

आयकरअपीलीयअधिकरण, विशाखापटणमपीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

श्रीवी. दुर्गाराव, न्यायिकसदस्य एवं श्रीडि.एस. सुन्दरसिंह, लेखासदस्यकेसमक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.539/Viz/2017 & 540/Viz/2017
(निर्धारण वर्ष/Assessment Years:2013-14 &2014-15)**

M/s Paramina Earth Technologies
Inc., Phillippines
Rep. by M/s Teknomin Construction
Limited, Flat No.F2, Ram's VSR
Apartment, Mogalrajpuram
Vijayawada
[PAN :AAGCP6215P]

Vs. Dy.Commissioner of
Income Tax
(International Taxation)
Visakhapatnam

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से / Respondent by

: Shri.I.KamaSastry, AR
: Smt.U.MiniChandran, DR

सुनवाई की तारीख / Date of Hearing

: 19.02.2020

घोषणा की तारीख/Date of Pronouncement

: 26.02.2020

आदेश /O R D E R

Per Shri D.S.Sunder Singh, Accountant Member :

These appeals are filed by the assessee against the orders of the Commissioner of Income Tax (Appeals) [CIT(A)]-10, Hyderabad in I.T.A.No.081/CIT(A)-10/2016-17/CIT(A), Hyderabad-10/10077/2016-17 and 0168/CIT(A)-10/2016-17/CIT(A), Hyderabad-10/010100/2016-17 dated 27.09.2017 for the Assessment Years (A.Y.)2013-14 and 2014-15.

Since the issues involved in these appeals are common, these appeals are clubbed, heard together and a common order is being passed for the sake of convenience as under.

2. Ground No.1 in both the appeals is related to taxing the receipt of Fees for Technical Services (FTS) under the provisions of section 9(1)(vii) of the Income Tax Act, 1961 (in short 'Act'). M/s Paramina Earth Technologies Inc. (PET) is a foreign company having expertise in the mining activity. It was engaged by M/s Teknomin Construction Ltd., Vijayawada (M/s TCL) to recruit skilled and experienced employees for mining at the mines of Hindustan Zinc Ltd., situated at Rajasthan. The assessee company was represented by M/s Teknomin Constructions Ltd., Vijayawada. The assessee filed the return of income for the A.Y. 2013-14 and 2014-15 admitting 'Nil' income. The case was selected for scrutiny and found that the assessee company had received retainer fee from Teknomin Constructions Ltd., Vijayawada for an amount of Rs.8,55,638/- for the A.Y.2013-14 and Rs.64,76,103/- for the A.Y.2014-15 and claimed the same as non taxable as per the Double Taxation Avoidance Agreement (DTAA) entered between India and Philippines. The Assessing Officer (AO) noticed from the computation statement that the assessee claimed the deduction of

the entire receipt stating that in the absence of PE in India as per the Indo Philippines DTAA and in the absence of FTS article in the Indo Philippines DTAA, the same is not taxable in India and arrived at Nil income. The AO asked for the explanation of the assessee and the assessee explained that for the services rendered by PET in identifying persons with requisite skill and experience, they were remunerated by TCL at the rate of 10% of the salary of certain specified employees. The same was billed by PET monthly as retainer fee and it was remitted to the assessee monthly by TCL. The salaries of individual employees were paid partly in India and partly through PET in Philippines to the designated bank account of the employee on monthly basis. 80% of salaries of the employees was to be paid in Philippines and the PET raises the bill on TCL it was remitted on monthly basis, along with retainer fee to PET. PET deducts amounts towards social security in Philippines, loans if any due to it from the employees, expenses incurred by PET in Philippines on behalf of the individual employee at the time of recruitment and other statutory dues. The entire amount was remitted to the designated bank account of the individual employee. The taxes if any on the salaries of the individual employees were to be borne by TCL. The Ld.AR submitted that PET does not have any office in India. All

the services with respect to identifying the persons suitable for employment by TCL are performed in Philippines. The payments with respect to services rendered are received in Philippines. The persons identified officially are not the employees of PET. They were subject to the supervision and control of TCL and their services can also be terminated by TCL. Their entire salaries were borne by TCL only. Since the work is performed by PET in Philippines and the payment for the services rendered was also received in Philippines and PET does not have permanent establishment in India, the amount received by PET for manpower recruitment services cannot be brought to tax as business income as per Article 7 of the DTAA between India and Philippines. Further, the Ld. AR submitted before the AO that in the absence of a separate article for Fees for Technical Services in the DTAA between India and Philippines, the retainer fees received by PET for services rendered to TCL in Philippines cannot be brought to tax in India as Fees for Technical Services as provided in section 9(1)(vii) of the Act. The assessee placed reliance on the decision of Coordinate Bench of ITAT Bangalore in the case of IBM India Private Limited Vs. Dy. Director of Income Tax, International Taxation, Circle-1(1), Bangalore in IT(IT)A Nos.489 to 498/Bang/2013 dated 24.01.2014. The

Ld.AR further submitted before the AO that as per Article 23 of the DTAA between India and Philippines, other income is to be taxed only in the country of residence of the recipient of the income, therefore, it cannot be brought to tax in India under the Article 23 also as PET is a tax resident of Philippines. The AO not being convinced with the explanation of the assessee relied on Circular 333 dated 02.04.1982 and issued show cause notice for which the assessee filed explanation stating that Circular No.333 dated 02.04.1982 covers method of computation of income and it does not provide for classification of income. However, the AO observed that the assessee initially deducted the tax u/s 195 after grossing up of tax @21.115% on remittances made to PET by TCL and later on revised TDS return. The AO viewed that the case law relied upon by the assessee in the case of IBM India Private Ltd (in short IBM) is distinguishable since in the case of IBM, the work was carried out in Philippines and no employees of IBM Philippines have travelled to India to perform any of the functions and there was no PE of IBM Philippines in India. Therefore, viewed that the assessee's case is distinguishable with that of IBM. The AO relied on the decision of DCIT(IT) Vs. TVS Electronics Ltd. [2012 (DT) 2533 (Chennai Tribunal)] and CBDT Circular No.333 [F.No.506/42/81-FTD] dated

02.04.1982 and viewed that payments made to TCL by PET are to be treated as Fee for Technical Services and taxable u/s 9(1)(vii) of the Act in the hands of the PET. Accordingly, issued draft assessment order u/s 144C of the Act for which the assessee has not filed objections before the Dispute Resolution Panel(DRP). Hence, the AO viewed that FTS required to be taxed, accordingly made the addition of Rs.8,55,638/- for the A.Y.2014-15 and taxed the same at 40% at the maximum marginal rate. Similarly for the A.Y.2014-15, the AO made the addition of Rs.64,76,103/- on identical facts.

3. Against which the assessee filed appeal before the CIT(A) and the Ld.CIT(A) dismissed the appeal of the assessee. The Ld.CIT(A) viewed that the decision of ITAT, Bangalore in the case of IBM India Pvt. Ltd. was distinguished by the AO. The assessee relied on another decision in DCIT Vs. Ford India Ltd. (2017) 49 CCH 0026 (Chennai Trib) and the Ld.CIT(A) viewed that in the case of Ford India Ltd the decision was rendered in the context of India Thailand DTAA which is not applicable to the facts of the assessee's case. In respect of ABB FZ-LLC Vs. ITO (IT) [162 ITD 89], ITAT, Bangalore, the Ld.CIT(A) viewed that the decision was rendered in the context of India-UAE DTAA which is also not applicable to the facts of the case. The Ld.CIT(A) relied on section 9(1)(vii) and Circular No.333 dated

02.04.1982 and held that the retainer fee paid by the assessee to PET is taxable as fee for technical services. The assessee's contention that there was no PE in India for the recipient to tax the retainer fees was also not accepted by the Ld.CIT(A), stating that there is a permanent establishment in India for PET which was already in the mining activities in Philippines. Therefore, viewed that the AO has correctly brought the payments made to PET by M/s Tecknomin towards retainer fee as fee for technical services u/s 9(1)(vii) of the Act, thus, the Ld.CIT(A) dismissed the appeals of the assessee.

4. Against which the assessee is in appeal before this Tribunal. During the appeal hearing, the Ld.AR submitted that the assessee had received retainer fee from Teknomin Constructions @10% of the salary of certain specified employees. The same is taxed by AO as Fee for Technical Services. There exists DTAA between India and Philippines and in the DTAA, there is no separate article for taxing the FTS separately. Since, there is no separate article to tax the FTS, the same required to be taxed under the head 'business profit' but not under the Fee for Technical Services. The Ld.AR further argued that for taxing the business profits, there must be a permanent establishment (PE) in India and the business

profits are not to be taxed in India in the absence of PE. The Ld.AR further submitted that the incomes which were not mentioned in the articles of DTAA are taxable only in the residence state, therefore, argued that the sum paid to the PET or received by PET as retainer fee is not taxable in India, hence requested to set aside the order of the lower authorities and allow the appeal of the assessee. The assessee relied on the decisions of ITAT Bangalore Bench in the case of ABB FZ-LLC Vs. ITO (IT) [162 ITD 89] I.T.(I.T.)A.No.188/Bang/2016 and the decision of ITAT Bangalore in the case of IBM India Private Ltd. Vs. DDIT in I.T.(I.T)A Nos.489 to 498/Bang/2013.

5. On the other hand, the Ld.DR strongly supported the order of the AO and argued that FTS required to be taxed in India u/s 9(1)(vii) of the Act and the Ld.CIT(A) has rightly confirmed the addition, therefore, requested to uphold the order of the Ld.CIT(A) and dismiss the appeal of the assessee.

6. We have heard both the parties and perused the material placed on record. There is no dispute that the payment made was in the nature of fee for technical services. There exists DTAA with the Philippines Government dated 25.03.1996 and as per the DTAA, fee for technical services was not

covered in Articles 6 to 22 which deals with taxing various sources of income, therefore, the same required to be taxed either as business profits or under Article 23. Article 23 deals with incomes not arising or not dealt within the articles of the treaty which shall be taxed in the contracting state of recipient. Therefore, fee for technical services which is not covered under the treaty of DTAA required to be taxed as business profit under Article 7 of DTAA. For the purpose of taxing the business profits, there must be permanent establishment in the contracting state. The AO has not made out a case of PE in the case of the assessee. The AO relied on the decision of TVS Electronics, which was negated by the High Court.

6.1. The Ld.CIT(A) in his order taken support of Clause 'c' of section 9(1)(vii), which is relevant for the payments made by the non resident, but not the resident. In the instant case, the payment was made by the resident to non resident, therefore, the Ld.CIT(A) misunderstood the provisions of section 9(1)(vii)(c). As far as Circular 333 is concerned, the same is related to computation of income, but not the classification of income. Hence the circular also cannot help the department to assess the FTS as separate source of income. Though the lower authorities as well as the Ld.DR tried

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to distinguish the case laws relied upon by the assessee, the issue is with regard to payment of fee for technical services to the non resident. Therefore, we are of the considered opinion that the facts of the case laws relied up on by the assessee are similar to that of the assessee's case, hence squarely covered in favour of the assessee. The coordinate bench of ITAT Bangalore in the case of IBM India Private Limited Vs. DDIT, Circle-1(1), Bangalore and also ABB FZ-LLC Vs. Income Tax Officer (supra) held that in the absence of provision of DTAA to tax fee for technical services, the same would be taxed as per article 7 of DTAA as business profits and in the absence of PE in India, the said income is not chargeable to tax in India. Though the decision was rendered in the context of India-UAE agreement, the same is very much relevant in the assessee's case. The coordinate bench of ITAT in the case law referred above, considered the absence of article for taxing the fee for Technical Services, Article 7, 23 and 24 and also Circular No.333 which was relied upon by the AO as well as lower authorities and held that the same cannot be taxed as income under the category of Fee for Technical Services. The coordinate Bench in the case of M/s ABB FZ-LLC Vs. Income Tax Officer in I.T.(I.T)A No.188/Bang/2016 dated 28.10.2016 held that once the income chargeable to tax as per the

DTAA are categorized by excluding the Fees for Technical Services then the scope of taxing the said income cannot be expended by importing the said provision from the Income Tax Act. For the sake of clarity and convenience, we extract relevant part of the order of the coordinate bench which reads as under :

“6. We have considered the rival submissions as well as the relevant material on record. There is no dispute as regards the nature of receipt by the assessee from ABB India Ltd. is Fees for Technical Services. The Assessing Officer has accepted the nature of receipt being Fees for Technical Services. It is also not in dispute that the Indo-UAE Treaty does not contain any provision/Article to tax Fees for Technical Services. Article 3(2) provides that if any term is not defined in the agreement then the meaning of which as per the law of the state concerning the taxes will be taken for the purpose of application of the agreement. For ready reference we reproduce Article 3(2) as under :

“ARTICLE 3

General Conditions

.....

(2) As regards the application of the Agreement by a contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the laws of that State concerning the taxes to which the Agreement applies.”

As it is clear that when a term is used in the agreement (DTAA) but has not been defined therein then the meaning of the said term unless the context otherwise requires shall have the meaning as defined under tax statute of the contracting state. The need of importing the meaning of the term from the tax statute arises only when a term is provided in the agreement but the meaning of the same has not been defined therein. Therefore the question arises is that when a term is not used in the tax treaty then the meaning of the said term or the term itself can be imported or can be applied for charging a particular income to tax in the contracting state. As regards the provisions of DTAA prevail over the provisions of tax statute so far as it is beneficial to the assessee is concerned there is no quarrel on this point that in case of any conflict

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between the provisions of agreement and the Act, the provisions of the agreement will prevail over the provisions of the Act as mandated by the provisions of section 90(2) of the Act. The income which is classified as royalty or Fees for Technical Services if derived from the regular business activities of the assessee then the said income is inherently regarded as business income for the purpose of taxation under the Act as well as tax treaty. However these two categories of income are separately classified for the purpose of charging to tax. Once the DTAA does not recognize any income as Fees for Technical Services or royalty then classification of the said income has to be as per the other provisions of the DTAA. There is no dispute that in the case of the assessee the income derived by the assessee is from providing services to the Indian counterpart which is a regular business activity and therefore the said receipt has to be recognized under the provisions of the DTAA as business income because the DTAA does not contain any provision to recognize or tax any income in the nature of Fees for Technical Services. The absence of the provision in the DTAA is not an omission but is a deliberate mutual agreement between the contracting states not to recognize/classify any income as Fees for Technical Services for taxation. Therefore the intention for not incorporating any provision in the DTAA is not to tax an income under the category of Fees for Technical Services. Once the income chargeable to tax as per the DTAA are categorized by excluding the Fees for Technical Services then the scope of taxing the said income cannot be expended by importing the said provision from the Income Tax Act when it is excluded under the DTAA."

6.2. Similarly, the coordinate bench of ITAT Bangalore in the case of DCIT (International Taxation) Vs. IBM India Pvt. Ltd. considered the similar issue and held that the payment made on account of FTS required to be taxed under Article 7 and in the absence of permanent establishment, the business receipts are not chargeable to tax in India. For the sake of clarity and convenience, we extract relevant part of the order of the coordinate bench of ITAT from para No.11 to 15 in the case of IBM India Pvt. Ltd. which reads as under :

“11. We have heard the rival submissions. There are two common issues which arise for consideration in these appeals by the revenue. The first issue is as to whether the CIT(A) was tight in holding that even if the reimbursement by IBM India to IBM Philippines are regarded as "FTS", yet in so far as payments by IBM India to IBM Philippines is concerned, the same would not be chargeable to tax in the hands of IBM Philippines in India, the source country and therefore there would be no obligation to deduct tax at source u/s.195 by IBM India when it makes payment to IBM Philippines in view of the absence of article in DTAA between India and Philippines (DTA) dealing with FTS, can it be taxed in the source country as other income" under Article 23(1) of the DTAA or u/s.9(1)(vii) Expln.2 of the Act as "FTS" has been concluded in several decisions of Tribunal in the context of DTAA clauses which are identical with DTAA between India and Philippines. The Assesses made payments to IBM Philippines by way of reimbursement of salary of expatriate employees sent on secondment to IBM India. One of the IBM Oversees entity to whom IBM India made payments was a tax resident of Philippine. It is in that context the issue came before the CIT(A) as to whether IBM India was obliged to deduct tax at source u/s.195 of the Act, when making payment. In fact in the case of IBM India Pvt. Ltd. Vs. DDIT in IT(IT)A Nos.489 to 498/Bang/2013 chargeability to tax of income in the nature of FTS when there is no such provision of taxing for Fees for Technical Services in the Indo-Philippines Treaty was considered and decided by the Bangalore Bench of ITAT in favour of the Assessee (vide Paragraph 7.3.1. to 9.1.5 of the said order).

12. In the aforesaid decision of the Tribunal in IBM India Pvt. Ltd. (supra), the admitted position is that there is no specific clause in DTAA regarding income in the nature of FTS. The assessee contended that in the absence of an FTS' clause in the DTAA, Article 7 (business profits) thereof would be applicable since IBM-Philippines is providing services in the course of its business and since it does not have a PE in India, payments made to IBM-Philippines are not chargeable to tax in India. Alternatively it was contended that if Article 7 of the DTAA is not applicable, the payments would be covered by Article 23 (1) of the DTAA which deals with 'Other Income which lays down the rule that it is only the State of residence of the recipient (Philippines) that would have right to tax 'other income' therefore payments to IBM- Philippines a tax resident of Philippines, would be taxable in Philippines and not in India. Per contra, Revenue contended that in the absence of FTS clause in the DTAA, as per Article 24(1) thereof, the taxability of the said payments would be governed by the domestic laws i.e. Section 9(1)(vii) of the Act and consequently these payments are chargeable to tax in India and liable for TDS u/s.195 of the Act.

13. The Tribunal after referring to Article 23 and 24 of the DTAA observed that the purpose of Article 24 was elimination of Double Taxation. The Tribunal referred to Article 24(1) of the DTAA which provided that the laws in force in either of the Contracting States shall continue to govern the taxation of income in the respective Contracting States except where provisions to the contrary are made in this Convention. The tribunal observed that at first sight, it may appear that Articles 23 and 24(1) of the DTAA are in conflict with each other and that Article 23 is an omnibus clause covering all items of income not dealt with in Articles 6 to 22 but it was not so because Article 24(1) specifically refers only to income which are not covered under any of the clauses in the DTAA and therefore Article 24 would be rendered redundant if Article 23(1) were to be construed as covering all other incomes which are not specifically dealt with any of the clauses of the DTAA. The Tribunal observed that if one were to interpret Article 24(1) as conferring right to tax 'FTS' in accordance with the domestic law of a contracting state, which is the contention of revenue in the case on hand, then Article 23 would become redundant since it ceases to be a residuary / omnibus clause covering items of income, wherever arising, not dealt with in the foregoing Articles of the Treaty. The tribunal held that provisions of law or treaty need to be interpreted in such a way as to avoid conflict between the various provisions and referred to the decision of Hon'ble Supreme Court in the case of CIT Vs. Hindustan Bulk Carriers (2003) 259 ITR 449. The Tribunal referred to decision of Hon'ble Bombay ITAT in the case of BNB Paribas SA V DCIT (2013) Tax Corp (AT) 32700, which dealt with identical clause in DTAA between India-UAE which is similar to Article 24(1) of DTAA, wherein the Mumbai ITAT held that the purpose of Article 25(1) of the India-UAE DTAA which is similar to Article 24(1) of the India-Philippines Treaty was to (i) eliminate double taxation and it is for this purpose, it has been provided that the 'laws in force' in either of the Contracting States shall continue to govern the taxation of the income unless express provision to the contrary are made in this Agreement (ii) provides for deductions or credit of the taxes paid in either of the states based on either exemption method or providing for credit for taxes paid in the other country and that Article 25 by itself does not provide any rules on the mechanism for computing relief. It is only for such purposes the domestic laws may have to be referred and it cannot be extended to tax business income falling under Article 7 as per domestic law. The Tribunal referring to the aforesaid decision held that Article 24(1) of the India- Philippines DTAA, which is similar to Article 25(1) of the India-UAE Treaty, does not confer a right to invoke the provisions of domestic laws for classification or taxability of income which is governed by Article 6 to 23 of the India-Philippines Treaty and that Article 24(1) operates in the field of computation of doubly taxed

income and tax thereon in accordance with the domestic laws of each contracting state and is not part of Articles 6 to 23 which deal with the classification of income into different heads. Para 2 of CBDT Circular NO.333 dt.2.4.1982 exemplifies what is stated in Article 24 of the India-Philippines DTAA; providing that the Mode of Computation of income as provided in the DTAA should be followed and where there is no specific provision in the treaty, the Income Tax Act will govern the same. Both Article 24 of the India-Philippine DTAA and CBDT Circular NO.332 dt.2.4.1982 have no role to play in classification of income and allocation of right to tax such income to one or both of the contracting states as the same are to be dealt with in accordance with Article 6 to 23 of the DTAA. Even though the India-Philippines DTAA does not have an Article dealing with 'FTS', its taxation would be governed by Articles 7 or Article 23 as the case may be, depending on the facts and circumstances of each case. If Article 24(1) of the DTAA is interpreted as dealing with taxation of items of income not dealt within the foregoing Articles 6 to 23 of the India-Philippines DTAA, as per domestic laws, it would render Article 23 thereof redundant. The Tribunal ultimately held that there is no merit in the contention put forth by revenue that in the absence of 'FTS Article under the India-Philippines Treaty, payments made to IBM-Philippines are taxable in India as per Article 24(1). Consequently, the findings of the authorities below that the payments made to IBM Philippines are taxable under Section 9(1)(vii) of the Act on the basis of Article 24(1) of the India-Philippines DTAA, was held to be incorrect and unsustainable.

14. *The Tribunal has also examined whether Article 23(1) would apply at all to the facts of the case. Article 23 begins with the words items of income not expressly covered by provisions of Article 6 to 22. Therefore, it is not the fact of taxability under article 6 to 22 which leads to taxability under article 23, but the fact of income of that nature being covered by article 6 to 22 which can lead to taxability under article 23. There could be many such items of income which are not covered by these specific treaty provisions, such as alimony, lottery income, gambling income, rent paid by resident of a contracting state for the use of an immovable property in a third state, and damages (other than for loss of income covered by articles 6-22) etc. The tribunal therefore held that article 23 does not apply to items of income which can be classified under sections 6-22 whether or not taxable under these articles, and the income from consultancy charges on is covered by Article 7, Article 12 or Article 14 when conditions laid down therein are satisfied. The Tribunal clarified that the fact that the remuneration paid to the assessee may be in the nature of technical fee within the scope of section 9(1)(vii) does not*

make a difference. Fees of this nature can be earned in business or otherwise. If earned in the course of business, they constitute income from business. There is no incompatibility between recognizing the receipts as royalties or technical fees and also looking upon them as the profits of a business. Judicial decisions have recognized the principle in regard to other types of receipts such as dividends and interest. That being so, when technical fees are received in the course of business, one cannot deny them the treatment envisaged by Article 7 specifically intended for application to business income. That apart as pointed out earlier, there are several DTAA's which prescribe different modes of taxation for business and for royalties and fees for technical services, but they are clear that the provisions of the "business" clause of the treaty (Article 7 here) will govern where such technical fees are earned in the course of business with a permanent establishment in the State in question. See for e.g., the DTAA's between India and Australia (Article 11(4)), Canada [Article XIII (SC)] or USA [Article 12(6)]. These indicate that even where royalties and fees for technical services receive separate treatment under a DTAA, it is the Article relating to computation of business income that would apply where such royalties or fees arise in the course of business carried on by the recipient. The Tribunal came to the conclusion that receipts were in the course of business of the Assessee and were therefore business income falling within Article 7 of the DTAA and would therefore not fall within the ambit of Article 23(1) of the DTAA. Since IBM Philippines did not have Permanent Establishment (PE) in India, the receipt was not chargeable to tax in India.

15. *The aforesaid decision would squarely apply to the present case as IBM Philippines received the monies in the course of their business and did not have PE in India and therefore the receipt in question cannot be brought to tax under Article 7 of DTAA as well. In view of the above decision of the co-ordinate bench in the case of IBM India Pvt. Ltd. Vs. DDIT (I.T) (supra), we are of the considered opinion that in the absence of the provision in the DTAA to tax Fees for Technical Services the same would be taxed as per the Article 7 of the DTAA applicable for business profit and in the absence of PE in India, the said income is not chargeable to tax in India. Consequently, we hold that there is no merit in the appeals by the revenue on this issue."*

6.3. In the instant case, there is no dispute that the payment made was in the nature of FTS and there is no article in DTAA for taxing the FTS separately. Therefore, the payment made to the non resident required to

be taxed under article 7 under the head 'business profits'. There is no PE in India to non resident. The AO has not made out a case of having PE to non resident in India. Therefore, the payment made to non resident are not to be taxed in India as business profits. Though the department has tried to distinguish the case laws, the fact remains that in the case laws referred above, the payment was made in the nature of Fee for Technical Services and the department has also accepted that the payment made to the non resident was in the nature of FTS. Therefore, the facts of the assessee's case are squarely covered by the decision of ITAT Bangalore supra. Accordingly, we hold that the lower authorities have erred in taxing the FTS separately u/s9(1)(vii) of the Act. Accordingly orders of the lower authorities are set aside and the appeals of the assessee are allowed.

7. Ground No.2 is related to the taxing of income @40% and Ground No.3 is related to charging of interest u/s 234B. Since we have allowed the appeal of the assessee in Ground No.1 with regard to taxing the FTS, ground No.2 and 3 become infructuous, hence, the same are dismissed as infructuous.

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8. Ground No.4 and 5 are general in nature which does not require specific adjudication. Accordingly, appeals of the assessee are allowed.
9. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 26th February, 2020.

Sd/- (वी.दुर्गा राव) (V. DURGA RAO)	Sd/- (डि.एस. सुन्दर सिंह) (D.S. SUNDER SINGH)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य/ACCOUNTANT MEMBER
विशाखापटणम /Visakhapatnam	
दिनांक /Dated : 26.02.2020	
L.Rama, SPS	

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M/s Paramina Earth Technologie Inc,
Rep. by M/s Teknomin Construction Limited, Vijayawada*

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee-M/s Paramina Earth Technologies, Inc., Phillippines, Rep. by M/s Teknomin Construction Limited, Flat No.F2, Ram's VSR Apartment, Mogalrajpuram, Vijayawada
2. राजस्व/The Revenue -Dy.Commissioner of Income Tax, (International Taxation), Visakhapatnam
3. The Commissioner of Income Tax (IT & TP), Hyderabad
4. The Commissioner of Income Tax (Appeals)-10, Hyderabad
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 6.गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, Visakhapatnam