IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "L" (SPECIAL BENCH)

BEFORE SHRI H.L. KARWA, PRESIDENT, SHRI D. MANMOHAN, VICE PRESIDENT AND SHRI P.M. JAGTAP, ACCOUNTANT MEMBER

ITA Nos. 5034/Mum/2004, 5035/Mum/2004, 7095/Mum/2004, 3021/Mum/2005 AND 2060-61/Mum/2008

Assessment Years 1998-99, 1999-00, 1999-00, 2000-01, 2001-02 & 2003-04

Asstt. DIT (IT) -1(2), Room No. 113, Scindia House, Ballard Estate, Mumbai – 400 001.	Vs.	M/s Clifford Chance, C/o Bharat S. Raut & Co., CA's, KPMG House, Kamala Mills Compound, 448 Senapati Bapat Marg, Lower Parel, Mumbai 400013. PAN AABFC 3095 N
Appellant		Respondent

C.O. 41-44/Mum/2008
Arising out of ITA Nos. 5034/M/04, 5035/M/04, 7095/M/04 & 3021/M/05
Assessment years 1998-99, 1999-00, 2000-01 & 2001-02

M/s Clifford Chance, C/o Bharat S. Raut & Co., CA's, KPMG House, Kamala Mills Compound, 448 Senapati Bapat Marg, Lower Parel, Mumbai 400013. PAN AABFC 3095 N	Vs.	Asstt. DIT (IT) -1(2), Room No. 113, Scindia House, Ballard Estate, Mumbai – 400 001.
Appellant		Respondent
Assessee by	Shri M.S. Syali, Sr. Advocate Shri Pawan Kumar Shri Ravi Sharma, Ms. Anusha Singh &, Shri Mayank Nagi	
Department by	Shri Girish Dave, Shri Mahesh Kumar & Shri Narender Kumar	

Date of hearing	17-04-2013
Date of pronouncement	13-05-2013

ORDER

PER P.M. JAGTAP, AM.

This Special Bench has been constituted by the Hon'ble President, ITAT u/s 255(3) of the Income Tax Act, 1961 to consider and decide the following questions of law arising from the appeals filed by the Revenue in the case of Clifford Chance:-

> **"1.** ***Whether insertion of Explanation to section 9 by way of amendment by Finance Act, 2010 with retrospective effect from 01-06-1976, changes the position of law, as far as the assessee is concerned?***
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> ***2. Whether on a true and correct interpretation of the term "Directly or indirectly attributable to Permanent Establishment" in Article 7(1) of the India-UK DTAA, it is correct in law to hold that the consideration attributable to the services rendered in the State of residence is taxable in the source State".***

2. The relevant facts of the case giving rise to the questions referred to this special bench are as follows. The assessee in the present case is a U.K. partnership firm of Solicitors. It is engaged in providing international legal services in certain areas and operates through its principal office in UK and branch offices in certain other countries. During the years under consideration, it rendered legal consultancy services in connection with different projects in India. Although it did not have an office in India, some part of the work relating to the projects in India was performed in India by its partners and employees during their visits to India. On the basis of the work so performed in India, income attributable to the services actually rendered in India was worked out by the assessee and the same was offered to tax in India in the return of

income filed for A.Y. 98-99. In this regard, reliance was placed by the assessee on Article 15 of the India-UK Treaty in support of its claim which reads as under :-

> "**Income derived by an individual, whether in his own capacity or as a member of a partnership,** who is a resident of a Contracting State in respect of professional services or other independent activities of a similar character may be taxed in that state. Such income may also be taxed in the other Contracting State if such services are performed in that other State and if (a) he is present in that other State for a period or periods aggregating 90 days in the relevant fiscal year, or (b) he or the partnership, has a fixed base regularly available to him, or it, in that other State for the purpose of performing his activities."

For assessment years 1999-2000, 2000-01, 2001-2002 and 2003-04, the returns of income were filed by the assessee declaring NIL income on the ground that the aggregate period or periods of stay of its partners and employees during the said years did not exceed 90 days and its income therefore was not taxable in India in these years.

3. On perusal of the Article 15 of India-UK Treaty, the A.O., however, was of the opinion that the same is not applicable in the case of the assessee since it does not cover partnership firms within its ambit. In this regard, reference was made by him to the DTAA between India and the USA as well as India and France wherein the relevant provisions- which are analogous to the provisions of Article 15 of the India-UK Treaty- included "firm of individuals", in addition to individuals in their own capacity. Reference was also made by the A.O. to the latest OECD Model for DTAA which has done away with the concept of Independent Personal Services as contained in Article 15 of the India-UK Treaty and has merged the same with the concept of business profits as defined in Article 7 of the Tax Treaty. He held that Article 15 thus was not applicable in the case of the assessee and in any case, the aggregate stay of its partners and employees having exceeded 90 days at least in A.Y.1998-99 and 1999-2000, the entire income of the assessee derived

from services rendered in connection with the projects in India was taxable in India for the said years as per Article 15. The A.O. was also of the opinion that the case of the assessee even otherwise was covered by Article 7 of the India-UK DTAA read with Article 5 thereof. Reference in this regard was made by him to the terms of Article 5(2)(k) of the India-UK DTAA which provided that the term 'Permanent Establishment' (PE) shall include, inter alia, the furnishing of services including managerial services other than those taxable under Article 13 (Royalties and fees for technical services) within a Contracting State by an enterprise through employees or other personnel but only if the activities of that nature continued within that state for a period or periods aggregating to more than 90 days within any 12 months period. In this regard, he found that the test of 90 days stipulated under Article 5(2)(k) was satisfied in the case of the assessee and the assessee thus had a PE in India in terms of the "duration of stay" test provided in the treaty. He held that the assessee also was having fixed place PE in India in the years under consideration through which services were rendered by its partners and employees during their stay in India. Having held that the assessee had a PE in India and also a business connection in India, the A.O. was of the opinion that the profit earned by the assessee from the rendering of services in India was in the nature of business profit covered under Article 7 of the India-UK DTAA. Reliance in this regard was placed by him on the definition of the term "business profits" given in the Indian Income Tax Act having wide import. He noted that the assessee in the present case was not only engaged in giving legal advice while sitting at the desk in the solicitors' office in UK but it was also engaged inter alia in identifying licenses and consents required including assistance in obtaining grant of the same, negotiating loan and security documentation and reviewing and advising on any information memorandum required for the project. He held that the assessee thus

had entered into the field of business activities in the true commercial sense and relying on the decision of Hon'ble Madras High Court in the case of P. Vadamalyam vs. CIT (74 ITR 94) and that of Hon'ble Andhra Pradesh High Court in the case of GVK Industries vs. ITO (228 ITR 564), he held that Article 7 of India-UK DTAA was applicable in the case of the assessee which was engaged in business activity in India.

4. Having held that the assessee had a PE in India during the years under consideration and it was carrying on business in India through the said PE, the A.O. held that the profits of the assessee to the extent they are directly or indirectly attributable to PE in India are taxable in India as per Article 7 of the India-UK DTAA. He then proceeded to determine such profit which should be brought to tax in India. Reference in this regard was made by him to the decision of Authority for Advance Ruling in the case of SRK Consulting Engineers (230 ITR 206) wherein it was held that the statutory test as laid down in section 9 of the Indian Income Tax Act together with Explanations thereto for determining the place of accrual of income from services is not the place where the services are rendered but the place where those services are utilized. Relying on the said decision of the Authority for Advance Ruling, the A.O. held that the amount received by the assessee from its clients for the services utilised in relation to the project in India was taxable in India even though such services were rendered outside India. Accordingly, the entire fees received by the assessee from its clients for the services utilised in relation to the projects in India was brought to tax by the A.O. in India in the hands of the assessee after allowing deduction u/s 44C of the Act.

5. Aggrieved by the orders of the A.O., the assessee preferred appeals before the ld. CIT(A) for all the six years under consideration raising the various issues. The ld. CIT(A) found that most of the issues raised by the

assessee were squarely covered by the order of the Tribunal passed in assessee's own case for A.Y. 1996-97 dtd 27th September, 2001 in ITA No. 1327 (Mum) of 2001. As noted by the ld. CIT(A), it was held by the Tribunal in the said order that the case of the assessee was covered under Article 15 and not under Article 5 read with Article 7 of the DTAA. He therefore decided this issue, involved in all the years under consideration, in favour of the assessee following the order of the Tribunal for A.Y. 1996-97. Having held that Article 15 of the India-UK treaty was applicable in the case of the assessee, the ld. CIT(A) agreed with the stand of the assessee that in all the years under consideration, except A.Y. 1998-99, the aggregate period of stay of the partners and employees of the assessee did not exceed 90 days and its income derived from the services rendered in connection with the projects in India was not taxable in India even under Article 15. He also did not agree with the AO that the assessee was having fixed place PE in India during the years under consideration.

6. As regards the next issue as to whether the entire receipts of the assessee from the projects in India was to be included in the total income or only the income attributable to the services rendered by the assessee in India was to be included for A.Y. 1998-99 wherein the presence of the assessee in India was found to be more than 90 days, the ld. CIT(A) found that this issue was also covered by the order of the Tribunal in assessee's own case for A.Y. 1996-97 wherein it was held that if the assessee is able to prove that it has rendered certain services outside India, the income to that extent can be excluded while computing the income taxable in India. He also noted that even under Explanation (a) of clause (i) to sub-section (1) of section 9 of the Income Tax Act, 1961, only the income attributable to services rendered in India was subject to tax in India and the income attributable to services rendered outside India was not chargeable to tax in India either under domestic tax law or even

under the relevant DTAA. Reference in this regard was made by him to Article 15 as well as Article 7 to hold that under both these Articles, income attributable to services rendered in India only can be considered for computing taxable income in India.

7. The ld. CIT(A) then proceeded to decide the issue relating to quantification of income attributable to the services rendered by the assessee in India. In this regard, he took note of the number of days for which the partners and employees of the assessee firm were present in India during the relevant year as well as project-wise summary of time sheet of the said employees/partners indicating the time spent in India as well as outside India on the projects and the income attributable thereto. He found that the average number of hours spent by the partners/employees of the assessee in India in all cases works out to more than 10 hours per day which, according to the ld. CIT(A), was quite reasonable. He therefore held that the assessee had been able to satisfactorily prove that the number of hours spent in India was correctly booked to the respective projects and the income attributable to work done in India was correctly calculated and offered to tax for A.Y. 1998-99. He held that the income declared by the assessee in the return of income for A.Y. 1998-99 thus was actually relatable to the services performed or rendered by the assessee in India and directed the A.O. to consider the same as fees attributable to the services rendered in India in order to compute the tax liability of the assessee for A.Y. 1998-99.

8. As regards the issue of inclusion of amount of reimbursement of expenses in the income of the assessee, the ld. CIT(A) found that this issue was also covered in favour of the assessee by the decision of the Tribunal in its own case for A.Y. 1996-97 wherein it was held that if the reimbursement of expenses was to be included in the income of the assessee, the corresponding expenses actually incurred by the assessee

has to be allowed as deduction after necessary verification. Accordingly the A.O. was directed by the ld. CIT(A) to allow the corresponding expenses actually incurred by the assessee after necessary verification. He also allowed the claim of the assessee for deduction on account of salary of its employees attributable to the services rendered in India after necessary verification following the order of the Tribunal in assessee's own case for A.Y. 1996-97 wherein a similar deduction was allowed by the Tribunal. Aggrieved by the orders of the ld. CIT(A), the Revenue has preferred its appeals before the Tribunal.

9. The appeals preferred by the Revenue in the case of the assessee for all the five years under consideration initially came up for hearing before the Division Bench of the Tribunal which took note of the fact that the decision of the Tribunal in assessee's own case for A.Y. 1996-97 reported in 82 ITD 106 (Mum.) on which reliance was placed by the ld. CIT(A) has already been affirmed by the Hon'ble Bombay High Court by the judgment reported in (2009) 176 Taxman 485. The Tribunal however found that the said decision of the Hon'ble jurisdictional High Court was held to be no more a good law by a co-ordinate Bench in the case of Linklaters LLP vs. ITO (International Taxation) reported in 40 SOT 51 (Mum) in view of the amendment brought by Finance Act, 2010 by substituting an Explanation to section 9(1) retrospectively w.e.f. 01-06-1976. It was held by the co-ordinate Bench in this context that the judgment of Hon'ble jurisdictional High Court in the case of the assessee i.e. Clifford Chance was based on the legal premises that u/s 9(1)(vii), "services, which are the source of income sought to be taxed in India, must be utilized in India and rendered in India". As held by the Tribunal, this legal premises however did not hold good any longer in view of amendment made in section 9 by the Finance Act, 2010 w.r.e.f. Ist June, 1976 whereby Explanation to section 9(1) was amended to provide that the income of the non-resident shall be deemed to accrue or arise in

India under clause (v) or clause (vi) or clause (vii) of section 9(1) and shall be included in his total income, whether or not (a) the non-resident has a residence or place of business or business connection in India or (b) the non-resident has rendered services in India. It was held by the Division Bench of this Tribunal in the case of Linklaters LLP (supra) that the said amendment in the statute has virtually negated the judicial precedents supporting the proposition that rendition of services in India is a sine qua non for its taxability in India. The submission made on behalf of the assessee on this aspect before the Division Bench in the case of the present assessee was that the amendment made by the Finance Act, 2010 with retrospective effect from 1-6-1976 was applicable to clause (v) or (vi) or clause (vii) of section 9(1) whereas the income of the assessee was covered by clause (i) of section 9(1). This submission made on behalf of the assessee was apparently found acceptable by the Division Bench of this Tribunal keeping in view that the amendment made by the Finance Act, 2010 w.e.f. Ist June, 1976 was not applicable in the case of the assessee as its income was chargeable in India u/s 9(1)(i).

10. The Division Bench in the case of Linklaters LLP (supra) had also decided another issue - which was also involved in the case of the present assessee - relating to determination of the quantum of income chargeable to tax in India in the hands of the non-resident who provided legal or consultancy services to certain projects in India. Reference in this regard was made by the Tribunal to Article 7(1) of the India-UK DTAA which used the expression "directly or indirectly attributable". As held by the Tribunal in the case of Linklaters LLP (supra), the use of the said expression would mean that the "force of attraction" rule is applicable and the entire earnings relatable to the projects in India would be chargeable to tax in India. It was held that the extension of taxability of profits of PE by including profits directly or indirectly attributable as per the provisions of Article 7(1) of the India-UK DTAA was akin to

Article 7(1)(b) and 7(1)(c) of the UN Model Convention which provided that in addition to the profit attributable to the PE, the taxability of PE profits will also extend to other business activities carried in that other State of goods or merchandise of the same or similar kind as those sold through that PE. It was held by the Tribunal in the case of Linklaters LLP (supra) that the basic philosophy underlying a force of attraction rule is that when an enterprise sets up a PE in another country, it brings itself within the fiscal jurisdiction of that country to such a degree that such another country can properly tax all profits that the enterprise derives from that country, whether the transactions are routed and performed through the PE or not. It was noted by the Division Bench hearing the case of the present assessee that there were atleast two other decisions of the co-ordinate Bench in the case of Airline Rotables Ltd. vs. Joint Director of Income Tax (International Taxation) [2010] 131 TTJ (Mumbai) 385 and in the case of DDIT vs. Set Satellite (Singapore) (Pte) Ltd. reported in 106 ITD 175 (Mum) wherein Article 7(1) of the Treaty was interpreted differently while taking different view than the one taken in the case of Linklaters LLP (supra).

11. Keeping in view the divergent views expressed by the co-ordinate Benches in the case of Set Satellite (Pte) Ltd. (supra) and Airline Rotables Ltd. (supra) on the one hand and Linklaters LLP (supra) on the other hand and having noticed prima facie merit in the contention raised on behalf of the assessee that the income of the assessee being taxable u/s 9(1)(i) of the Act, the amendment made by Finance Act, 2010 by way of substitution of Explanation to section 9 w.r.e.f. 01/06/1976 is not applicable in the case of the assessee [the acceptance of which would lead to taking a view which is contradicting the view taken by the co-ordinate Bench in the case of Linklaters LLP (supra)], the Division Bench of the Tribunal referred the case to the Hon'ble President for constituting a Special Bench. Accordingly this Special Bench has been constituted by

the Hon'ble President to consider and decide the two questions of law involved in the case of the assessee as already referred to at the beginning of this order.

12. Opening the arguments on the issue involved in question No. 1, the ld. Sr. Counsel for the assessee Shri M.S. Syali drew our attention to the decision of the Hon'ble Bombay High Court in assessee's own case for A.Y. 1996-97 which is reported in (2009) 176 Taxman 485. He pointed out that the provisions of section 9(1)(i) were reproduced by their Lordships on page 468 of the report before recording its conclusion on page 470 of the report in para 38 that section 9(1)(i) is applicable in the case of the assessee and not section 9(1)(vii). He submitted that even the ld. CIT(A), in his impugned orders, held that the amount received by the assessee for the services rendered in relation to the projects in India was not in the nature of fees for technical services covered u/s 9(1)(vii). He submitted that this finding of the ld. CIT(A) has not been disputed by the Department in the appeals filed before the Tribunal and thus it attained finality. He also invited our attention to the copy of reassessment order passed by the A.O. in assessee's case for A.Y. 1998-99 to point out that the A.O. admitted that the income of the assessee is liable to tax in India u/s 9(1)(i) and it is not the case of the Department, at any stage, that section 9(1)(vii) is applicable in the case of the assessee. He then invited our attention to the amendment made in section 9, by the Finance Act, 2010 with retrospective effect from 1-6-1976 to submit that the said amendment comes into play only in the cases where clauses (v) or (vi) or (vii) of sub section (1) of section 9 is applicable. In this regard, reliance was placed by him on the decision of Hon'ble Delhi High Court in the case of DIT vs. Ericsson AB, Ericsson Radio System AB reported in 204 Taxman 192 wherein Explanation to section 9 as substituted by Finance Act 2010 w.r.e.f. 1-6-1976 is held to be applicable only to clause (v), (vi) or (vii) of sub section (1) of section 9. He contended that the scope of the

said amendment thus is limited inasmuch as it is applicable only in a case where the income of a non-resident is deemed to accrue or arise in India under clause (v), or (vi) or (vii) of sub section (1) of section 9 and the same cannot be extended and applied in the case of an assessee where the income is held to be liable to tax in India under clause (i) of sub section (1) of section 9. In support of this contention, he relied on the following judicial pronouncements:

1. T.A. Hameed v. M. Vishwanathan (2008) 3 SCC 243.
2. Kesho Nath Khurana v. UOI & Others 1981 (Supp) SCC 38.
3. Central Wines v. ITO (2000) 244 ITR 307 (AP).
4. CIT vs.Highway Construction Co. Pvt. Ltd.(1996)217 ITR 234(Gau)

13. As regards the decision of the Tribunal in the case of Linklaters LLP (supra), Mr. Syali, the ld. Sr. Counsel for the assessee invited our attention to pages 74,77, 78 & 80 of the Tribunal order [reported in 40 SOT 51 (Mum)] and submitted that the applicability of section 9(1)(i) was not disputed even in that case. He contended that the Tribunal still relied on the amendment made in section 9 by the Finance Act, 2010 with retrospective effect from 1-6-1976 to hold that the decision of the Hon'ble Bombay High Court in the case of the assessee ie. Clifford Chance for A.Y. 1996-97 is no more a good law by ignoring that the said amendment was not even applicable to the case of an assessee whose income was held to be liable to tax in India u/s 9(1)(i) and not 9(1)(vii). In short, the case of the ld. Sr. Counsel was that the said amendment is not applicable to the case of the assessee and the decision of the Hon'ble Bombay High Court for A.Y. 1996-97, which is in favour of the assessee, is still a good law which is binding on this Special Bench.

14. The ld. Special Counsel for the Revenue Shri Girish Dave, on the other hand, submitted that a Special Leave Petition has been filed by the Revenue before the Hon'ble Supreme Court against the decision of Hon'ble Bombay High Court in assessee's own case for A.Y. 1996-97. He

invited our attention to the copy of the said petition and submitted that the entire focus in the SLP filed by the Revenue is on the applicability of section 9(1)(vii) in the case of the assessee. He contended that it cannot therefore be said that the applicability of section 9(1)(i) in the case of the assessee has not been disputed by the Department. He then invited our attention to the common issue raised by the Revenue in ground No. 1 of its appeals preferred before the Tribunal for all the years under consideration and submitted that a preliminary issue challenging the eligibility of the assessee for Treaty benefits has been raised by the Revenue on the ground that the assessee being a partnership firm is not a person as per the Treaty in order to be eligible for DTAA benefits. He contended that this is the main case of the Revenue but since the returns of income for the years under consideration were filed by the assessee, the taxability of the assessee in India has been considered by the A.O. as per the Act and also as per the Treaty. He submitted that the case of the assessee all along has been that its case is covered by Article 15 of the Treaty and therefore domestic law is not applicable. He invited our attention to the copy of re-assessment order passed by the A.O. for A.Y. 1998-99 filed by the ld. counsel for the assessee and submitted that the major portion of the said order as contained in pages 1 to 9 was devoted to this preliminary issue before finally holding that the assessee is not entitled to the Treaty benefit. He contended that the assessee having relied in support of its case on Article 15 of the Treaty and not on section 9(1)(i), there was no question of deciding the applicability of section 9(1)(i) in the case of the assessee and even if there is some reference made to section 9(1)(i) in the orders of the authorities below, that by itself is not sufficient to say that section 9(1)(i) is held to be applicable in the case of the assessee. He contended that the assessee having opted to claim relief under Article 15 of the Treaty cannot rely on the domestic law to claim that section 9(1)(i) is applicable in its case. He

also contended that the A.O. having held that the assessee is not a person as per the Treaty and the Treaty therefore is not applicable in its case, has determined the income of the assessee under the domestic law by referring to wrong provision of section 9(1)(i) and it cannot be said relying on such wrong reference made by the A.O. that section 9(1)(i) is applicable in the case of the assessee and the finding to this effect has become final.

15. Shri Girish Dave then invited our attention to the decision of the Hon'ble Bombay High Court rendered in assessee's own case for A.Y. 1996-97 and submitted that the issue has been decided in favour of the assessee relying on the decision of Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd. vs. DIT (2007) 288 ITR 408 which was in the context of provisions of section 9(1)(vii). He submitted that most of the operative portion of the order of the Hon'ble Bombay High Court is devoted to discuss the said decision of the Hon'ble Supreme Court with specific reference made to section 9(1)(vii) at several places without referring section 9(1)(i). He contended that it therefore cannot be said that section 9(1)(i) is specifically held to be applicable in the case of the assessee by the Hon'ble Bombay High Court. He contended that section 9(1)(vii) on the other hand is clearly applicable in the case of the assessee involving fees received for professional services. Reliance in this regard was placed by him on the decision of the co-ordinate Bench of this Tribunal in the case of DDI (International Taxation) vs. Tata Iron & Steel Co. Ltd. reported in (2009) 34 SOT 83 (Mum) wherein it was held that the fees for technical services covered u/s 9(1)(vii) also include professional services. He also relied on the decision of Mumbai Bench of ITAT in the case of Linklaters LLP (supra) wherein it was held in para 19 that the Hon'ble Bombay High Court has decided the case of the assessee for A.Y. 1996-97 by relying on the provisions of section 9(1)(vii). He also furnished a note explaining the

intention of the legislature behind the amendments made in section 9 by Finance Act, 2007 as well as by Finance Act, 2010.

16. We have considered the rival submissions and also perused the relevant material available on record. It is not in dispute that the assessee herein is a firm of solicitors which is a tax resident of UK. During the years under consideration, it rendered legal consultancy services in connection with different projects in India, some part of which was performed in India. Income attributable to the services so performed in India was offered to tax by the assessee in India in the return of income filed for A.Y. 1998-99 as per Article 15 of the India-UK Treaty since the aggregate period of its presence in India through partners and employees exceeded 90 days in that year. In the returns of income filed for other years, the assessee declared 'Nil' income on the ground that the aggregate period of its presence in India did not exceed 90 days and its income was not taxable in India as per Article 15 of the India-UK Treaty. According to the A.O., Article 15 of the India-UK Treaty, is not applicable - the assessee being a partnership firm. He held that the assessee having carried on the activity of rendering services in India for a period or periods aggregating to more than 90 days within any 12 months period, it was having a permanent establishment in India in terms of Article 5(2)(k) of the India-UK DTAA and the profit earned by the assessee from the rendering of services in India was chargeable to tax in India as business profit under Article 7 of the India-UK DTAA. He also held that the entire fees received by the assessee from its clients for the services rendered in India as well as outside India was chargeable to tax in India as the said services were utilised in relation to the projects in India.

17. On appeal, the ld. CIT(A) agreed with the stand of the assessee that its case was covered under Article 15 and not under_Article 5(2) read with Article 7 of the DTAA by relying on the decision of the Tribunal

passed in assessee's own case for A.Y. 1996-97 as reported in (2002) 82 ITD 106 (Mum.) In the said decision, it was held by the Division Bench of this Tribunal that Article 15 of the India-UK DTAA deals with "independent personal services" of professionals and such services could only be rendered by competent professionals. It was held that as per Article 15, the income must be derived from profession by an individual and the **individual can get this income in his own capacity or as a member of partnership.** It was also held that the term "member" as used in Article 15 of the India-UK DTAA is the term of most general meaning and even lawyers representing the firm as employees also come within its ambit. As regards the quantification of income to be taxed in India, the Tribunal held that if the assessee could prove that it rendered services outside India, its income to that extent should be excluded while computing its total income for determining tax payable in India. However in the absence of any document or other proof produced by the assessee to establish that the services were also rendered outside India, the Tribunal held that this issue could not be decided in favour of the assessee. It was held by the Tribunal in this context that it could be presumed that the main services were rendered by the assessee in India and if at all some minor work was done outside India, it was only of allied and incidental nature. It was held by the Tribunal that the entire fees charged by the assessee in respect of the services rendered in relation to infrastructure projects in India as composite activity was thus chargeable to tax in India.

18. The decision of the Tribunal in its case for A.Y. 1996-97 was challenged by the assessee in an appeal filed before the Hon'ble Bombay High Court. While disposing of the said appeal (by the judgment reported in (2009) 176 Taxmann 458 (Bom.) as Clifford Chance vs. DCIT), the Hon'ble Bombay High Court agreed with the view of the Tribunal that Article 15 of the India-UK Treaty was applicable in the case of the

assessee. In this context, the court observed that Article 15 provides for the residence rule in relation to taxation of income of an individual including members of a partnership, the exception being where such an individual is present in the other state for a period aggregating to 90 days or more in the relevant previous year. It was held that if the test of 90 days is satisfied, the effect is to virtually take the assessee out of the Treaty, the taxability of the income being determined u/s 9(1)(i) of the Act. As regards the determination of income u/s 9(1)(i) of the Act, the Hon'ble Bombay High Court held that the territorial nexus doctrine plays an important part in the assessment of tax and if the income arising out of operations in more than one jurisdiction has territorial nexus with each of the jurisdictions on actual basis, it may not be correct to contend that the entire income accrues or arises in each of the jurisdictions. Reference in this regard was made to the decision of Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd. vs. DIT (2007) 288 ITR 408 which was in the context of section 9(1)(vii)(c) requiring fulfillment of two conditions namely – the services which are the source of income that is sought to be taxed in India `must be utilised in India and rendered in India. It was held by the Hon'ble Bombay High Court that since both these conditions were not satisfied simultaneously in the case of the assessee, the income of the assessee as charged on hourly basis for the services rendered in India and utilised in India only was chargeable to tax in India.

19. The issue before the Special Bench as raised in question No. 1 however is whether the said decision of the Hon'ble Bombay High Court rendered in assessee's own case for A.Y. 1996-97 still holds good in view of the retrospective amendment made in section 9 by the Finance Act, 2010 with effect from 1st June, 1976 whereby Explanation to section 9(1) has been amended to provide that the income of the non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or

clause (vii) of section 9 and shall be included in its total income, whether or not (a) the non-resident has a residence or place of business or business connection in India or (b) non-resident has rendered services in India. The said Explanation as amended by the Finance Act, 2010 with retrospective effect from 1-6-1976 is reproduced below:-

> *[Explanation]- For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (viii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not, -*
>
> *(i) the non-resident has a residence or place of business or business connection in India or,*
>
> *(ii) the non-resident has rendered services in India."*

20. As is clearly evident from the perusal of the aforesaid Explanation, it is applicable in the case of income of a non-resident covered by clause (v) or clause (vi) or clause (vii) of sub section(1) of section 9. In the case of DIT vs. Ericsson A.B., New Delhi reported in (2012) 204 Taxman 192, the Hon'ble Delhi High Court has held that the amendment made by the Finance Act, 2010 in section 9 by substituting/amending Explanation with retrospective effect from 1-6-1976 only impacts clauses (v), (vi) & (vii) of sub-section (1) of section 9 and since the case before their Lordships involved payments not covered under the said clauses, it was held that the said amendment will have no application. The question that now arises is whether the income earned by the assessee in the present case, from the services rendered in connection with the projects in India, is of the nature covered by clause (v) or clause (vi) or clause (vii) of section 9(1) ?

21. Section 9(1) lists out certain incomes which are deemed to accrue or arise in India and clause (v) thereof deals with income by way of interest while clause (vi) deals with income by way of royalty. In the present case, the income received by the assessee from the services

rendered in relation to the projects in India cannot be said to be in the nature of interest or royalty and there is no dispute about the same. Clause (vii) of sub-section (1) of section 9 deals with income by way of fees for technical services and the contention raised by Shri Girish Dave, the ld. Counsel for Revenue, is that the income received by the assessee from rendering of professional services, being in the nature of fees for technical services, is covered by the said clause. In support of this contention, he has relied on the decision of the Tribunal in the case of DDI (IT) vs. Tata Iron & Steel Co. Ltd. reported in 34 SOT 83 (Mum) wherein it was held that the fees for technical services covered u/s 9(1)(vii) also includes professional services. It is however observed that it was never the case of the A.O. at any stage that the fees received by the assessee for the services rendered in relation to the projects in India is of the nature of fees for technical services covered u/s 9(1)(vii) of the Act. On the other hand, he relied on Article 7 of the India-UK Treaty to determine the income of the assessee from said fees chargeable to tax in India as business profits, without making any reference to Article 13 of the India-UK Treaty which specifically deals with "Royalty and Fees for Technical Services" for computing the income of the assessee chargeable to tax in India. The A.O. also allowed deduction u/s 44-C which is allowable specifically in computing the income of a non-resident assessee chargeable under the head "profits and gains of business or profession" whereas the special provisions for computing the income by way of royalties or fees for technical services in case of non-resident are contained in section 44DA of the Act. In one of the assessment orders passed for A.Y. 1998-99 in assessee's case u/s 143(3) r.w.s. 147 of the Act on 27-3-2006, the A.O. himself has clearly mentioned that the assessee is liable to tax on the total income earned in India u/s 9(1)(i) of the Act and accordingly proceeded to compute such income after allowing deduction u/s 44C of the Act. Even in the impugned orders, the

ld. CIT(A) held that the amount received by the assessee for the services rendered in relation to the projects in India is not in the nature of fees for technical services covered u/s 9(1)(vii) of the Act and this finding of the ld. CIT(A) has not been disputed by the Department in the appeals filed before the Tribunal.

22. Shri Girish Dave, the ld. Counsel for the revenue has submitted before us that the issue relating to applicability of section 9(1)(vii) in the case of the assessee has been raised by the Department in the SLP filed before the Hon'ble Supreme Court against the decision of the Hon'ble Bombay High Court in assessee's case for A.Y. 1996-97. A perusal of the copy of the said SLP filed before us, however, shows that neither in the questions of law raised therein nor in the grounds taken, any issue has been specifically raised to the effect that section 9(1)(i) is not applicable in the case of the assessee and the income received by it is in the nature of fees for technical services covered u/s 9(1)(vii). Even otherwise, it can not be assumed merely on the basis of SLP filed by the Revenue that section 9(1)(vii) is applicable in the case of the assessee.

23. In support of the revenue's case that section 9(1)(vii) is applicable in the case of the assessee, Shri. Girish Dave has placed heavy reliance on the decision of the Division Bench of this Tribunal in the case of Linklaters LLP (supra) wherein it was held in para 15 of the order that the judgment of Hon'ble Bombay High Court in the case of the assessee for A.Y. 1996-97 was rested on the legal premises that u/s 9(1)(vii) the services, which are source of income sought to be taxed in India, must be utilised in India and rendered in India and these legal premises no longer held good in view of the retrospective amendment brought out by the Finance Act, 2010 in section 9 w.e.f. 1st June, 1976. As already noted by us, the decision of the Tribunal in the case of the assessee for A.Y. 1996-97, holding that Article 15 of the India-UK Treaty is applicable in

its case, was upheld by the Hon'ble Bombay High Court on the basis of satisfaction of test of 90 days presence in India. The Hon'ble Bombay High Court also held in para 38 of its order that if the test of 90 days is satisfied, the effect is to virtually take the assessee out of the treaty, the taxability of the income being determined u/s 9(1)(i) of the Act. As regards the interpretation of section 9(1)(i), the Hon'ble Bombay High Court held in para 39 of its order that the same is no longer res integra as it has been construed by the Hon'ble Supreme Court in three cases viz. Carborandum Co. vs. CIT (1977) 108 ITR 335, CIT vs. Toshoku Ltd. (1980) 125 ITR 525 and Ishikawajima Harima Heavy Industries Ltd. (supra).

24. It may be noticed that the issue involved in the case of Carborandum Co. (supra) was whether the technical fee in excess of 5% received by the American Company from the Indian Company during the previous year relevant to A.Y. 1957-58 had accrued or arisen in India and the same was decided by the Hon'ble Supreme Court with reference to sub-section (1) and sub-section (3) of section 42 of the 1922 Act. Sub-section (1) of section 42 of the 1922 Act provided that all income, profits or gains accruing or arising, whether directly or indirectly, from any business connection in the taxable territories shall be deemed to be income accruing or arising within the taxable territories while sub-section (3) of section 42 provided that in the case of business of which all the operations are not carried out in the taxable territories, the profits and gains of the business deemed under this section to accrue or arise in the taxable territories shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. The provisions of sub-section (1) and (3) of section 42 of the 1922 Act thus were similar to clause (i) of sub-section (1) of section 9 of the 1961 Act read with Explanation 1(a) thereto and it was held by the Hon'ble Supreme Court that on a plain reading of sub-sections (1)

and (3) of section 42, income accruing or arising from any business connection in the taxable territories, even though the income may accrue or arise outside the taxable territories, will be deemed to be income accruing or arising in such territories provided operations in connection with such business, either all or a part, are carried out in the taxable territories. It was held that if all such operations are not carried out in the taxable territories, the profits and gains of the business deemed to accrue or arise in the taxable territories shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories.

25. In the case of Toshoku Ltd. (supra), the issue involved was whether the commission amounts credited in the books of the statutory agent could be treated as incomes accrued, arisen or deemed to have accrued or arisen in India to the non-resident assessees during the previous year relevant to A.Y. 1962-63 and the stand taken by the Department before the Hon'ble Supreme Court was that the entire commission amounts should be treated as income deemed to have accrued or arisen in India as the same, according to the department, had either accrued or arisen through and from the business connection in India that existed between non-resident assessees and the statutory agent. This stand of the Revenue was not accepted by the Hon'ble Supreme Court by observing that the same had overlooked the effect of clause (a) of Explanation to clause (i) of sub-section (1) of section 9 of the 1961 Act which provided that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. It was reiterated by the Hon'ble Supreme Court that if all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in

India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. It is pertinent to note here that a reference in this regard was made by the Hon'ble Supreme Court to its earlier decision rendered in the case of Carborandum Co. (supra) observing that the same was decided on the basis of section 42 of the Income Tax Act, 1922 that corresponds to section 9(1)(i) of the Income Tax Act, 1961.

26. Keeping in view the decision of Hon'ble Supreme Court in the case of Carborandum Co. (supra) which was in the context of section 42 of the Income Tax Act, 1922 which corresponds to section 9(1)(i) of the Income Tax Act, 1961 and in the case of Toshoku Ltd. (supra) which was in the context of section 9(1)(i) itself, the Hon'ble Bombay High Court, in assessee's case for A.Y. 1996-97, held that the provisions of section 9(1)(i) having been construed by the Hon'ble Supreme Court, the interpretation thereof was no longer res-integra and the issue was decided by applying such interpretation of section 9(1)(i) of the Act which was held to be applicable in the case of the assessee for the determination of its taxable income in India. It is no doubt true that reference was also made by the Hon'ble Bombay High Court to the decision of Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd. (supra) which was in the context of section 9(1)(vii)(c) of the Act. However their Lordships were conscious of the fact that the said decision was rendered in the context of section 9(1)(vii)(c) of the Act as is evident from para 44 of the order. It was also observed by the Hon'ble Bombay High Court, in para 47 of the order, that with the understanding of law laid down by the Hon'ble Apex Court in the case of Ishikawajima Harima Heavy Industries Ltd. (supra), if one turns to the facts of the case in hand and examines them on the touchstone of section 9(1)(vii)(c), services, which are source of income sought to be taxed in India, must be utilised in India and rendered in India. We

therefore find it difficult to concur with the view expressed by the division bench of this Tribunal in the case of linklaters LLP (supra) that the judgment of Hon'ble Bombay High Court in assessee's case for A.Y. 1996-97 is based on the legal premise of interpretation of section 9(1)(vii) and the said premise no longer holds good in view of amendment made by the Finance Act, 2010 in section 9 with retrospective effect from 1st June, 1976. In our opinion, the amendment made by the Finance Act 2010 in section 9 with retrospective effect from Ist June, 1976, which is applicable only in the cases covered under clause (v), (vi) or clause (vii) of section 9(1) and not clause (i) of section 9(1), thus has not negated the decision of Hon'ble Bombay High Court in the case of the assessee for A.Y. 1996-97 and the said decision rendered in the context of section 9(1)(i) still holds good even after the said amendment in so far as the assessee's case is concerned. We therefore answer the question No. 1 referred to this Special Bench in the negative i.e. in favour of the assessee.

27. Having answered question No. 1 referred to this Special Bench in the negative i.e. in favour of the assessee holding that the position of law as propounded by the Hon'ble Bombay High Court in assessee's case for A.Y. 96-97 still holds good and accordingly its income derived from the professional services rendered in respect of the projects in India is chargeable to tax in India only to the extent it is attributable to the services rendered/performed in India, we are of the view that the issue involved in question No. 2 referred to this Special Bench has become virtually infructuous and is rendered only academic. However, as the said question is also referred specifically for the consideration of this Special Bench, we now proceed to consider and decide the same for the sake of completeness.

28. While arguing the case of the assessee on the issue involved in question No. 2, Shri Syali invited our attention to Article 7(1) of the India-UK Treaty and submitted that as per the said Article, profit attributable directly or indirectly to the PE in India is taxable in India. He submitted that what is directly and indirectly attributable to the PE in India is defined in Article 7(2) and 7(3) of the Treaty and the Tribunal in the case of Linklaters LLP (supra) was not justified in referring to the UN Model Convention to come to the erroneous conclusion that the force of attraction rule is incorporated in Article 7(1) of the India-UK DTAA. He invited our attention to the relevant portion of the UN Model Convention placed in the paper book and submitted that Article 7(1), 7(2) and 7(3) thereof are entirely different from Article 7(1), 7(2) & 7(3) of the India-UK Treaty. Reliance was placed by him on the decision of the Hon'ble Supreme Court in the case of Ishikawajma Harima Heavy Industries Ltd. (supra) to submit that what is directly and indirectly attributable to PE as envisaged in Article 7(1) of the India-UK Treaty has been explained by the Hon'ble Supreme Court. He contended that the scope of "profits indirectly attributable to PE" as defined and explained in Article 7(3) of the India-UK treaty is specific and limited and there is no justifiable reason to expand the same by relying on the UN Model Convention.

29. Shri Girish Dave, the ld. Counsel for the Revenue submitted that the profits indirectly attributable to the PE as specified in Article 7(1) of the India-UK Treaty has no doubt been defined and explained in Article 7(3) of the Treaty. He contended a specific formula however is given in Article 7(3) to determine the profits of an enterprise indirectly attributable to the PE and the same is required to be applied to determine the income of the assessee that is indirectly attributable to the PE in India.

30. We have considered the rival submissions and also perused the relevant material available on record. The issue raised in question No. 2 involves interpretation of Article 7(1) of the India-UK DTAA to construe whether the consideration attributable to the services rendered by the assessee in the state of residence i.e. U.K. in connection with the projects in India is taxable in the source state i.e. India. The said Article 7(1) is extracted below :-

> *1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment".*

It is manifest that as per Article 7(1), if an enterprise of a contracting state carries on business in the other contracting state through a PE situated therein, the profits of that enterprise may be taxed in that other state only to the extent the same is directly or indirectly attributable to that PE. What is directly and indirectly attributable to the PE for the purpose of Article 7(1) is explained in Article 7(2) and Article 7(3) of the India-UK treaty, the provisions of which read as under:-

> *"2. Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, the profits which that permanent establishment might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment shall be treated for the purposes of paragraph 1 of this Article as being the profits directly attributable to that permanent establishment.*
>
> *3. Where a permanent establishment takes an active part in negotiating, concluding or fulfilling contracts entered into by the enterprise, then, notwithstanding that other parts of the enterprise have also participated in those transactions, that proportion of profits of the enterprise arising out of those contracts which the contribution of the permanent establishment to those transactions bears to that of' the enterprise as a whole shall be treated for the*

purposes of paragraph 1 of this Article as being the profits indirectly attributable to that permanent establishment".

31. The connotations of "what is directly attributable to the PE" for the purpose of Article 7(1) is defined and explained in Article 7(2) of the India-UK treaty which contemplates that a PE be treated as a separate and distinct enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE in order to work out the profits which that PE might be expected to make. Article 7(2) thus is based on the hypothesis whereby the PE is to be treated as independent of the enterprise of which it is a PE so as to work out the profits which would have been earned by the PE had it been wholly independent of the enterprise of which it is a PE. Based on this hypothesis, we are of the view that the profits earned by the other part of the enterprise by rendering services outside India cannot be treated as profits directly attributable to the PE of the assessee in India as per Article 7(2) of the India-UK Treaty and this undisputed position is clearly reflected in Article 7(2).

32. In the present case, the real dispute is what are the profits of the assessee that are indirectly attributable to the PE in India for the purpose of Article 7(1) of the Indo-UK treaty so as to ascertain whether the profits of the assessee attributable to the services rendered outside India in connection with the projects in India can be said to be indirectly attributable to the PE in India. Before we deal with this issue, let us first consider whether the relevant provisions of Article 7(1) of the India-UK Treaty are akin to the provisions of Article 7(1), especially clause (b) and clause (c) thereof, of the UN Model Convention as held by the Division Bench of this Tribunal in the case Linklaters LLV (supra) to arrive at a conclusion that force of attraction rule is applicable to such an extent that when an enterprise sets up a PE in another country, it brings itself

within the fiscal jurisdiction of that another country to such a degree that such another country can properly tax all profits that the enterprise derives from that country, whether the transactions are routed and performed through that PE or not. In this regard, it is relevant to refer to the provisions of Article 7(1) of the UN Model Convention which is reproduced below:-

> "The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the Contracting State through a permanent establishment therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in that other state of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment."

33. A comparative study of Article 7(1) of the India-UK DTAA and Article 7(1) of UN Model Convention shows that there is material difference in the provisions of these two Articles. Article 7(1) of the UN Model Convention itself points out the scope of profits of an enterprise in contracting state which carries on business in other contracting state through PE situated therein that may be taxed in other contracting state and includes within its ambit, in addition to the profits of the enterprise attributable to that PE, the profits attributable to sales in that other state of goods or merchandise of the same or similar kind as those sold through that PE as well as the profits attributable to other business activities carried on in that other state of the same or similar kind as those effected through that PE. **Article 7(1) of the India-UK DTAA, on the other hand, provides that the profits of an enterprise in a contracting state through PE situated therein may be taxed in other contracting state but only so much of them which are directly and indirectly attributable to that PE.**

34. What is indirectly attributable to the PE for the purpose of Article 7(1) is explained in Article 7(3) of the India-UK Treaty DTAA which clearly provides that **where a PE takes an active part in negotiating, concluding or fulfilling contracts entered into by the enterprise, then, notwithstanding that other parts of the enterprise have also participated in those transactions, that proportion of profits of the enterprise arising out of those contracts which the contribution of the PE to those transactions bears that of the enterprise as a whole shall be treated for the purposes of para (1) of this Article as being the profits indirectly attributable to that PE.** If Article 7(1) of the India-UK DTAA is read with Article 7(3) thereof, we are of the considered view that the provisions thereof are not at all akin to the provisions of section 7(1)(b) and 7(1)(c) of the UN Model Convention and it would not be correct to say that the connotations of "profits indirectly attributable to permanent establishment" extend to the two categories of income as specified in clause (b) and clause (c) of Article 7(1) of the UN Model Convention and incorporate a force of attraction rule as held by the Division bench of this Tribunal in the case of Linklaters LLP (supra).

35. In our opinion, when the connotations of "profits indirectly attributable to permanent establishment" are defined specifically in Article 7(3) of the India-UK DTAA which clearly explains the scope and ambit of the profits indirectly attributable to the PE and the provisions of said article being unambiguous and capable of giving a definite meaning, there is really no need to refer to the provisions of Article 7(1) of UN Model Convention which are materially different from the provisions of Article 7(1) of the India-UK DTAA read with Article 7(3) thereof. The reliance of the Division Bench of this Tribunal on the provisions of Article 7(1)(b) and 7(1)(c) of the UN Model Convention as well as on the UN Model Convention Commentary to come to a conclusion in the case of Linklaters LLP (supra) that the connotations of "profits indirectly

attributable to permanent establishment" used in Article 7(1) of the Indo-UK treaty incorporates a force of attraction rule thereby bringing an enterprise having a PE in another country within the fiscal jurisdiction of that another country to such a degree that such another country can properly tax all profits that the enterprise derives from that country - whether the transactions are routed and performed through their PE or not - is clearly misplaced and we are unable to subscribe to this proposition.

36. As already noted, the connotations of "profits indirectly attributable to permanent establishment" used in Article 7(1) are explained and defined in Article 7(3) of the India-UK DTAA. The provisions of Article 7(3) explaining the scope of profits indirectly attributable to permanent establishment are unambiguous and capable of giving a definite meaning clearly defining the scope of profits indirectly attributable to permanent establishment. As provided therein, where a permanent establishment takes an active part in negotiating, concluding or fulfilling contracts entered into by the enterprise, then, notwithstanding that other parts of the enterprise have also participated in those transactions, profits of the enterprise arising out of those contracts shall be apportioned in the ratio of the contribution of the PE to those transactions and the contribution of the enterprise as a whole and such profits as apportioned to the contribution of the PE shall be treated for the purposes of Article 7(1) as being the profits indirectly attributable to that PE. Consequently the profits apportioned to the contribution of other parts of the enterprise to the transactions cannot be treated as profits indirectly attributable to the PE for the purpose of Article 7(1) so as to bring the same to tax in the source country. We therefore answer the question No. 2 in the negative i.e. in favour of the assessee.

37. Before parting, we may note for the sake of clarity that besides the issues involved in the two questions referred to this special bench, there are various other issues raised by the revenue in their appeals filed in the present case such as determination of exact days of presence of the assessee in India, the existence of fixed place PE of the assessee in India etc. Since the issues raised in the questions referred to this special bench are specific and limited, we have confined ourselves to consider and decide the same leaving all other issues open for the consideration of the regular bench.

38. The matter will now go before the regular bench to dispose of the appeals keeping in view our decision rendered above.

Order pronounced in the open court on this 13th day of May, 2013.

Sd/-	sd/-	sd/-
(H.L. KARWA)	(D. MANMOHAN)	(P.M. JAGTAP)
PRESIDENT	VICE PRESIDENT	ACCOUNTANT MEMBER

RK
Mumbai, dated 13-5-2013

copy to…

1. The Appellant
2. The Respondent
3. CIT(A), Mumbai concerned.
4. CIT, Mumbai Concerned
5. DR ITAT, Mumbai "L" Bench
6. Guard file

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI