the assessee are in the nature of reimbursement of expenses. Further, the assessee also did not substantiate the fact as to whether JCD India has deducted tax on the said payments. Thus, the same cannot be taxed as salary in India. Also, the agreement as submitted by the assessee is neither signed nor dated. Hence, the contention of the assessee cannot be accepted, and the amount claimed to be received as contribution towards social security is treated as FTS and taxed accordingly."

7.4 The learned DRP, however, in view of the decision of the Hon'ble Delhi High Court in the case of Centrica India's offshore private limited WPC No. 6807/2012 dated 25/04/2014 held that reimbursement of expenses for Social Security fund etc. of seconded employees being in the nature of FTS, taxable under section 9(1)(vii) of the Act as well as under article 13(4) of India

France treaty. The relevant finding of the Ld. DRP is reproduced as under:

> *"The facts of the taxpayer's case show a similarity of presentation to that of Centrica which has been discussed in some detail for ready reference supra. Perusal of the broad principles laid down by the Hon'ble High Court and approved by the Hon'ble Supreme Court will show that where employees are seconded and continue to retain their lien with their parent organization, on terms where they transfer and makes available their technical knowledge, then, the reimbursements of salaries of seconded employees are in the nature of FTS in the hands of the Parent organization taxable on source basis. To apply the principles laid down by the Hon'ble High Court to the case on hand, the secondment agreement was required to be examined by DRP and the relevant clauses have been reproduced in a tabular format vis-a-vis the relevant principles laid down by the Delhi High Court for easy reference.*

Centrica Reference	**Secondment Agreement Reference**
Seconded employees duties and functions were dictated by the instructions and directions of the CIOP. However crucially they retained their entitlement to participate in the overseas entities retirement and social security plans and other benefits in terms of its applicable policies, and their salary was properly payable by the overseas entities, which claimed the money from CIOP.(page 40 para 34) There was no purported relationship between CIOP and the secondees since secondees could not sue CIOP for default in payment of salary and though CIOP was given the right to terminate the secondment, but the original and subsisting relationship with overseas entity -whose regular employees they were, could not be terminated. While CIOP may have operational control over these persons in terms	Who bears the responsibility or risk for the results produced by the employee's work? • Who has the authority to instruct the worker regarding the manner in which the work has to be performed? • Who has control 'and responsibility over the place where the work is performed? • Who puts the tools and materials necessary for the work at the employee's disposal? • Who determines the number and qualifications of the employees? • Who has a right to terminate the contractual arrangements entered into with that individual? • Whether there is a right to impose disciplinary sanctions related to the work of that individual?

of the daily work, and may be responsible (in terms of the agreement) for their failures, these limited and sparse factors cannot displace the larges and established context of employment abroad. (page 42 para 36). Though CIOP was given the right to terminate the secondment, but the original and subsisting relationship with overseas entity -whose regular employees they were, could not be terminated. The attachment of the secondees to the overseas organization is not fraudulent or even fleeting, but rather permanent, especially in comparison to CIOP, which is admittedly only their temporary home. (Page 42 para 35). Even the OECD commentary on Article 15 notes that the situation is different if the employee works exclusively for the Enterprise in the state of employment and was released for the period in question by the Enterprise in his state of residence.	Who determines the work schedule of that individual?

A secondment Agreement is typically supported by a detailed Employment contract setting out the terms of employment. The Employment Contract and Salary Reimbursement Agreement when read together point out either points of similarity or distinction vis-a-vis the Centrica case particularly whether the employees have been released from their work and subsequently entered into a separate local employment agreement with India AE etc. But the documents not having been filed by the taxpayer the taxpayer has then failed to discharge its evidentiary onus. In absence of contractual evidence to the contrary, DRP thus has no option but to conclude that the attachment of the secondees was not fleeting as concluded by the Honble High Court in Centrica and that employees seconded,

continued to retain their lien with their parent organization, on terms where they transferred and made available their technical knowledge, and the reimbursement of salaries of seconded employees was thus in the nature of FTS in the hands of the taxpayer on source basis.

This truly is a difficult situation wherein avoiding the FTS could mean yielding ground on a PE. In a recent case of Morgan Stanley the Mumbai ITAT considered and held that where there existed a PE and FTS had been rendered through the said PE, there, profit would need to be determined under Article 7 of the Treaty. The taxpayer has relied upon several judicial pronouncements which are not taken up since the discussion is now academic in view of the above discussion and the decision of the Hon'ble Delhi High Court approved by the Supreme Court. The reimbursements of salaries for secondment of employees are in the nature of FTS and are sums chargeable to tax . It is germane also to mention that decisions in Verizon Data Services India Pvt Ltd.[2011] 337 ITR 192(AAR), AT&S India (P) Ltd. [2006] 157 TAXMAN 198 (AAR), Petroleum India International [2012] 27 taxmann.com 325 (Mum.), Shell India Markets (P.) Ltd. [2012] 342 ITR 223 (AAR-New Delhi),Target Corporation India (P) Ltd [2012] 348 ITR 61 (AAR),Food World Supermarkets Ltd v DDIT TS-629-ITAT-2015(Bang.) support the aforesaid treatment of reimbursement of salaries of seconded employees as FTS both under the Treaty and the withholding of taxes u/s 195 under the Act thereon. The reimbursements of expenses for social security fund etc of seconded employees being in the nature of FTS and taxable under section 9(l)(vii) and under Article 13(4) of the India-France Treaty has been correctly done by the Assessing Officer and the draft order is approved."

7.5 Before us the learned Counsel of the assessee relied on his submissions made before the lower authorities and submitted that the Assessing Officer in assessment year 2011-12, has not followed the directions of the learned DRP and verified the records presented by the assessee in final assessment proceedings and therefore issue may be restored back to the Assessing Officer for verification. However on the issue of application of the decision of the Hon'ble Delhi High Court in the case of Centrica India offshore private limited (supra) no submissions have been made by the learned Counsel of the assessee.

7.6 On the contrary, the learned DR relied on the order of the learned DRP for assessment year 2012-13 and submitted that the services rendered by the seconded employees was taxable in the hands of the assessee as fee for technical services in view of the decision of the Hon'ble Delhi High Court in the case of Centrica India offshore private limited (supra).

7.7 We have heard the rival submission of the parties on the issue in dispute. We note that the learned DRP in the assessment year 2012-13 has applied the ratio of the decision of the Hon'ble Delhi High Court in the case of Centrica India offshore private limited (supra). This issue of application of the decision of the Hon'ble Delhi High Court came up before the learned DRP in assessment year 2012-13 for the first time. But we find that agreements with regard to secondment of the employees between the assessee and the JCD India, agreement between the expatriate employee and the assessee and employment agreement between the JCD India and expatriate, have not been examined either by the Assessing Officer or by the learned DRP and therefore in the interest of the justice, we feel it appropriate to restore this issue to the file of the Assessing Officer for verifying various agreements mentioned above and then decide the issue-in-dispute in accordance with law after providing an adequate and sufficient opportunity of being heard to the assessee. The ground No. 4 of both the appeals, is accordingly allowed for statistical purposes.

8. In ground No. 5 in both the appeals the assessee has raised the issue that education cess and secondary and higher

education cess is not applicable while taxing the income on gross basis under the India France DTAA.

8.1 Before us, the learned Counsel of the assessee relied on the decision of the Tribunal, Kolkatta bench in the case of DCIT Vs BOC Group Ltd reported in (2015) 64 taxmann.com 386 (kolkatta-Trib) and submitted that tax rate prescribed in the DTAA shall have to be followed strictly without any additional taxes thereon in the form of surcharge or education cess.

8.2 The learned DR, on the other hand, supported the action of the lower authorities, but could not produced any decision of the Tribunal or the court wherein such cess or surcharge on the Income-tax under the DTAA has been upheld.

8.3 We have heard the rival submission of the parties on the issue in dispute. We find that the Tribunal in the case of BOC Group Ltd. (supra) has considered various decisions on the issue in dispute and then adjudicated the issue as under:

> *"6. We have heard the rival submissions and perused the materials available on record and the various case laws relied upon by the counsels of both the sides. We find that the assessee herein is governed by India UK Treaty wherein the relevant clauses are reproduced hereunder for the sake of convenience:-*
>
> *ARTICLE 2 Taxes covered-1. The taxes which are the subject of this Convention are*
>
> *(a) in the United Kingdom:*
> *(i) the income-tax;*
> *(ii) The corporation tax;*
> *(iii) The capital gains tax; and*
> *(iv) The petroleum revenue tax;*
> *(hereinafter referred to as "United Kingdom tax");*
> *(b) In India The income-tax including any surcharge thereon;*
> *(hereinafter referred to as "Indian tax")*

2. This Convention shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of this Convention in addition to, or in place of, the taxes of that Contracting state referred to in paragraph 1 of this Article. The competent authorities of the Contracting States shall notify each other of any substantial changes which made in their respective taxation laws.

ARTICLE 3- General definitions-
1. In this Convention, unless the context otherwise requires:
(a) The term United Kingdom means Great Britain and Northern Ireland;
(b) The term India means the Republic of India;
(c) The term tax means United Kingdom tax or Indian tax, as the context requires,, but shall not include any amount which is payable in respect of any default or omission in relation to the ITA No. 571/Kol/2013-C-AM The BOC Group Ltd 4 taxes to which this Convention applies or which represents a penalty imposed relating to those taxes;

ARTICLE 13- Royalties and fees for technical services -1. Royalties and fees for technical services arising in a Controlling State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) In the case of royalties within paragraph 3(a) of this Articles, and fees for technical services within paragraphs 4(a) and (c) of this Article,

(i) During the first five years for which this Convention has effect; (aa) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first mentioned Contracting State or a political sub-division of that State, and (bb) 20 per cent of the gross amount of such royalties or fees for technical services in all other cases; and

(ii) During subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and

(b) In the case of royalties within paragraph 3(b) of this Article and fees for technical services defined in paragraph 4(b) of this Article,

10 per cent of the gross amount of such royalties and fees for technical services."

The expression 'tax' is defined in Article 2(1) to include 'income tax'and is stated to include 'sur charge' thereon, so far as India is concerned. Article 2(2) further extends the scope of the 'tax' by laying down that it shall also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1".

7. We find that education cess was introduced in India by the Finance Act, 200, and Section 2(11) of the Finance Act, 2004 described it as follows:

(11) The amount of income-tax as specified in sub-sections (4) to (10) and as increased by a surcharge for purposes of the Union Calculated in the manner provided therein, shall be further increased by an additional surcharge for purposes of the Union, to be called the "Education Cess on income-tax", so as to fulfill the commitment of the Government to provide ITA No. 571/Kol/2013-C-AM The BOC Group Ltd 5 and finance universalized quality basic education, calculated at the rate of two per cent of such income-tax and surcharge [Emphasis supplied]

8. It is thus clear that the education cess, as introduced in India initially in 2004, was nothing but in the nature of an additional surcharge. It was described as such in the Finance Act introducing the said cess.

9. We have also noted that Article 2(1) of the applicable tax treaty provides that the taxes covered shall include tax and surcharge thereon. Once we come to the conclusion that education cess is nothing but an additional surcharge, it is only corollary thereto that the education cess will also be covered by the scope of Article 2. In any case, education cess was introduced by the Finance Act 2004, with effect from assessment year 2005-06 which was much after the signing of India Simngapore tax treaty on 24th January 1994. In view of the specific provisions to the effect, that the scope of Article 2 shall also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1", and in view of the fact that education cess is essentially of the same nature as surcharge, being an additional surcharge, the scope of article 2 also extends to the education cess."

6.1. We find that the Article 2 of the India UK Treaty provides that income tax including any surcharge thereon and it further provides that this convention shall also apply to any identical or substantially similar taxes which are imposed by either contracting state after the date of signature of this convention in addition to or in place of the taxes of the contracting state referred to in paragraph 1 of this article. Hence by this , it can safely be concluded that the levy of education cess though introduced from Finance Act, 2004 which is much after the date of signing of this convention would also be made applicable while determining the tax rates under the convention. It is well settled that the education cess is nothing but an additional surcharge. When the Article 2 states that surcharge is included in income tax and the tax rate of 15% for fee for technical services is prescribed in Article 13 shall have to be deemed to include surcharge and since cess is nothing but an additional surcharge, the tax prescribed under DTAA @ 15% in the instant case shall be deemed to included surcharge and education cess. Hence we hold that when the tax rate is determined under DTAA, then the tax rate prescribed thereon shall have to be followed strictly without any ITA No. 571/Kol/2013-C-AM The BOC Group Ltd 6 additional taxes thereon in the form of surcharge or education cess. Reliance in this regard is also placed on the following decisions in support of our contentions:-

a) DIC Asia Pacific Pte Ltd vs Asst Director of Income Tax, International Taxation in ITA No. 1458 (kol) of 2011 dated 20.6.2012 for Asst Year 2009-10 reported in (2012) 52 SOT 447 (Kol ITAT) This was a case of treaty between India and Singapore. Issue involved was taxability of interest and royalty income under the relevant article of the treaty and the levy of surcharge and education cess to the tax prescribed under DTAA in the relevant article. It was held that :-

"A plain reading of Article 2, 11 and 12 of the treaty show that while interest and royalties can indeed be taxed in the source state, the tax so charged on the same, under Articles 11 and 12, cannot exceed 15% and 10% respectively. The expression 'tax' is defined in Article 2(1) to include 'income tax' and is stated to include 'surcharge' thereon, so far as India is concerned. Article 2(2) further extends the scope of the 'tax' by laying down that it shall also cover "any identical or substantially similar taxes which are imposed by either contracting state after the date of signature of the present agreement in addition to, or in place of, the taxes referred to in paragraph 1".

It is clear that the education cess, as introduced in India initially in 2004, was nothing but in the nature of an additional surcharge. It

was described as such in the Finance Act 2004 introducing the said cess.

We have also noted Article 2(1) of the applicable tax treaty provides that the taxes covered shall include tax and surcharge thereon. Once we come to the conclusion that education cess is nothing but an additional surcharge, it is only corollary thereto that the education cess will also be covered by the scope of Article 2. Accordingly, the provisions of Article 11 and 12 must find precedence over the provisions of the Income Tax Act and restrict the taxability, whether in respect of income tax or surcharge or additional surcharge - whatever name called, at the rates specified in the respective article. In any case, education cess was introduced by the Finance Act 2004, with effect from assessment year 2005-06 which was much after the signing of India Singapore traty on 24th January 1994. In view of the specific provisions to the effect that the scope of Article 2 shall ITA No. 571/Kol/2013-C-AM The BOC Group Ltd 7 also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of , the taxes referred to in paragraph 1", and in view of the fact that education cess is essentially of the same nature as surcharge, being an additional surcharge, the scope of article 2 also extends to the education cess.
For the reasons set out above, we are of the considered view that the education cess cannot indeed be levied in respect of tax liability of the appellant company. The assessee, therefore, deserves to succeed on this issue.

b) Sunil V. Motiani vs ITO (International Taxation) reported in (2013) 33 taxmann.com 252 (Mumbai Trib) This judgement was rendered by the Mumbai Tribunal in the context of India UAE Treaty after considering the decision of the Uttarakhand High Court in the case of CIT vs Arthusa Offshore Co reported in 216 CTR 86 which dealt with India US Treaty. It was held that :-

"5. We have heard both the parties and their contentions have carefully been considered. We found that the issue raised by the assessee is covered in favour of the assessee by the aforementioned decisions of Tribunal in the case of Sunil V. Motiani (supra)."

c) Parke Davis and Company LLC vs ACIT reported in (2014) 41 taxmann.com 193 (Mumbai Trib) This judgement was rendered in the context of India USA treaty after considering the decision of the Uttarakhand High Court in the case of CIT vs Arthusa Offshore Co reported in 216 CTR 86 which dealt with India US Treaty. It was held that :-

"2. At the outset it was submitted by Ld. AR that the only issue raised by the assess in the present appeal is that the education cess and secondary and higher secondary education cess of Rs.50,104/- is not liable to be payable when tax is determined as per India US Tax Treaty . It was submitted that this issue is covered in favour of assessee by the decision of ITAT in the case of Sunil V. Motiani v. ITO [2013 33 taxmann.com 252/59 SOT 37 (Mumbai-Trib). He has placed a copy of the said order on our ITA No. 571/Kol/2013-C-AM The BOC Group Ltd 8 record and a copy was also given to Ld. DR. He drew our attention towards the observation of the Tribunal in para-5."
3. On the other hand, Ld. DR submitted that education cess and secondary and higher secondary education cess are considered to be tax payable even when the tax is determined on the basis of DTAA. For this purpose she relied upon the decision of Hon'ble Uttarakhand High Court in the case of CIT v. Arthusa Offshore Co. [2008] 169 Taxman 484 and decision of Advance Rulling Authority in the case of Airports Authority of India, In re[2008] 299 ITR 102/168 Taxman 158(AAR-New Delhi).
5. We have heard both the parties and their contentions have carefully been considered. We found that the issue raised by the assessee is covered in favour of the assessee by the aforementioned decisions of Tribunal in the case of Sunil V. Motiani (supra)."

d) ITO (Intl Taxn) vs M/s M Far Hotels Ltd in ITA Nos. 430 to 435 / Coch / 2011 dated 5.4.2013 (Cochin Tribunal) This judgement was rendered in the context of India France treaty. Issue involved was taxability of management fees and interest income under the relevant article of the treaty and the levy of surcharge and education cess to the tax prescribed under DTAA in the relevant article. It was held that :-

"If the provisions of DTAA are more beneficial to the taxpayer, then the provisions of DTAA would prevail over the Indian Income Tax Act. Since the DTAA is silent about the surcharge and education cess for the purpose of deduction of tax at source, this tribunal is of the considered opinion that the taxpayer may take advantage of that provision in the DTAA for deduction of tax. The CITA has only deleted the tax component to the extent of surcharge and education cess at the rate applicable under the DTAA. Therefore, this tribunal do not find any infirmity in the orders of lower authority. Accordingly, the same are confirmed. "

Respectfully following the aforesaid judicial precedents, ***we hold that the surcharge and education cess is not leviable when the tax rate is prescribed under DTAA****. Hence ITA No. 571/Kol/2013-C-AM The BOC Group Ltd 9 we do not find any*

infirmity in the order of the Learned CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed."

(Emphasis supplied externally)

8.4 We find that in the instant case in India France DTAA also the Income-tax include any surcharge thereon and tax rates have been prescribed on the FTS as under:

"[2. However, such royalties, fees and payments may also be taxed in the Contracting State, in which they arise and accordingy 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]"

8.5 In view of the provisions of the India France treaty on the issue being similarly worded with the provisions of the India UK DTAA, following the finding of the Tribunal in the case of BOC group Ltd.(supra), we direct the Assessing Officer to delete the education cess and secondary and higher education cess levied on the Income-tax on the gross basis under the India France DTAA. The ground No. 5 in both assessment year is thus allowed.

9. In ground No. 6 in both the appeals, relates to allowing the credit of tax deducted at source by the JCD India while calculating the tax liability of the assessee.

9.1 We find that this is issue of verification of the credit of tax deducted at source by the Assessing Officer. Accordingly, we restore this issue to the file of the Assessing Officer with the direction to the assessee to produce all the necessary documentary evidence in support of its claim of credit of tax deducted at source for verification by the Assessing Officer along with the tax credit available in the database of the Income-tax

department and then allow the credit in accordance with law. The ground No. six of the appeal in both the years is allowed for statistical purposes.

10. The ground No. 7 being consequential in nature, we are not required to adjudicate upon. Accordingly, dismissed as infructuous.

11. In the result, both the appeals of the assessee are accordingly allowed partly for statistical purposes.

Order pronounced in the open court on 20th March, 2020.

Sd/-	***Sd/-***
(AMIT SHUKLA)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 20th March, 2020.
RK/-(D.T.D.S.)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi